Power, To a Point: Is the Power to Add and Remove Discretionary Beneficiaries of a Trust Fiduciary?

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Introduction

This dissertation concerns the power to add and remove discretionary beneficiaries of a trust. Specifically, it suggests the power ought to be viewed as a fiduciary power and have obligations attach to its exercise. Two arguments are put forward as justification: that the nature of the power is fiduciary, and, alternately, that the power creates a fiduciary relationship between the appointor and existing beneficiaries.

Chapter I describes how the Court of Appeal in *Clayton v Clayton*[1] has recently treated this power. In this relationship property dispute, the power was held to be a general power of appointment, and further, to constitute property of Mr Clayton. This finding entitled Mrs Clayton to an equal share of the powers 'property.'[2] It is suggested that the finding will have potential repercussions that extend beyond the Property (Relationships) Act 1976,[3] and as a result the power deserves further consideration.

Chapter II reviews the classification of powers, by dispositive scope and by obligations that attach. It is suggested that as the power to add and remove beneficiaries does not result in the automatic appointment of property, it is inappropriate for it to label it as a general power of appointment. While a power to add and remove beneficiaries may be read as a personal power on the terms of the trust document, the question remains; should it be?

Chapter III proposes that the power to add and remove discretionary beneficiaries is fiduciary in nature, regardless of whether the appointor and beneficiaries are in a fiduciary relationship. It is suggested that when the nature of a power goes to the core of a trust, fiduciary limits are imposed to prescribe its exercise. This requires an identification of the core of a trust and

[1] *Clayton v Clayton* [2015] NZCA 30, [2015] NZFLR 233, (2015) 30 FRNZ 1, hereafter referred to as *Clayton v Clayton* (CA). Leave to appeal to the Supreme Court was granted in *Clayton v Clayton* [2015] NZSC 84. The hearing took place in September 2015. As of writing, no judgment has been released.
[2] Property (Relationships) Act 1976, s 11; *Clayton v Clayton* (CA) at [113]. The power was valued as "the value of the right to the holder of the power in a case such as this one will be the value of the property received in the event that the power were exercised, that is, the net value of the assets of the trust." This valuation predicates the exercise of the power exclusively in Mr Clayton's favour, and further assumes that any trustee will act so as to vest all trust property in him. Whether this is the correct valuation of a power, or indeed whether a power such as this can be valued at all, is beyond the scope of this dissertation. See Shelley Griffiths "Valuation of Interests in Discretionary trusts; Valuing the Invaluable and Unvaluable" (paper presented for the New Zealand Law Society, Relationship Property Intensive — your big (legal) day out!, August 2010); Shelley Griffiths "Valuing "Bundles of Rights" for the Property (Relationships) Act 1976; When Neither Art nor Science is Enough" (2011) 7 NZFLJ 98; contrast Tobias Barkley "Valuing Discretionary Interests and Accompanying Rights" (2013) 7 NZFLJ 223.
[3] Property (Relationships) Act 1976, hereafter referred to as the PRA.

consideration of whether the power to add and remove discretionary beneficiaries impacts on this.

In the alternative, Chapter IV suggests that a fiduciary relationship exists between the person holding the power to add and remove beneficiaries and existing beneficiaries of the trust. This requires an assessment of when such a relationship can arise and the application of these factors to the power to add and remove beneficiaries.

Chapter V aims to establish that the power can be exercised so as to meet the core obligation of a fiduciary: the duty of loyalty. It is suggested that the content of this duty should be viewed as acting for the benefit of the beneficiaries as a whole. Within this framework, it is suggested that the power to add and remove beneficiaries can adhere to the core fiduciary obligation and therefore can appropriately be considered a fiduciary power.

Finally, Chapter VI considers the impact of the power to add and remove beneficiaries being viewed as a personal power, and what this view of the power means to our concept of a trust.

Chapter I: Clayton v Clayton

The power to add and remove beneficiaries of a trust has been accepted as valid in the past.[4] However, questions regarding the nature of the power have come to a head in light of the Court of Appeal's decision in *Clayton v Clayton*.[5] The case concerns a relationship property dispute between Mr & Mrs Clayton following the dissolution of their marriage.

Mr & Mrs Clayton were married in 1989.[6] Most of the assets acquired during their marriage were owned by entities associated with Mr Clayton, controlled by companies and trusts that also encompassed a wide variety of business interests. The property in these trusts had an estimated value of $28,831,000.[7] One such trust was the Vaughan Road Property Trust (VRPT). Mr Clayton was the settlor, sole trustee and a discretionary beneficiary of the trust, and the final beneficiaries were his children.[8] As trustee, Mr Clayton had wide powers, which were both unfettered and uncontrolled,[9] including distributing income and capital as he saw fit,[10] the ability to self-benefit [11] and the ability to ignore any conflict of interests.[12] Further, in his capacity as the "Principal Family Member" of the trust, Mr Clayton had the power to appoint and remove trustees and the power to appoint and remove any of the discretionary beneficiaries.[13]

Upon the dissolution of the marriage, Mrs Clayton sought to include the trust assets in the relationship property pool. The desire of the Courts to reach a decision that is commensurate and fair in the context of the relationship property proceedings is evident. How they go about this result, however, is troubling.

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[4] *In re Manisty's Settlement* [1974] Ch 17.
[5] *Clayton v Clayton* CA), above n 1.
[6] *Clayton v Clayton* [2013] NZHC 301, [2013] 3 NZLR 236, (2013) 29 FRNZ 306 at [3] per Rodney Hansen J, hereafter referred to as *Clayton v Clayton* (HC).
[7] This is the valuation given at the time of the Family Court hearing: *MAC v MAC* Rotorua FAM-2007-063-652, 2 December 2011 at [4] per Judge Munro.
[8] Declaration of Trust Establishing Vaughan Road Property Trust, clause 2.1
[9] At clause 11.1 and clause 12.2.
[10] At clause 4 and clause 5.
[11] At clause 14.1.
[12] At clause 19.1.
[13] At clauses 7 and 17.

A. The Decision in the Lower Courts

The Family Court[14] held that the VRPT was not a sham,[15] but it was illusory. The High Court[16] agreed, albeit it for different reasons:[17]

> …the provisions of the Vaughan Road Property Trust give Mr Clayton unfettered power to distribute the income and the capital of the trust to himself if he wishes and to bring the trust to an end at any time he pleases. Mr Clayton effectively retained all the powers of ownership. …The reality is, however, that if he chooses to, Mr Clayton is able to deal with trust property just as he would if the trust had never been created.

B. The Decision in the Court of Appeal

The Court of Appeal disagreed with the lower courts. It held that there is no principle of an illusory trust separate from a sham;[18] a trust that meets the three intentions of certainty, subject matter and object is valid.[19] The width of powers held by a trustee will not nullify the existence of a trust.[20] The Court of Appeal invited further submissions as to whether Mr Clayton's power to add and remove beneficiaries constituted property, thus bringing it within the scope of the PRA.[21]

The Court concluded that the power was a general power of appointment. By holding it in his personal capacity, the donor of the power intended it to be exercised without considering the interests of the beneficiaries removed or appointed.[22] The Court then followed *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd (TMSF)*,[23] where the Privy Council held the power of revocation in the hands of the settlor constituted a

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14 *MAC v MAC*, above n 7 at [85] per Judge Munro.
15 A sham trust refers to a trust created with a mutual intent to operate as something else, discussed further below. See: *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 (CA), *Official Assignee v Wilson* [2008] NZCA 122, [2008] 3 NZLR 45 ; *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289.
16 *Clayton v Clayton* (HC), above n 6 at [91] per Rodney Hansen J.
17 At [90] per Rodney Hansen J.
18 *Clayton v Clayton* (CA), above n 1 at [75]-[85].
19 *Knight v Knight* (1840) 3 Beav 148, 49 ER 58 (Ch); see also Andrew S Butler "Creation of an Express Trust" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2 ed, Thomson Reuters, Wellington, 2009) at [4.2]; David Hayton, Paul Matthews and Charles Mitchell (eds) *Underhill & Hayton: Law Relating to Trusts and Trustees* (LexisNexis, London, 2010) at [8.1].
20 *Clayton v Clayton* (CA), above n 1 at [80].
21 At [35].
22 At [109].
23 *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited and others* [2011] UKPC 17.

general power tantamount to ownership, to conclude that Mr Clayton's power was property and thus subject to the PRA.[24]

The Court of Appeal's justification is broadly divided into five sections: that there is no need to distinguish between property and powers for all contexts and purposes; the similarity between the power of appointment and the power of revocation; the decision to hold the power personally rather than as a trustee; the resulting inability for fraud on a power or fiduciary obligations to attach to a general power; and the support by the provisions of the PRA.[25]

Central to the Court's reasoning is their finding that Mr Clayton had the power to remove all beneficiaries, leaving himself as the sole beneficiary and thus unifying legal and equitable ownership.[26] This unification would mean Mr Clayton would effectively have revoked the trust, akin to the power of revocation held to be property in *TMSF.*[27] If this were true, the power may well have been properly classified as property, as its exercise would result in the trust property vesting in Mr Clayton. However, Mr Clayton did not have the power to become the sole beneficiary of the trust. He had the power to remove discretionary beneficiaries,[28] not the power to remove final beneficiaries and thus the exercise of the power would not have brought the trust to an end. This appears to undermine much of the Court's reasoning that the power is property.

C. Does the Finding Have Any Repercussions Beyond the PRA?

Clayton was decided in proceedings under the PRA. Some commentators believe it is confined to this context.[29] However, others see it as having wider implications.[30]

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[24] *Clayton v Clayton* (CA), above n 1 at [101]
[25] At [86]-[111]
[26] At [47]: If Mr Clayton was the sole beneficiary and trustee the trust would collapse as there would be no separation of legal and equitable title. See also *Re Cook, Beck v Grant* [1948] Ch 212, [1948] 1 All ER 231 (Ch), *Re Heberley (deceased)* [1971] NZLR 325 (CA), Geraint Thomas and Alastair Hudson *The Law of Trusts* (2 ed, Oxford University Press, Oxford, 2010) at [1.37]
[27] *Clayton v Clayton* (CA), above n 1 at [101]
[28] Declaration of Trust Establishing Vaughan Road Property Trust, above n 8 at clause 7.1.
[29] Jared Walker and Hugh McGee "Clayton v Clayton: Court of Appeal reminder that trusts are not always sacrosanct" (7 April 2015), Bell Gully < http://www.bellgully.co.nz/resources/resource.03824.asp>; Hannah Norton "Attention: Supreme Court" (15 July 2015), NZ Lawyer Magazine < http://www.nzlawyermagazine.co.nz/news/attention-supreme-court-202702.aspx>.
[30] Jeremy Bell-Connell "*Clayton v Clayton*: Trust Busting" [2015] NZLJ 288 at 288-289.

1. The context of the PRA

It is suggested that there is no reason that property under the PRA will not constitute property in other contexts. Section 2 of the PRA defines an "owner" as "the person who, apart from this Act, is the beneficial owner of the property under any enactment or rule of common law or equity."[31] "Property" is defined as inclusive of real property, personal property, any estate of interest in any real or personal property, any debt or thing in action, and any other right or interest.[32] This definition is substantively the same as its predecessors [33] and identical to the definition of property in the Property Law Act 1952. [34] Despite the Court's reference to the 'extended' definition of property,[35] in reality the definition is no different to a plethora of other statute law. [36] In contrast to other jurisdictions, [37] these definitions indicates the conventional understanding of property attaches to the PRA.[38] As a result, the finding in *Clayton* could extend beyond the PRA.

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[31] Property (Relationships) Act 1976, s 2. In other words, determination of ownership under the PRA is the same as the general law; see Jessica Palmer and Nicola Peart "Trust Principles Overlooked" (December 2011) NLZJ 423 at 423; Nicola Peart, Mark Henaghen and Greg Kelly "Trusts and Relationship Property in New Zealand" (2011) 17(9) Trust & Trustees 866 at 866.
[32] Property (Relationships) Act 1976, s 2.
[33] Matrimonial Property Act 1976, s2 defined property as "includ[ing] real and personal property and any estate or interest in any property real or personal, and any debt, and any thing in action, and any other right or interest", as did the Matrimonial Property Act 1963, s 2.
[34] Property Law Act 1952, s 2. This Act has been repealed but the Property Law Act 2007, s 4 definition is substantively the same.
[35] *Clayton v Clayton* (CA), above n 1 at [36], [93], [111], [114].
[36] See *Z v Z (No 2)* [1997] 2 NZLR 258 (CA), [1997] NZFLR 241, (1996) 15 FRNZ 88 at 109, which provides a list of statutes containing an identical or similar definition, including the Child Support Act 1991, s 2; Crimes Act 1961, s 2; Domestic Actions Act 1975, s 7; Family Proceedings Act 1980, s 2;Forest and Rural Fires Act 1977, s 2; Housing Corporation Act 1974, s 2; Mortgagors and Lessees Rehabilitation Act 1936, s 4 and the Trustee Act 1956, s 2. Acts passed subsequent to this decision that share this definition include the Public Trust Act 2001, s 4 and the Legal Services Act 2011, s 4. This is contrasted to the recent extension of property in the Wills Act 2007, s 8 and the Insolvency Act 2006, s 3.
[37] For example, the Family Law Act 1975 (Australia), s 4 extends the definition of property to property "which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion" and as a result can consider interests that may not be property according to the general law: see *Ashton and Ashton* (1986) 11 Fam LR 457; *Davidson and Davidson* (1991) FLC 92-197; *Goodwin and Goodwin Alpe* (1991) FLC 92-192; *Kelly and Kelly (No 2)* (1981) FLC 91-108; *Kennon v Spry* [2008] HCA 56, (2008) 251 ALR 257; *Stephens & Stephens* (2007) FLC 93-336; Diana Bryant "Heterodox is the New Orthodox- Discretionary Trusts and Family Law: A General Comparison" (2014) 20(7) Trust & Trustees ; John Glover "A Challenge to Established Law on Discretionary Trusts?- *Re Richstar Enterprises*" (2007) 30 Aust Bar Rev 70; Denis Ong *Trusts Law in Australia* (4 ed, The Federation Press, Sydney, 2012) at 319-325. The Matrimonial Causes Act 1973 (UK) does not extend the definition of property but does permit consideration of interests that may not traditionally be viewed as property, such as interests in a trust, when exercising their discretion, see *Charman v Charman* [2007] EWCA Civ 503; *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415; *Thomas v Thomas* [1995] 2 FLR 668 ; *Whaley v Whaley* [2011] EWCA Civ 617.
[38] *Z v Z (No 2)*, above n 36, at 110: "The consistent, cumulative use of that definition and its use in this particular case strongly indicate that the conventional understanding of "property" is being drawn on in this statute." For examples of this, see also *Thompson v Thompson* [2015] NZSC 26 at [24]-[76] per William Young J; *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31 at [18] per Tipping J; *Nation v Nation* [2005] 3 NZLR

2. General trust law principles

Secondly, the finding was "supported by the provisions of the PRA,"[39] but not justified by the PRA alone. Rather, the reasoning was presupposed by the view that "a general power of appointment of this nature may give rise to property rights in the hands of the appointor of the power."[40] A major factor in the Court of Appeal's reasoning is the decision of the Privy Council in *TMSF*.[41] This decision was not a relationship property dispute; rather it was an insolvency case and justified in equity, having traversed through the history of general powers and property in trust law.[42]

It is evident the Court of Appeal did not think the PRA was necessary to their decision when approving the statement of Lord Collins in *TMSF*,[43] that "general powers may give rise to property rights 'even apart from express legislative intervention.'[44] The endorsement of such a broad statement indicates the wide scope of implications the decision is capable of having on trust law in general.

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46 (CA) at [74]; *Hunt v Muollo* [2003] 2 NZLR 322 (CA) at [11] per Tipping J; *Erceg v Erceg* [2015] NZHC 594 at [17] per Courtney J; *Brownie v Brownie* HC Christchurch AP217/97, 4 April 1998 at 12-13 per Chisholm and William Young JJ; *Briggs v Briggs* [1996] 14 FRNZ 404 (HC) at 411 per Thorp J; *Z v Z* [1989] 3 NZLR 413 (CA); Frances Gush "The "Bundle of Rights" — Unravelling Trust Principles?" (2012) 7 NZFLJ at 158-161; Palmer and Peart "Trust Principles Overlooked", above n 31 at 423; *Report of the Working Group on Matrimonial Property and Family Protection* (Department of Justice, October 1988).

[39] *Clayton v Clayton* (CA), above n 1 at [111].

[40] At [40].

[41] *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited and others* above n 23.

[42] The Privy Council applied *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2009] QB 450 (CA) at [151], which permitted the appointment of receivers by equitable execution gradual development to whatever equity considers in assets. The Privy Council further considered historical cases where power was not viewed as property: *Thorpe v Goodall* (1811) 17 Ves 388; *In re Mathieson* [1927] 1 Ch 283 (CA); *Morgan v Inland Revenue Comrs* [1963] Ch 438 (CA); *In re Mathieson* [1927] 1 Ch 283 (CA) the early legislative intervention, such as the Bankrupt Laws (England) Act 1822, and the growth of the view that powers could in some circumstances be viewed as property: *In re Watts* [1931] 2 Ch 302 at 305 per Bennet J; *In re Churston Settled Estates* [1954] 1 Ch 334 at 344 per Roxburgh J; *In Re Triffit's Settlement, Hall v Hyde* [1958] Ch 852 at 861 per Upjohn J; *Clarkson v Clarkson* [1994] BCC 921 [CA] at 931 per Hoffmann LJ; , Edward Sugden *A Practical Treatise on Powers* (8 ed, Lord St Leonards, 1861); Geraint Thomas *Thomas on Powers* (2 ed, Oxford University Press, Oxford, 2012) at [1.08].

[43] *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited and others* above n 23 at [49] and [60].

[44] *Clayton v Clayton* (CA), above n 1 at [96].

Chapter II: An Introduction to Powers

A. The Nature of Powers

In 1886, Fry J defined a 'power' as "an individual personal capacity of the appointor of the power to do something".[45] Powers can operate at law, or in equity.[46] The person who creates the power will be referred to as the donor, and the holder of the power as the appointor.[47] Powers can be administrative or dispositive. Administrative powers, such as the power to invest, are conferred for the purpose of managing property, whereas dispositive powers allow a person "to create or dispose of beneficial interests or proprietary rights which that person does not himself own."[48] It is the latter that is of relevance to this dissertation.

B. Classification by Range of Objects

Dispositive powers can be classified in a variety of ways.[49] One such classification is in relation to the range of persons in favour of whom the power can be exercised.[50] A general power of appointment allows the appointor to appoint property to anyone, including him or herself.[51] As a result of the wide scope of disposal available to the appointor, limits as to fraudulent or excessive execution of the power do not apply.[52] In contrast, a special power is a power than can only be exercised in favour of certain people or classes.[53] An example would be a power that enabled X to appoint trust property to Y or Z if X saw fit. Finally, there is a hybrid power, where objects are not defined by positive inclusion, but the class of

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45 *In re Armstrong* (1886) 17 QB 521 at 531, *Re Beckbessinger* [1993] 2 NZLR 362 (HC) at 366 per Tipping J; Thomas, above n 42 at [1.04].
46 *Laws of New Zealand* Powers: Legal and Equitable Powers (online ed) at [7].
47 Thomas, above n 42 at [1.03].
48 At [1.14].
49 For example, contrast the classifications of *In re D'Angibau* (1879) 15 Ch 228 (CA) at 232-23 per Jessel MR, to *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch) at 1613-1614 per Warner J.
50 See Lynton Tucker, Nicholas Le Poidevin and James Brightwel (eds) *Lewin on Trusts* (19 ed, Sweet & Maxwell, London, 2014) at [29-010]; see also ch 30.
51 At [29-010], [30-003]; see also *Kain v Hutton* [2008] NZSC 61, [2008] 3 NZLR 589 at [47] per Tipping J; *Orbell v Commissioner of Stamp Duties* [1923] NZLR 1342 (SC) at 1344 per Adams J; *Re McEwen* [1955] NZLR 575 (SC) at 577 per Gresson J; *Freme v Clement* (1881) 18 Ch D 499, 50 L J Ch 801 at 504 per Jessel MR; Peart, Henaghen and Kelly, above n 31 at 880, Marilyn Piccini Roy "Powers of Appointment: Civil and Common Law Comparisons" (2010-2011) 30 Est Tr & Pensions J 344 at 350.
52 Tucker, Le Poidevin and Brightwel (eds) *Lewin on Trusts,* above n 50 at [20-011]; *Kain v Hutton*, above n 51 at [47] per Tipping J.
53 Tucker, Le Poidevin and Brightwel (eds) *Lewin on Trusts,* above n 50 at [29-010], [30-016]; Thomas, above n 42 at [1.17]; ILM Richardson and RL Congreve (eds) *Law of Estate and Gift Duties* (5 ed, Butterworths, Wellington, 1978) at [2.99].

objects remains restricted in some way.[54] For example, the power to appoint to anyone, except Y or Z. These latter powers are restricted in their exercise in that any appointment must be in favour of the objects of the power, for a proper purpose.[55]

1. Powers as property

Over time, Fry J's view that "no two ideas can well be more distinct the one from the other than those of 'property' and 'power'"[56] has been eroded. For some purposes, such as the calculation of estate duty,[57] insolvency,[58] and the application of the rule against perpetuities,[59] the appointor of a general power has been regarded as being for all practical purposes[60] an owner of the property to which it relates. This concept continues to expand: in *TMSF*, the Privy Council held powers of revocation were sufficiently close to the notion of property to enable equitable execution.[61] This makes sense in some circumstances: where there is a general power in its widest sense, and no duty is owed to anyone as to its exercise, the appointor can exercise it however they choose and thus the power can be viewed as tantamount to ownership. [62]

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[54]Tucker, Le Poidevin and Brightwel (eds) *Lewin on Trusts,* above n 50 at [29-010], [30-043]; Thomas, above n 42, at [1.18]; *Re Park* [1932] 1 Ch 580 at 582; *In re Manisty's Settlement*, above n 4 at 26 per Templeman J; *In re Hay's Settlement Trusts* [1981] 3 All ER 792, [1981] 1 WLR 202 (Ch) at 208 per Megarry V-C.

[55] Tucker, Le Poidevin and Brightwel (eds) *Lewin on Trusts,* above n 50 at [30-021]; *Duke of Portland v Topham* (1864) 11 HLC 32, 11 ER 1242 at 54 per Lord Westbury "the appointor under the power, shall… act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power".

[56] *In re Armstrong*, above n 45 at 531 per Fry J. But see *Lord Townshend v Windham* (1750) 2 Ves Sen 1, 28 ER 1 (Ch) per Lord Hardwicke; *O'Grady v Wilmot* [1916] 2 AC 231(HL) at 270 per Lord Sumner, where powers were viewed as property for the benefit the deceased's creditors. This was viewed as a rule of equity rather than property: see Tony Molloy "The Vulnerability of Asset Protection Trusts Revocable By the Settlor: 'Equity's Tenderness for Creditors' and the Privy Council's Judgment in *Tasarruf Mevduati Sigorta Fonu*" (2011) 17(8) Trust & Trustees 784, Jessica Palmer "Controlling the Trust" (2011) 12 Otago L Rev 473 at 490.

[57] The Succession Duty Act 1853 (UK) first imposed taxes on property subject to a general power, when the power took effect. "Taking effect" was interpreted as when the power came "into operation"; *In Lovelace's Case* 4 De G & J , 28 L J (Ch) at 497 per Turner LJ. Subsequently, "coming into operation" was interpreted as either the actual execution of a power, or when the power was first capable of being executed, leading to a power being considered part of the deceased' s dutiable estate regardless of its exercise: *Charlton v Attorney General* (1879) 4 App Case 427 (HL) at 445 per Lord Selborne. This was continued in New Zealand in Estate and Gift Duties Act 1968 until estate duty was abolished in 1993; for more, see Richardson and Congreve (eds), above n 53.

[58] Insolvency Act 2006, s 101.

[59] *In re Churston Settled Estates* above n 42 at 344 per Roxburgh J.

[60] At [44]; *In re Watts* above n 42 at 305 per Bennet J.

[61] *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited and others* above n 23 at [8] per Lord Collins.

[62] *In Re Triffit's Settlement, Hall v Hyde*, above n 42 at 861 per Upjohn J.

However, there are still some contexts where viewing a general power as property will not be appropriate.[63] It is suggested that powers have been viewed as property when their exercise will vest property in another.[64] If this power can be used to vest the property in the appointor, as is permitted by a general power or the power of revocation, it can be appropriate to view the property of the appointor's. Differentiating between a general power of appointment and property in this situation may well be "grasping at shadows…while substance escapes."[65] It is suggested that this is not the case with the power to add and remove discretionary beneficiaries.

2. Can the power to add and remove discretionary beneficiaries constitute a general power of appointment?

The removal of a discretionary beneficiary does not align itself with the concept of a general power of appointment. It is not disposing of any property to another. Rather, it is taking 'property' away, the antithesis of appointment. The removal of beneficiaries is also incapable of constituting a general power when considering over whom the power can be exercised. It can only be exercised in regards to a predetermined class of people; the existing beneficiaries. No such limit applies to general powers of appointment.[66]

The power to add a beneficiary creates less of a syntactic issue in this sense; it possible conceptually to view the addition of a beneficiary as an 'appointment.' However, the appropriateness of referring to the power as 'general' is queried. In reality, the settlor is unlikely to have intended anyone in the world to be appointed as beneficiaries. Rather, it is suggested the settlor of a trust would intend the power to be exercised to appoint people who would naturally come within the scope of the class of beneficiaries for whose benefit the trust

[63] *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited and others* above n 23 at [33] per Lord Collins: "There is no doubt that while for some purposes a power was not property, for other purposes the holder of a general power could be regarded as being for all practical purposes an owner ."

[64] For example, in *Re Wills' Trust Deeds* [1964] Ch 219 at 228 per Buckley J: "If the donee be himself an object of the power so that he could at his own option appoint the whole of the trust property in his own favour, I conceive that it would be impossible to regard the power as having any fiduciary character, for such a power would be equivalent to ownership…"; see also Palmer "Controlling the Trust", above n 56 at 491: for a power to constitute a propriety interest, the power must be "unfettered to the extent that it permits the holder to gain access to, and therefore benefit from, the trust property without any element of subservience to the trustee or accountability to the beneficiaries."

[65] Sugden, above n 42, *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited and others* above n 23 at [61] per Lord Collins.

[66] See Tucker, Le Poidevin and Brightwel (eds) *Lewin on Trusts,* above n 50 at [29-010].

was created. The nature of the power operates to curtail any generality of its intended exercise.

Further, a general power of appointment exists over property that will vest in another upon its exercise.[67] The power to add discretionary beneficiaries does not vest property in the appointed beneficiary. A discretionary beneficiary does not have a proprietary interest in the trust,[68] and it is therefore suggested the 'role' of being a beneficiary cannot constitute property in of itself.[69] Rather, it merely gives the beneficiary a chance of receiving a distribution of property.[70] To state that the power is a power of appointment is to suggest the power is capable of appointing property in and of itself, which is incorrect; the beneficiary still relies on the trustee's exercise of their powers to receive property.[71] It is for this reason that the power to add and remove beneficiaries cannot constitute property of the appointor: it appoints no property upon its exercise.

Thus it is suggested that the power to add and remove discretionary beneficiaries does not meet the definition of a general power of appointment. Another method of classification is required.

[67] *Freme v Clement* above n 51 at 504 per Lord Jessel MR.
[68] *Gartside v Inland Revenue Comission* [1968] AC 553 (HL) at 606 per Lord Reid; *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694 (PC) at 713. This view has been upheld in New Zealand: see *Hunt v Muollo*, above n 38 at 325 per Tipping J; *Johns v Johns* [2004] 3 NZLR 202 (CA) at [31] per Tipping J; *Nation v Nation*, above n 38 at [74]. Compare this to the treatment of final beneficiaries, who are viewed as having a property interest, *Johns v Johns*, above n 68, at [45] per Tipping J.
[69] As per *Hunt v Muollo*, above n 38 at [11] per Tipping J,"it is only on the making of a distribution to the discretionary beneficiary that the beneficiary obtains any interest in property, and then only to the extent of the distribution." It is suggested as impossible to extrapolate any property right in 'being' a discretionary beneficiary who does not have any property rights him or herself. The right to 'be' a beneficiary has no distinct and measureable value; rather it is analogous to a personal attribute such as personal goodwill, which has been traditionally excluded as property. For more see *Thompson v Thompson*, above n 38 at [52]-[55] per William Young J; *Briggs v Briggs* above n 38 per Thorp J; James Penner *The Idea of Property in Law* (Oxford University Press, Oxford 1997).
[70] Palmer "Controlling the Trust", above n 56 at 493.
[71] Nicola Peart and Jessica Palmer "Clayton v Clayton: A Step Too Far?" (2015) 8 NZFLJ 114 at 117. The power to add and remove beneficiaries may have constituted property as part of the "bundle of rights" doctrine that has viewed a collection of rights or powers involved in a trust as constituting property of a person; however, this was not considered in *Clayton v Clayton* (CA). For more on this see *Z v Z (No 2)*, above n, 38; *Walker v Walker* [2007] NZCA 30; *Harrison v Harrison* [2009] NZCA 68, NZFLR 687; and the doubt cast over this recently by *Financial Markets Authority v Hotchin* [2011] 3 NZLR 469 (HC); Shelley Griffiths "Valuation of Interests in Discretionary trusts; Valuing the Invaluable and Unvaluable" (paper presented for the New Zealand Law Society, Relationship Property Intensive — your big (legal) day out!, August 2010), above n 2; Griffiths, above n 2.

C. *Classification by Duties Imposed*

A second method of classification of powers is according to the duties they impose on the appointor.[72] The appointor of a personal power can exercise it for their benefit.[73] They have no duty to exercise it,[74] and the objects have no right to complain if the appointor chooses not to do so.[75] The court cannot interfere to compel the exercise,[76] as the discretion of the holder is made "absolute and uncontrollable" [77] by the trust instrument.

In contrast, a true fiduciary power[78] exists for the benefit of beneficiaries,[79] and further limitations and duties attach. Such duties can include the duty to take into account relevant considerations and ignore irrelevant considerations, and not to act irrationally and capriciously. [80]

1. Can the power to add and remove beneficiaries constitute a personal power?

The Court of Appeal in *Clayton* was quick to find that the power to add and remove beneficiaries was a power that gave Mr Clayton an "unfettered right" [81] to remove beneficiaries.[82] In addition, there was no prohibition on Mr Clayton benefitting from the trust.[83] The Court notes fiduciary obligations do not generally attach to powers that are personal and may be exercised exclusively in the appointor's own interests.[84] This finding makes two assumptions; that capacity determines the classification of a power, and that the

[72] Tucker, Le Poidevin and Brightwel (eds) *Lewin on Trusts,* above n 50 at [29-015].
[73] Edwin Simpson "Breaches" in P Birks and Ariana Pretto (eds) *Breach of Trust* (Hart Publishing, Portland, 2002) at 87.
[74] *In re Mills* [1930] 1 Ch 654 (CA) at 666 per Lawrence LJ; *Re Will's Trust Deeds* [1964] Ch 219, 1 All ER 390 (Ch) at 225 per Buckley J; *Mettoy Pension Trustees Ltd v Evans*, above n 49 at 1614 per Warner J.
[75] *McPhail v Doulton* [1971] AC 424 (HL) at 441 per Lord Hodson.
[76] Thomas, above n 42 at [1.40]; se also *Gisborne v Gisborne* (1877) 2 App Cas 300; *Re Gulbenkian's Settlements* [1970] AC 508 (HL) at 521 per Lord Upjohn; *McPhai*l *v Doulton* above n 75 at 449 per Lord Wilberforce.
[77] *McPhail v Doulton* above n 75 at 441 per Lord Hodson; *In re Hay's Settlement Trusts*, above n 54 at 209 per Megarry VC.
[78] There is a third 'trust power' which must be exercised, but at the holder's discretion as to its manner: *Brown v Higgs* (1803) 8 Ves Jr 561, (HL) per Eldon LJ. Such a power operates as a trust and the Court can compel exercise and intervene if an exercise is capricious. This is not of concern for the purposes of this dissertation. For more, see *McPhail v Doulton* above n 75 at 441-442 per Lord Hodson; *Gower v Mainwaring* (1750) 2 Ves Sen 87, 28 ER 57 (Ch); *Hewett v Hewett* (1765) 2 Ed 332, 28 ER 925 (Ch); *In re Hodges* (1878) 7 Ch D 754' John Hopkins "Certain Uncertainties of Trusts and Powers" (1971) 29 CLJ 68.
[79] Hayton, Matthews and Mitchell, above n 19 at [1.77].
[80] *Re Gestetner Settlement* [1953] Ch 672 at 668 per Harman LJ; *In re Hay's Settlement Trusts*, above n 54 at 209 per Megarry VC; David Hayton "English Fiduciary Standards" (1999) 55 Vand J Transnat'l L 555 at 588,
[81] *Clayton v Clayton* (CA), above n 1 at [88].
[82] The trust deed gave him the Principal Family Member power to appoint or remove any person from the class of discretionary beneficiaries: Declaration of Trust Establishing Vaughan Road Property Trust at clause 17.
[83] At clause 14.1.
[84] *Clayton v Clayton* (CA), above n 1 at [104].

ability for an appointor to use a power for their own benefit immediately negates any fiduciary obligations, or indeed obligations at all.

2. The capacity in which a power is held

It is acknowledged that if a power is held in a personal capacity, often no duties attach. However, it is suggested this is not always determinative. The Court of Appeal cites Buckley J in *In Re Will's Trust Deeds*[85] as support for their approach:

> …where a power is conferred on someone who is not a trustee of the property to which the power relates or, if he be such a trustee, is not conferred on him in that capacity, then in the absence of a trust in favour of the objects of the power in default of appointment, the appointor is, at any rate prima facie, not under any duty recognisable by the court to exercise a power…

With respect, it must be acknowledged that not having a duty to exercise a power is not the same as not having any duties attach to a power at all. The fact an appointor cannot be compelled into exercising a power does not mean that the power comes without limitations.[86]

Attention is also drawn to Buckley J's use of "prima facie." Thus the presumption that powers held in a personal capacity are unrestrained by duties is rebuttable. Duties can attach to powers "even if the legal ownership of the trust property was not vested in the appointor," for he might, as Romer LJ pointed out in *In re Mills,* [87] "be a trustee of the particular power."[88] It falls to be considered when a person may be viewed as a trustee, or fiduciary, of a particular power. This can occur if a person is in a fiduciary relationship with the objects of the power, and is explored in Chapter IV.

[85] *Re Will's Trust Deeds*, above n 74 at 237 per Buckley J. See also *Re Gulbenkian's Settlements* above n 76 at 518 per Lord Upjohn.
[86] For example, a personal power cannot be exercised for the benefit of someone other than the objects specified by the instrument conferring the power: Simpson, above n 73. If a trustee holds a personal power that can be exercised for their benefit they are not bound to exercise it and the court cannot compel them to do so. However, that "does not mean that he can simply fold him hands and ignore it, for normally he must from time to time consider whether or not to exercise the power, and the court may direct him to do this": *In re Hay's Settlement Trusts*, above n 54 at 209 per Megarry VC. Further, if a trustee holds the power in a fiduciary capacity, even though they cannot be compelled to exercise the power, when the power is exercised "it is not enough for him to refrain from acting capriciously; he must do more. He must make such a survey of the range of objects or possible beneficiaries . . .as will enable him to carry out his fiduciary duty." *In re Hay's Settlement*, above n 54 at 209 per Megarry VC; *McPhail v Doulton* above n 75 at 457 per Lord Wilberforce.
[87] *In re Mills*, above n 74 at 669 per Romer LJ.
[88] At 669 per Romer LJ, as cited in *Re Will's Trust Deeds*, above n 74 at 228 per Buckley J.

Capacity has also been viewed as irrelevant if the subject matter of the power goes to the core of the trust. This was demonstrated in relation to the power to add and remove trustees in *Carmine v Ritchie*.[89] In this case, the trust instrument vested the power in Mrs Ritchie in her capacity as "Principal Family Member". Mrs Ritchie exercised this power to remove Mr Carmine as a trustee.

As the power was vested in Mrs Richie personally it did not automatically follow that the power was fiduciary.[90] Despite this, Gilbert J held that the power to appoint new trustees is:[91]

> …generally acknowledged to be a fiduciary power even thought it may not have been conferred on trustees or the holder of any other office…. because the subject matter of the power is the office of the trustee which lies at the core of the trust and carries fundamental and onerous obligations to act in the best interests of the beneficiaries as a whole.

If Mrs Ritchie chose to exercise the power to appoint and remove trustees, she was bound by the duties of good faith and acting in the best interests of the beneficiaries, regardless of the decision of the settlors to reserve the powers for themselves in their personal capacity.[92] The focus is on the nature of the power conferred on the holder. The intention of the settlor when conferring the power is not enough to remove all limits. Thus if the subject matter, or nature, of the power is at the core of the trust, any assumption that capacity dictates obligations may be refuted.

3. *The ability to self-appoint*

The ability of an appointor to appoint to themselves has prevented duties from attaching to the power in the past.[93] However, at times powers have been held to be fiduciary despite the ability for the holders to appoint themselves.[94] The exercise of the power will still require the

[89] *Carmine v Ritchie* [2012] NZHC 2279.
[90] At [63] per Gilbert J.
[91] At [66].
[92] At [70].
[93] *Re Penrose* [1933] Ch 793 at 805; *Re Boston's Will Trusts* [1956] Ch 395 at 406; *In Re Triffit's Settlement, Hall v Hyde*, above n 42 at 864 per Upjohn J; Tobias Barkley "The Content of the Trust: What Must a Trustee Be Obliged to Do With the Property?" (2013) 19(5) Trust & Trustees 452 at 463.
[94] Tucker, Le Poidevin and Brightwel (eds) *Lewin on Trusts,* above n 50 at [20-126]; "it is possible to authorise a trustee who is also a beneficiary to exercise a power under which the trustee himself can benefit over other beneficiaries. " For example, *In re Beatty, Hinves and Others v Brooke and Others* [1990] 1 WLR 1503 (Ch) at 1506 per Hoffman J, trustees were able to appoint to themselves "notwithstanding that they may have a direct personal interest in the mode of its exercise"; See also, *Edge v Pensions Ombudsman* [1998] Ch 512 (HC) at 534 per Scott VC; affirmed in *Edge v Pensions Ombudsman* [2000] Ch 602 (CA).

fiduciary to give consideration to whether it should be exercised, and to act in accordance with the purpose of the donor.[95] Trustees can also be fixed beneficiaries of a trust:[96] the obligation to act selflessly continues to exist beyond the stated interest.[97] Implied authorization for the abrogation of any fiduciary duties is discussed further below.

D. Conclusion: a Reversal in Methodology

It is evident that while the capacity in which a power is held, and the ability to self-appoint is relevant to the classification of a power, it is not always determinative.[98] As the power to add and remove beneficiaries, held in a personal capacity, has never been subject to judicial contemplation, there is a need to identify the nature of the power to determine its classification.

Rather than say because the power is held in a personal capacity, or could potentially be used for the appointor's benefit, the power must be personal; it is suggested that the justification be reversed. The nature of the relationship between appointor and objects, or the power itself, should be examined first.[99] The validity of any appointment then depends on whether the power is fiduciary or not.[100]

This methodology is proposed in relation to the power to add and remove beneficiaries. Is the power fiduciary? This requires consideration of how powers have been found to be fiduciary in the past. It is only if the power is found to be fiduciary, should discussion regarding self-appointment be relevant.

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[95] *In re Beatty, Hinves and Others v Brooke and Others*, above n 94 at 1506 per Hoffman J.
[96] Andrew S Butler "The Trust Concept, Classification and Interpretation" in Andrew S Butler (ed) *Equity and Trusts In New Zealand* (2 ed, Thomson Reuters, Wellington, 2009) at [3.1.2].
[97] Tobias Barkley "Clayton v Clayton: The Court of Appeal on the Concepts of Property and Trusts" (2015) NZLJ 164 at 165.
[98] Tucker, Le Poidevin and Brightwel (eds) *Lewin on Trusts* above n 50 at [30-04]: "The mere fact that a donee may lawfully benefit from the exercise of a power…does not of itself make it a general power".
[99] This method has support: "It is the nature of the relationship... that gives rise to the fiduciary duty": *Guerin v R* [1984] 2 SCR 335 at 384 per Dickson J; and thus "definitions of the fiduciary relationship which turn on the duty of loyalty ultimately are circular, and provide no guidance on which a fiduciary obligation should be attached to a relationship between the parties", Laura Hoyano "The Flight to the Fiduciary Haven" in Peter Birks (ed) *Privacy and Loyalty* (Oxford University Press, Oxford, 1997) at 182.
[100] *In Re Skeat's Settlement* [1889] 42 Ch D 522 (Ch) per Kay J at. 526. This approach has been evident recently in Australia, see *Scaffidi v Montevento* [2011] WASCA 146 at [145] per Murphy JA & Hall J; *Schuhmacher v Emmerson* [2013] QSC 205 at [93] per Daubney J.

Chapter III: Is the Power to Add and Remove Discretionary Beneficiaries Fiduciary As A Result of Its Nature?

This dissertation suggests that there are two ways in which a power can be classified fiduciary, neither of which relies explicitly on the holder being a trustee. The first argument relates to the nature of the power: that is, the nature of some powers ought to be held fiduciary regardless of the capacity in which it is held, due to their impact on the core of the trust. The second argument relates to the relationship created by the existence of the power between the appointor and existing beneficiaries: that it ought to be viewed as a fiduciary relationship and thus have fiduciary obligations attach to the exercise of the power.

This chapter will address the first of these two arguments. It is suggested that the power to add and remove beneficiaries is such a power that justifies a 'fiduciary' label so as to ensure the core of the trust is not undermined.[101]

A. A Precursor: Settlor Intention

In *Clayton v Clayton*,[102] the Court of Appeal made it clear that Mr Clayton's intention when conferring powers was determinative as to whether the power to add and remove discretionary beneficiaries power was fiduciary.[103] Any empirical inquiry such as this renders theory and morality irrelevant.[104] Instead, the focus goes to what the settlor intended to achieve based on the wording of the trust instrument and surrounding circumstances.[105] Thus if the appointor of a power is able to benefit themselves, the settlor cannot have intended the

[101] Jessica Palmer and Nicola Peart "Double Trouble: The Power to Add and Remove Beneficiaries and The Power to Appoint and Remove Trustees" (paper presented to New Zealand Law Society CLE Ltd Trusts Conference, Auckland and Wellington, June 2015) at 39.
[102] *Clayton v Clayton* (CA), above n 1.
[103] *Clayton v Clayton* (CA), above n 1 at [102]. See also *Kain v Hutton*, above n 51 at [47] per Tipping J; *Re Gulbenkian's Settlements* above n 76; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) at 705; Thomas, above n 42 at [1.45]; Hayton, Matthews and Mitchell, above n 19 at [1.76]; Matthew Conaglen and Elizabeth Weaver "Protectors as Fiduciaries: Theory and Practice" (January 2012) 18(1) Trust & Trustees 17 at 35; Stewart E Sterk "Trust Protectors, Agency Costs and Fiduciary Duty" (2005-2006) 27 Cardozo L R 276 at 2799; Tsun Hang Tey "The Duties of a Trust Enforcer" (2010) 23 S Ac L J 363; Antony Duckworth "Trust Law in the New Millennium: Part II - Prospective" (2001) Trust & Trustees 11 at 13.
[104] John Glover *Commercial Equity: Fiduciary Relationships* (Butterworths, Australia, 1995), at [3.75]; *Hallstroms Pty Ltd v FCT* (1946) 72 CLR 634.
[105] Hayton "English Fiduciary Standards", above n 80 at 570; *Vestey's Executors v Inland Revenue Commissioner* [1949] 1 All ER 1108 (HL) at 1131 per Lord Simonds.

power to be fiduciary.[106] Upon this approach, equity respects the intention of the settlor to confer rights upon the enforcer of a trust as they see fit.[107]

It is conceded that the intention of a settlor when conferring a power will be relevant to the classification of a power. However, it is suggested that stated intention is not always determinative. While a settlor's manifested intention may be used as a general rule, it is apparent equity may step in and subject a power or person to a fiduciary standard.[108] Further, the court will aim to facilitate and not frustrate the intentions of the settlor only so long as these intentions do not contravene mandatory policy or practical rules of trust law.[109]

This leaves the Court with two options. One option is to accept the settlor's intention to create a trust and construe powers as fiduciary to ensure the policy and principles of trust law are upheld.[110] Alternately, if the settlor did not intend a power crucial to the trust to be fiduciary, "the law of trusts should not be used to validate structures that are anthetical to the very heart of what a trust is"[111] and the trust ought to be held invalid. While a lack of settlor intention will certainly be fatal to the existence of an express trust, as discussed further below, it is suggested the settlor's intention when creating specific powers does not necessarily carry with it such finality.

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[106] Tucker, Le Poidevin and Brightwel (eds) *Lewin on Trusts,* above n 50 at [29-047].

[107] Tey, above n 103 at 365; David Hayton "Developing the Obligation Characteristic of the Trust" (2001) 117 LQR 96 at 98.

[108] That is, an express intention to create a trust is not the only method by which a trust can exist. See *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [82] per Blanchard & Tipping JJ; Sarah Worthington *Equity* (Oxford University Press, Oxford, 2003) at 64:"Equity sometimes imposes trusts in defiance of the parties' intentions…Trusts arising by operation of law can be either *constructive trusts* or *resulting trusts*." A constructive trust is "imposed by law for reasons other than the manifested intention", James Edelman "Two Fundamental Questions for the Law of Trusts" (2013) 129 LQR 66 at 67. Resulting trusts are imposed based on a presumption that property was not intended to pass absolutely, whereas constructive trusts are imposed when the property owner's intention is deemed, often objectively, to be such that it is unconscionable to deny that partial beneficial ownership had passed to another: see Jessica Palmer "Attempting Clarification of Constructive Trusts" (2010) 24 NZULR 113 at 114, 123. Intention remains crucial to the creation of a trust, but it is not always the subjective or stated intention that trumps.

[109] Hayton "Developing the Obligation Characteristic of the Trust", above n 107 at 104; Hayton "English Fiduciary Standards", above n 80 at 580: "The approach of the court is to facilitate and not to frustrate intentions of settlors, so long as it does not contravene mandatory rules of trust law whether based on policy or on practical grounds (e.g., rules against perpetuities, the beneficiary principle, the requirements of certainty, justiciability and accountability of trustees to beneficiaries)."

[110] It is suggested upholding the trust will be the Court's preference: "A trust should be upheld if there is sufficient practical certainty in its definition for it to be carried out, if necessary with the administrative assistance of the court, according to the expressed intention of the settlor": *McPhail v Doulton* above n 75 at 450 per Lord Wilberforce; see also *Re Exeter Settlement* [2010] JLR 169; Michael Stanford-Tuck "How to Juggle Beneficiaries: The Power to Add or Remove" (2011) 17 Trust & Trustees 695 at 696.

[111] Jessica Palmer and Nicola Peart "Double Trouble: The Power to Add and Remove Beneficiaries and The Power to Appoint and Remove Trustees" (paper presented to New Zealand Law Society CLE Ltd Trusts Conference, Auckland and Wellington, June 2015), above n 101 at 39.

B. Re Skeat's Settlement: A Test 'Independent of any Authority'

It is useful to consider when a power has been held fiduciary in the past. An example is the power to appoint trustees, first recognised as fiduciary in *Re Skeats Settlement.*[112] In this case, the husband and wife were empowered to appoint any other person as a trustee and attempted to appoint the husband. Kay J found that the power of appointing the trustee was fiduciary:[113]

> I will try it in this way…Could the person who has the power of appointment put the office of trustee up for sale, and sell it to the best bidder? It is clear that would be entirely improper. Could he take any remuneration for making the appointment? In my opinion, certainly not. Why not? The answer is that he cannot exercise the power for his own benefit. Why not again? The answer is inevitable. Because it is a power which involves a duty of a fiduciary nature; and I therefore come to the conclusion, independently of any authority, that the power is a fiduciary power.

The unseemliness of direct benefits received by an appointor upon exercise of the power dictates Kay J's finding. This intuitive prohibition is a manifestation of the fiduciary duty to avoid profiting from their role.[114] As the power involves a duty of a fiduciary nature, it must therefore be fiduciary in nature itself.

1. Does the power to add and remove beneficiaries meet this test?

Applying Kay J's test "independent of authority"[115] to the power to add and remove beneficiaries leads to the same instinctive result. Could the appointor of the power sell the position of the beneficiary? Likewise, could a person appointed as a beneficiary pay the appointor for their appointment? Reflexively, it seems inappropriate for the appointor to receive such a benefit. This suggests that the power to add and remove beneficiaries could involve a uniquely fiduciary duty [116] and therefore constitute a fiduciary power. Traditionally, we expect those who hold powers in a trust (normally the trustee) to be prohibited from

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[112] *In Re Skeat's Settlement*, above n 100; see also *In re Newen* [1894] N 38, 1 Ch 297, *Montefiore v Guedalla* (1903) 2 Ch 723 at 725, 726 per Buckley J.
[113] *In Re Skeat's Settlement*, above n 100 at 526-527 per Kay J.
[114] This is discussed in detail in Chapter V below.
[115] *In Re Skeat's Settlement*, above n 100 at 526.
[116] Matthew Conalgen *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing, Portland, 2010) at 39 refers to the principle prohibiting profiting from a fiduciary position as "peculiar to fiduciaries in the sense that they, nor functionally equivalent doctrines, are applied to actors who are not considered to occupy fiduciary positions.

receiving a benefit from the exercise of these powers,[117] and it appears this extends to the power to add and remove beneficiaries. A beneficiary is even more crucial to our idea of a trust than a trustee; it seems equally incongruous for an appointor to profit when appointing either. The nature of the power appears to be one that ought to be limited in order to retain our conception of the trust.

This intuitive feeling must be grounded to something more substantive to gain support. It is suggested that fiduciary duties attach when the nature of the power is such that it goes to the core of the trust, and may threaten the integrity of the trust if it is not fettered in some way. This requires an identification of the core of the trust and consideration of the nature of powers that have previously been viewed as fiduciary, regardless of capacity, to conclude whether the power to add and remove beneficiaries meets this threshold and thus ought to be deemed fiduciary.

C. Identifying When a Power Will Involve a 'Duty of a Fiduciary Nature'

Rarely does the power to add and remove trustees merit much discussion as to why the power involves a duty of a fiduciary nature; rather, *Skeats* is cited as authority that the power is fiduciary.[118] Some state a power will be fiduciary when it is presumed to be exercised for the beneficiaries as a whole,[119] or when the power is intended to be exercised to further the trust.[120] Identification of when such a presumption arises is key.

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[117] See, for example: *Bray v Ford* [1896] AC 44 (HL) per Lord Herschell "It is an inflexible rule of a Court of Equity that a person in a fiduciary position…is not, unless otherwise expressly provided, entitled to make a profit…" The principle is "that which is the fruit of the trust property or of the trusteeship is itself trust property" *Swain v Law Society* [1981] 3 All ER 797 (CA) at 813. See also *Aberdeen Rail Co v Blaikie Brothers* (1854) 23 LT 315 (HL); *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 2 NZLR 163 (PC) at 166 per Lord Wilberforce; *Bristol and West Building Society v. Mothew* [1998] Ch 1 (CA) at 18 per Lord Millet; *Stevens v Premium Real Estate Ltd* [2009] NZSC 15 at [67] per Blanchard J.

[118] David Pollard "The Power of Employers to Appoint or Remove Trustees of Occupational Pension Schemes: Is It Fiduciary?" (2011) 25 TLI 184 at 203. See, for example: *Jurgen von Knieriem v. Bermuda Trust Company Ltd and Grosvenor Trust Company Limited* (1994) I BOCM 116 (Bermuda SC) at 124 per Meerabux J; *Inland Revenue Commissioners v Schroder* [1983] STC 480 (Ch) at 500 per Vinelott J.

[119] Kah Lee Lau "The Control of Trust Protectors" (2012) 26 TLI 39 at 46; Duckworth "Trust Law in the New Millennium: Part II - Prospective", above n 103 at 14, Antony Duckworth "Trust Law in the New Millennium: Part III: Fundamentals" (2001) Trust & Trustees 9 at 13. See also *Re Osiris Trustees* [2000] WTLR 932, (2003) ITELR 404 (Isle of Man HC) at 944 per Deemster Cain. This is especially so when the powers are to direct investments and distributions: Hayton "English Fiduciary Standards", above n 80 at 585-586; *Vestey's Executors v Inland Revenue Commissioner*, above n 105 at 1115 per Lord Simonds. The presumption a directive power will be fiduciary is also found in legislation: see Uniform Trust Code §808(d) (United States), however in other jurisdictions it is the presumption is the opposite and the holder of powers is deemed non-fiduciary; for example, the Trusts (Guernsey) Law 2007 s 15(2).

[120] Alexander A. Bove Jr, "The Development, Use, And Misuse Of The Trust Protector And Its Role In Trust Law And Practice" (Paper presented at the University of Zurich , Switzerland, April 2012), at 6.

The presumption can arise as a result of the relationship between the power-holder and beneficiary, as evidenced by the relationship between trustee and beneficiary. This is discussed below. Alternately, as Bove states, the holders of such a power may find themselves in a fiduciary position when the nature of the power is such that it is essential to the integrity of the trust and interests of the beneficiaries.[121] It is suggested that when a power of such an essential nature exists, presumptions regarding the purpose of the power arise to justify the imposition of obligations on the appointor and therefore protect the core of the trust.

Recall *Carmine v Ritchie*,[122] where the power to add and remove trustees was held to be fiduciary regardless of the capacity in which the appointor held the power, because the subject matter of the power lies at the core of the trust and carries with it obligations to act in the best interests of the beneficiaries as a whole.[123]

As the Court already holds powers which enable the appointing and removal of trustees by the Court to ensure that the obligations to act in the best interests of the beneficiaries are being met,[124] it is suggested that it is not the obligations assumed by the new trustee that justified the power's classification as fiduciary.[125] Instead, it is because the subject matter of the power is at the core of the trust.

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[121] At 7, referring to the finding in *Jurgen von Knieriem v. Bermuda Trust Company Ltd and Grosvenor Trust Company Limited*, above n 118.

[122] *Carmine v Ritchie*, above n 89.

[123] At [66] per Gilbert J.

[124] There are two ways in which the Court can appoint or remove trustees: Section 51 of the Trustee Act 1956, which empowers the Court to appoint new trustees when it is expedient to do so, and inexpedient, difficult or impracticable to do so without the assistance of the Court; and the inherent jurisdiction of the Court to appoint or remove trustees if doing so is necessary for the welfare and best interests of the beneficiaries: see *Letterstedt v Broers* (1884) 9 App Cas 371 (PC) at 386 per Lord Blackburn; *Hunter v Hunter* (1938) NZLR 520 (CA) at 529. These powers co-exist to ensure trusts are propertly administered for the welfare of the beneficiaries: *Powell v Powell* [2015] NZCA 133 at [47] per Cooper J; *Nysse v Nysse* [2014] NZHC 2833 at [7] per Brown J; *Clarke v Karaitiana* [2011] NZCA 154 at [37] per Randerson J; *Miller v Cameron* (1936) 54 CLR 572 at 575 per Dixon J, referred to in *Kain v Hutton* [2007] NZCA 199 at [266] per Glazebrook J.

[125] See also *In Re Skeat's Settlement*, above n 100, at 526, where Kay J merely acknowledge the obligations imposed on a new trustee before relying on other factors to determine the nature of the power: "The ordinary power of appointing new trustees, under a settlement such as this is, of course imposes upon the person who has the power of appointment the duty of selecting honest and good persons who can be trusted with the very difficult, onerous, and often delicate duties which trustees have to perform…Is that power of selection a fiduciary power or not?"

1. What is the core of a trust?

Many different descriptions are offered as to what a trust 'is'. Thomas and Hudson offer four requirements of a trust:[126]

> …that it is equitable, that it provides the beneficiary with rights in property, that it imposes obligations on the trustee, and that those obligations are fiduciary in nature.

The deceptive simplicity of this definition inevitably cannot always run true.[127] Instead, the flexibility of the trust structure means the answer to the question 'what is a trust' is likely to never be fully answered.[128] However, as Jessica Palmer writes, an understanding of the theories behind trusts remains desirable to ensure a conceptual coherence of the particulars of trust law.[129] This is extended to argue an understanding of the theoretical concepts that drive the debate is required to identify what we substantively require at the 'core' of a trust, suggested as alienation and accountability.[130]

Two main schools of thought will be discussed in this section that dominate the debate of the theoretical basis for a trust: the proprietary theory and the obligational theory.

2. The proprietary theory

The key idea in this theory is that the trustee holds property that is beneficially owned by another.[131] Fundamental to this theory is that there is a separation of legal ownership (which goes to the trustee) and the beneficial ownership (which goes to the beneficiary),[132] over trust

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[126]Thomas and Hudson, above n 26 at [1.01]

[127] For example, the requirement of a beneficiary to enforce the trust (the beneficiary principle, established in *Morice v Bishop of Durham* (1804) 9 Ves June 399, 32 ER 65 (MR)) can be negated in the case of a charitable trust, where the Attorney-General will enforce the trust: see Charitable Trusts Act 1957, s 60; further, occasional non-charitable purpose trusts have been upheld: see *In re Denley's Trust Deed* [1969] 1 Ch 373.

[128] "It is a futile exercise to try to find a definition of the trust which is both comprehensive (in that it includes all the trust's distinctive features) and also accurate": Patrick Parkinson "Reconceptualising the Express Trust" (2002) 61 CLJ 657 at 652.For some early attempts at a definition, see WG Hart "What is a Trust?" (1899) 15 LQR 294; for a more recent attempt, see Edelman, above n 108.

[129] Jessica Palmer "Theories of the Trust and What They Might Mean for Beneficiary Rights to Information " [2010] NZ L Rev 544: "an awareness of these two influential conceptions is certainly most helpful and, I would argue, necessary to ensure that the more particular principles of trust law are, as far as possible, conceptually coherent. "

[130] Jessica Palmer and Nicola Peart "Double Trouble: The Power to Add and Remove Beneficiaries and The Power to Appoint and Remove Trustees" (paper presented to New Zealand Law Society CLE Ltd Trusts Conference, Auckland and Wellington, June 2015), above n 101 at 39.

[131] Palmer "Theories of the Trust and What They Might Mean for Beneficiary Rights to Information", above n 129 at 542.

[132] Parkinson, above n 128 at 658; James Penner "Exemptions" in Peter Birks & Arianna Pretto (ed) *Breach of Trust* (Hart Publishing, Portland, 2002) at 252. Separation of beneficial ownership is required to enable the

property.[133] The trustee has the power to deal with the property, and the beneficiary holds the right to benefit.[134] The beneficial interest is derivative of the trustee's interest, not competitive;[135] "if the trustee does not have the rights he has, then the beneficiary cannot have the rights he has."[136]

The right of the beneficiaries under the proprietary theory does not come from the trustees undertaking to carry out the trust,[137] but rather the settlor's granting of the right of beneficial ownership of their property through a declaration of trust, accompanied by a legal transfer of that property to another.[138] It is this intention of the settlor to alienate both forms of ownership that creates a property interest and is fundamental to this theory. Absent this intention, the ownership rights enjoyed by the beneficiaries cannot be explained. If the settlor did not intend to divest or alienate themselves of their property, at best a bailment has taken place.[139] The core of the proprietary theory is therefore alienation, in both intention and fact.

3. The obligational theory

The obligational theory views the trust as a relationship between the settlor and the trustee that creates obligations to beneficiaries by the trustees.[140] As a result, the beneficiary does not have a property right but merely an equitable interest in trust property, which creates personal rights against the trustee to fulfil the obligations imposed on them when the trust was created.[141]

The obligational theory of trusts serves to explain why duties beyond pure property-based

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court to enforce the duties of a trustee: Duckworth "Trust Law in the New Millennium: Part II - Prospective", above n 103 at 11.

[133] Parkinson, above n 128 at 658.

[134] James Penner "The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust" (2014) 27 CJLJ 473 at 477.

[135] Paul Matthews "From Obligation to Property, and Back Again? The Future of the Non-Charitable Purpose Trust" in David Hayton (ed) *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (Kluwer Law International, London, 2002) at 206.

[136] Penner "The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust", above n 134 at 475.

[137] Penner "The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust", above n 134 at 475.

[138] Peter Jaffey "Explaining the Trust" (2015) 131 LQR 377 at 385.

[139] A bailment must be distinguished as different from a trust; see FW Maitland (Revised by John Brunyate) "Lecture IV: The Modern Trust" in *Equity – A Course of Lectures* (2 ed, Cambridge University Press Cambridge, 1936) at 45.

[140] Palmer "Theories of the Trust and What They Might Mean for Beneficiary Rights to Information", above n 129 at 543.

[141] Jaffey, above n 138; Parkinson, above n 28 at 663.

obligations are imposed by a trust. [142] Duties such as honesty and good faith do not attach to mere ownership, yet are explicitly required by Millet LJ's description of the "irreducible core"[143] of trustee duties. This is explainable only by the obligational model.[144]

There is no requirement that the trust property belong in some way to the beneficiaries. Rather, the property is the trustee's own, but subject to special obligations.[145] With these obligations arise accountability, suggested as the core element of a trust under the obligational theory.[146] As noted by Barkley, "a deed that purports to be a trust but excludes the fiduciary obligation cannot be effective in creating a trust."[147] Without these obligations, there is merely a gift from the settlor,[148] which equity will not perfect by implementing a trust.[149] But the settlor cannot intend a gift. Rather, the settlor must intend his "beneficence to be structured in a certain way which can not be facilitated by a gift";[150] to simultaneously create a benefit and impose obligations.[151] These obligations ensure that the trustees are accountable for their actions in relation to the beneficiaries. Consequently, there is no trust unless someone is ultimately able to enforce the trust obligation and hold trustees accountable.[152]

4. Conclusion

Both theories accord with our ideals of what a trust 'is' or 'should be.' Yet it is clear that no

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[142] "Ownership of property for another creates a duty of preservation at most, yet the duties of trustees can and must go beyond this": Palmer "Theories of the Trust and What They Might Mean for Beneficiary Rights to Information", above n 129 at 552.
[143] *Armitage v Nurse* [1998] Ch 241 (CA) at 253 per Lord Millet.
[144] Palmer "Theories of the Trust and What They Might Mean for Beneficiary Rights to Information", above n 129 at 552.
[145] Penner "The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust", above n 134 at 254.
[146] See Hayton "Developing the Obligation Characteristic of the Trust", above n 107; JW Harris "Trust, Power and Duty" (1971) 87 LQR 48 at 49,53.
[147] Barkley "Clayton v Clayton: The Court of Appeal on the Concepts of Property and Trusts", above n 97 at 165.
[148] *Morice v Bishop of Durham*, above n 127 at 404 per William Grant MR: "An uncontrollable power to dispose of the property by the trustee would result in ownership, not a trust."
[149] FW Maitland (Revised by John Brunyate) "Lecture VI: "Trusts Implied, Resulting and Constructive" " in *Equity – A Course of Lectures* (2 ed, Cambridge University Press, Cambridge, 1936) at 72: "An imperfect gift is no declaration of trust because the two intentions are very different." See also *Jones v Lock* (1865) 1 Ch App 25.
[150] Douglas A Alderson "The Express Trust's Nocturnal Cerberus: Some Observations on the Morality of Intention to Create an Express Trust" (1988-1989) 9 Est & Tr J 319 at 331.
[151] Charles Rickett "The Classification of Trusts " (1999) 18 NZULR 305 at 310.
[152] Duckworth "Trust Law in the New Millennium: Part II - Prospective", above n 103 at 16; *Morice v Bishop of Durham*, above n 127.

one theory will be able to withstand all scrutiny in elements of trust law.[153] This does not mean there is absolutely no coherence in what a trust is and what goes to its core. Rather, this dissertation proposes that the core of the trust is twofold, and each core element in turn is evident in one of the theories above. As a result, "the trust has two facets";[154] there is no trust without a concept of accountability, and equivalently there can be no trust without a concept of alienation.[155] It is suggested that any power that goes to the core of the trust must be deemed a fiduciary power to ensure this core remains intact.

C. When Does a Power Go to the Core of a Trust? An Analysis Using Trust Protectors

Analysis of when a trust protector has been viewed as holding fiduciary powers is used to provide an indication of when powers go to the core of a trust.

A trust protector, while "not a term of art and is not known as such to our law,"[156] generally refers to a named position in the trust document, holding powers that can impact on the trustees and their dealings with trust property.[157] The position of a trust protector is similar to the non-trustee appointor of the power to add and remove beneficiaries; both positions involve a person outside of the trustee-beneficiary relationship holding a power with respect to the trust. Therefore, the treatment of protectors by the courts provides a helpful indication to how the appointor of the power to add and remove beneficiaries ought to be treated.

Protectors have been viewed as both fiduciary and non-fiduciary. It is suggested that the treatment of protectors is determined by reference to the nature of the power they hold. This offers further support to the proposition that capacity does not always dictate a fiduciary limitation on a power's exercise.

In *Re Freiburg Trust*,[158] trustees required the consent of the protector before they could exercise their powers. The protector was convicted of stealing trust funds, and the trustee's

[153] Palmer "Theories of the Trust and What They Might Mean for Beneficiary Rights to Information", above n 129 at 544.
[154] Jaffey, above n 138 at 399; Rickett, above n 151 at 307, referring to Peter Birks "Definition and Division: A Meditation on Institutes" in Peter Birks (ed) *The Classification of Obligations* (Clarendon Press, Oxford, 1997).
[155] Jessica Palmer and Nicola Peart "Double Trouble: The Power to Add and Remove Beneficiaries and The Power to Appoint and Remove Trustees" (paper presented to New Zealand Law Society CLE Ltd Trusts Conference, Auckland and Wellington, June 2015), above n 101 at 39.
[156] *Rawson Trust Co Ltd v Perlman* [1990] 1 Butterworths OCM 31 (Bahamas SC) at 50 per Smith J.
[157] Donovan Waters "The Protector- New Wine in Old Bottles " in A.J Oakley (ed) *Trends in Contemporary Trust Law* (Oxford University Press, Oxford, 1996) at 63.
[158] *Re Freiburg Trust* [2004] JRC 056, (2004) 6 ITELR 1078.

sought to remove him from his role as protector. The Court held this was possible as:[159]

> A protector is in the position of a fiduciary and the court must have power to police the activities of any fiduciary in relation to a trust whether he be called a protector or indeed by any other name. Such a jurisdiction is a necessary incident of the duties to protect the interests of the beneficiaries…

It is suggested that the view that a protector is in the position of a fiduciary is due to the nature of the power. The power to consent to trustee decisions necessarily introduces the protector into the relationship between trustee and beneficiary and impacts the ability of the trustee to perform the obligations owed to their beneficiary. If the power were not fettered in some way, the beneficiary would not be able to hold anyone to account to ensure performance of the trust, a necessary element of a valid trust.[160] Thus the nature of the power goes to the core of the trust, and for this core to retain integrity; the protector must be viewed as fiduciary. This view limits the exercise of the power, and relevant in this case, enables the court to utilise its inherent jurisdiction to remove the protector, just as they are able to remove a trustee.[161]

It is acknowledged that powers viewed as existing for the benefit of the protector are not held to be fiduciary. For example, in *Re Z Trust*,[162] the exercise of a power of amendment was used to appoint capital to a protector who was also a beneficiary. The Court held the settlor intended the power to be exercised for the personal benefit of the protectors. This intention prohibited the power from being fettered despite the impact on the core of the trust. Similarly, *Rawson v Perlman*[163] did not view a power of veto held by protectors, who were also beneficiaries, to be fiduciary; the power was a personal power as it was intended to be exercised to prevent trustees from distributing to one beneficiary. With respect, it is suggested that these powers also go to the core of a trust and ought to have been fettered by some form of limitation. While the intention of the settlor is relevant to a power, the context of a trust cannot be ignored. When a power operates to frustrate the decision-making powers

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[159] At 1080.
[160] *Morice v Bishop of Durham*, above n 127.
[161] The ability for the Court to remove a trustee, as part of its inherent jurisdiction was first recognised in *Letterstedt v Broers*, above n 124. For more, see footnote 124.
[162] *In re Z Trust* [1997] CILR 248 (Cayman Islands Grand Court).
[163] *Rawson Trust Co Ltd v Perlman*, above n 156.

of the trustee, questions of the validity of the trust must surely arise,[164] unless such powers are restrained by similar duties to those that bound the trustee.

The case *Re Papadimitriou*[165] indicates how a protector can be viewed as fiduciary and still benefit from the trust. In this case, the fact that the protector was also a beneficiary did not stop the power to appoint trustees being viewed as fiduciary. Despite the conflicting role of beneficiary and protector, the power required the protector to act in good faith and in the interests of all beneficiaries.[166]

The protector's powers also included consenting to any changes made to the class of beneficiaries and the appointment of any trust funds. The judge stated if the trustees were concerned that the protector was prohibiting the proper execution of the trust by improperly withholding consent, they were able to apply to the court for relief to protect the interest of the beneficiaries.[167] To Weaver and Conaglen, this suggests a fetter on this power also, "either by removal of the protector under the court's inherent jurisdiction or through the fraud on a power doctrine. Certainly the former would imply that the protector held this power in a fiduciary capacity."[168] Again, this power of consent is considered one that goes to the core of the trust and ought to be fettered.

Other indicators that have lead to a protector being viewed as fiduciary have included succession provisions,[169] charging clauses,[170] and the protector themselves being distinct or separate from the settlor.[171] Such indicators are conceded as important, but not necessarily determinative, to the categorisation of the power.

It has been stated that the wider and more far reaching the powers,[172] or if the power impinges or imposes on the role of the trustee as the ultimate guardian of the trust, [173] the

[164] Terence Tan Zhong Wei "The Irreducible Core Content of Modern Trust Law" (2009) 15 Trust & Trustees 477 at 490.
[165] *Re Papadimitriou* [2004] WTLR 1141 57 (Isle of Man HC).
[166] At 62-63, 72 per Deemster Cain.
[167] At 72-73.
[168] Conaglen and Weaver, above n 103 at 34.
[169] *Rawcliffe v Steele* [1993-95] Manx LR 426 (Isle of Man HC) at 426.
[170] *Re Circle Trust* [2006] CILR 323, (2006) 9 ITELR 676 12 (Cayman Islands Grand Court) at 23;*Rawcliffe v Steele*, above n 169.
[171] *Re Freiburg Trust* above n 157.
[172] Dawn Goodman "The Trust Protector - A Creature of Duty or the Settlor's Shadow?" (2014) 6 PCB 264 at 265.
[173] Conaglen and Weaver, above n 103 at 35, Rebecca Puni "Exploring the Many Identities of the Protector" (2013) 19 Trust & Trustees 908 at 913.

protector is likely to be viewed as fiduciary.[174] It is suggested that the wider the power, or the more it inhibits the integral role of the trustee, the more likely it is to go to the core of a trust and thus justify the imposition of fiduciary duties. A corresponding duty imposed on the protector may seem appropriate to stop the protector effectively becoming a "law unto himself".[175] This could apply in New Zealand,[176] following a statement by Heath J in *Elworthy-Jones v Counties Trustee*:[177]

> …it seems reasonably clear that [an appointor] will be subject to fiduciary obligations which are sufficient to ensure that he or she acts in good faith and for the benefit of those entitled beneficially to the trust property…If a "Guardian" was not subjected to such obligations a real danger would exist that those who are appointed to exercise powers on behalf of those beneficially entitled to the trust property (i.e. trustees who owe fiduciary obligations) could be undermined by a person owing no fiduciary obligation to beneficiaries. Such a legal position would be inconsistent with the fundamental purpose of a trust structure…

A power that impinges on the role of the trustee also leads to questions of the functionality of a trust. This is discussed in more detail below.

D. The Power to Add and Remove Discretionary Beneficiaries and the Core of the Trust

The impact on the core of a trust in relation to the power to add and remove beneficiaries is best explained by way of an example. Suppose B is a discretionary beneficiary of XYZ trust, of which T is the sole trustee. S holds the power to add and remove beneficiaries. If this power is left unfettered, does its exercise impact on the integrity or core of the trust?

Recall the proprietary theory, which requires alienation of both legal ownership (to the trustee), and beneficial or equitable ownership (to the beneficiaries). Suppose S is the settlor, and thus was once the owner of the trust property. With the power to add and remove

[174] Conaglen and Weaver, above n 103 at 34.
[175] Lau, above n 119 at 44;Wei, above n 163 at 43
[176] A 2002 Law Commission Report recommended legislation in regards to protectors actions exposing trustees to liability: Law Commission *Some Problems in the Law of Trusts* (NZLC R79, 2002) at [24]. This recommendation was evident in the Trustee Amendment Bill (144-2), cl 49A. However, the Bill did not progress to legislation and was discharged on the 12 May 2012. See Helen Dervan "Trusts' Law Reform: Do We Need A Statutory Straitjacket?" (2014) 20 Trust & Trustees 673.
[177] *Elworthy-Jones v Counties Trust Company Ltd* (HC Auckland CP 15 AS02, 14 August 2002) at [31].

discretionary beneficiaries, S can, at any time, remove B. While S may have in form transferred the legal title to T, in reality, S has retained control as to whom this title can be exercised in favour of. It must be at least questioned if S ever divested himself of his beneficial ownership interest. The unfettered retention of this power by S gives no indication any alienation of beneficial ownership occurred when the trust was settled. In light of the nature of the power, limitations must be imposed on S's ability to exercise the power to ensure S can be viewed as having fully alienated his beneficial interest.

Further, the holder of the power is in a position to alter those who are owed obligations. Does this then alter the meaningfulness of the beneficiary's right to hold trustees accountable, vital to the core of the trust?[178] Suppose T's powers allow him to distribute trust property to other beneficiaries to the complete exclusion of B. B, upon receiving no trust property, is entitled to access relevant trust documents[179] to assess whether the decision is open to challenge, and to ensure T's exercise was fair, reasonable and proper.[180] Such rights spring from the right of the beneficiary to hold the trustees accountable.[181] If appropriate, the Court will intervene to ensure the proper administration of the trust.[182]

Suppose instead that S exercises their power to remove B as a beneficiary. The impact on B as beneficiary is the same. In both situations, B has been excluded from the receipt of trust property. B, however, no longer has the right to hold S accountable. This would allow potentially skirting around trustee obligations and removing accountability from decision-making of trustees. A power that vetoes the exercise of beneficiaries' rights has been questioned for repugnancy in the past.[183] This introduction of a third party is similar to the power of consent in the protector cases and ought to be fettered to protect the core accountability aspect of the trust.

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[178] Donovan Waters "Settlor Control—What Kind of a Problem is it?" (2009) 15(1) Trust & Trustees 12 at 13.
[179] It was once thought a proprietary interest was required for such access; see *O'Rourke v Darbishire* [1920] AC 581 (HL). This proprietary interest was later held to be unnecessary to gain access to documents to ensure the trust is being properly administered: see *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 (CA) at 421-422 per Kirby P; *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709 at [51] per Lord Walker; adopted in New Zealand in *Foreman v Kingstone* [2004] 1 NZLR 841 (HC) at [81] per Potter J; but see *Erceg v Erceg* [2014] NZHC 155 at [32] per Venning J. For more, see Palmer "Theories of the Trust and What They Might Mean for Beneficiary Rights to Information", above n 129.
[180] *Gartside v Inland Revenue Comission*, above n 68 at 617-618 per Lord Wilberforce.
[181] *Hartigan Nominees Pty Ltd v Rydge*, above n 179.
[182] *Schmidt v Rosewood Trust Ltd*, above n 179.
[183] Antony Duckworth "Protectors- Fish or Fowl? Part 1" (1996) 3 PCB 169 at 176.

This example demonstrates how the power to add and remove beneficiaries can be seen as going to the core of the trust. Its impact on the alienation and accountability, regardless of the capacity in which it is held, is such that it ought to be "regulated by equity"[184] to prevent any undermining of the trust.[185]

F. Conclusion

This chapter sought to establish the first of two reasons for viewing a power as fiduciary. When the nature of a power is such that it goes to the core of a trust, the law is prepared to find the power fiduciary in order to avoid a threat to the integrity of a trust. This core is suggested as alienation and accountability. It is believed that the nature of the power to add and remove beneficiaries has implications on both the alienation of beneficial ownership and accountability of trustees. As a result, viewing the power as fiduciary is justified to protect the core of the trust.

[184] Jessica Palmer and Nicola Peart "Double Trouble: The Power to Add and Remove Beneficiaries and The Power to Appoint and Remove Trustees" (paper presented to New Zealand Law Society CLE Ltd Trusts Conference, Auckland and Wellington, June 2015), above n 101 at 39.
[185] At 39.

Chapter IV: Is the Appointor of the Power to Add and Remove Discretionary Beneficiaries in a Fiduciary Relationship with the Existing Beneficiaries?

The previous chapter argued that the power to add and remove beneficiaries is by its very nature fiduciary. This chapter suggests that the nature of the relationship between the appointor of the power to add and remove beneficiaries and existing beneficiaries is fiduciary. That is, the power to remove existing beneficiaries, and add new beneficiaries, creates a fiduciary relationship as a result of the impact the exercise of the power has on the existing beneficiaries' interest. The impact of removing a beneficiary is clear: the beneficiary no longer exists in relation to the trust. The addition of a discretionary beneficiary may appear less tangible, as it merely reduces the chances of the existing beneficiaries benefitting from the trust. However, it is suggested that the appointment of an additional beneficiary is typically made to enable property to be appointed to that beneficiary; thus the adverse effect of the appointment on existing beneficiaries is all the more likely.

Fiduciary relationships are of different types,[186] with different obligations,[187] and as a result circumstances and context are crucial.[188] A relationship that does not generally give rise to fiduciary obligations may nevertheless have a fiduciary dimension.[189] There is much debate over when such a relationship arises, and the degree to which the law will limit or prohibit behavior in light of this relationship. A relationship which gives rise to fiduciary obligations can be found by law, or by fact.[190]

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[186] There is a wide scope of recognised fiduciary relationships and obligations. These include doctors and patients, see *Norberg v Wynrib* [1992] 2 SCR 226, 92 DLR (4th) 449, guardian and child, see *H v R* [1996] 1 NZLR 299 (HC), and a state to its indigenous people; see *Guerin v R*, above n 99.

[187] *Hospital Products Ltd v US Surgical Corporation* (1984) 156 CLR 41 at 68 per Gibbs J; see also *Boardman v Phipps* [1967] 2 AC 46 (HL) at [46] per Lord Upjohn,

[188] For example, see *New Zealand Netherlands Society "Oranje" Inc v Kuys*, above n 117 at 166 per Lord Wilberforce: "the precise scope of [the relationship] must be moulded according to the nature".

[189] *Chirnside v Fay*, above n 108 at [72], referring to Andrew Butler (ed) *Equity and Trusts in New Zealand* (Thomson Brookers, Wellington, 2003) at [14.2].

[190] PD Finn "The Fiduciary Principle" in T.G. Youdan (ed) *Equity, Fiduciaries and Trusts* (The Carswell Co. Ltd, Canada, 1989) at 33-56.

A. Fiduciary Relationships Found by Law

Some relationships are recognised as "inherently fiduciary" in nature and create a status-based existence[191] for a fiduciary relationship.[192] Trustee-beneficiary is a fiduciary relationship deemed so by law. Other accepted relationships include partners, agents and principals, employers and employees, companies and directors, and solicitors and clients.[193]

B. Fiduciary Relationships Found by Fact

Contrast this to the fiduciary relationships created by factual circumstances. Attempting to find such a relationship upon the facts can be challenging, as there is no set universal test or formula.[194] Given the finding of a fiduciary relationship depends primarily on fact and circumstance,[195] a test which may be appropriate for the finding of a fiduciary relationship in one circumstance may in turn be inappropriate for the next,[196] leading to claims the relationship is a "concept in search of a principle."[197]

Regardless of these doubts, it is still useful to examine categories and circumstances that can imply fiduciary obligations.[198] These include relationships of influence,[199] confidential information,[200] inequality of bargaining power,[201] ascendancy,[202] dependence,[203] an

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[191] Paul B. Miller "Justifying Fiduciary Duties" (2012-2013) 58 McGIll L J 969 at 1010. See also Paul B. Miller "A Theory of Fiduciary Liability" (2011) 56 McGIll L J 235 at 241, Worthington, above n 108 at 129.
[192] This classification was adopted in New Zealand in *Chirnside v Fay*, above n 108 at [73]; see also Jeff Berryman "Fact based Fiduciary Duties and Breaches of Confidence: An Overview of their Imposition and Remedies for Breach " (2009) 15 NZBLQ 35 at 36.
[193] *Hospital Products Ltd v US Surgical Corporation* above n 187 at 68 per Gibbs J, and at 96 per Mason J; *Chirnside v Fay*, above n 108 at [73].
[194] Glover *Commercial Equity: Fiduciary Relationships*, above n 104 at [2.9]; *Hospital Products Ltd v US Surgical Corporation* above n 187 at 96; *Chirnside v Fay*, above n 108 at [80]. No universal test has been established since the decision in *Chirnside v Fay*: *Jay v Jay* [2014] NZCA 445 at [65] per Stevens J.
[195] *LAC Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574 at 648 per La Forest J; *Galambos v Perez* 2009 SCC 48, [2009] 3 SCR 247 at [48] per Cromwell J.
[196] *Hospital Products Ltd v US Surgical Corporation* above n 187 at 135.
[197] Sir Anthony Mason "Themes and Prospects" in PD Finn (ed) *Essays in Equity* (The Law Book Company Sydney, 1985) at 246.
[198] The seminal classification is found in L.S Sealy "Fiduciary Relationships" (1962) 20 CLJ 69. See also Finn "The Fiduciary Principle", above n 190 at 46. For similar assertions, see *Hodgkinson v Simms* [1994] 3 SCR 377 at 409 per La Forest J.
[199] Glover *Commercial Equity: Fiduciary Relationships*, above n 104 at [1.13]; Finn "The Fiduciary Principle", above n 190 at 46; *Johnson v Buttress* (1936) 56 CLR 113 at 135.
[200] Finn "The Fiduciary Principle", above n 190 at 46; *LAC Minerals Ltd v International Corona Resources Ltd* above n; JC Shepherd *The Law of Fiduciaries* (Carswell, Toronto, 1981) at 28.
[201] *Hospital Products Ltd v US Surgical Corporation* above n 187;*Coleman v Myers* [1977] 2 NZLR. 225 (CA) at 275 per Cooke J, citing *Gibson v Jeyes* (1801) 6 Ves 278, 31 ER 1044
[202] Finn "The Fiduciary Principle", above n 190 at 46.
[203] At 46.

undertaking made by a party,[204] entrusting of property,[205] mutual reliance,[206] powers or discretion held by one party[207] and a relationship of trust and confidence.[208] Overarchingly, what is required is a "meticulous examination of the facts"[209] to identify the circumstances which determine the existence and extent of a fiduciary duty.[210]

In New Zealand, the "key feature"[211] in finding a fiduciary relationship is the entitlement of one party to place trust and confidence in the other, as established in *Chirnside v Fay*.[212] The Supreme Court said this in regards to the finding of a fiduciary relationship:[213]

> …all fiduciary relationships, whether inherent or particular, are marked by the entitlement (rendered in *Arklow* as a legitimate expectation) of one party to place trust and confidence in the other. That party is entitled to rely on the other party not to act in a way which is contrary to the first party's interests.

Trust and confidence are used interchangeably.[214] A fiduciary relationship arises when one party reposes trust in other, or is entitled to do so.[215] This does not require an explicit agreement or undertaking.[216] Rather, the circumstances in their entirety must create such a legitimate expectation[217] or level of trust and confidence that justify equity's intervention.[218].

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[204] *Bristol and West Building Society v. Mothew*, above n 117.
[205] Tamar Frankel *Fiduciary Law* (Oxford University Press, Oxford, 2010) at 4.
[206] *Chirnside v Fay*, above n 108.
[207] *Guerin v R*, above n 99; *Frame v Smith* [1987] 2 SCR 99 at 133 per Wilson J; see also Miller "A Theory of Fiduciary Liability", above n 191 at 264; Shepherd, above n 200 at 35; Ernest J Weinrib "The Fiduciary Obligation" (1975) 25 UTLJ 1 at 7.
[208] *Chirnside v Fay*, above n 108 at [80]; *Estate Realties Ltd v Wignall* [1991] 3 NZLR 482 (HC) at 492 per Tipping J; *Day v Mead* [1987] 2 NZLR 443 (CA).
[209] Berryman, above n 192 at 6, referring to *Hospital Products Ltd v US Surgical Corporation* above n 187 at 413; *Breen v Williams* (1996) 186 CLR 71 (HCA) at 82 and *Re Coomber* [1911] 1 Ch 723 at 728 per Fletcher Moulton LJ.
[210] *Arklow Investments Ltd v Macleans* [2000] 2 NZLR 1 (PC) at 5 per Henry J.
[211] *Jay v Jay,* above n 194 *at* [65].
[212] *Chirnside v Fay*, above n 108 at [80]. In this case, the Supreme Court found Mr Chirnside and Mr Fay's joint venture to be a fiduciary relationship. Mr Fay was awarded roughly $850,000 as a result of Mr Chirnside's breach of this relationship when he acted so as to exclude him from their venture. This test has been subsequently upheld in *Paki v Attorney General* [2014] NZSC 118 at [269]; *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628 at [116]; *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26 at [31]; *Jay v Jay*, above n 194 at [65].
[213] *Chirnside v Fay*, above n 108 at [80].
[214] Glover *Commercial Equity: Fiduciary Relationships*, above n 104 at [1.12].
[215] *Chirnside v Fay*, above n 108 at [85].
[216] At [82]: "Equity imposes an obligation to eschew self-interest when the circumstances require. To hold otherwise would be to confine the powers of equity to situations akin to express trusteeship and would emasculate the breadth of equity's traditional reach…"; *New Zealand Netherlands Society "Oranje" Inc v Kuys*, above n 117 at 166.
[217] *Arklow Investments Ltd v Macleans* above n 210 per Henry J at 4.
[218] *Day v Mead*, above n 208 at 467 per Casey J.

England,[219] Canada[220] and Australia[221] now also share versions of this reasonable expectation test. The greater the degree of trust and confidence, vulnerability and power held by the proposed fiduciary, the more reasonable it is to expect that the party will act in a certain way; namely, in the position of a fiduciary.[222]

The decision as to whether a fiduciary relationship can or should exist can also be intrinsically linked to social policy.[223] This reflects an underlying purpose of fiduciary law, of protection and recognition that "not all relationships are characterized by a dynamic of mutual autonomy."[224] If particular relationship or interest requires protection to maintain its integrity, credibility and utility, the law may prescribe the exercise of a power or duty despite the actual expectations of a party.[225]

C. Application to the Power to Add and Remove Beneficiaries

1. Fiduciary by law

Analogies to an inherently fiduciary relationship are helpful when finding a fiduciary duty by fact.[226] An analogy is drawn between trustee-beneficiary relationship and the appointor of the power to add and remove beneficiaries and the existing beneficiaries.[227]

Trustees exist for the benefit of the beneficiaries,[228] as without the beneficiary, there is no trust. The same can be said for the appointor of the power to add and remove beneficiaries, whose existence can also only be because of the beneficiaries.

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[219] Edelman, above n 108 at 318; John McGhee (ed) *Snell's Equity* (33 ed, Sweet & Maxwell, United Kingdom, 2014) at [7-005]; *Brandeis Brokers Ltd v Black* [2001] 2 All ER (Comm) 980 at [36].
[220] Edelman, above n 108 at 318;McGhee, above n 219 at [7-005]; *Waxman v Waxman* (2004) 7 ITELR 162 (CA Ontario) at [512]. However note *Galambos v Perez*, above n 195 at [81] where it was held any reasonable expectation requires an undertaking.
[221] Edelman, above n 108 at 318;McGhee, above n 219 at [7-005]; *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 (NSW) at 541; *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd* [2007] FCA 963 (NSW) at [273].
[222] Edelman, above n 108 at 317-318.
[223] PD Finn *Fiduciary Obligations* (The Law Book Company, Sydney, 1977) at 26; Finn "The Fiduciary Principle", above n 190 at 27; Robert Flannigan "The Boundaries of Fiduciary Accountability" (2004) NZ L Rev 215 at 233. As Sarah Worthington "Fiduciaries: When is Self-Denial Obligatory?" (1999) 58 CLJ 500 at 505 notes, this imposition can be traced back to *Welles v Middleton* (1784) 1 Cox 112 at 124-125, where a fiduciary relationship was required for the "preservation of mankind." .
[224] *Hodgkinson v Simms*, above n 198 per La Forest J at 422; *Galambos v Perez*, above n 195 at [70].
[225] Finn "The Fiduciary Principle", above n 190 at 47.
[226] *Jay v Jay*, above n 194 at [65]; *Chirnside v Fay*, above n 108 at [92]; *Liggett v Kensington* [1993] 1 NZLR 257 (CA) at 282-282; J R F Lehane "Fiduciaries in a Commercial Context" in PD Finn (ed) *Essays in Equity* (The Law Book Company Sydney, 1985); John Glover "Identification of Fiduciaries" in Peter Birks (ed) *Privacy and Loyalty* (Oxford University Press, Oxford, 1997) at 269-271.
[227] Such analogies have also been drawn between trustees and protectors, see William Norris "The Protector's Position - Suggesting Some Basic Principles" (1995) 2 PCB 109 at 113; Wei, above n 163 at 482.

Both the trustee and the appointor impact on the discretionary beneficiaries receipt of trust property. The dispositive power of a trustee will determine the substantive value of the beneficial interest. Without the obligations owed by the trustee, the beneficiary is left with no effective means of monitoring this relationship. The "very *function* or *purpose* or *reason* for one party's role in the relationship" demands that fiduciary obligations between the two must attach.[229] The power to add and remove beneficiaries predetermines the relationship between the trustee and beneficiary that enables any appointment of property to occur. Therefore, it is suggested that a discretionary beneficiary ought to be able to monitor this relationship also. Rather than differentiate two positions that owe their existence to the same origin and create similar vulnerabilities in accountability, it seems logical to draw analogies and support for the view that the relationship between the appointor of this power and beneficiaries is fiduciary.

Despite the similarities to a trustee-beneficiary relationship,[230] it has been stated objects of a special power are not in a fiduciary relationship with the appointor.[231] In *Re Somes*, [232] when asked why the release of a power of appointment was not a fraudulent exercise of a power, Chitty J states, "there is no fiduciary relationship between him and the objects of the power."[233] Crucially, however, he further states "that if he does exercise the power of appointment, he must exercise it honestly for the benefit of an object or the objects of the power, and not corruptly for his own personal benefit…"[234] Therefore, there is scope for the argument that some form of fiduciary obligations exist so as to constrain the power in some way. While the appointor owes no duty to exercise the power,[235] it may be incorrect to state the appointor owes no duty at all.[236]

2. Fiduciary by fact

Discussion then turns to whether the power to add and remove beneficiaries is a fiduciary relationship by fact: does the nature of the power create an entitlement to repose trust and confidence in the appointor? Circumstances that have appeared in other definitions of

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228 *Letterstedt v Broers*, above n 124 at 386.
229 Worthington, above n 223 at 506.
230 Similarities are noted in Finn *Fiduciary Obligations*, above n 223, Appendix A; that the position is created to benefit others and is similar to the dispositive powers of a trustee.
231 *In Re Somes* [1896] 1 Ch 250 at 255 per Chitty J; *In Re Brown's Settlement* [1939] Ch 944, 3 All ER 391 (Ch) at 953-954 per Morton J. See also Finn *Fiduciary Obligations* above n 223, Appendix A.
232. *In Re Somes* [1896] 1 Ch 250 (Ch) 255.
233 At 255.
234 At 255.
235 *In re Greaves* [1954] Ch 434 (CA) at 446 per Evershed MR.
236 At 447.

fiduciary relationships, namely undertakings, the power of one party, vulnerability and social purpose are used as "evidential factors"[237] as to whether any entitlement can be found.

As stated by Millet LJ in *Bristol & West Society v Mothew,*[238] a fiduciary duty arises when someone "has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence."[239] An undertaking by the fiduciary is apparent in most definitions of a fiduciary relationship,[240] and is a manifestation of a circumstance resulting in the reposition of trust and confidence.[241] It is clear in New Zealand such an undertaking may be implied.[242]

It is suggested that the appointor of the power to add and remove beneficiaries ought to be viewed as having made an implied undertaking to act for the beneficiaries. As a result of the existence of the power, the beneficiaries have no control over their interest and are thus incapable of acting for themselves. That is the nature of beneficial ownership; any rights of a beneficiary are derived from the obligations that they are owed.[243] The appointor has necessarily undertaken to act for the beneficiaries, as the beneficiaries cannot.

This implied undertaking is supported by the norms of existing relationships[244] between beneficiaries and those who act for them; i.e. the deemed fiduciary relationship between trustees and beneficiaries. The only way a beneficiary can protect their interest is through or against the trustee,[245] because the trustee owes duties to that beneficiary. The trustee, in turn, owes this duty because of the inescapable undertaking they must have made to act for, or on behalf of, the beneficiary. A similar inescapable undertaking is proposed in relation to the appointor of the power to add and remove beneficiaries.

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[237] *Hodgkinson v Simms*, above n 198 per La Forest J at 409.
[238] *Bristol and West Building Society v. Mothew*, above n 117.
[239] At 18. This statement has been noted as relevant in New Zealand; see *Paki v Attorney General*, above n 212 at [269] per William Young J; and *Proprietors of Wakatu v Attorney-General* above n 212 at [116] per Ellen France J.
[240] Austin Scott "The Fiduciary Principle" (1949) 37 CLR 539 at 540; *Bristol and West Building Society v. Mothew*, above n 117 at 18; *Hospital Products Ltd v US Surgical Corporation* above n 187 at 96; *Liggett v Kensington*, above n 226 at 281. An undertaking was noted as fundamental in *Galambos v Perez*, above n 195 at [66], see also *Norberg v Wynrib*, above n 186 at 273 per McLachlin J. For more, see Jessica Palmer "Fiduciaries and Remedies" [2007] NZ L Rev 36.
[241] *Chirnside v Fay*, above n 108 at [85].
[242] At [82]; see also *New Zealand Netherlands Society "Oranje" Inc v Kuys*, above n 117 at 166.
[243] Matthews, above n 135 at 206; see also Penner, above n 134 at 475; Lionel Smith "Trust and Patrimony" (2008) 38 Rev Gen Droit 379 at 388 at 390; Ben McFarlane and Robert Stevens "The Nature of Equitable Property" (2010) 4 J Eq 1.
[244] *Galambos v Perez*, above n 195 at [77], cited with approval in *Jay v Jay*, above n 194 at [66].
[245] Smith "Trust and Patrimony", above n 243 at 390.

Others state that the source of fiduciary obligation is "precisely the power to affect the interests of a person adversely"[246] and this forms the "constitutive or most basic formal property of the fiduciary relationship."[247] The power of a person, having been given the opportunity to benefit others, simultaneously standing in a position to prefer their own interests has been referred to as a "telling indication"[248] of a fiduciary relationship. The fiduciary duty imposed is "equity's blunt tool for control of the discretion."[249] Finding a fiduciary obligation resulting from unilateral power and vulnerability, as formulated by Wilson J in *Frame v Smith*,[250] has appealed to New Zealand courts in the past.[251]

The power to add and remove beneficiaries is such a unilateral power that, when exercised, will operate to create or eradicate the beneficial interest. A trust necessitates a transfer or surrender of autonomy by the beneficiary, and any remaining autonomy of the beneficiary over the existence of their interest has been transferred by the existence of this power.[252] It would be inexplicable for a beneficiary not to repose trust and confidence in the face of such a complete power.

The overriding power that the appointor holds creates a 'power-dependency' relationship[253] that can generate a level of vulnerability that the law is willing to respond to. The existing beneficiary is peculiarly vulnerable[254] as a result of their one-sided reliance.[255] Vulnerability is of particular importance when it is created by the relationship itself, rather than external

[246] *Breen v Williams*, above n 209 per Toohey J at 201.
[247] Miller "Justifying Fiduciary Duties" above n 191 at 1012.
[248] *Liggett v Kensington*, above n at 281-282 per Gault J.
[249] Weinrib, above n 207 at 4.
[250] *Frame v Smith*, above n 207 at 99.
[251] See *Watson v Dolmark Industries Ltd* [1992] 3 NZLR 311 (CA) at 315 per Cooke P, who held "vulnerability is an important, indeed cardinal feature of a fiduciary relationship". See also *Saunders v Houghton* [2009] NZCA 610 at [84]; *DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10 (CA) at 23 per Richardson P.
[252] This results in the appointor's actions not merely affecting the beneficiary; rather, they act *for* that person: Lionel Smith "Fiduciary Relationships: Ensuring The Loyal Exercise of Judgement on Behalf of Another" (2014) 130 LQR 608 at 613.
[253] *Hodgkinson v Simms*, above n 198 at [34]; *Norberg v Wynrib*, above n 186 at 255. However see also *Galambos v Perez*, above n 195 at [70] for concerns about relying on power-dependency to find fiduciary relationship, and an assessment of the implications of this in Miller "A Theory of Fiduciary Liability", above n 191 at 264-265.However, in this dissertation power-dependency is used as a relative, not determinative factor and thus remains relevant.
[254] *Frame v Smith*, above n 207 at 137, per Wilson J who required such peculiar reliance in the sense that the beneficiary was unable to "prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power."
[255] Glover *Commercial Equity: Fiduciary Relationships*, above n 104 at [3.12].

factors.[256] It is evident that it is the creation of the relationship is the cause of the vulnerability of the beneficiary; no personal attributes or prior positions are relevant to the supremacy the appointor has over the beneficiary. It is purely a result of the appointor being given the power to add and remove beneficiaries that the beneficiary has lost the ability to self-protect the existence of their interest.[257]

Finally, as stated, law will impose a fiduciary relationship when it serves a social purpose to preserve the utility or integrity of the relationship. The context of the power and the nature of the relationship will be relevant in determining any social purpose. For example, commercial contracts "derive their social utility from the pursuit of self-interest"[258] and the courts are therefore loath to import fiduciary obligations to hamper this purpose. Yet the law still imposes some obligations in commercial contexts, as demonstrated by the treatment of the power of sale held by a mortgagee. Certain standards are imposed on a mortgagee as a response to the power they hold over another's interest, but the power is ultimately held for their own benefit.[259] The assumption of responsibility is not enough to justify the burden of a fiduciary relationship and the subsequent obligations.[260] Rather, lesser duties of unconscionability and good faith operate to restrain any exercise of the power.[261]

It is proposed that the relationship between a person holding the power to add and remove beneficiaries and the beneficiaries of the trust is one where a fiduciary relationship will serve to preserve the integrity of their relationship to each other, and the trust overall. The utility of the trust comes not from self-interest, but from servitude. Imposing a fiduciary relationship between an appointor and discretionary beneficiaries upholds this utility by ensuring servitude in relation to any alteration of the beneficial interest. It must be remembered the unique vulnerability and dependence the beneficiary has in the context of a trust. Confidence is involuntarily placed in parties that control the interest of another. Beneficiaries have a diluted concept of ownership, or interest, which results in an inability to control or exert dominion over this interest until another exercises a separate power for their benefit. This is

[256] Weinrib, above n 207 at 6; *Hodgkinson v Simms*, above n 198 at 406; *Galambos v Perez*, above n 195 at [68]; *Jay v Jay*, above n 194 at [66]. See also P J Millet "Equity's Place In The Law of Commerce" (1998) 114 LQR 214.
[257] Deborah DeMott "Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences" (2006) 48 ACJ 925 at 945
[258] *Hodgkinson v Simms*, above n 198 at [38].
[259] Finn *Fiduciary Obligations*, above n 223 at [17]; Donovan Waters *The Constructive Trust : The Case for a New Approach in English Law* (Athlone Press, London, 1964), Chapter III.
[260] Peter Birks, "The Content of Fiduciary Obligation" 34 Isr L Rev 2 at 28.
[261] Finn "Fiduciary Law ", above n 190 at 3, 11.

why law is prepared to deem a trustee-beneficiary relationship fiduciary and afford protection to those vulnerable and reliant on the proper exercise of power. It is suggested similar social utility would be achieved if such protection were extended to appointors whose powers can be used to establish whether a trustee-beneficiary relationship can exist in the first place.

D. Conclusion

This chapter has sought to establish that the power to add and remove beneficiaries is one that can create a fiduciary relationship by fact. The undertaking, power and vulnerability created by the power is comparable to the trustee-beneficiary fiduciary relationship and go towards creating circumstances which entitle a beneficiary to repose trust and confidence in the appointor to the extent that finding a fiduciary relationship to exist could well be justified. The power to add and remove beneficiaries puts the beneficiary in a position where they are uniquely vulnerable to two classes of people: trustees and the appointor of the power. The law is evidently prepared to protect adverse impact on a beneficial interest from the former, and there is no reason this protection should not extend to the latter.

Chapter V: The Consequences of the Power to Add and Remove Beneficiaries Being Viewed as Fiduciary

This chapter considers the impact on the appointor should the power be viewed as fiduciary either as a result of its nature, or as a result of the fiduciary relationship created between the appointor and existing beneficiaries of the trust. The crucial consequence of finding a power or relationship to be fiduciary is that equity intervenes to impose a duty to promote, protect and preserve the interests of those whom they have power over.[262] Any apparent freedom of the fiduciary is circumscribed, as the exercise of the power must be steered towards the interests of the beneficiary.[263]

This is normally referred to as the "irreducible core"[264] of a fiduciary duty: loyalty.[265] It is this sole and selfless pursuit of the beneficiary's interest that is peculiarly fiduciary[266] and distinguishes the obligation of the fiduciary from any other relationship.[267] Thus the final step in establishing whether the power to add and remove beneficiaries can be fiduciary is whether the obligation can co-exist with and limit the power.

A. What is the Content of the Fiduciary Obligation of Loyalty?

1. The rules against conflict

The content of the loyalty obligation is quietly contentious. Often it is assumed, rather than justified,[268] as the rules against conflict and profit. The no-conflict rule prevents a fiduciary from acting when their interests, or the interests of another party, conflict with the interests of the beneficiary.[269] The no-profit rule operates to prevent the fiduciary from using the power

[262] Arthur B. Laby "Resolving Conflicts of Duty in Fiduciary Relationships" (2004-2005) 54 Am U L Rev 75.
[263] Finn *Fiduciary Obligations*, above n 223 at [27].
[264] Most recently, by the Supreme Court in *Fenwick v Naera* [2015] NZSC 68 at [70] per Glazebrook J; Tucker, Le Poidevin and Brightwel (eds) *Lewin on Trusts,* above n 50 at [20-01]; Weinrib, above n 207 at 16.
[265] *Bristol and West Building Society v. Mothew*, above n 117 at 18; *DHL International (NZ) Ltd v Richmond Ltd* above n 251 at 23.
[266] Matthew Conaglen "The Nature and Function of Fiduciary Loyalty" (2005) 121 Law Quarterly Review 452 at 453; Conalgen, above n 116.
[267] See *Bristol and West Building Society v. Mothew*, above n 117 at [18]; *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA) at 680-681 per Tipping J; above n 260; Conalgen, above n 116 at 60; Miller "A Theory of Fiduciary Liability", above n 191 at 311;Millet, above n 256 at 219.
[268] Miller "Justifying Fiduciary Duties", above n 191 at 977.
[269] Hayton, Matthews and Mitchell, above n 19 at [55.1]; Thomas, above n 42 at [12.01]; Thomas and Hudson, above n 26 at [10.113]; Finn *Fiduciary Obligations*, above n 223 at 199-251.

for their own benefit.[270] Both rules operate to comprehensively exclude the fiduciary from acting in a way that may lead to a breach of these rules[271] by prohibiting even the temptation that a fiduciary would not abide by their obligation of loyalty.[272]

The no-conflict rules go beyond prohibiting self-interest. Finn states a fiduciary is not only prohibited from misusing their position to their own benefit, but further from gaining a possible advantage for a third party, or having a personal interest or inconsistent engagement with a third party.[273] If the content of the fiduciary obligation of loyalty is viewed as these no-conflict rules, an unavoidable clash with a fiduciary power to add or remove beneficiaries results. Every addition will be an advantage to a third party and a potential disadvantage to the existing pool of beneficiaries, and every removal will be to the detriment of the beneficiary removed. The introduction of another's interest acts so as to destroy disinterested judgment, and without this disinterested judgment, the fiduciary relationship cannot exist.[274]

Yet like many rules of equity, the no-conflict rule is flexible to changing conditions[275] and there can be exceptions to the absolute nature of the rule.[276] One exception is an express provision in the trust instrument that permits trustee remuneration.[277] Another exception arises when the trust instrument expressly[278] or impliedly permits conflict. If the conflict is impliedly permitted, the no-conflict rule is interpreted as preventing the fiduciary from placing themselves *in* positions of conflict.[279] That is, as the conflict is inherent in the power, it must be authorised and thus no breach of the rule occurs.[280]

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[270] Tucker, Le Poidevin and Brightwel (eds) *Lewin on Trusts,* above n 50 at [29-292]; Jeff Kenny "Trustee Powers" in Andrew S Butler (ed) *Equity and Trusts In New Zealand* (2 ed, Thomson Reuters, Wellington, 2009) at [6.5.5]; Thomas and Hudson, above n 26 at [10.135].
[271] *Ex p James* (1803) 8 Ves 337 at 345 per Lord Eldon; Thomas and Hudson, above n 26 at [10.114].
[272] For example, see *Keech v Sandford* (1726) Sel Cas Ch 61, 25 ER 223 at 223-224; *Aberdeen Rail Co v Blaikie Brothers*, above n 117 at 316 per Lord Cranworth; *Bray v Ford*, above n 117 at 51 per Lord Herschell; *Boardman v Phipps*, above n 187.
[273] Finn "The Fiduciary Principle", above n 190 at 27; PD Finn "Fiduciary Law " in Ewan McKendrick (ed) *Commercial Aspects of Trusts and Fiduciary Obligations* (Clarendon Press, Oxford, 1993) at 9; referring to Deane J in *Chan v Zacharia* (1984) 154 CLR 178 at 194 as "the most explicit recognition of this for Commonwealth law purposes."
[274] E R Hoover "Basic Principles Underlying Duty of Loyalty" (1956) 5 Clev-Marshall L Rev 7 at 10. See above Birks, above n 260 at 10; Smith "Fiduciary Relationships: Ensuring The Loyal Exercise of Judgement on Behalf of Another", above n 252 at 624.
[275] *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606 at 636 per Upjohn LJ.
[276] Thomas and Hudson, above n 26 at [10.125]; Thomas, above n 42 at [12.05]; *Bray v Ford*, above n 117 at 51.
[277] Thomas, above n 26 at [12.05]; *Swain v The Law Society* [1983] AC 598 (HL) at 619.
[278] As in *Clayton v Clayton* (CA), above n 1, where the trust deed explicitly permitted trustees to benefit.
[279] Thomas, above n 42 at [12.20]; Finn *Fiduciary Obligations*, above n 223 at [100].
[280] *Edge v Pensions Ombudsman*, above n 94 at 547, 568-69 (HC); 627 (CA).

Such an implied authorisation is found in the exercise of discretionary dispositive powers of a trustee. If there are multiple beneficiaries, no singular beneficiary can be seen as having a right to exclusive attention.[281] The trustee owes each beneficiary a duty of loyalty, but the exercise of their dispositive power will likely favour some beneficiaries over others. However, this does not create a legitimate claim of conflict of interest from a discretionary beneficiary. Rather, the trustee is entitled to be partial, exclude some beneficiaries, and prefer others[282] because of the very nature and purpose of their discretionary power.[283] In light of this nature and purpose, trustees must act to serve the collective interests as best they can,[284] and upon its exercise it is enough to show they have exercised their power in line with their remaining fiduciary obligations that continue to apply.[285]

Implied authorization may be appropriate when the trustee has a variety of other ancillary duties and powers to perform beyond their dispositive discretion. These additional duties will still carry with them the prohibition on conflict. In comparison, the fiduciary relationship created in this dissertation only has one power; to add and remove discretionary beneficiaries. If the singular power of the appointor excludes by implication the no conflict rules, assumed as constituting the core fiduciary obligation of loyalty, can it still legitimately be viewed as fiduciary?

To combat this inherent conflict, this dissertation adopts the viewpoint that these rules do not constitute the content of the fiduciary obligation. Rather, they are secondary,[286] prophylactic[287] obligations that arise to protect the primary obligation of loyalty.[288] The requirement of loyalty as the primary obligation must be determined. Following this, it falls

[281] Finn *Fiduciary Obligations*, above n 223 at [125].
[282] *Edge v Pensions Ombudsman* (CA), above n 94.
[283] Thomas, above n 42 at [10.154].
[284] Finn *Fiduciary Obligations*, above n 223 at [33].
[285] *Edge v Pensions Ombudsman*, above n 94 at 627 (CA); *In re Beatty, Hinves and Others v Brooke and Others*, above n 94 at 1506; Thomas, above n 42 at [12.26].
[286] The distinction between primary and secondary obligations is drawn from John Austin *Lectures in Jurisprudence* (Murray, London, 1869); above n 260 at 13.
[287] The idea for this prophylactic approach was drawn from Conalgen, above n 116 at 4; Smith "Fiduciary Relationships: Ensuring The Loyal Exercise of Judgement on Behalf of Another", above n 252 at 624. However, Conaglen views the prophylactic obligations operating to protect non-fiduciary duties; here, it is suggested prophylactic obligations are operating to protect the core fiduciary obligation. Conaglen especially has faced criticism for this view; see Rebecca Lee "Rethinking the Content of the Fiduciary Obligation" (2009) 3 Conv 236.
[288] Finn "Fiduciary Law ", above n 273 at 9 describes the fiduciary obligations as “designed essentially to procure loyalty in service.”

to be considered whether the power to add and remove beneficiaries can be exercised 'loyally'.

2. The suggested content of fiduciary loyalty

It is suggested Millet LJ encapsulates what the fiduciary obligation of loyalty requires when he states:[289]

> The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts…

Neither a trust nor a fiduciary relationship can exist without this duty. Loyalty has been defined as "faithful adherence to one's promise".[290] This definition explains the obligation to perform a trust honestly and good faith, in accordance with the purpose of which the trust.[291]

However, viewing the content of the obligation of loyalty in this way merely requires the performance of obligations.[292] This is required in many relationships; yet as stated above, it is purportedly this obligation of loyalty that distinguishes a fiduciary from any other relationship or power. A gloss is therefore applied to extend the fiduciary content of loyalty[293] to require something more; a standard of conduct[294] or manner of exercising judgment[295] that requires the beneficiary's interest to be treated as paramount.[296] This is why Millet LJ requires that the trust must not just be performed honestly and in good faith, but also for the benefit of the beneficiaries.

It is conceded that there is no agreement as to what this gloss on loyalty requires.[297] In a fiduciary context, loyalty has been variously described as a duty to act altruistically,[298] to not

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[289] *Armitage v Nurse*, above n 143 at 253.
[290] Conalgen, above n 116 at 60; *Oxford English Dictionary* (Online Version March 2015, Oxford University Press).
[291] *Armitage v Nurse*, above n 143; see also *Gisborne v Gisborne* above n 76 at 305; *Re Gulbenkian's Settlements* above n 76 at 518 per Lord Reid.
[292] Conalgen, above n 116 at 60; Glover *Commercial Equity: Fiduciary Relationships*, above n 104 at [5.13]; *Breen v Williams*, above n 209 at 137 per Gummow J.
[293] Conaglen, above n 116 at 60.
[294] Geraint Thomas "The Duty of Trustees to Act in the 'Best Interests' of Their Beneficiaries" (2008) 2 J Eq 177 at 203;Finn "Fiduciary Law ", above n 273 at [7]; Finn "The Fiduciary Principle", above n 190 at 27.
[295] Smith "Fiduciary Relationships: Ensuring The Loyal Exercise of Judgement on Behalf of Another", above n 252 at 610-611.
[296] GE Dal Pont and DRC Chalmers *Equity and Trusts in Australia and New Zealand* (2 ed, Law Book Co of Australasia, Australia, 2000) at 72;Leonard Rotman *Fiduciary Law* (Thomson Carswell, Toronto, 2005) at 142.
[297] Smith "Fiduciary Relationships: Ensuring The Loyal Exercise of Judgement on Behalf of Another", above n 252 at 610.
[298] Birks, above n 260 at 14.

act in a way contrary to the other's interests,[299] to advance the interests of the beneficiary,[300] to preserve and promote the interests of the beneficiary, [301] and to act in the best interests of the beneficiaries.[302] These definitions all steer towards the idea that acting loyally requires performing the trust not only as directed, but also in such a manner that benefits the beneficiaries. This is the suggested as the gloss on loyalty beyond acting honestly and good faith; that the fiduciary must act for the benefit of the beneficiaries.[303] This is supported by Underhill's definition of a trust:[304]

> A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property…for the benefit of persons.

This may appear lower than the often-cited standard to act in the best interests of the beneficiaries. For practical purposes, however, the two standards are used interchangeably.[305] The benefit of the beneficiaries, as a minimum standard of loyalty, is preferred to avoid the impossibility of the open-ended standard of best interests.[306]

Further, it is proposed that this must be for the benefit of the beneficiaries *as a whole*. In light of the ever-growing popularity of discretionary trusts and powers,[307] requiring actions that benefit the entirety of those to whom the fiduciary owes a duty to results in a primary obligation that can be meaningfully upheld, rather than relying on implied or explicit authorisation to be loyal to some of the beneficiaries.

This proposed definition stands when tested against the varying justifications of loyalty. Two

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[299] See *Chirnside v Fay*, above n 108 at [80].
[300] Finn *Fiduciary Obligations*, above n 223 at [15].
[301] At [11].
[302] *Cowan v Scargill* [1985] Ch 270 at 287-289 per Megarry VC.
[303] See also John Langbein "Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?" (2005) 114 Yale L J 929; Parkinson, above n 128 at 680; Smith, above n 252.
[304] Hayton, Matthews and Mitchell, above n 19 at [1.1]; see also substantively identical definitions in DWM Waters *The Law of Trusts in Canada* (2 ed, Carswell, Toronto, 1984) at 3-4; Chris Kelly and Greg Kelly *Garrow and Kelly Law of Trust and Trustees* (7 ed, LexisNexis NZ, Wellington, 2013) at 3; H.A J Ford and WA Lee *Principles of the Law of Trusts* (Law Book Co, Sydney, 1990) at 3; LA Sheridan *Keeton and Sheridan's The Law of Trusts* (12 ed, Barry Rose Law Publishers, Chichester, 1993) at 1, which was endorsed in Tucker, Le Poidevin and Brightwel (eds) *Lewin on Trusts,* above n 50 at [1-003]. Further, this matches the definition proposed by the New Zealand Law Commission; see Law Commission *Review of the Law of Trusts: Preferred Approach Paper* (NZLC IP31, 2012) at 29.
[305] Thomas, above n 294 at 202; Lord Nicholls "Trustees and Their Broader Community: Where Duty Morality and Ethics Converge" (1996) 205 ALJ 202 at 215.
[306] "It would be impossible to say that it had been fulfilled, because a person could always do more to further the interests of that other person": Smith, above n 252 at 609; Finn *Fiduciary Obligations*, above n 223 at [28].
[307] See Donovan Waters "The Trust in a Changed and Yet Changing World" (2008) 15 JTCP at 242; Peart, Henaghen and Kelly, above n 31 at 867;Antony Duckworth "Trust Law in the New Millennium: Part I - Retrospective" (2000) Trust & Trustees 9 at 12.

examples are offered. In his seminal work "*Fiduciary Obligations*",[308] Finn states loyalty prohibits the fiduciary from abusing the trust and confidence reposed in them by preventing the use of their powers for their own benefit, or their beneficiaries' detriment.[309] It will seldom be for the benefit of the beneficiaries as a whole to have a power exercised for the benefit of the fiduciary. Nor will acting to the detriment of the beneficiaries as a whole meet this standard of loyalty. The interpretation stands with Finn's requirements.

More recently, Miller viewed the requirement of loyalty as a reflection of the special kind of vulnerability a beneficiary is susceptible to: exploitative behavior by the fiduciary.[310] As a result, loyalty is required to proscribe disloyal conduct rooted in inconsistent allegiances.[311] Viewing loyalty as acting in the benefit of beneficiaries as a whole does not disregard this. Disloyal conduct and inconsistent allegiances will still be prohibited; again, such allegiances will not be for the benefit of beneficiaries. In light of this vulnerability, secondary obligations such as the no-profit rule are imposed on the primary obligation to prescribe the actions of the fiduciary[312] and procure their loyalty.[313]

As suggested, any duty imposed on the fiduciary is prophylactic in that it only exists so as to protect the fiduciary obligation of loyalty. Fiduciary duties are a regime designed to protect this primary obligation.[314] As a result, there cannot be any inherent conflict with loyalty and any secondary duty. Further this view explains why rules beyond the no-conflict rules exist. For example, situations where a power is exercised having taken into account irrelevant considerations will be a breach of the fiduciary's obligation, even if those irrelevant considerations did not conflict.[315] The breach arises because irrelevant considerations that ought not to be taken into account when tasked with the obligation of acting for the benefit of beneficiaries. Similarly, it is not for the benefit of the beneficiaries for a power to be exercised capriciously, or for an improper purpose.

This may appear to create a prescriptive view in a jurisdiction that has traditionally favoured the proscriptive; that is, to suddenly insist on positive actions when before prohibiting actions

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308 Finn *Fiduciary Obligations*, above n 223.
309 At [27]-[34].
310 Miller "A Theory of Fiduciary Liability", above n 191 at 270.
311 At 280.
312 Finn *Fiduciary Obligations*, above n 223 at [25], [27].
313 Finn "Fiduciary Law ", above n 273 at [9].
314 Finn "The Fiduciary Principle", above n 190 at 26.
315 See Thomas, above n 42 at ch 10, for a discussion on the duties that can on fiduciary powers beyond the no-conflict rules.

would suffice.[316] With respect, this is incorrect. This view of the fiduciary obligation does not necessarily require a fiduciary to act. Some benefits will require positive acts, some will not.[317] Any secondary obligation or duty will only arise as a consequence of what the primary obligation requires in that particular context.

B. The Power to Add and Remove Beneficiaries and the Fiduciary Obligation of Loyalty

1. Does capacity impact on the obligations owed by an appointor?

There has been commentary that suggests the obligations imposed on fiduciary powers held by non-trustees will differ from those traditionally imposed on trustees and thus create a limited fiduciary role.[318] This is suggested to be incorrect; while the requirements of the appointor may differ from those of a trustee, a trustee is only on example of a fiduciary relationship. To say a power is fiduciary is only the start of the inquiry as to what the power involves.[319] An appointor must still uphold the primary obligation of loyalty.

For example, in *Re Osiris Trustees Ltd v Goodways Ltd*,[320] the settlor reserved the power to appoint and remove trustees. The Court acknowledged the power to be fiduciary, but stated a non-trustee does not stand in exactly the same position as a trustee: a trustee can be compelled to exercise the power as they are under a continual obligation to act in the best interests of beneficiaries and cannot ignore their fiduciary duties, while a non-trustee cannot. However, should the non-trustee choose to exercise the power, it must be for the best interests of the beneficiaries. Thus even if the settlor or unpaid friend or relative holds the power, duties to "act in good faith in the interests of the beneficiaries"[321] attach. The appointor's obligations upon exercise of the power remain at the same base level as any other

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[316] See Finn *Fiduciary Obligations*, above n 233 at [30]; Finn, above n 190 at 2, 28; Glover *Commercial Equity: Fiduciary Relationships*, above n 104 at [5.2]. See also Dyson Heydon "Modern Fiduciary Liability: The Sick man of Equity?" (2014) 15 Trust & Trustees 447; Birks, above n 260 at 35; Lee, above n 287; Darryn Jensen "Prescription and Proscription in Fiduciary Obligations" (2010) 21 KLJ 333 at 334.
[317] See Finn *Fiduciary Obligations*, above n 223 at [30], that fiduciary loyalty "acknowledges the distinctive characteristics of a fiduciary's office. His position leaves it to him to determine how his duties are to be discharged his powers exercised, for the benefit of his beneficiaries. While the obligation positively requires the fiduciary to act in the interests of his beneficiaries, it does not itself seek to define how those interests are to be served."
[318] Conaglen and Weaver, above n 103 at 34.
[319] For example: *Securities and Exchange Commission v Chenery Corporation* 318 US 80 (1943) at 85-6 per Frankfurter J: "to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary?"
[320] *Re Osiris Trustees*, above n 119.
[321] At 943.

fiduciary.

In the matter of the VR Family Trust[322] further demonstrates how the appointor, while not identical to a trustee, still owes the core fiduciary obligation. In this case, the appointment of trust property and adding or removing beneficiaries by trustees required the written consent of the protector. The trust deed explicitly stated these powers were not fiduciary. However, the judge held that this only meant that the protector did not have to consider exercising their powers; if the power was exercised, it was still required to be for the benefit of the beneficiaries.[323]

In *Carmine*, the power had to be exercised in good faith, for the benefit of the beneficiaries.[324] This resulted in a fact-based inquiry as to whether the exercise of the power was for a proper purpose, consistent with the object of the power, and in the best interests of the beneficiaries as a whole. This view was followed in *Harre v Clark*,[325] where the power to add and remove trustees, held by the settlor, was required to be exercised in the interests of the trust.[326] Evidently, the fact the power was held by a non-fiduciary had no impact in either case on the duties owed to the beneficiaries, other than perhaps whether there was a duty to act. The irrelevance of capacity is further indicated by the willingness of the court to extend to protectors the court's inherent jurisdiction to remove trustees, review decision-making and appoint trustees to avoid a trust failing.[327]

Some other 'limited' duties that attach to the non-trustee as have been stated as acting in good faith, acting without caprice, and considering whether to exercise the power.[328] With respect, this does not appear to indicate a limited view of the fiduciary requirements of the appointor of the power. It does indicate that the powers cannot be exercised selfishly or without constraint. In other words, it indicates a tailoring of the requirements to the specific power, as with any fiduciary power or relationship, to uphold the primary fiduciary obligation

[322] *In the Matter of the VR Family Trust* [2009] JRC 109, JLR 202, CILR 323
[323] At [28]-[29].
[324] *Carmine v Ritchie*, above n at [70]. Gilbert J then established how such a power could be exercised for the best interests of the beneficiaries, at [77]: "She did not act capriciously or in bad faith or for any improper purpose. She did not exceed the power vested in her and she did not breach any duty to the beneficiaries in removing Mr Carmine. Rachel is clearly a strong and capable woman, well able to make her own decisions, and she took independent legal advice before acting. Her decision was not vitiated by any undue influence…"
[325] *Harre v Clark* [2014] NZHC 2533.
[326] At [24].
[327] *Rawcliffe v Steele*, above n 169 at 427; See also *Re Circle Trust* above n 170; *In the Matter of the A Trust* [2012] JRC 169A at [11].
[328] Conaglen and Weaver, above n 103 at 34.

of loyalty.

2. Adding and removing others

For an appointor to exercise the power to add and remove discretionary beneficiaries loyally, they must be able to demonstrate that any exercise of the power is honest, in good faith and for the benefit of the beneficiaries as a whole. It is suggested honestly and in good faith is easily demonstrable; this merely requires the appointor performs the power honestly and in accordance with its terms. It could, however, be questioned how adding or removing beneficiaries can ever be for the benefit of beneficiaries. It is suggested a wider view of benefit should be adopted, considering the overriding impact of the appointment or removal of beneficiaries, using existing case law.

It has been stated appointing to a non-object can, at times, be for the benefit of beneficiaries of the trust.[329] The test for when such appointment will benefit the beneficiaries was considered in *Kain v Hutton,*[330] where the Blanchard J stated:[331]

> Has the actuating purpose…been to benefit the object? It is crucial that this question is answered taking full account of contemporary practices concerning how interests in assets are held and transferred within family groups.

Taking into account such contemporary practices widens the concept of benefit beyond the immediate and encompasses the practicality of multiple interests a trust may now involve.[332] For example, if the beneficiaries of a family trust were the settlor's young children, appointing the settlor as beneficiary will benefit the children as the appointment of trust

[329] See Finn *Fiduciary Obligations*, above n 223 at [107]: "If a discretion is exercised with the sole or principal purpose in mind of benefitting a non-beneficiary, it will be wholly improper- unless in all the circumstances the fiduciary could, and did reasonably believe that by acting in that person's interests he was thereby furthering his beneficiaries interests"; see also Antony Duckworth "Protectors- Fish or Fowl? Part 2" (1996) 4 PCB 245 at 246.

[330] *Kain v Hutton*, above n 51. In this case, trustees of the Mangaheia Trust had the power under the deed to allocate income as they saw fit to the discretionary beneficiaries of the trust. The trustees exercised this power to distribute shares to Mrs Couper, one of the discretionary beneficiaries, who on that day settled the shares on a new trust (the Ponui Trust). The beneficiaries of the Ponui trust included Mrs Couper and her children, who were not objects of the original Mangaheia Trust. The Mangaheia Trust beneficiaries alleged this was a fraud on the power to confer a benefit on non-objects,

[331] At [21].

[332] This was evident in *Kain v Hutton,* above n 51 at [22]: "She made it clear in evidence that she had wanted provision to be made for her daughters. By doing so in the form of a sophisticated discretionary trust, no doubt on advice, the trustees with her participation gave her not only personal benefit – she could ensure, if she wished it, that the shares would revert to her – but also the benefit of being able to assist her daughters if she thought that course appropriate in the future. In that manner, as the Court of Appeal appreciated, she could discharge a moral duty to them."

property will inevitably be used for the children's benefit.

McKnight v Craig[333] was concerned with the power of the Court to vary a trust deed under s 64A of the Trustee Act 1956.[334] The Court is unable to approve an arrangement that has a detrimental impact on the rights of the beneficiary on whose behalf the Court is giving consent.[335] French J acknowledged:[336]

> … The Court is to take a wide approach to benefits and detriments in arrangements and must consider the arrangements as a whole in a practical and business like way. Indirect and intangible benefits and detriments are relevant including the welfare and honour of the family.

Including indirect benefits of appointing or removing beneficiaries on the beneficiaries' as a whole invites considerations wider than just the potential erosion of an interest In relation to the power to add and remove beneficiaries it may well be for the best interests to remove a divorced spouse from the trust, or perhaps add a new child or step-child. Such actions will benefit the welfare or honour of the family and thus demonstrate how the power can be exercised for the benefit of beneficiaries as a whole.

3. Adding and removing the appointor from the pool of discretionary beneficiaries

If the appointor were an existing beneficiary, it would likely not be disloyal to remove themselves. It is for the benefit of the beneficiaries to have as little competition as possible when it comes to the distribution of trust property. Questions may arise as to whether the appointor can exercise the power to appoint themself as beneficiaries.

It is conceded that attached to the many explanations of loyalty comes the prohibition on the fiduciary benefitting from their position. It could be argued there is no tangible benefit if the power to add and remove discretionary beneficiaries is used to self-appoint, as the addition of a beneficiary does not automatically result in the appointment of property. Yet the added beneficiary still benefits in some way: they gain the chance of receiving a distribution, which they did have not before. Further, as has already been suggested, the addition of a beneficiary will likely be in order to enable a distribution of trust property. In reality, the self-

[333] *McKnight v Craig* HC Dunedin CIV-2009-412-000919, 22 June 2010.
[334] Trustee Act 1956, s 64A.
[335] s 64A (1)
[336] *McKnight v Craig*, above n 333 at [8].

appointment of the appointor will result in a benefit that is to the existing beneficiaries detriment by diminishing what they may potentially receive. Viewed in this light, an appointor would be unable to self-appoint without breaching their fiduciary obligations.

Nonetheless, it is suggested that there may be rare occasions where it may benefit the existing beneficiaries for the appointor to exercise the power in their own favour and become a beneficiary of the trust. This has been held permissible in exceptional circumstances[337] in relation to the power to add and remove trustees.

Recall the trust above where the beneficiaries were young children. Suppose the mother was also a beneficiary, and the appointor, the father. If the mother were to pass away, any appointment of trust property may be redundant if the children were too young to deal with this property. It may well be, in this exceptional circumstance, be for the benefit of the beneficiaries for the father to appoint himself to ensure the children are able to benefit through any distributions made to him.

C. Conclusion

This chapter aimed to demonstrate how the appointor of the power to add and remove beneficiaries could uphold the core fiduciary duty of loyalty. The benefit to beneficiaries as a whole should be considered and any secondary obligations may be justified in so far as they act to uphold protection of this fundamental obligation. Viewed in this light, it clear that the power to add and remove beneficiaries can be exercised in a manner that upholds this duty.

The exact duties and their scope that may attach to the appointor of the power to add and remove beneficiaries to ensure this core obligation remains protected is beyond the scope of this dissertation.[338] Suffice to say, the duties would go beyond fraud on the power[339] and would likely extend to requirements that the appointor act in good faith, for proper purposes, taking into account relevant considerations and ensuring that the power is not exercised in a capricious, irrational or perverse manner.[340]

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[337] *Montefiore v Guedalla* above n 112; *In re Newen*, above n 112; and more recently *Pe v Pe* HC Christchurch CIV-2004-409-1368, 29 October 2004 at [51].
[338] For more on what the power might require, see Heydon, above n 316.
[339] *Penson v Forbes* [2014] NZHC 2160 at [19] per Associate Judge Osborne.
[340] Kenny, above n 270 at [6.5]-[6.7]; *Penson v Forbes*, above n 339 at [20]; see also Re *John Bishop Family Trust* HC Auckland CIV-2002-404-3634, 22 December 2003 at [28]; where a claim by Mrs Bishop that her removal as a beneficiary was a breach of trust by the trustees as they did not act in good faith, and acted in an arbitrary, capricious and unreasonable manner and for an improper purpose was not struck out; although Mrs

Chapter VI: Potential Consequences if the Power to Add and Remove Beneficiaries is Viewed as a Personal Power

It is accepted that finding the power to add and remove beneficiaries ought to be viewed as fiduciary may not find universal favour. This chapter considers the impact on a trust if the power to add and remove discretionary beneficiaries is considered to be a personal power.

A. The Reservation of Powers and the Validity of a Trust

The law has expressly permitted the reservation of both administrative and dispositive powers as "not necessarily inconsistent with the existence of a trust".[341] The limit for when a power will be inconsistent with a trust is unclear.[342] The irreducible core of trustee duties[343] has been viewed as an appropriate test in determining the "minimum functionality" of a trust.[344] These core duties require trustees to perform the trust honestly and in good faith, for the benefit of the beneficiaries; further, if the beneficiaries have no rights enforceable, there is no trust.[345] If these minimum obligations cannot be upheld alongside the reserved power, a trust cannot exist.

A trust is a relationship.[346] Upon creation of a trust, the settlor loses control over the property[347] and "drops out of the picture";[348] the trust has been created to "dispose of that

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Bishop had "evidential mountains to climb in support of her claim that the trustees acted capriciously or out of spite" O'Regan J did not consider the plea to have no reasonable course of action.

341 Waters "Settlor Control- What Kind of a Problem is it?" above n 178 at 13; see the Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition, Article 2 which states "The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust." This Convention is not ratified in New Zealand.

342 Waters "Settlor Control- What Kind of a Problem is it?", above n 178 at 13. See also Patrick O'Hagan "The Reluctant Settlor-Property, Powers and Pretences" (2011) 17 Trust & Trustees 905 at 910.

343 This concept is attributed to David Hayton "The Irreducible Core Content of Trusteeship" in A.J Oakley (ed) *Trends in Contemporary Trust Law* (Clarendon Press, Oxford, 1996), and was seized upon by Millet LJ in *Armitage v Nurse*, above n 143 at 253-254.

344 David Fox "Non-excludable Trustee Duties" (2011) 17(1) Trust & Trustees 17 at 17; Palmer "Controlling the Trust", above n 56 at 479.

345 *Armitage v Nurse*, above n 143 at 253-254.

346 Jill E Martin *Modern Equity* (18 ed, Sweet & Maxwell, London, 2009) at 49; see also Palmer "Controlling the Trust", above n 56 at 478; Nicola Peart "Can Your Trust Be Trusted?" (2009) 12 Otago L Rev 59 at 60.

347 It is important to note that the settlor loses control over the property in their capacity as settlor; they may settle a trust and declare themselves trustees. In this case, the settlor would still lose control in their capacity as settlor, but could retain control over the property as trustee. How they treat this property will be constrained by fiduciary law. See Thomas and Hudson, above n 26 at [1.37]; Hayton, Matthews and Mitchell, above n 19 at [1.1].

348 Donovan Waters "Trusts: Settlors Reserved Powers" (2005) 25 Est Tr & Pensions J 234 at 234; Hayton "Developing the Obligation Characteristic of the Trust", above n 107 at 96; Thomas and Hudson, above n 26 at [1.38].

property in favour of another"[349] and it is this relationship between trustees and beneficiary that dictates the rights and obligations of a trustee. The existence of an appointor with the power to add and remove discretionary beneficiaries introduces another party to this relationship, and grants legal control[350] over an element of the trust. The appointor has control over the existence of any discretionary beneficial interest, and consequently has some control over to whom the trustees owe duties.

Such control, held by a non-trustee, may threaten the legitimacy of a trust when it operates to oust the trustee from their irreducible duties.[351] Waters comments that the power to add or remove beneficiaries, without any criteria for its exercise, would create a higher level of risk that control has passed to another.[352] The exercise of the power will result in "interference.[353] However, this is only an indirect interference.[354] Even if the appointor added themself and removed all other discretionary beneficiaries, in isolation the power does not result in unfettered access to trust property, nor remove subservience to the trustee.[355] This was made explicitly clear in *Financial Markets Authority v Hotchin*:[356]

> Powers of appointment of trustees, and even of discretionary beneficiaries, are not sufficient to give Mr Hotchin control over the assets of the Trusts, because that control rests, at law, with the trustee once appointed.

Further, throughout any addition or removal of discretionary beneficiaries, the trustee's duties to existing beneficiaries remain ongoing.[357] This is in contrast to reserved powers that require non-trustees to consent to distributions, give binding directions as to trustee actions, and even remove all liability of a trustee for any act at all. Such direct interferences clearly

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[349] *Knight v Knight*, above n 19 at 68 per Lord Langdale.
[350] "Legal control of a trust occurs where the trust deed itself confers the relevant powers on the controller such that they are legally valid", as opposed to factual control, which occurs when "where a controller has assumed power over trust property without any legal right to exercise such power or authority': Jessica Palmer "Dealing with the Emerging Popularity of Sham Trusts" [2007] NZ L Rev 81 at 89-90; see also Peart, above n 346 at 64. Factual control will generally not enable a person to undermine a trust, but legal control may if such control undermines the core duties of the trustee, see Palmer "Controlling the Trust", above n 56 at 474, 480.
[351] Waters "Settlor Control- What Kind of a Problem is it?" above n 178 at 13.
[352] Donovan Waters "The Power in a Trust Instrument to Add and Delete Beneficiaries" (2011) 31 Est Tr & Pensions J 173 at 187.
[353] Waters "The Power in a Trust Instrument to Add and Delete Beneficiaries", above n 352 at 257.
[354] At 257.
[355] Palmer "Controlling the Trust", above n 56 at 479, 484.
[356] *Financial Markets Authority v Hotchin*, above n 71 at [131] per Winkelmann J.
[357] Palmer "Controlling the Trust", above n 56 at 481, 483; in response to attempts in cases such as *Harrison v Harrison*, above n 71, and *B v X* HC Auckland CIV 2010-404-002861, 16 March 2011, to invalidate a trust on the basis that there was no separation of legal and equitable estates, and no fiduciary duty, respectively. Palmer argues the decisions are incorrect as they ignore the ongoing and vested interests that a trustee still owes to existing beneficiaries. For more, see also Peart, Henaghen and Kelly, above n 31 at 879-880.

fetter, limit and exclude the trustee's ability to exercise their powers honestly and in good faith for the benefit of the beneficiaries[358] and would justify invalidating the existence of a trust.

It is suggested that while the power to add and remove discretionary beneficiaries may not render a trust unenforceable in isolation, its indirect interference with the minimum functionality of a trust cannot be ignored and ought to be considered alongside other powers in a trust, as discussed below.

B . Has a Trust Been Created?

1. The power and the certainties of a trust

For a trust to be valid, three certainties must be met: intention, object and subject.[359] Relevant to our purpose, it is asked what impact the power to add and remove beneficiaries has on the certainty of intention of the settlor to create a trust.[360]

A settlor of an express trust must, expressly or impliedly, intend create a trust.[361] In New Zealand, this certainty of intention has had much debate in regards to sham trusts. The current intention required for a sham trust in New Zealand was stated in *Official Assignee v Wilson*:[362]

> …the settlor has to intend, at the inception of the trust, to give third parties or the Court the appearance of creating rights and obligations different from the legal rights and obligations actually intended.

[358] Palmer "Controlling the Trust", above n 56 at 479; see also 484-486, for discussion on how the power to remove all trustee liability can be enough control to render a trust invalid, and its treatment in *BQ v DQ* [2010] SC (Bda) 40 Civ.
[359] *Knight v Knight*, above n 19.
[360] The power to add and remove discretionary beneficiaries may appear to raise questions as to the certainty of objects. As the power can be used to "redesign the object clause of a trust" some might argue the settlor did not have requisite certainty of the intention of their objects; but this has not been argued; see Waters "The Power in a Trust Instrument to Add and Delete Beneficiaries", above n 352 at 186. However, certainty of objects is aimed towards administrative workability to enable a court to exercise a trust and thus requires certainty as to whether a person is or is not within the class of beneficiaries; see *Morice v Bishop of Durham*, above n 127 at 540; *Re Gestetner Settlement*, above n 80 at 669 per Harman J; *Re Gulbenkian's Settlements* above n 76 at 528 per Lord Upjohn; *McPhail v Doulton* above n 75 at 456 per Lord Wilberforce. As the power to add and remove discretionary beneficiaries does not interfere with this identification, certainty of objects is not an issue.
[361] See *Paul v Constance* [1977] 1WLR 527 (CA) for how certainty of intention can be implied from conduct.
[362] *Official Assignee v Wilson*, above n 15 at [125] per Glazebrook J.

This intention must be mutual between settlor and trustee,[363] to deceive others as to what the parties are actually trying to achieve.[364] In the absence of such mutual intention, it is apparent a genuine intention to create a trust will suffice, regardless of any powers withheld by the settlor.[365]

It is queried in this dissertation whether this is, or should be, enough to satisfy certainty of intention.[366] The views of Pear and Palmer are supported:[367] while the intent of a settlor may exist in *form*, when the structure of a trust lacks the necessary divestment of beneficial ownership or creation of obligations, a trust cannot have been created as the intention does not exist in *substance*. It is not enough to say a trust exists because there is a trust deed.[368] Similarly, it is not enough to fervently wish or intend to gift property: delivery is required for the gift to be complete.[369] Genuine intention, without requisite actions, cannot create a desired legal consequence. The settlor must have, in substance and form, intended to divest themselves of ownership for the benefit of others, who in turn have rights against those who hold the property on their behalf. Without this intention, a trust ought not to exist.

Upon this view, the power to add and remove beneficiaries raises questions in regards to the existence of a trust. Has there truly been a divesting of beneficial ownership, at least to the extent required to satisfy our ideals of an irrevocable trust?[370] Or does the beneficiary remain dependent on the settlor's benevolence, as they would be had there been no declaration of trust? Can a third party determine whether trustees will be accountable for their discretion by simply removing beneficiaries and removing their ability to enforce the obligations owed to

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[363] At [41] per Robertson and O'Regan JJ; *Financial Market Authority v Hotchin* [2012] NZHC 323 at [49]. For more on this requirement, see Palmer "Dealing with the Emerging Popularity of Sham Trusts", above n 350; and Matthew Conaglen "Sham Trusts" (2008) 67 CLJ 176.

[364] Peart, Henaghen and Kelly, above n 31 at 873; Peart, above n 346 at 67.

[365] Palmer "Controlling the Trust", above n 56 at 477.

[366] See also Law Commission *Review of the Law of Trusts: Preferred Approach Paper* (NZLC IP31, 2012) above n 304 at 2.23; Law Commission Some Issues with the Law of Trusts in New Zealand: Review of the Law of Trusts Second Paper (NZLC IP20, 2010) at [5.28]-[5.33]; Sue Tappenden "The Family Trust in New Zealand and the Claims of 'Unwelcome Beneficiaries'" (2009) 2(4) J Pol & L at 19: "the form of a trust may be there but the essence of equity is not …Instead of striving to maintain equitable standards courts have only looked at the form of the trust instrument and have become so fixated on questions of intention that the wider issues of whether equity has been served are lost."

[367] Peart and Palmer "Clayton v Clayton: A Step Too Far?" above n 71 at 115.

[368] BoHao (Steven) Li "No Such Thing as a Sham Trust" (2013) 44 Victoria U Wellington L Rev 115 at 139.

[369] *Williams v Williams* [1956] NZLR 970 (SC) at 972 establishes the three requirements for an *inter vivos* gift: "intention of the donor to make a gift, secondly, the assent of the donee to the gift, and, thirdly, the actual or constructive delivery of the chattel". Absent this delivery, a gift will fail; at 974.

[370] See *Financial Market Authority v Hotchin*, above n 364 at [38], noting *Hughes v Stubb* (1842) 1 Hare 476, 66 ER 1119 (Ch) per Wigram J in regards to the difficulty in finding a trust when the settlor retains dominion over property despite vesting legal title in others and declaring a trust. See also the example in Chapter III.

them? Such questions indicate that certainty of intention to create a trust, as we know it, may not exist. This requires no intention to deceive,[371] but rather acknowledges that given the nature of the power, without limits, no trust may not have been intended.

However, the power to add and remove discretionary beneficiaries does not automatically negate any intention to create a trust. If a third party holds the power, the settlor has given up their absolute property rights.[372] Further, as above, even if the settlor holds the power, they are still prohibited from treating the property as their own; the trustee still controls the trust assets.[373] Finally, as the trust is still ultimately enforceable by final beneficiaries, the accountability core remains intact, even if potentially undermined to some extent.[374]

C. The Result: A Vulnerable Trust

In isolation, the power to add and remove discretionary beneficiaries does not completely erode core duties owed to existing discretionary and final beneficiaries. Nor does it immediately negate the intention to create a trust. It is suggested instead that given the indirect interference or implications the power may have on such crucial elements of a trust, viewing the power to add and remove discretionary beneficiaries as personal can leave a trust vulnerable to challenge. This challenge can be mitigated or exacerbated by other powers and limitations found in the trust instrument. As Palmer states:[375]

> …the particular content and extent of some such powers may compromise the legitimacy of the trust, while, with the inclusion of others, the trust will nevertheless remain enforceable.

In conjunction with other powers, a personal power to add and remove discretionary beneficiaries may well go towards rendering a trust unenforceable. For example, Mr Clayton, in addition to holding the power to add and remove discretionary beneficiaries, was the sole trustee of the VRPT.[376] As trustee, Mr Clayton held powers to appoint income and capital for his own benefit with complete and unfettered discretion, without considering all beneficiaries, ignoring any conflict of interest, in a way that might be contrary to the interests of any beneficiaries.[377] In this extreme case, the power to add and remove discretionary

[371] Peart and Palmer "Clayton v Clayton: A Step Too Far?" above n 71 at 116.
[372] O'Hagan, above n 342 at 907.
[373] *Financial Markets Authority v Hotchin*, above n 364.
[374] Waters "Settlor Control- What Kind of a Problem is it?", above n 178 at 14.
[375] Palmer "Controlling the Trust", above n 56 at 479.
[376] Declaration of Trust Establishing Vaughan Road Property Trust, clauses 7 and 17.1
[377] At clauses 4, 5, 11.1, 12.2 and 14.1.

beneficiaries contributes to questions of the legitimacy of his substantive intention to divest beneficial ownership and create a trust in light of the control he retained.

Consider instead the impact of the power in *Financial Markets Authority v Hotchin*.[378] In this case, the impact of the power to add and remove beneficiaries was limited by a clause in the trust deed that prohibited a trustee who was also a beneficiary from exercising any power in their own favour.[379] Thus even with the power to remove all beneficiaries and leave himself as sole trustee, Mr Hotchin could not distribute to himself.[380] The difference in the impact of the power is clear. It is far easier to see how the trustees still owe their irreducible core duties to beneficiaries, and how an intention to create a trust exists in substance, when the power is fettered by the trust deed in this way. It is thus the context that will determine the true impact of a personal power to add and remove dictionary beneficiaries on a trust. It is suggested a settlor treat the power to add and remove beneficiaries as fiduciary if they want the validity of their trust to remain certain.

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[378] *Financial Market Authority v Hotchin*, above n 364.
[379] At [34] per Winkelmann J.
[380] At [34],

Conclusion

This dissertation has sought to establish that the power to add and remove beneficiaries is fiduciary. Chapter I discussed the decision of the Court of Appeal in *Clayton v Clayton*, where the power was viewed as a general power of appointment and further property of Mr Clayton. This chapter also established that the decision could extend beyond the PRA.

Chapter II involved a discussion of the varying classification of powers. Crucially, this chapter argued that the power to add and remove beneficiaries cannot constitute a general power of appointment and further cannot constitute property, as it does not give the appointor access to trust property. Instead it was suggested that the classification of the power to add and remove beneficiaries is either personal or fiduciary. To determine this a new methodology was suggested: determining whether the power was fiduciary before assessing how the appointor may exercise the power.

Chapter III argued that the power to add and remove beneficiaries is one that goes to the core of the trust, alienation and accountability. When powers go to this core, regardless of the capacity of the holder, they ought to be fettered to ensure the integrity of the trust remains intact.

Chapter IV further suggested that the relationship between the appointor and the existing beneficiaries was probably a fiduciary relationship in fact. Trust and confidence is surely reposed in the appointor by a beneficiary in light of the appointor's control and the beneficiary's subsequent vulnerability in regards to the existence of their beneficial interest. Further, viewing the relationship as fiduciary serves a social purpose by ensuring that any alteration of a beneficial interest is fettered and upholds 'trust' in a trust.

Chapter V went on to consider if the power could be exercised in line with the core fiduciary obligation of loyalty. Varying definitions of loyalty were discussed, and the view that loyalty is acting for the benefit of the beneficiaries as a whole was put forward. When viewed in this light, it is possible the power can be exercised loyally and thus the final element of the power being viewed as fiduciary was established.

Chapter VI considered the impact on a trust if the power was to be viewed as personal. While the power may not invalidate an existing trust, or negate the certainty of intention required, it can leave a trust vulnerable to challenge. This will depend on the trust instrument overall, and it was suggested that viewing the power as fiduciary would strengthen the validity of a trust.

It is conceded that as it stands in New Zealand, the power to add and remove beneficiaries may well be treated as a personal power and exercised any way the appointor pleases. However, the decision in *Clayton* indicates that the Court may no longer treat this favourably and is willing to intervene in some way when the powers, in reality, go against our concept of a trust. Access through the extension of powers and property is suggested as incorrect. An argument based on impinging on the irreducible core, or lack of intention to create a trust would offer a more principled approach of achieving a similar result, depending on the terms of the trust deed. It is hoped that the Supreme Court decision in *Clayton* will deal with the power to add and remove discretionary beneficiaries in the VRPT in a way that reflects both trust and property law principles. If not, the legislature ought to step in to ensure the law reflects the modern reality and usage of trusts by either making clear what powers are permitted,[381] or making clear when trusts with extensive powers will be overridden by legislation for certain purposes.[382]

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[381] For example, see The Bahamas' Trustee Act 1998 s 3; Nevis International Exempt Trust Ordinance 1994 s 47; Cook Islands International Trusts Act 1984 s 13 C; Trust (Jersey) Law 1984, Article 9A, where the reservation of powers is permitted and will not invalidate a trust.

[382] For more, see Nicola Peart "Intervention to Prevent the Abuse of Trust Structures" (2010) NZ L Rev 567.

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