Busting Trusts When a Relationship Breaks Down?

Reforming Section 44C of the Property (Relationships) Act 1976

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I Introduction

Trusts have long enabled the property-sharing rules of the Property (Relationships) Act 1976 ("PRA") to be avoided. This dissertation aims to analyse and critique the recent Law Commission proposals which seek to prevent the trust's viability in frustrating the PRA's public policy. The focus of this dissertation is the proposal to amend section 44C of the PRA. However, the proposal to repeal section 182 of the Family Proceedings Act 1980 ("FPA") and modify the PRA's classification provisions will also be explored, as both are closely interlinked with the proposed amendment of section 44C. Ultimately, I argue that despite the Law Commission proposals being a step in the right direction, they do not strike the right balance between upholding relationship property rights, and affording adequate protection to trusts.

There are three substantive Chapters. Chapter II provides an overview of the relevant provisions of the PRA, how the trust undermines its public policy, and the shortcomings of the current law. Chapter III provides an analysis of the Law Commission proposals on the classification of property, the 'amendment' to section 44C of the PRA and the repeal of section 182 of the FPA. Finally, I argue in Chapter IV that the proposals do not strike the right balance between upholding the PRA's public policy and trust law.

II The Property (Relationships) Act 1976 and Trusts

A The Property (Relationships) Act 1976

The PRA determines how each partner's property is divided at the end of a relationship. Its property-sharing rules are drawn from values embedded in the New Zealand society. The PRA's overarching policy is a just division of property between the partners upon separation.[1] This policy is derived from its primary theoretical basis that a relationship is a family joint venture – both partners equally contribute to the relationship (albeit in different ways) and thus, expect to share in the fruits of that joint venture.[2] Accordingly, if that joint venture breaks down, partners have the reasonable expectation to share equally in the fruits of the failed joint venture. The PRA applies to marriages, civil unions and de facto relationships of three or more years' duration,[3] and to all property beneficially owned by the partners, either individually or jointly.[4] Unlike other jurisdictions, such as England and Australia,[5] the PRA operates as a partial code.[6] This ensures that relationship property disputes are resolved according to the same principles and enables cheaper, simpler and quicker resolution of disputes as matters can be addressed at the same time in one court.[7]

B The Trust Issue

The 'New Zealand family trust' is generally an express discretionary trust, where the trust deed gives trustees the discretion to determine when and how to distribute trust property amongst the beneficiaries.[8] Although partners can avoid the PRA's property-sharing regime by contracting out,[9] the trust is often used instead.[10] Trust property is only classified as relationship property (and subject to equal sharing)[11] to the extent the partner can be said to be

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[1] Law Commission *Dividing Relationship Property – Time for Change?* (NZLC IP41, 2017) at [3.4]; Property (Relationships) Act 1976, s 1M(c).
[2] Law Commission *Review of the Property (Relationships) Act 1976* (NZLC R143, 2019) at [2.46].
[3] Section 1C.
[4] Section 2, definitions of "property" and "owner".
[5] England and Australia have a discretionary system: see Matrimonial Causes Act 1973 (UK), s 24 and Family Law Act 1975 (Cth), s 79.
[6] Section 4; Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR4.01].
[7] Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach* (NZLC IP44, 2018) at [6.91].
[8] Law Commission (IP41), above n 1, at [20.11].
[9] Property (Relationships) Act, pt 6.
[10] Trusts are advantageous as they can be settled before a subsequent relationship is contemplated without the consent or knowledge by the other partner, whereas section 21 agreements must be agreed to by the other partner, who would likely be advised against agreeing as they would be forfeiting relationship property rights. Furthermore, even if entered into correctly, section 21 agreements can be overturned by the court on the ground of serious injustice (section 21J): Nicola Peart "The (Property) Relationships Act 1976 and Trusts: Proposals for Reform" (2016) 47 VUWLR 443 at 460.
[11] Sections 8 and 11. However, the presumption of equal sharing will not apply where there are extraordinary circumstances (s 13), or where the relationship is of a short duration (ss 14, 14AA and 14A). The court may adjust the equal division of property to address economic disparities (ss 15 and 15A), or if two homes were owned at the time of the qualifying relationship (s 16).

the beneficial owner.[12] Discretionary beneficiaries only have a mere hope or expectation to benefit from trust assets which does not amount to a beneficial interest.[13] Thus, partners who are discretionary beneficiaries are not beneficial owners of the trust property, so the trust property is not subject to the PRA. This undermines the PRA's public policy, which is to achieve a just division of property upon separation. The popularity of family trusts in New Zealand magnifies this issue.[14]

C Shortcomings of the current law

The law currently does not strike the right balance between upholding relationship property rights and protecting trusts. It is skewed heavily towards protecting trusts which prevents the PRA's public policy from being achieved. Sections 44 and 44C of the PRA are inadequate at addressing this imbalance, which led to the reliance on section 182 of the FPA and expanding the PRA's definition of "property". Furthermore, in an attempt to provide a just outcome between the partners, common law remedies such as the sham trust, illusory trust and constructive trust have been resorted to. However, these remedies all have their own limitations and have been criticised for reasons such as complexity and inconsistency with the PRA or trust law.

1 Section 44 of the PRA

Section 44 applies where *any* disposition of property has been made with an *intention* to defeat the PRA claim or rights of any person.[15] It covers dispositions into trusts, but also dispositions into other structures. Although section 44 permits the court to order a transfer of money or trust property to the claimant as compensation, the high evidentiary requirement to prove intention means it is rarely successfully argued.[16] Intention to defeat PRA rights at the time of disposition is particularly difficult to prove with trusts as most dispositions occur when the relationship is intact.

2 Section 44C of the PRA[17]

[12] Section 2, definition of "owner".
[13] *Kain v Hutton* [2008] NZSC 61, [2008] 3 NZLR 589 at [25].
[14] New Zealand has significantly more trusts than countries such as the United Kingdom, Australia and Canada: Law Commission *Some Issues with the Law of Trusts in New Zealand: Review of the Law of Trusts Second Paper* (NZLC IP20, 2010) at [2.1]-[2.6]. It is estimated that there are 300,000 – 500,000 trusts in New Zealand: Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, September 2013) at [2.3].
[15] To satisfy the "intention" requirement, a claimant must prove their partner disposed of property into a trust, knowing that as a consequence of that, the claimant loses their PRA claim or rights. Intention will be proven even if there was no wish to cause the other partner loss: *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 at [53]-[54] adopted for the purposes of section 44: *Ryan v Unkovich* [2010] 1 NZLR 434 (HC) at [33].
[16] Nicola Peart, Mark Henaghan and Greg Kelly "Trusts and Relationship Property in New Zealand" Trusts & Trustees (2011) 17 Trusts & Trustees 866 at 869.
[17] Chapter III provides a more detailed analysis: see page 15.

Section 44C was inserted into the PRA in 2001 in response to section 44's high evidentiary threshold.[18] It applies if since the relationship began, either or both partners have disposed of relationship property into a trust, which had the effect of defeating the claim or rights of one partner, and section 44 does not apply to that disposition.[19] Because it deals with the *effect* of a disposition defeating a partner's PRA claim or rights, intention does not need to be proven.[20] However, its limited jurisdiction means it is easy to avoid its application, and the court's inability to directly access trust capital diminishes section 44C's effectiveness at achieving a just division.

3 Section 182 of the FPA[21]

Section 182 enables a court to vary nuptial settlements, which includes making orders against the trust.[22] It has been used particularly where a court has jurisdiction under section 44C, but section 44C's limitation on the court's powers prevent a just outcome from being achieved. In *Ward v Ward*, although the court had jurisdiction under section 44C to compensate Mrs Ward, Mr Ward had insufficient assets outside the trust from which compensation could be ordered, and the trust produced little income.[23] Judge Robinson refused to exercise his discretion under section 44C,[24] and instead relied on section 182.[25] Resort to section 182 has been critiqued for its inconsistency with the PRA as it permits orders to be made against trust capital whereas Parliament deliberately omitted this power under section 44C,[26] and there is no presumption of equal sharing.[27] Section 182 may also lead to injustice, as it only applies to married or civil union couples, not de facto couples.[28]

4 Powers as property

In *Clayton v Clayton (Vaughan Road Property Trust)* ("*Clayton (VRPT)*"), a combination of Mr Clayton's powers relating to the trust was held to be "property" under the PRA, as they were "rights" that give him an "interest" in the VRPT assets.[29] As settlor, Principal Family Member, trustee and a discretionary beneficiary, Mr Clayton's powers and entitlements under the trust gave him extensive control over the trust assets. As trustee and a discretionary beneficiary, he could exercise any power vested in the trustee in his favour, without considering

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[18] Property (Relationships) Amendment Act 2001, s 51; *Nation v Nation* [2005] 3 NZLR 46 (CA) at [143].
[19] Section 44C(1).
[20] Matrimonial Property Amendment Bill 1999 (109-2) (select committee report) at xii; *Nation* (CA), above n 18, at [143].
[21] Chapter III provides a more detailed analysis: see page 30.
[22] The court may exercise its wide discretion under section 182 to remove trust capital, vary trust terms, resettle the trust for one or both partners' benefit, or make orders regarding the administration or management of the trust: Family Proceedings Act 1980, s 182(1).
[23] *Ward v Ward* FC Hastings FAM-2004-020-116, 20 April 2007.
[24] At [48].
[25] At [73].
[26] Matrimonial Property Amendment Bill, above n 20, at xii.
[27] *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31 at [20].
[28] Family Proceedings Act, s 182(1).
[29] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 ["*Clayton (VRPT)"*] at [80]; section 2, definition of "property", (e). Determining trust powers amount to "property" does not permit the court to access the trust assets, it simply enlarges the pool of property: at [84].

the interests of other beneficiaries, and despite conflicts with his trustee duties to other beneficiaries.[30] Mr Clayton could effectively appoint all trust assets to himself.[31] Because those powers amounted to a general power of appointment over the trust assets,[32] the value of the trust powers was held to be equivalent to the value of the net trust assets.[33] However, it has been suggested that the combination of Mr Clayton's powers meant no trust could exist because Mr Clayton, as trustee, owed no fiduciary duties to the beneficiaries.[34]

5 Sham trusts

If a trust deed is a sham, it will be invalid and beneficial ownership of the property reverts to the partner/settlor under a resulting trust.[35] This enables the trust assets to be treated as "property" under the PRA. A trust deed is a sham if the true common intention of the parties[36] was to create rights and obligations other than that in the trust deed.[37] It usually requires proof of a positive intention to deceive, not merely a lack of intention to create a trust.[38] This is a high threshold to meet and is often difficult to prove as most family trusts are not created with the intention to deceive.[39]

6 Illusory trusts

A trust that is not a sham can be illusory. An illusory trust is also invalid and the assets can be treated as those of the partner/settlor.[40] The illusory trust argument was suggested in *Clayton*

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[30] At [56].
[31] At [54], [57]-[58].
[32] At [58], [68]. The donee of a general power of appointment may exercise that power to benefit anyone, including himself: David Hayton, Paul Matthews and Charles Mitchell *Underhill and Hayton Law of Trusts and Trustees* (19th ed, LexisNexis, London, 2016) at 44. A general power of appointment is considered as "tantamount to ownership" and can be treated as "property" for particular purposes: *Clayton (VRPT)*, above n 29, at [61]; *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank & Trust Co (Cayman) Ltd* [2011] UKPC 17, [2012] 1 WLR 1721 ["*TMSF*"] at [40]-[44] and [60].
[33] At [107]. Mr Clayton's VRPT powers were classified as relationship property, to which Mrs Clayton was entitled to an equal share, as they were acquired after his relationship with Mrs Clayton began: at [86].
[34] Jessica Palmer "What to Do about Trusts?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance* (Intersentia, Cambridge, 2017) 177 at 188.
[35] Kate Davenport and others (eds) *Law of Trusts* (online looseleaf ed, LexisNexis) at [A.9].
[36] Where the settlor is not also the sole trustee, there is ongoing debate on whether only the settlor's intention is relevant (see Jessica Palmer "Dealing with the Emerging Popularity of Sham Trusts" [2007] NZ Law Rev 81 at 93-94); or whether it is the common intention of the settlor and trustee(s) that is relevant (see Matthew Conaglen "Sham Trusts" [2008] CLJ 176 at 184). The latter is currently the international view: Hayton, Matthews and Mitchell, above n 32, at 97-98.
[37] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289 at [33] approved in *Clayton (VRPT)*, above n 29, at [113].
[38] *Official Assignee v Wilson* [2007] NZCA 122, [2008] 3 NZLR 45 at [52]-[52] per Robertson and O'Regan JJ and [106] per Glazebrook J. See also Palmer, above n 34, at 182.
[39] See *Clayton (VRPT)*, above n 29, at [111] and [117].
[40] The courts do not like using the label "illusory", preferring to describe such trusts simply as invalid: *Clayton (VRPT)*, above n 29, at [123]; *JSC Mezhdunarodniy Promyshlenniy Bank and another v Pugachev and others* [2017] EWHC 2426 (Ch), [2017] All ER (D) 72 (Oct) at [71].

(VRPT),[41] and successful in *Webb v Webb*.[42] In *Webb*, Mr Webb was the settlor, sole trustee, Consultant and a discretionary beneficiary. As trustee, Mr Webb could appoint income and/or capital to himself unconstrained by fiduciary duties.[43] As Consultant, he could resettle the trust or vary its terms to vest all property in himself.[44] The trust was held to be invalid as Mr Webb, could have recovered at any time, his beneficial interest in the trust assets.[45] However, this reasoning has some slight inconsistencies with trust law. The power of revocation, which, like Mr Webb's powers, enables the donee (usually the settlor) to retrieve the beneficial ownership of the trust assets unconstrained by fiduciary duties.[46] Whilst a trust conferring a power of revocation remains valid,[47] Mr Webb's powers rendered his trust illusory and invalid. Perhaps a better test would have been whether the trustee(s) continue to owe fiduciary duties to the beneficiaries.[48] Furthermore, the illusory trust argument sits within the general law and can be exploited in cases other than to achieve a just division of property.[49]

7 Constructive trusts

If a constructive trust is imposed over assets held in an express family trust in favour of the defendant partner, that partner will have a beneficial interest in the trust assets, which constitutes as "property" under the PRA. In *Clark v Clark*, Mrs Clark successfully argued that Mr Clark had a constructive trust interest over a farm held in Mr Clark's family trust.[50] Mrs Clark argued that Mr Clark made contributions to the farm and had a reasonable expectation of an interest in it.[51] Although the farm was found to be his separate property,[52] increases in its value could be attributed to the application of relationship property,[53] so Mrs Clark was entitled to half of the increase in value.[54] Constructive trusts are also used to recognise a claimant's contributions to trust property. This will be discussed in Chapter III.[55]

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[41] The Supreme Court could not unanimously agree whether the VRPT was illusory, and determined the case on the alternative ground that Mr Clayton's powers were "property": *Clayton (VRPT)*, above n 29, at [127]. The illusory trust argument is suggested at [124]-[125].
[42] *Webb v Webb* [2017] CA No. 7/17 (Court of Appeal of the Cook Islands).
[43] Mr Webb's fiduciary duties as trustee were negated by the trust deed: at [61].
[44] At [62].
[45] At [53], [56] and [65].
[46] The power of revocation is a general power of appointment; the donee may exercise that power as they wish, even to benefit themselves: Hayton, Matthews and Mitchell, above n 32, at [1.67].
[47] In *TMSF*, above n 32, there was no question that the trusts were valid (at [9]), despite the settlor having the power to revoke the trust at any time, vesting the beneficial ownership of all trust property in himself (at [12] and [28]).
[48] Where the settlor has the power to revoke the trust, the trust remains valid as the trustees continue to owe fiduciary duties to the beneficiaries: Palmer, above n 34, at 188.
[49] This is one of the concerns of resorting to common law remedies (rather than legislation) to achieve a just division between the parties: Peart, Henaghan and Kelly, above n 16, at 880. For example, see the illusory trust argument in *Pugachev*, above n 40, at [212]-[278], which was an insolvency case decided a year after *Clayton (VRPT)*, above n 29, and just before *Webb*, above n 42.
[50] *Clark v Clark* [2012] NZHC 3159, [2013] NZFLR 534.
[51] At [60]-[62].
[52] At [74].
[53] Property (Relationships) Act, s 9A(1).
[54] At [106]; Property (Relationships) Act, ss 9A and 11(c).
[55] See page 25.

III Law Commission Proposals

A The Relationships Property Act

The Law Commission recently reviewed the PRA and concluded that the now 40-year old legislation,[56] does not reflect the values, relationships and expectations of modern New Zealanders.[57] It recommends that the PRA should be extensively amended and renamed the 'Relationships Property Act' ("RPA").[58] To avoid confusion between the PRA and the proposed Act, I will refer to the proposed Act as the RPA. The RPA clarifies the PRA's statement of purposes and principles which are currently "an unhelpful mix of concepts".[59] The RPA would be premised upon a singular purpose: to achieve a just division of property when a relationship ends on separation.[60] A separate section would include the relevant principles, most of which have been carried over from the PRA. These principles include that: all forms of contributions to the relationship should be treated equally, relationship property should be shared equally, partners should be free to contract out of the Act, and relationship property disputes should be resolved inexpensively, simply and speedily as is consistent with justice.[61]

The shortcomings of the current law mean trusts have been able to frustrate the public policy of the PRA. To address these shortcomings, the Law Commission proposes to amend section 44C of the PRA,[62] and repeal section 182 of the FPA.[63] Section 44 of the PRA will be retained in its current form due to its wider scope in capturing dispositions other than trusts made with the intention of defeating relationship property claims or rights.[64] Before discussing these proposals, I will deal with the classification of property proposals which underpin the trust property recommendations. I will refer to the Law Commission proposals as 'clauses', and the current provisions as 'sections'.[65]

B Classification of property

1 Current law

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[56] Which has not been significantly amended since 2001.
[57] Law Commission (R143), above n 2, at [2.15].
[58] At [2.34]. The Relationships Property Act will only apply to relationships that end on separation. Due to the differing considerations and competing interests that apply on death of a partner, the Law Commission recommends that a separate Act should govern the rules applicable to relationships that end on death of a partner, together with family protection and testamentary promises claims: at [2.74].
[59] At [2.52]; ss 1M and 1N.
[60] At [2.51].
[61] At [2.60]. Other principles include that: a just division of property recognises tikanga Māori, the Act applies in the same way to relationships that are substantively the same, economic advantages and disadvantages arising from the relationship are to be shared, and the best interests of any child of the relationship is a primary consideration.
[62] At [11.65].
[63] At [11.108].
[64] At [11.102]-[11.106].
[65] The classification of property and section 44C proposals are drafted in the Property (Relationships) Amendment Bill, found in Appendices 2 and 3 in Law Commission (R143), above n 2, at 496 and 502.

At the end of a relationship, each partner's property is classified as "relationship property" or "separate property".[66] Relationship property is equally divided between the partners upon separation,[67] whilst each partner generally retains their own separate property.[68] Three conceptual approaches justify classifying property as relationship property:

1. Fruits of the relationship: This is derived from the idea that the partners' relationship is a 'family joint venture' and that each partner's equal contribution,[69] albeit in different ways, to that joint venture entitles them each to share in the 'fruits' of the joint venture.[70] Property acquired or produced by either or both partners *during the relationship* are generally fruits of the relationship.

2. Family acquisitions: This includes property that was *acquired with the relationship in mind*, to benefit the family joint venture – i.e. property acquired for the partners' common use or common benefit.[71] Acquisitions funded from separate property are justified as relationship property under this approach as they are regarded as a monetary contribution to the relationship. This is consistent with the principle that all forms of contribution to the relationship should be treated equally.[72]

3. Family use: Currently, this justifies treating the family home "whenever acquired" and family chattels "whenever acquired" as relationship property.[73] The underlying basis of the family use approach is unclear.[74]

These approaches respectively correspond to relationship property broadly consisting of property acquired or produced by either partner during the relationship, property acquired for the partners' common use or common benefit, and the family home and family chattels. Separate property generally consists of pre-relationship property, third party gifts and inheritances, and special types of property.

2 Proposal: Classification provisions

The Law Commission intends to retain the distinction between relationship property and separate property. However, it proposes to modify the family use approach in its application

[66] The Property (Relationships) Act is a deferred sharing regime which only applies upon the breakdown of a relationship: s 19. Until then, each partner holds property separately.
[67] Section 11.
[68] Subject to the court's discretion: sections 15A, 18B and 18C.
[69] Section 18(2).
[70] Law Commission (R143), above n 2, at [3.18].
[71] At [3.19].
[72] Sections 1M(b), 1N(b) and 18(2).
[73] Sections 8(1)(a) and (b).
[74] Several theories have been put forward, including that the partners' use of the family home and family chattels signals their intention to treat the property as "theirs", that family chattels and the family home can be presumed to have been contributed to by both partners due to their centrality to family life, that they are core family assets which could help meet the future needs of the partners or children at the end of a relationship, and that it was a historical tool from which women's property rights were recognised and developed: Law Commission (R143), above n 2, at [3.20]-[3.21].

to the family home.[75] The purpose of modifying the classification rules is to align them with the expectations of modern New Zealanders as to what property should be shared upon separation. In summary, the new classification provisions mean partners will share in property that was:[76]

1. acquired by either partner before the relationship, if it was acquired in contemplation of the relationship and for the partners' common use or common benefit (family acquisitions);
2. acquired by either partner during the relationship (fruits of the relationship and/or family acquisitions); or
3. used as a family chattel (family use).

The family use approach will no longer extend to the family home "whenever acquired" as the current approach no longer aligns with modern expectations.[77] Currently injustice may arise where parties are expected to share equally in the family home regardless of when it was acquired or regardless of the partner's intentions and expectations at the time it was acquired.[78] Sharing the family home equally may lead to injustice where the home was owned by one partner before the relationship or if it was a gift or inheritance, as it cannot be said that the home was acquired by either partners' efforts during the relationship, or to be used by the partners as the family home.[79]

The media has portrayed the Law Commission as proposing to abolish the 50:50 split of the family home.[80] This is misleading. In most cases, the family home will still be shared equally because the family home will still be relationship property if it was:

1. acquired before the relationship but in contemplation of the relationship and intended for the common use or common benefit of the partners (i.e. a family acquisition);[81] or
2. acquired during the relationship for the common use or common benefit of the partners "*regardless of the source of funds used*" (i.e. a fruit of the relationship and/or a family acquisition).[82] This means that if the family home was acquired after the relationship was contemplated, with separate property, relationship property, gifts or inheritances, it will be relationship property.[83] If a partner owned the house before the relationship

[75] At [3.67].
[76] At [3.66].
[77] At [3.69].
[78] At [3.69].
[79] At [3.69].
[80] See: Zane Small "Government to consider Law Commission's recommendation of abolishing 50-50 split of family home" (23 July 2019) Newshub <https://www.newshub.co.nz/home/politics/2019/07/government-to-consider-law-commission-s-recommendation-of-abolishing-50-50-split-of-family-home.html> where it states the "Law Commission has tabled in Parliament its recommendation to abolish the rule where the family home is split 50-50 after a break-up".
[81] Law Commission (R143), above n 2, at [3.80].
[82] At [3.82].
[83] Property (Relationships) Amendment Bill, cls 9(1) and 10(b).

was contemplated, but sold it during the relationship to purchase a new house to be used as the family home, the new house will be relationship property.[84]

The 50:50 rule is only 'abolished' if one partner owned the home (via a purchase, gift or inheritance) before the relationship was contemplated and that home was used as the family home during the relationship.[85] In such cases, only the increase in value during the relationship will be relationship property.[86] Increases in value of the family home due to market inflation will also be shared due to its status as a central family asset with financial, emotional and practical value,[87] in contrast to other types of property.[88]

C 'Amending' Section 44C

The following is the Law Commission's proposed amendment to section 44C:[89]

Property (Relationships) Amendment Bill (Trust property)

44C Remedies when property held on trust

(1) This section applies if the court is satisfied that –

(a) either or both of the partners to a relationship have, at any time when the relationship was reasonably contemplated, or at any subsequent time during or after the relationship, disposed of separate property or relationship property to a trust, and that disposition has the effect of defeating a claim or right of either or both of the partners under this Act; or

(b) trust property has been sustained by either or both of the following:

(i) the application of relationship property:

(ii) the actions of either or both of the partners during the relationship; or

(c) any enhancement of trust property (being an increase in the value of the property, or any income or gains derived from the property) is attributable directly or indirectly to either or both of the following:

(i) the application of relationship property:

(ii) the actions of either or both of the partners during the relationship.

(2) If the court considers it just in the circumstances, having regard to all relevant matters, including the matters in **subsection (3)**, the court may make 1 or more of the following orders:

(a) an order requiring one of the partners to the relationship (**A**) to pay to the other partner (**B**) a sum of money out of relationship property or separate property:

(b) an order requiring A to transfer to B any relationship property or separate property:

[84] Clause 10(b); see Example 3.
[85] Clause 9(1)(a); Law Commission (R143), above n 2, at [3.73]-[3.74].
[86] Clause 10(d); Law Commission (R143), above n 2, at [3.123].
[87] At [3.123].
[88] At [3.121].
[89] At 509 (Appendix 3).

(c) an order requiring the trustees of the trust to pay to A or B, or both A and B, a sum of money:

(d) an order requiring the trustees of the trust to transfer to A or B, or both A and B, any trust property:

(e) an order varying the terms of the trust:

(f) an order resettling some or all of the trust property on 1 or more new trusts.

(3) The matters referred to in **subsection (2)** are, –

(a) if this section applies because of **subsection (1)(a)**, –

(i) the extent to which a claim or right of either or both of the partners under this Act has been defeated by the disposition of the property to the trust; and

(ii) the date of the disposition of the property to the trust; and

(iii) any benefits the partners have received from the trust, including the value of any consideration given for the disposition of the property to the trust; and

(iv) whether the disposition of the property to the trust was made with the informed consent of both partners; and

(v) whether the trust is intended to meet the needs of any minor or dependent beneficiaries; or

(b) if this section applies because of **subsection (1)(b) or (c)**, –

(i) the extent to which the trust property has been sustained or enhanced by the application of relationship property or the actions of either or both of the partners; and

(ii) the date or dates on which the trust property was sustained or enhanced by the application of relationship property, or the actions of either or both of the partners; and

(iii) any benefits the partners have received from the trust, including the value of any consideration given for the sustaining or enhancing the trust property; and

(iv) whether the trust property was sustained or enhanced with the informed consent of both partners; and

(v) whether the trust is intended to meet the needs of any minor or dependent beneficiaries.

Clause 44C would apply where trust property was:

1. disposed into a trust after the relationship was reasonably contemplated and had the effect of defeating a claim or right under the RPA;
2. sustained by the application of relationship property or the actions of either partner during the relationship; or
3. enhanced by the application of relationship property or the actions of either partner during the relationship.

I will discuss the origins of clause 44C as found in the PRA before addressing the jurisdictional requirements to enable a claim, and the type of powers (and scope of these powers) available to the court.

1 Dispositions into trust having the effect of defeating PRA/RPA claims or rights

(a) Section 44C

(i) Jurisdiction

Section 44C enables a claimant to be compensated where there was a disposition of relationship property into a trust, by either or both partners, since the relationship began, which had the effect of defeating the PRA claim or rights of one of the partners, and section 44 does not apply.[90] Its purpose is compensatory; to redress the unequal benefits that may arise between the partners resulting from the disposition of relationship property into a trust.[91] This is evidenced through section 44C's application where *one* partner's rights have been defeated. If both partners' rights were defeated, no inequality would result requiring compensation. Furthermore, section 44C states that the court "may make 1 or more … orders for the *purpose of compensating* the spouse or partner whose claim or rights under this Act have been defeated by the disposition".[92]

Nation v Nation is described as a "paradigm" section 44C case.[93] Mr and Mrs Nation were married for 28 years and lived on a farm. Half the farm was relationship property (purchased by Mr Nation from his grandfather's estate during his marriage),[94] and the other was Mr Nation's separate property (distributed to Mr Nation as a beneficiary of a trust).[95] The farm was disposed into the Punawaitai Trust by Mr Nation during the marriage via a sale which resulted with a debt of $415,803 left owing to Mr Nation.[96] When the marriage ended, the farm was not owned by Mr or Mrs Nation, but by the trustees of the Punawaitai Trust. Mr and Mrs Nation were only discretionary beneficiaries,[97] so neither had a beneficial interest in the farm.[98] The farm was not "property" subject to the PRA.[99] Mrs Nation could not claim an equal share in the relationship property half-interest, worth $1,725,500 million at the hearing date. All Mrs Nation could claim was an equal share in half the $415,803 interest-free debt that corresponded to the relationship property half-interest in the farm. On these facts, there was a disposition into a trust, of relationship property (half-interest in the farm), by one of the partners (Mr

[90] Section 44C(1).
[91] Matrimonial Property Amendment Bill, above n 20, at xii; *Nation* (CA), above n 18, at [143] and [149]; Nicola S Peart "Equity in Family Law" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thompson Reuters, Wellington, 2009) 1161 at 1184; Nicola Peart "Section 44C of the Property (Relationships) Act 1976: Conflicting Interpretations" (2003) 4 BFLJ 199.
[92] Section 44C(2).
[93] *Nation* (CA), above n 18, at [149].
[94] At [11]; Property (Relationships) Act, s 8(e).
[95] At [14]; Property (Relationships) Act, ss 10(1)(a)(iv) and (2).
[96] At [19]-[20].
[97] *Nation v Nation* [2003] NZFLR 150 (FC) at [152].
[98] *Kain v Hutton*, above n 13, at [25].
[99] *Nation* (CA), above n 18, at [74].

Nation) during the marriage, and section 44 did not apply.[100] Furthermore, the disposition of the farm had the effect of defeating Mrs Nation's claim. Although Mrs Nation could claim an interest in the debt (which had remained constant in value), she was unable to claim an interest in the farm which had significantly increased in value. Mrs Nation's claim was defeated to the extent she was unable to claim the difference.

However, section 44C's jurisdiction does not capture a case where the trustees acquired trust property before the relationship,[101] if the trustees purchased trust property from someone other than one of the partners during the relationship,[102] or if the disposition was made by one of the partners before the relationship.[103] Nor does it capture dispositions that have the effect of defeating the claim or rights of both partners equally.[104] For example, if both partners were discretionary beneficiaries under the trust,[105] or if neither partner was a discretionary beneficiary because the trust was settled wholly for the children's benefit. The court has taken a holistic approach to determine whether, in reality, the rights of both partners have been equally defeated by the disposition.[106] Furthermore, section 44C does not apply where trust property was sustained or enhanced by either or both partners' actions.

(ii) Scope of powers

Under section 44C, a court may order the defendant partner to compensate the claimant if it considers that it is just to do so,[107] through the payment of money or transfer of property to the claimant, out of the defendant partner's separate property or share of relationship property.[108] If that is insufficient, the court may, as a last resort,[109] order the trustees to pay trust income to the claimant.[110] In making an order, the court must have regard to the value of the relationship property disposed of to the trust, the value of relationship property available for division, the date(s) on which the disposition occurred, whether the trust gave consideration for the property (and if so, how much), whether the partner or any child of the relationship is a beneficiary of the trust, and any other relevant matter.[111] Generally, compensation reflects what the claimant would have received but for the trust.[112]

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[100] At [146] and [149].
[101] *Genc v Genc* [2006] NZFLR 1119 (HC) at [17] and [75].
[102] *Ronayne v Coombes* [2016] NZCA 393, [2016] NZFLR 672 at [12].
[103] See later discussion on *Hawke's Bay Trustee Company Ltd (as trustees of Hodgkinson Trust) v Judd* [2016] NZCA 397 and *Murrell v Hamilton* [2014] NZCA 377.
[104] Section 44C only applies where the claim or rights of *one* of the partners has been defeated.
[105] *Ronayne v Coombes*, above n 102, at [16]-[17].
[106] *AJR v RWR* FC Hamilton FAM-2004-019-001345, 31 October 2008 where that argument was put forward by Dr Ritchie as both himself and Mrs Ritchie were discretionary beneficiaries (at [47]). However, Dr Ritchie was unsuccessful as the court determined that he retained powers enabling him to determine how the trust assets were to be managed, which beneficiaries would benefit and by how much, whereas Mrs Ritchie had no such rights (at [54]).
[107] Section 44C(4).
[108] Section 44C(2).
[109] Section 44C(3)(a).
[110] Section 44C(2).
[111] Section 44C(4).
[112] *Rabson v Gallagher* [2011] NZCA 459, [2011] NZFLR 1040 at [76].

The power to make orders against trust capital was deliberately not included in section 44C. Despite recommendations by the Ministerial Working Group on Matrimonial Property and Family Protection,[113] Parliament thought that such a power threatened to undermine trusts created for legitimate purposes.[114] However, the inability to make orders against trust capital significantly limits section 44C's ability to provide compensation where the defendant partner has little assets outside the trust from which a sum of money or property can be ordered,[115] and additionally, the trust produces little income.[116]

In *Ward*, Mr and Mrs Ward each owned half the shares in Laing Park Limited.[117] Laing Park Limited's major asset was the farm on which they lived and carried out their partnership. Mr and Mrs Ward transferred all their shares into a post-nuptial trust (Cahirdean Trust) for the benefit of themselves and their two children. The Court had jurisdiction under section 44C because since the relationship began, there was a disposition of relationship property into the Cahirdean Trust (the transfer of Mr and Mrs Ward's shares to the Cahirdean Trust, 83.3% of which was relationship property)[118] by both partners, which had the effect of defeating Mrs Ward's claim to share equally in the significant increase in value of the shares, and section 44 did not apply. However, Mrs Ward's section 44C application was dismissed for several reasons, including Mr Ward's lack of separate property or relationship property outside the trust from which compensation could be awarded, and the little income produced by the Trust.[119]

(b) Proposal: Clause 44C(1)(a)

(i) Jurisdiction

The section 44C 'amendments' are found in clause 44C(1)(a). Clause 44C(1)(a) applies to dispositions of separate property or relationship property into a trust (not just relationship property), that were made during, or in contemplation of, the qualifying relationship (not just after the relationship began), which had the effect of defeating a claim or right of either or both partners under the RPA (not just one partner). I will discuss each requirement in turn.

Disposition of separate property or relationship property

[113] Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 30.
[114] Matrimonial Property Amendment Bill, above n 20, at xii; *Ward* (SC), above n 27, at [18]; *Clayton v Clayton* [2015] NZCA 30, [2015] 2 NZLR 293 ["*Clayton* (CA)"] at [85].
[115] Section 44C(2)(a) and (b); Matrimonial Property Amendment Bill, above n 20, at xii.
[116] Section 44C(2)(c). Most family trusts consist little more than the family home which produces little income, making the court's powers under section 44C(2)(c) obsolete: see *P v P* [2003] NZFLR 925 (FC) at [84]. Only one case has been found where the court ordered income from a trust to be paid towards a partner: *DAM v PRM* FC Masterton FAM-2008-035-512, 30 March 2011 at [12], [128]-[134].
[117] *Ward* (FC), above n 23, at [10].
[118] 16.7% of the shares were Mr Ward's separate property as he owned those shares before his relationship with Mrs Ward began: at [32].
[119] At [37]-[48].

Extending section 44C to include dispositions of separate property prevents partners from using trusts to defeat relationship property rights in the following scenarios:

1. by disposing of separate property into a trust, then having the trust purchase relationship property;
2. by defeating the other partner's entitlements to the increase in value of the family home under the proposed amendments.

P v B illustrates how clause 44C would address the first scenario.[120] During the relationship, Mr P entered into an agreement to purchase the family home. He nominated the trustees of his family trust as the purchaser.[121] Mr P then loaned money (his separate property) to the trustees which was used to purchase the home.[122] Despite the disposition having the effect of defeating the wife's entitlement to half the family home, section 44C did not apply – although there was a disposition of property into a trust,[123] there was no disposition of *relationship* property.[124]

Under clause 10(b), Mr P's family home would be relationship property as it was acquired during the relationship, using his separate property, and intended for the common use or common benefit of the partners. The disposition of Mr P's money (separate property) into the trust would have had the effect of defeating his wife's claim to half the family home. Because clause 44C(1)(a) applies to dispositions of relationship property *or* separate property, it would provide relief to the wife, whereas section 44C did not. Clause 44C(1)(a) ensures a partner can obtain relief for the defeat of their entitlement to share in family acquisitions regardless of whether the property was acquired through the disposition of separate property or relationship property.

In the second scenario, if the family home was owned by one partner, or received as a gift or inheritance from a third party, before the relationship was contemplated, it will remain as *separate property*.[125] However, any increase in value of the family home during the relationship will be relationship property.[126] If clause 44C(1)(a) did not extend to dispositions of separate property, a partner could, during the relationship, dispose of the family home (separate property) into a trust, which would have the effect of defeating the other partner's right to claim an equal share in its increased value.

Disposition made in contemplation of the qualifying relationship

Clause 44C(1)(a) captures dispositions made when the qualifying relationship was "reasonably contemplated", not just dispositions made "since the [relationship] began".[127] This was intended to discourage the use of trusts to avoid the RPA and encourage use of the contracting

[120] *P v B [Relationship property]* [2009] NZFLR 773 (HC).
[121] At [4]-[6].
[122] At [7].
[123] At [13].
[124] At [21].
[125] Property (Relationships) Amendment Bill, cl 9(1).
[126] Clause 10(d).
[127] Section 44C(1)(a).

out provisions.[128] However, it is optimistic to expect partners would use the contracting out provisions without first seeking other means to avoid the RPA.[129] Additionally, the phrase "reasonably contemplated" was intended to minimise disputes as to when the relationship (particularly a de facto relationship) began.[130] However, the phrase "reasonably contemplated" is inherently ambiguous and would likely introduce more issues than it seeks to resolve. Whereas "de facto relationship" is defined in the PRA, "reasonably contemplated" is not.[131] Its meaning must be judicially determined. This would likely be influenced by existing case law interpreting the phrase "in contemplation of the relationship" in the context of sections 8(d) and 21 of the PRA.[132]

Section 8(d) defines property owned by either partner immediately before the relationship began as relationship property if the property was acquired *in contemplation of the relationship*. "In contemplation of the relationship" means having a serious expectation the relationship will result; the relationship is not merely feasible, possible or likely.[133] Section 21 permits partners *in contemplation of entering into a relationship* to contract out of the PRA.[134] There must be a specific contemplation of a relationship with a particular person – a present intention to enter into that relationship.[135] The relationship must actually have been intended at the time the agreement is entered into.[136]

Bearing those interpretations in mind, "dispositions made when the relationship was reasonably contemplated" likely includes dispositions made into a trust where the partner had a "present intention" and "serious expectation" to enter into a qualifying relationship with a particular person. "Reasonable" suggests that such a circumstance would be an objective inquiry inferred from the facts. However, this is speculative of what a court may determine "reasonably contemplated" to mean. What this illustrates is that, instead of entertaining disputes as to when the qualifying relationship began, disputes will arise as to when the qualifying relationship was "reasonably contemplated". Such disputes will likely be just as, or even more, complicated.

Disposition had the effect of defeating a claim or right of either or both partners

The Law Commission intends to prevent people from using trusts to deny their partner's entitlement to any claim or right under the RPA, not solely the right to share equally in

[128] Law Commission (R143), above n 2, at [11.79].
[129] Such as a company/trust structure like that in *Kidd v Van den Brink* HC Auckland CIV 2007-404-6948, 1 July 2008.
[130] The time when a relationship began can determine whether property is classified as separate property or relationship property.
[131] Section 2D.
[132] It has also been interpreted in the context of sections 8(d) and 21 of the Matrimonial Property Act 1976 which corresponded to and preceded sections 8(d) and 21 of the Property (Relationships) Act. Notably, however, the sections of the Matrimonial Property Act did not extend to de facto relationships.
[133] *Plimmer v Plimmer* (1979) 2 MPC 153 at 153-154. Also see *M v H* [2017] NZHC 2385, [2017] NZFLR 751 at [29] and [37].
[134] Section 21(1). The preceding Matrimonial Property Act stated that partners "in contemplation of their marriage to each other" may contract out of the Act: section 21(1).
[135] *M v H* (HC), above n 133, at [24], [37].
[136] *M v H* [2018] NZCA 525 at [51].

relationship property. RPA rights other than equal sharing that may be circumvented by trusts include those deriving from occupation orders,[137] deferring the sharing of relationship property, occupation rent,[138] compensation for economic disparity,[139] and compensation for post-separation contributions.[140] Clause 44C(1)(a) clarifies that it applies to dispositions into a trust which has the effect of defeating *a* claim or right.[141] This ensures clause 44C(1)(a) will be interpreted wider than section 44C in *Ronayne v Coombes*.[142] The husband sought occupation rent under section 18B for the two and a half years in which his wife continued to live in the family home post-separation.[143] Section 18B could not apply as the family home was held by a trust so it was not relationship property.[144] The husband was also unsuccessful under section 44C for several reasons,[145] including that there was no claim or right defeated as any decision to charge post-occupation rent rested with the trustees who owned the house.[146] Clause 44C(1)(a) would enable the husband to obtain relief for the disposition of relationship property into a trust that defeated his right to claim occupation rent under section 18B.

Furthermore, section 44C could not apply because if there was a disposition into the trust, it would have defeated both the husband's and wife's claims equally because both were discretionary beneficiaries, and the trust funds were ultimately distributed equally to the parties.[147] This would not limit clause 44C(1)(a)'s application because it applies whether the disposition defeats the rights of one, or both, partners. Although this widens its jurisdictional scope to provide relief in a greater number of cases, this change indicates that clause 44C(1)(a) is no longer concerned with compensating for the unequal benefits that may result from a disposition of property into trust.[148] Rather, clause 44C(1)(a) seems to be more focussed on providing relief where RPA entitlements have been frustrated by trusts, thus preventing the effectiveness of trusts in enabling partners to avoid the RPA.[149] Due to the differing conceptual aims of section 44C and clause 44C(1)(a), it may be misnomer to call the clause 44C(1)(a) an 'amendment' to section 44C.

(ii) Scope of powers

If a court has jurisdiction under clause 44C(1)(a), it may make one or more of the orders set out in clause 44C(2). The court's powers under section 44C – to order a payment of money or

[137] Section 27.
[138] Section 18B.
[139] Section 15A.
[140] Section 18B.
[141] Law Commission (R143), above n 2, at [11.82].
[142] At [11.84]; *Ronayne v Coombes*, above n 102.
[143] At [10].
[144] At [11].
[145] Faire J also found that there was no disposition of relationship property because the trustees had purchased and owned the property throughout. The fact that the source of funds used to purchase the house was relationship property did not mean that the house purchased by the trustees somehow became relationship property: at [12] and [14].
[146] At [15].
[147] At [16]-[17].
[148] Matrimonial Property Amendment Bill, above n 20, at xii; *Nation* (CA), above n 18, at [143] and [149]; Nicola S Peart, above n 91, at 1184.
[149] Law Commission (R143), above n 2, at [11.67].

transfer of capital out of separate property or relationship property – have been carried over into clause 44C(2).[150] However, an order can be made in favour of either or both partners, not just the claimant.[151] Orders against trustees regarding trust income may still be made, although it is no longer reserved as a 'last resort', and can be made in favour of either or both partners.[152] 'New' powers include the power to vary trust terms which is currently an ancillary power under section 33(3)(m),[153] the power to resettle trust property,[154] and the power to order trustees to transfer trust capital to either or both partners.[155] The court's powers under clause 44C(2) are significant as they enable direct orders to be made against trustees in favour of a partner who may not even be a beneficiary of the trust. This has the potential to greatly undermine trusts and the rights of third-party trust beneficiaries.

A court may make any order under clause 44C(2) that it considers "just in the circumstances", having regard to all relevant matters including those in subclause (3)(a). These are: the extent a claim or right of either or both partners under the RPA has been defeated by the disposition of property into trust, the date of disposition, whether the partners received any benefits, (including the value of any consideration), whether the disposition was made with the partners' informed consent, and whether the trust was intended to meet the needs of minor or dependent beneficiaries. Unlike section 44C, clause 44C(2) does not explicitly state what an order under clause 44C(2) purports to achieve.[156] Furthermore, subclause (3)(a) does not provide adequate protections for trusts. I will explore both issues in Chapter IV.

Here, I will illustrate, using *Nation*, how a clause 44C(2) order may be determined.[157] The Law Commission indicates that a court would begin by determining what the claimant would have received under the RPA, but for the trust.[158] Once that initial quantum is established, the court will then consider whether any relevant matters justify reducing that quantum to protect the interests of third parties who stand to benefit (or potentially benefit) from the trust.[159] Mrs Nation would have a claim under clause 44C(1)(a) as there was a disposition of relationship property (half the farm) into a trust, since the relationship was reasonably contemplated, which would have had the effect of defeating her right to share equally in half the farm. In *Nation*, quantum was not determined due to a lack of information.[160] For illustrative purposes, I will assume that under section 44C, Mr Nation was ordered to pay $327,299.25 to Mrs Nation out of his share of relationship property or separate property. That is the difference between Mrs Nation's entitlement in the half-interest in the farm that was defeated, and the amount she could

[150] Property (Relationships) Amendment Bill, cls 44C(2)(a) and (b).
[151] Clauses 44C(2)(a) and (b).
[152] Clause 44C(2)(c). Compare with Property (Relationships) Act, s 44C(3)(a).
[153] Clause 44C(2)(e).
[154] Clause 44C(2)(f).
[155] Clause 44C(2)(d).
[156] Section 44C(2).
[157] *Nation* (CA), above n 18.
[158] This is the first relevant matter specified in clause 44C(3)(a)(i) and is the current inquiry under section 44C: *Rabson v Gallagher*, above n 112, at [76].
[159] Law Commission (R143), above n 2, at [11.95] and [11.98].
[160] *Nation* (CA), above n 18, at [155]. The case was remitted to the Family Court but the parties presumably settled.

claim in the debt.[161] Under clause 44C, the starting point is that Mrs Nation is entitled to $327,299.25, the award she would have received under the RPA, but for the disposition of the farm into the trust.

If $327,299.25 was to be paid out of Mr Nation's relationship property or separate property, Mrs Nation would likely be awarded $327,299.25 as the order only affects Mr Nation's rights and interests, not the trust.[162] However, if relief was ordered through the payment of trust income, the transfer of trust capital, resettlement of the trust or variation of the trust terms, a lesser quantum may be awarded. This is because these orders would affect the interests of third parties who stand to benefit from the trust. The extent to which the initial quantum would be decreased depends on the relevant matters the court has regard to, and what it considers to be just. Relevant matters may include that the disposition occurred during the marriage, and that Mrs Nation was a discretionary beneficiary and may have enjoyed trust benefits, although no direct consideration was given to her for the transfer of the farm.[163] Furthermore, although Mrs Nation sought independent advice on the transaction, she did so when the relationship was volatile. Whether the independent advice constituted informed consent may be relevant.[164] Additionally, the partners' four children were discretionary beneficiaries, although none were minors or dependent.[165] It may also be relevant that the farm had been in Mr Nation's family since 1917. Any combination of these matters (and other relevant matters) may lead to Mrs Nation receiving an award less than $327,299.25.

2 Sustaining or enhancing trust property

(a) Sustaining or enhancing separate property

(i) Section 9A

Increases in value of separate property, or any income or gains derived from the owning partner's separate property, that is attributable to the application of relationship property is relationship property to which the non-owning partner is entitled to an equal share under section 9A(1). If the increase in value is directly or indirectly attributable to the actions of the non-owning partner, the increase in value is classified as relationship property under section 9A(2), but quantum is determined with respect to each partners' contributions to the increase in value. Section 9A(2) gives no guidance on how the partners' respective contributions are to be assessed, meaning awards are likely a "matter of general impression".[166]

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[161] That figure also assumes that all matters under section 44C(4) have been considered in reaching that quantum. That figure was obtained by using the value of the farm at the hearing date ($1,725,000) and the value of the interest-free debt ($415,803). Half of the farm was relationship property, meaning Mrs Nation would have been entitled to $431,250.00. Half of the debt was relationship property, of which Mrs Nation could claim $103,950.75. That leaves a difference of $327,299.25.
[162] Clause 44C(2)(a) or (b).
[163] Clause 44C(3)(a)(iii).
[164] Clause 44C(3)(a)(iv).
[165] Clause 44C(3)(a)(v).
[166] *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [46].

Claimants generally receive less than 50% of the increase in value under section 9A(2) because the court treats increases due to inflation as the owner's contribution. This is to recognise that they brought the separate property into the relationship in the first place.[167] This is despite acknowledging that inflation due to market forces is not generally attributable to either partners' contributions.[168] This means that if the property increased significantly in value, the claimant generally receives a smaller share despite both partners' contributions being roughly equal.[169] That was the case in *Clark*, where the wife was awarded 25% of the increase in value of a farm.[170] In *Rose v Rose*, Mrs Rose received a larger proportion (40%) as her case was "unusual" – the property was heavily mortgaged which significantly increased the relationship debt and the property (and its significant increase in value) might have been lost without Mrs Rose's financial contributions.[171]

Claimants being awarded less for contributions by their actions (non-monetary contributions) compared to the application of relationship property (monetary contributions) runs contrary to the principle that all contributions should be treated equally.[172] Furthermore, section 9A(2) deals with direct and indirect contributions by the non-owner, whereas section 9A(1) only applies to direct applications of relationship property. This means that where relationship property was indirectly applied (such as to meet household expenses) rather than directly (such as to reduce the mortgage debt), it would be an indirect contribution under section 9A(2), rather than a direct application of relationship property under section 9A(1). An award under section 9A(2) would likely be less than 50%, whereas a claimant gets an equal share under section 9A(1). This also runs contrary to the principle that all contributions should be treated equally.[173]

(ii) Section 17

If a claimant is unable to prove that the separate property increased in value, they may rely on section 17. Section 17 permits the court to increase the claimant's share of relationship property or order a sum of money as compensation where the owning partner's separate property has been sustained by the application of relationship property or the actions of either partner.[174] "Sustaining" in this context, means the claimant preserved the property, kept it in its existing condition, or maintained it.[175] The property will not be classified as relationship property, but section 17 entitles the claimant to compensation for their contributions because it is a contribution to the family joint venture.[176]

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[167] At [47] and [51]; *Clark*, above n 50, at [112].
[168] *Rose v Rose*, above n 166, at [47].
[169] *Clark*, above n 50, at [114].
[170] At [114].
[171] *Rose v Rose*, above n 166, at [50]-[51].
[172] Property (Relationships) Act, ss 1N(b) and 18(2).
[173] Sections 1N(b) and 18(2). See Margaret Briggs and Nicola Peart "Sharing the Increase in Value of Separate Property under the Property (Relationships) Act 1976: A Conceptual Conundrum" (2010) 24 NZULR 1 at 14-17.
[174] See *Clark*, above n 50, at [117].
[175] *French v French* [1988] 1 NZLR 62 (CA) at 69.
[176] Section 17 is not part of the provisions defining relationship property. The claimant should not be entitled to share in the full value of the separate property, but should have the value of their *contributions* to the property

(b) Proposal: Clause 10(e)

Clause 10(e) replaces section 9A. Clause 10(e) states that any increase in value of, or income or gains derived from, a partner's separate property that are directly or indirectly attributable to the application of relationship property, the application of the other partner's separate property, or the actions of either or both of partners, is relationship property. Unlike section 9A, increases in value of separate property will be treated as relationship property (to which both partners are entitled to an equal share) whether the increase is attributable to the application of relationship property or a partner's actions. Additionally, increases in value due to the application of the non-owning partner's separate property is included. Furthermore, under clause 10(e), increases in value due to market forces will not be shared, unless the increase in value would not be obtained but for the application of relationship property or either partners' actions.[177]

The Law Commission considered that section 17 provides the court with an appropriate amount of flexibility to determine compensation where separate property is sustained. Other than explicitly stating that section 17 also applies where the separate property was sustained by the application of the other partner's separate property, section 17 remains unchanged.[178] I will refer to section 17's equivalent in the RPA as "clause 17".

(c) Sustaining or enhancing trust property

(i) Section 44C

Section 44C may provide compensation where relationship property was used to sustain trust property that would have been the defendant partner's separate property but for the trust. In *Hodgkinson v Hodgkinson*, the orchard on which the partners lived was the husband's separate property.[179] The husband transferred half of the orchard into a family trust with the full sale price ($474,318) owing to him. That half of the orchard was trust property whilst the other remained the husband's separate property. The orchard had been sustained by the application of relationship property – a replacement tree programme funded by income generated during the relationship.[180] The wife was entitled to $8,500 under section 17 for the half orchard that was the husband's separate property.[181] Although the application of relationship property also sustained the half orchard held in trust, that half was no longer separate property. Section 17 could not apply. The disposition of half the orchard into the trust had the effect of defeating the wife's section 17 claim. The wife was awarded a further $8,500 as compensation under

recognised by the award. The classification of property reforms follow the status quo and does not classify separate property to which the claimant sustained as relationship property.

[177] Law Commission (R143), above n 2, at [3.121]. Essentially, increases in value due to inflation will not be shared unless there is a case such as *Rose v Rose* where the farm (and the increase in value) would likely have been lost but for Mrs Rose's financial contributions: *Rose v Rose*, above n 166, at [44] and [50].

[178] Law Commission (R143), above n 2, at [9.15]-[9.17].

[179] *Hodgkinson v Hodgkinson* [2003] NZFLR 780 (FC).

[180] At [86].

[181] At [88], [93]-[94].

section 44C – the additional amount she would have received had half the orchard not been trust property. If the orchard had increased in value, section 44C could be used in a similar way to compensate for the disposition into trust which defeated a section 9A claim.

(ii) Constructive trust

While the application of relationship property to sustain or enhance trust property is captured under section 44C, the PRA provides no remedy to a non-owning partner who sustained or enhanced trust property by their own actions. Claimants have relied on constructive trusts which the courts have been prepared to impose over property held in discretionary family trusts.[182] A court would make an award to the claimant,[183] where:[184]

1. the claimant contributed to trust property during the relationship; and
2. those contributions helped preserve or increase the value of the trust property; and
3. the court determined the other *Lankow v Rose* requirements were satisfied;[185] despite
4. the claimant not being a beneficiary of the trust.

Hawke's Bay Trustee Company Ltd (as trustees of Hodgkinson Trust v Judd illustrates how the constructive trust was used to recognise a claimant's contributions to sustain trust property.[186] Mr Hodgkinson and Ms Judd were married for six and a half years. They lived in a property on Lane Road, Havelock North ("Lane Road") owned by the trustees of the Richard Hodgkinson Trust. The trustees were Mr Hodgkinson and a corporate trustee that was effectively controlled by Mr Dine, an accountant.[187] Ms Judd was not a beneficiary (the beneficiaries were Mr Hodgkinson, his children and any grandchildren). It was accepted that Ms Judd's direct contribution of $50,000 from the sale of her home towards renovations of the Lane Road property,[188] and indirect contributions through 20-40 hours of work per week over six and a half years on the household and garden,[189] preserved Lane Road's value, as well as "manifestly exceed[ing] the benefits" she received from the relationship.[190] Ms Judd was

[182] See *Prime v Hardie* [2003] NZFLR 481 (HC) at [30], *Glass v Hughey* [2003] NZFLR 865 (HC), *Marshall v Bourneville* [2013] NZCA 271, [2013] 3 NZLR 766 and *Murrell v Hamilton* (CA), above n 103, at [22]. The reason for this was due to the reality of the New Zealand trust landscape where more property is held in discretionary family trusts and trustees are more often than not the beneficiaries of those trusts and in control of them: *Hawke's Bay Trustee v Judd* (CA) above n 103, at [44].

[183] Unless the claimant's contributions were of a "cosmetic nature": *Vervoort v Forrest* [2016] NZCA 375, [2016] 2 NZLR 807 at [75].

[184] See *Murrell v Hamilton* (CA), above n 103; *Vervoort v Forrest*, above n 183, and *Hawke's Bay Trustee v Judd* (CA), above n 103.

[185] That the claimant has a reasonable expectation of an interest in the property and the defendant should reasonably yield that interest to the claimant: *Lankow v Rose* [1995] 1 NZLR 277 (CA) at 294. Regarding the last requirement, the question is not whether the legal owner (trustee) expects to yield an interest, but whether it is reasonable for them to yield an interest: *Hawke's Bay Trustee v Judd* (CA), above n 103, at [49].

[186] *Hawke's Bay Trustee v Judd* (CA), above n 103.

[187] The corporate trustee was the Hawke's Bay Trustee Company Ltd operated by the accounting firm (Brown Webb Richardson Ltd). Stephen Dine was the accountant and director of that firm: at [8].

[188] At [20].

[189] The property was a one and a half hectare block with the house consisting of four bedrooms, three bathrooms and a separate double garage with a self-contained studio above it. The gardens were "substantial" and mostly ornamental although there was also a vegetable garden: at [27].

[190] Lane Road did not increase in value: in 2005, the value of the Lane Road property was $850,000, which had increased to $910,000 in 2010, but fell to $820,000 by 2012: at [11].

awarded equitable compensation for her contributions, assessed at $10,000 for every year of the marriage, amounting to $65,000.[191]

In *Murrell v Hamilton*, the claimant's contributions helped enhance the trust property's value.[192] Ms Murrell and Mr Hamilton began a de facto relationship in 2002 and separated in 2010. In 2004, they moved into the Devon Street house in Arrowtown ("Devon Street") which was being built by a building company operated by Mr Hamilton. The company was owned by the trustees of the Hamilton Family Trust, who were Mr Hamilton and Mr Mirkin (a solicitor). Ms Murrell contributed to Devon Street as a homemaker – furnishing the house and landscaping to transform the 'shell' into a home.[193] When the couple moved to Dunedin, Devon Street was rented out for two years before being sold for $573,418. A $250,000 net profit was made from Devon Street. Panckhurst J determined that Ms Murrell's contributions entitled her to a 15% interest in the property, and therefore, 15% of the profits ($37,500).[194]

Firstly, both Ms Judd and Ms Murrell had to rely on the constructive trust to obtain relief. Although Lane Road and Devon Street would have been the family home to which Ms Judd and Ms Murrell would be entitled to an equal share, section 44C could not apply as the properties were not disposed into the trust by either of the partners during the relationship. Lane Road was purchased by the trustees from a third party before the relationship,[195] and the land on which Devon Street was built was acquired by the trustees from Mr Hamilton's parent's trust before the relationship.[196] Section 182 of the FPA would have been unavailable to Ms Judd as the settlement likely lacked a sufficient connection to the marriage and section 182 could not help Ms Murrell as she was not married to, or in a civil relationship with, Mr Hamilton.

Secondly, the bending of traditional trust principles to accommodate the "practical realities" and achieve justice for Ms Judd and Ms Murrell has resulted in several inconsistencies in the Courts' reasoning.[197] The Courts determined that Ms Judd and Ms Murrell had a reasonable expectation of an interest in the property, despite both having full knowledge the house was held in a trust of which they were not a beneficiary.[198] In fact, Ms Judd knew Mr Hodgkinson had set up the trust specifically to prevent a future partner from taking his assets upon separation.[199] Moreover, the courts determined that it would be reasonable for the trustees to yield a beneficial interest in the trust property to Ms Judd and Ms Murrell, despite trustees having no beneficial interest to yield.[200] Furthermore, the relevant question is whether *the*

[191] At [51].
[192] *Murrell v Hamilton* (CA), above n 103.
[193] At [9]-[11].
[194] At [29].
[195] *Judd v Hawke's Bay Trustee Company Ltd* [2014] NZHC 3298 at [11].
[196] *Murrell v Hamilton* [2013] NZHC 3241, at [10].
[197] *Vervoort v Forrest*, above n 183, at [62].
[198] Compare *Gillies v Keogh* [1989] 2 NZLR 327 (CA) at 340.
[199] *Judd v Hawke's Bay Trustee Company Ltd* (HC), above n 195, at [28].
[200] Trustees only have a legal interest in trust assets, beneficial interest in the trust assets is held by the beneficiaries collectively: Hayton, Matthews and Mitchell, above n 32, at 3. Also see Charles Rickett "Instrumentalism in the

trustees, as the legal owners of trust property, could reasonably expect to yield a beneficial interest in the trust assets. Because co-trustees must act unanimously, the requirement must be for all co-trustees to have that expectation. Although tenable that Mr Hodgkinson and Mr Hamilton have a reasonable expectation to yield an interest to their partner, it is unclear how an independent co-trustee, such as Mr Dine or Mr Mirkin, could have held that expectation.[201] Unjust enrichment principles were relied on to justify why it would be reasonable for the beneficiaries to yield their interest to Ms Judd or Ms Murrell. However, considering Ms Judd and Ms Murrell knew the property was trust property, it seems odd that any enrichment of the beneficiaries could be considered "unjust"; their contributions seem to be better regarded as gifts, which the beneficiaries are entitled to enjoy.[202]

Finally, conservative awards were made. But for the trust, Ms Judd and Ms Murrell would have been entitled to a half share in the property, as it would have been the family home.[203] Ms Judd was awarded an equitable compensation of $65,000, and Ms Murrell, a 15% beneficial interest in the proceeds of Devon Street.[204] The conservative quanta are reflective of the courts' concern with compensating for the detriment suffered by the claimant in making the contributions,[205] and the constraint to only consider contributions to the trust *property*, as opposed to contributions to the relationship.[206]

(d) Proposals: Clauses 44C(1)(b) and (c)

(i) Jurisdiction

Clauses 44C(1)(b) and (c) enable relief where trust property has been sustained or enhanced by the application of relationship property (previously covered under section 44C) or the actions of either partner during the relationship (previously recognised by constructive trusts). Clauses 44C(1)(b) and (c) apply more broadly than clause 44C(1)(a) because there is no need to prove a disposition of property. Importantly, without the ability to claim for enhancing the value of trust property under clause 44C(1)(c), a claimant would be unable to claim the increase in value of a family home which has been *held in trust before the relationship was reasonably*

Law of Trusts – The Disturbing Case of the Constructive Trust upon an Express Trust" (2016) 47 VUWLR 463 at 474.

[201] The courts have justified their reasoning by stating that a constructive trust claim can only succeed against property held in the trust if the co-trustee(s) had delegated decision-making responsibilities to the defendant partner trustee: *Murrell v Hamilton* (CA), above n 103, at [22] and [28]. The Court held that it was reasonable for Mr Hodgkinson to expect to yield the interest to Ms Judd, as Mr Dine had effectively delegated his trustee duties to Mr Hodgkinson: *Hawke's Bay Trustee v Judd* (CA), above n 103, at [45]-[46] and [70]. Similarly, Mr Mirkin had effectively left the trust decision-making to Mr Hamilton: *Murrell v Hamilton* (CA), above n 103, at [27].

[202] Charles Rickett, above n 200, at 471.

[203] Proceeds of the family home are considered relationship property: Property (Relationships) Act, s 8(1)(l).

[204] A constructive trust interest may be recognised through monetary compensation or a beneficial interest in the property: *Lankow v Rose*, above n 185, at 282 per Hardie Boys J and at 294 per Tipping J; *Gillies v Keogh*, above n 198, at 332 per Cooke P.

[205] *Lankow v Rose*, above n 185, at 282 per Hardie Boys J.

[206] *Murrell v Hamilton* (CA), above n 103, at [34] and *Judd v Hawke's Bay Trustee* (HC), above n 195, at [37] citing *Lankow v Rose*, above n 185, at 294 per Tipping J.

contemplated.[207] Clause 44C(1)(a) would not apply as there would be no disposition of property into the trust since the relationship was reasonably contemplated.

Furthermore, clauses 44C(1)(b) and (c) mean that claimants such as Ms Judd and Ms Murrell can bring their claim under the RPA rather than relying on the constructive trust.[208] Although the Law Commission states that this amendment is "not significantly expanding the remedies available to a partner upon separation, rather simplifying and codifying the available remedies within the [RPA]", I disagree.[209] Clauses 44C(1)(b) and (c) are conceptually different to the constructive trust claim. The conceptual basis of a constructive trust is to compensate the claimant for the detriment suffered by contributing to the property.[210] The conceptual basis of clauses 44C(1)(b) and (c) derive from sections 9A and 17, which recognise that a partner's contributions to sustain or enhance another partner's separate property are contributions to the family joint venture. Clauses 44C(1)(b) and (c) were intended to extend the rationale behind sections 9A and 17 to trust property so that a partner's contributions would be recognised, whether the property sustained or enhanced was separate property or trust property.[211] However, extending this rationale to trust property enables a partner to claim against trust property settled by third parties[212] before the relationship was ever contemplated.[213] Recognising a partner's contributions to another partner's separate property is justified under the RPA as they are contributions to the family joint venture. However, recognising contributions to trust property settled by third parties before the relationship was contemplated is not justified as they are contributions external to that joint venture. The RPA should have no application in such instances. The conceptual basis of clause 44C(1)(b) and (c) is flawed.

(ii) Scope of powers

If trust property has been sustained or enhanced by the application of relationship property or either partners' actions during the relationship, the court may make an order if it considers it just in the circumstances, having regard to all relevant matters, including those set out in subclause (3)(b). The orders that can be made are the same as those under clause 44C(1)(a). However, the matters in subclause (3)(b) are slightly different to those considered under a clause 44C(1)(a) claim. When exercising jurisdiction under clause 44C(1)(b) or (c), the court must consider, if relevant: the extent to which the trust property was sustained or enhanced by the application of relationship property or the partners' actions, the date(s) on which the trust property was sustained or enhanced, benefits the partners received from the trust (including any consideration for the sustenance or enhancement), whether the sustenance or enhancement was done with both partners' informed consent, and whether the trust is intended to meet the

[207] The increase in value of the family home will always be relationship property: Property (Relationships) Amendment Bill, cl 10(d).
[208] Law Commission (R143), above n 2, at [11.107].
[209] Law Commission (IP44), above n 7, at [6.80].
[210] *Lankow v Rose*, above n 185, at 282 per Hardie Boys J.
[211] Law Commission (R143), above n 2, at [11.86].
[212] By third parties I mean anyone other than one of the partners to the relationship.
[213] Law Commission (R143), above n 2, at [11.87].

needs of minor or dependent beneficiaries.[214] It seems the general exercise would first be to determine what the claimant would have been entitled to under the RPA, but for the trust.[215] Then, the court will determine whether it would be just to decrease that initial quantum by considering all relevant matters.

Clause 44C(1)(b) would apply to Ms Judd as Lane Road was trust property that was sustained by her actions during the relationship. But for the trust, Lane Road would be Mr Hodgkinson's separate property as it was acquired before the relationship was reasonably contemplated.[216] Ms Judd helped sustain Lane Road by her actions and would be entitled to compensation under clause 17. This would be Ms Judd's entitlement under the RPA, but for the trust. In arriving at that quantum, the court would have regard to the extent of her contributions ($50,000 spent on renovations and working in the household and garden),[217] as well as benefits she would have received (a rent-free home).[218] However, other factors may reduce Ms Judd's entitlement. For example, Ms Judd's knowledge that Lane Road was held in a trust to which she was not a beneficiary may indicate the property was sustained with both partners' informed consent.[219] Furthermore, if any of the children or grandchildren beneficiaries were minors or dependent, the initial quantum might be reduced.[220]

Clause 44C(1)(c) would apply to Ms Murrell because Devon Street was trust property that was enhanced by her actions during the relationship. But for the trust, Devon Street would be Mr Hamilton's separate property as it was acquired before the relationship was reasonably contemplated.[221] Ms Murrell would have a clause 10(e) claim, which would entitle her to half the increase in value. Under clause 44C(1)(c), the starting point would be Ms Murrell's entitlements under the RPA, but for the trust, which is half the increase in value under clause 10(e). However, there may be relevant matters that justify a reduction in that quantum. In this inquiry, for example, the award may be reduced because Ms Murrell only contributed to 15% of the increase in value,[222] and benefitted from a rent-free home.[223] Because clause 44C(1)(c) begins with a starting point of half the increase in value, Ms Murrell is likely to receive more under clause 44C(1)(c) than a constructive claim (where she only received a 15% interest in the property).

But for the trust, Lane Road and Devon Street would have been subject to the RPA.[224] It makes sense for clause 44C to provide relief for the defeat of Ms Judd's and Ms Murrell's RPA entitlements by the trust. However, the Law Commission intends that clauses 44C(1)(b) and (c) would also provide relief where the trust property was settled by a third party or before the

[214] Clause 44C(3)(b).
[215] Law Commission (R143), above n 2, at [11.67].
[216] It meets Property (Relationships) Amendment Bill, cl 9(1)(a) and does not fulfil cl 10(a).
[217] Clause 44C(3)(b)(i).
[218] Clause 44C(3)(b)(iii).
[219] Clause 44C(3)(b)(iv).
[220] Clause 44C(3)(b)(v).
[221] It meets clause 9(1)(a) and does not fulfil clause 10(a).
[222] Clause 44C(3)(b)(i).
[223] Clause 44C(3)(b)(iii).
[224] Clauses 17 and 10(e)

relationship was reasonably contemplated, if the trust property was preserved or enhanced by relationship property or either partners' actions during the relationship.[225] That means clauses 44C(1)(b) and (c) may enable claims against trust property that would not have been subject to the RPA, had that property not been in trust. This makes no sense, particularly if the court were to determine the quantum of relief. The starting point would be the claimant's entitlement under the RPA, but for the trust. That entitlement would be nothing. This indicates that the conceptual basis of clause 44C is flawed.

D Repealing Section 182 of the Family Proceedings Act 1980

1 Section 182

Section 182 allows a court to vary nuptial settlements on divorce to remedy the consequences of the failure of a continued marriage.[226] It confers a wide discretionary power on the courts, which permits orders including, but not limited to, the transfer of trust capital, variation of trust terms, resettlement the trust for one or both partners' benefit, and orders regarding administration or management of the trust.[227] Section 182 provides an alternative remedy where a just division of property cannot be achieved under sections 44 or 44C of the PRA.[228]

Before the court determines whether, and if so, how, to exercise discretion, it must determine whether or not the trust is a nuptial settlement.[229] A nuptial settlement is a settlement that makes "some form of continuing provision for both or either of the parties to a marriage in their capacity as spouses, with or without provision for their children".[230] The Supreme Court clarified that "in their capacity as spouses" meant only that there must be a connection or proximity between the settlement and the marriage.[231] A discretionary family trust set up during a marriage where either or both spouses are beneficiaries will likely have that connection.[232] When exercising discretion, the court's purpose is to remedy the consequences of the failure of the premise of a continuing marriage.[233] The court will compare the claimant's position under the settlement had the marriage continued with the claimant's current position after dissolution of the marriage.[234]

2 Proposal: Repeal section 182

The Law Commission proposes to repeal section 182 as it believes clause 44C will adequately achieve a just division of relationship property in situations where property is held in trusts,

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[225] Law Commission (R143), above n 2, at [11.87].
[226] *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189 at [53]; *Ward* (SC), above n 27, at [15].
[227] Family Proceedings Act, s 182(1); Law Commission (R130), above n 12, at [19.35].
[228] See *Ward* (SC), above n 27, and *Clayton (Claymark)*, above n 226.
[229] *Clayton (Claymark)*, above n 226, at [27].
[230] At [33] citing *Ward v Ward* [2009] NZCA 139, [2009] 3 NZLR 336 at [27].
[231] At [34].
[232] At [34].
[233] At [53].
[234] At [53].

leaving section 182 redundant. This is because orders such as resettlement of the trust, which have been made under section 182, can be done under clause 44C.[235] The Law Commission views section 182 as a "relic from the past",[236] evidenced by its lack of application to de facto couples.[237] Furthermore, it emphasises that the RPA should operate as a code to ensure property disputes are resolved by the same purpose and principles.[238] Currently, remedies are sought through the PRA and FPA, meaning that different and sometimes contradictory legislative purposes are being given effect to.[239]

However, there are a few concerns with repealing section 182 because it has a much broader application than clause 44C. Section 182 applies to all settlements (not only trusts), and there is no need to prove a disposition of property into a trust, or that trust property was sustained or enhanced during the relationship by the application of relationship property or either or both partner's actions. There is also the possibility of a child of the marriage bringing a section 182 claim.[240] Furthermore, although the court has wide powers under clause 44C, it is still limited to those powers. Under section 182, the court has a much wider discretion.[241]

[235] See *Clayton (Claymark)*, above n 226; and *Ward* (SC), above n 27.
[236] Law Commission (R143), above n 2, at [11.108]. It can be traced back to section 37 of the Divorce and Matrimonial Causes Act 1867, which was based on English legislation enacted in 1859: *Clayton (Claymark)*, above n 226, at [5].
[237] Law Commission (R143), above n 2, at [11.108]; Law Commission (IP44), above n 7, [6.91].
[238] Law Commission (R143), above n 2, at [11.108]; Property (Relationships) Act, s 4.
[239] Whilst the purpose of the Property (Relationships) Act is to achieve a just division of property with a presumption of equal sharing (ss 1M(c) and 11), section 182's purpose is to achieve fairness between the spouses where a settlement was made on the premise of a continuing marriage and the spouses subsequently divorce: *Clayton (Claymark)*, above n 226, at [60]; *Ward* (SC), above n 27, at [15].
[240] Suggested as obiter in *Thakurdas v Wadsworth* [2018] NZHC 1106, [2018] NZFLR 451 at [69]. That case concerned whether an executor of a deceased spouse's estate could bring a section 182 claim. The Court held that it could: at [82].
[241] Family Proceedings Act, s 182(1).

IV Striking the Right Balance?

A balance must be struck to ensure that the trust structure is only interfered with where necessary (and if so, to the least extent possible) to achieve a just division of property upon separation. The law currently does not strike the right balance. It is heavily skewed towards protecting trusts, which prevents the public policy of the PRA from being achieved. The courts and academics have indicated that better legislative provisions are the best way forward, as opposed to using common law doctrines such as shams, illusory trusts and constructive trusts, or having to expand the definition of property.[242] These judicial methods have been criticised as being complex and inconsistent with the PRA and trust law.[243] Additionally, because they form part of the general law, they can be misused in contexts other than to achieve a just division of relationship property upon separation.[244] This Chapter explores how legislative provisions have been used to protect public policy and why trusts should be protected. I will then explain why the Law Commission proposals to 'amend' section 44C of the PRA and repeal section 182 of the FPA still do not strike the right balance.

A Protecting public policy

The RPA is meant to be a piece of social legislation reflecting the values and expectations of New Zealand society as to how property should be divided between partners when their relationship ends. Its public policy, premised upon the theory of the relationship being a family joint venture, is to achieve a just division of property upon separation. Trusts prevent that public policy from being achieved. This creates injustice as it prevents partners from enjoying their entitlement to the fruits of the failed joint venture. Where trusts have been contrary to the public policy of legislation, the legislature has implemented measures to prevent or restrict their use. The Property Law Act 2007, Insolvency Act 2006 and section 44 of the PRA permit the court to set aside dispositions of property into trusts.[245] Government departments are empowered to disregard trusts in certain circumstances under the Residential Care and Disability Support Services Act 2018,[246] Child Support Act 1991 and Income Tax Act 2007.[247] These legislative provisions enable dispositions into a trust, or the trust structure itself, to be disregarded where it is necessary to prevent avoidance of the Act's provisions. Whilst the

[242] *Clayton* (CA), above n 114, at [83]; Palmer, above n 34, at 192; Peart, Henaghan and Kelly, above n 16, at 881-882; Bs Atkin and M Henaghan (eds) *Family Law Policy in New Zealand* (Auckland, Oxford University Press, 2013) at 240.
[243] Law Commission (R143), above n 2, at [11.25]-[11.28].
[244] Peart, Henaghan and Kelly, above n 16, at 880. However, it is important to note that these legislative proposals do not render the currently criticised common law doctrines redundant in all cases. For example, the sham trust or illusory trust argument may be advantageous because once proven, all the partner's/settlor's trust assets form part of the pool of property available for division under the Relationships Property Act. In contrast, under clause 44C, the court has a wide discretion; there is no guarantee the court will make an order, and if so, it may be less than the partner's entitlements under the Relationships Property Act.
[245] Property Law Act 2007, ss 344 to 350; Insolvency Act 2006, ss 204 to 213.
[246] Sections 39 and 40 which replaced section 147A of the Social Security Act 1964.
[247] Henry Brandts-Giesen and Sarah Kelly "Rethinking traditional asset planning in New Zealand" [2018] NZLJ 263 at 265.

RPA's public policy can (and should) be protected in this way, clause 44C inappropriately goes much further than merely protecting the RPA's public policy.[248]

B Protecting trusts

The orthodox rules of trust law embody the principles of proprietary autonomy and commercial certainty which are essential pillars of a functioning society. Inherent in being an owner of property is the freedom to deal with that property as one wishes. If an owner settles that property on a trust (assuming it is valid), the owner and third parties, (particularly the trust beneficiaries) are entitled to rely on that trust whist conducting their proprietary, commercial and personal affairs. In this way, the trust is not dissimilar to the company structure, which serves a similar function in enabling the organisation of affairs and promoting commercial certainty.[249] Whereas clause 44C gives the court extensive powers to disregard the trust veil, these powers are not extended to companies.[250]

Trusts exist in many forms and for different purposes. Spousal trusts, such as the post-nuptial settlement in *Ward*,[251] are settled by the partners for the benefit of each of them and their children. They usually consist of assets acquired or produced by the partners during the relationship. In contrast, 'dynastic trusts' are settled by the parent (or grandparent or great-grandparent) of one partner for the benefit of their family. Its purpose is generally to hold significant family assets or businesses within a multigenerational ownership structure for the benefit of future family generations,[252] such as the trust in *Kidd v Van den Brink*.[253] Among other reasons, trusts may also be settled by a partner to ensure the benefit of his or her assets for children from a former relationship; to provide benefits for a vulnerable person (such as a minor or disabled person); to provide benefits for a charitable purpose; or to conduct business affairs.[254] Interference with trusts directly affects the rights of third parties, particularly the trust beneficiaries. Although discretionary beneficiaries do not have a proprietary interest in the trust assets,[255] it is still important to consider their hope or expectation of a potential proprietary interest and their right to hold trustees to account.

As illustrated, trusts are settled for a myriad of different purposes and benefit a diverse range of beneficiaries. Not *all* trusts should be trumped by the RPA. Any remedy aimed at protecting the RPA's public policy should only apply to dispositions into trusts that have had the effect

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[248] See page 38.
[249] Note however, that companies are legal entities and trusts are not: Hayton, Matthews and Mitchell, above n 32, at 4.
[250] Dispositions into companies are dealt with in the Property (Relationships) Act by sections 44D and 44F. See *Kidd v Van den Brink* (HC), above n 129, at [52] where the court was reluctant to interfere with the corporate veil. No reforms regarding dispositions into companies were proposed: Law Commission (R143), above n 2, at [11.106].
[251] *Ward* (SC), above n 27.
[252] See Palmer, above n 34, at 180.
[253] *Kidd v Van den Brink* (HC), above n 129. The facts are outlined later at page 35.
[254] Law Commission (IP41), above n 1, at [20.23].
[255] *Kain v Hutton*, above n 13, at [25].

of defeating RPA entitlements, or trust assets that would have been subject to the RPA but for the trust (generally spousal trusts rather than dynastic trusts).[256]

C Law Commission proposals do not strike the right balance

The Law Commission proposes to 'amend' (or more accurately, 'reinvent') section 44C to shift the status quo towards better protection of relationship property rights. Clause 44C achieves this to some extent, through extending section 44C's jurisdiction to include dispositions of separate property, dispositions that have the effect of defeating a claim or right under the RPA, and where either or both partners' RPA rights have been defeated. Clause 44C also provides relief where trust property has been sustained or enhanced by a partner's actions, which was previously not captured under section 44C. Furthermore, the court's powers under section 44C have been carried over into clause 44C with broader application – they can be made in favour of either or both partners, and the power to order trustees to pay trust income is no longer reserved as a last resort. Additionally, clause 44C permits orders against the trust capital, resettlement of the trust, and variation of the trust terms to enable a just division to be effected.

Although I agree that reform is needed to shift the current imbalance towards better protection of relationship property rights, I argue that these proposals still do not strike the right balance. Firstly, there remains issues with clause 44C's jurisdiction. In some cases, clause 44C does not provide relief where trusts have the effect of defeating relationship property rights. In other cases, clause 44C goes too far and provides relief even where trusts have not had the effect of defeating relationship property rights. Secondly, clause 44C has inadequate constraints on the courts' broad powers to afford sufficient protection to trusts.

1 Clause 44C's jurisdictional issues

Firstly, I would like to explore what the Law Commission is trying to achieve with clause 44C. Unlike section 44C, clause 44C does not provide express direction as to the purpose of a clause 44C order. In its report, the Law Commission states clause 44C's objective is: 1) to provide relief when a partner's entitlement under the RPA has been frustrated by the operation of a trust structure; or 2) to provide relief when trust property was preserved or enhanced by the relationship.[257] It is appropriate for clause 44C to aim to achieve the first objective as that is consistent with upholding the RPA's public policy. However, in relation to the second, I argue that clause 44C should not provide relief where trust property was preserved or enhanced *unless* that would uphold the RPA's public policy. In other words, that clause 44C's jurisdiction should not extend to situations where, if the trust property had not been in a trust, the claimant would have no entitlement under the RPA with respect to that property. Due to the importance of trusts, the RPA should only permit judicial interference with trusts where that is necessary to protect the RPA's public policy, and no more. Bearing that in mind, I will now discuss why clause 44C's jurisdiction prevents it from upholding the RPA's public policy.

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[256] See the hypothetical case of *Carissa v Dan* on page 38.
[257] Law Commission (R143), above n 2, at [11.67].

(a) Failure to provide relief where trusts have the effect of defeating RPA rights

In *Kidd v Van den Brink*, Mr Van den Brink and Ms Kidd enjoyed benefits, including the family home, from the Hilversum Family Trust No 2 ("the Trust") settled by Mr Van den Brink's father in 1998.[258] Mr Van den Brink was a final beneficiary and discretionary beneficiary and Ms Kidd, as Mr Van den Brink's wife, was a discretionary beneficiary. The trustees owned shares in various family companies together with other family companies.[259] The family home was owned by a company (ABL), the shares of which were owned by the Trust.

Ms Kidd made section 44 and 44C claims that the rent payments of $650 per month deducted from the husband's salary (relationship property) for occupation of the family home, and her contributions to improve the family home, amounted to "dispositions" which defeated, or had the effect of defeating, her rights. Neither satisfied section 44's intention threshold. Section 44C also could not apply as there were no "dispositions" into a trust. Because rent payments were made to ABL, they were not dispositions into the Trust as payments were made *to the company*.[260] Ms Kidd's contributions to improve the family home were also not dispositions into the Trust as they were made to an asset *owned by the company*, not the trustees.[261] Although ABL was wholly owned by the trustees, the corporate veil meant that payments to the company and contributions to an asset owned by the company could not be treated as dispositions into the trust.[262] Although dispositions of relationship property into companies are dealt with by sections 44D and 44F, these sections were inapplicable to Ms Kidd.[263]

Clause 44C poses the same restrictions to Ms Kidd that section 44C did. The rent payments (relationship property) would not be a disposition of property into a trust, as they were made to a company. Under the proposals, the home itself would not be relationship property as it was owned by the company throughout the relationship, not acquired by either partner for the partners' common use or common benefit.[264] Only the family home's increase in value would be relationship property.[265] Ms Kidd would be unable to claim her share in the increase in value as her contributions to enhance the family home would not be contributions to "trust property"; they would be contributions to a company asset.[266]

(i) A modernised section 182 in the RPA

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[258] *Kidd v Van den Brink* (HC), above n 129.
[259] 100% of the shares in Auckland Brinkville Ltd (ABL), 50% of the shares in P H Van den Brink Ltd (the 'family company') and 50% of the shares in BAT Promotions Ltd. The remaining 50% share in the two latter companies were owned by VDB Capital Ltd (another family company): at [4]-[5].
[260] At [45].
[261] At [60]. The trustees owned the company shares, not the house.
[262] At [52].
[263] Section 44F is a compensatory provision much like section 44C, although it only applies to a "qualifying company" (defined in section 44D). ABL was not a "qualifying company" as section 44D requires one of the partners to hold equity securities in that company which carry in the aggregate at least half the voting rights at a general meeting of the company. Neither Mr Kidd nor Mr Van den Brink owned shares in ABL.
[264] Clauses 10(a) and (b).
[265] Property (Relationships) Amendment Bill, cl 10(d).
[266] Clause 44C(1)(c).

Although section 44C could not apply, the Court of Appeal found it tenable that dispositions made to the Trust during the marriage were post-nuptial settlements to which section 182 could apply,[267] despite the fact that the Trust was settled before the marriage.[268] Whilst Ms Kidd could claim a constructive trust claim for her contributions which enhanced the family home, an award would likely be conservative, and would not take into account her contributions to the relationship. This illustrates that where clause 44C's jurisdiction is limited, the generality of section 182 ensures that claimants such as Ms Kidd continue to have a statutory remedy.

Section 182 has been labelled as a "relic from the past",[269] and criticised for operating outside the PRA. However, rather than repealing it or keeping it in its current form, section 182 should be 'modernised' and included in the RPA. By 'modernised', I mean that section 182 should be extended to de facto couples and apply upon separation rather than dissolution of a marriage.[270] This would address its discriminatory application and align it with the RPA's principles. Having the amended section 182 in the RPA means it would be applied consistently with RPA principles (including the presumption of equal sharing) and preserve the RPA's function as a partial code. A modernised section 182 in the RPA would address the current shortcomings of section 182, whilst preserving its advantages to achieve a just division of property. These advantages include section 182's jurisdictional elements being broader than those of clause 44C, meaning a claimant does not have to prove a disposition of property into a trust, or that trust property was sustained or enhanced. Furthermore, the flexibility of the court's wide discretion means that section 182 can cater to the varied circumstances that arise. An amended section 182 in the RPA could read as follows:

> "In determining any order or declaration it considers just under section 25,[271] the court may inquire into the existence of any settlement with the necessary connection or proximity to the marriage, civil union or de facto relationship of the partners…"

Such a provision could have the same powers and relevant matters outlined in clause 44C.[272] An amended section 182 could also preserve the possibility for someone other than the parties to the relationship (such as a child of the relationship) to bring a claim.[273]

(ii) The hypothetical case of *Elaine v Felicity*

[267] However, this issue was not taken further as the parties settled: Peart, Henaghan and Kelly, above n 16, at 872.
[268] *Kidd v Van den Brink* [2010] NZCA 169 at [11] and [16]. The Court of Appeal found the initial settlement of the Trust could not be an ante-nuptial settlement.
[269] Law Commission (R143), above n 2, at [11.108]. It can be traced back to section 37 of the Divorce and Matrimonial Causes Act, which was based on English legislation enacted in 1859: *Clayton (Claymark)*, above n 226, at [5].
[270] This was proposed by the Law Commission in their final report on their review on trust law: Law Commission (R130), above n 14, at [19.38]. It would mean spouses and civil union partners will not need to wait two years for the dissolution of their relationship to invoke section 182: Family Proceedings Act, s 39.
[271] Section 25 of the Property (Relationships) Act.
[272] Later, I argue the relevant matters in clause 44C should be revised. A modernised section 182 should reflect the revised list of relevant matters.
[273] Suggested as obiter in *Thakurdas v Wadsworth*, above n 240, at [69]. That case concerned whether an executor of a deceased spouse's estate could bring a section 182 claim. The Court held that it could: at [82].

The hypothetical case of *Elaine v Felicity* illustrates another, perhaps more 'everyday' situation compared to *Kidd v Van den Brink* which would unlikely be captured by clause 44C. It demonstrates the usefulness of section 182, particularly an amended section 182. In its final report, the Law Commission provided Example 3 to help explain the effect of clause 10(b):[274]

> "Before Elaine meets Felicity, Elaine owns her own apartment. After she enters into a relationship with Felicity, Elaine sells her apartment and uses the sale proceeds of $600,000 to pay the deposit on a property that she and Felicity buy together. The property that Elaine and Felicity buy together is relationship property. The $600,000 is no longer Elaine's separate property."

That fact scenario can be modified to introduce the use of a trust:

> Before Elaine meets Felicity, Elaine owns her own apartment which she put into a trust. After she enters into a relationship with Felicity, the trust sells the apartment and the sale proceeds of $600,000 are used to pay the deposit on a property that Elaine and Felicity use as their family home. But for the trust, the family home would be relationship property.[275]

The modified scenario would not meet clause 44C(1)(a) as the disposition occurred before the relationship was reasonably contemplated. It may be successful under clause 44C(1)(b) or (c) but only if the house was sustained or enhanced by the application of relationship property or the actions of Elaine and/or Felicity (neither of which may be the case). If it was neither sustained nor enhanced by the application of relationship property or the partners' actions, Felicity will be unsuccessful under clause 44C, despite the trust having the effect of defeating her entitlement to share in the family home that would have been relationship property.

If Elaine and Felicity were married or in a civil union relationship, section 182 could apply. The house acquired by the trust during the relationship would likely have a sufficient connection or proximity to the relationship to be a nuptial settlement.[276] If Elaine and Felicity broke up, the court could vary that settlement as the court thinks fit. *Elaine v Felicity* demonstrates how section 182 would be relevant not just in a complex company-trust structure such as in *Kidd v Van den Brink*, but also in simpler transactions. It also demonstrates the injustice that arises if section 182 was retained in its current form to exclude its application to de facto couples. If Elaine and Felicity were a de facto couple, section 182 would have no application, despite all other facts remaining the same.

(b) Providing relief even where trusts have no effect of defeating RPA rights

[274] Law Commission (R143), above n 2, at Appendix 2.
[275] Property (Relationships) Amendment Bill, cl 10(b).
[276] *Kidd v Van den Brink* (CA), above n 268, at [11] and [16]; *Clayton (Claymark)*, above n 226, at [34].

Clauses 44C(1)(b) and (c) were intended to provide relief not only where trust property was sustained or enhanced by the application of relationship property, but also where trust property had been sustained or enhanced by the actions of either or both partners. However, they are conceptually flawed as they enable relief to a partner for contributing to trust property that never would have been subject to the RPA, had it not been in trust. This goes beyond merely providing relief for the defeat of RPA rights. The hypothetical case of *Carissa v Dan* illustrates this:

Carissa and Dan are a couple who live in a lifestyle block (the family home) down the road from Dan's family farm. The farm was settled on a trust by Dan's parents, Pete and Patricia, for the benefit of Dan and his three siblings. Pete, Patricia and their lawyer are the trustees. Because Pete and Patricia struggle to manage the farm by themselves, Carissa and Dan often help out. During the relationship, Carissa contributed to the significant increase the value of the farm by managing the livestock. If Carissa and Dan broke up, Carissa would have a clause 44C(1)(c) claim; the court could make orders against the trust in favour of Carissa for her contributions towards increasing the farm's value. However, had the farm not been in trust, it would be owned by Pete and Patricia. The farm would not fall under the RPA, which only applies to property beneficially owned by Carissa and Dan. Essentially, clause 44C(1)(c) enables Carissa to obtain 'relief' for something she was never entitled to under the RPA.[277] It is doubtful whether, even under the general law, Carissa would be entitled to anything.[278] Additionally, only partners can contract out of the RPA, as it was only intended to apply to the partners' property.[279] Pete and Patricia have no way of protecting their farm from Carissa's clause 44C claim as they cannot contract out of the RPA. This undermines the core principles of proprietary autonomy, commercial certainty and the rights of third-parties, and also does not protect the public policy of the RPA.

(c) Conclusions

Clause 44C should only provide relief to a partner where that would uphold the public policy of the RPA – to help achieve a just division of property between the partners. It should not provide relief where trust property was preserved or enhanced *unless* that would uphold the RPA's public policy. Clause 44C should permit partners such as Ms Kidd to claim relief for what she would have been entitled to under the RPA but for the trust, such as an equal share in the rent payments and the family home's increase in value. However, it should not permit claims such as Carissa's, which would not be covered by the RPA had the property not been in trust. Furthermore, the generality of a modernised section 182 provision in the RPA would

[277] Under the Relationships Property Act, Carissa would only be entitled to claim an interest in the increase in value of *Dan's separate property*, not the property of Pete and Patricia: Property (Relationships) Amendment Bill, cl 10(e).

[278] Carissa could have a constructive trust claim as she contributed to managing the livestock which is a contribution to the *property*, not the relationship. However, there remains the issues of whether Carissa had a reasonable expectation of an interest in the farm and whether the trustees should reasonably be expected to yield to her an interest (unlike *Hawke's Bay Trustee v Judd* (CA), above n 103, and *Murrell v Hamilton* (CA), above n 103) the partner (Dan) is not one of the trustees).

[279] See also Peart, above n 10, at 460. The contracting out provisions in Part 6 of the Property (Relationships) Act will be carried over into the Relationships Property Act: Law Commission (R143), above n 2, at [13.19].

ensure legislation provides a just division of property between the partners in cases that evade clause 44C's jurisdiction.

2 Clause 44C's inadequate constraints on the court's powers

Before discussing the inadequacies of clause 44C's constraints on the courts' powers, it is useful to analyse the extent to which the English and Australian courts interfere with trusts when making orders relating to property interests at the end of a relationship. Caution must be taken when making comparisons to these jurisdictions as they have a discretionary regime where the court is given broad discretion to alter property interests at the end of a relationship.[280] In contrast, the PRA (and RPA) are intended to operate as a 'partial code' with rules detailing how property is to be divided. Additionally, England and Australia do not have a presumption of equal sharing.

(a) England and Wales

In England and Wales, section 24(1)(a) of the Matrimonial Causes Act 1973 (UK) permits the court to order a transfer of property as part of ancillary relief to spouses at the end of a marriage.[281] Property adjustment orders are often considered together with financial provision orders[282] to achieve a fair outcome,[283] taking into account the principles of need, compensation and sharing.[284] Although trust assets are not "property", they can be indirectly taken into account as part of a spouse's "financial resources",[285] if trust income or capital is likely to be available to a spouse immediately or in the foreseeable future.[286] That test focuses on a partner's access to, rather than control of, trust assets.[287]

Under section 24(1)(a), the court can only make personal orders against the spouse, not against the trust capital. These orders may act as judicial encouragement for trustees to exercise

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[280] In England, the power only applies to marriage and civil union relationships under the Matrimonial Causes Act or the Civil Partnership Act 2004. The courts have no discretionary jurisdiction to resolve property or financial disputes between partners living together in cohabitation (i.e. 'de facto couples') who separate: *Halsbury's Laws of England* (2015) vol 72 Matrimonial and Civil Partnership Law at [146]. In Australia, it applies to married, civil union and de facto couples of more than two years: Family Law Act.

[281] The Civil Partnership Act provides similar relief for parties to a civil partnership: see sch 5.

[282] *Halsbury's Laws of England*, above n 281, at [507]; see also *Button v Button* [1968] 1 All ER 1064 (CA) at 1067. This contrasts with the New Zealand statutory framework as the Property (Relationships) Act deals solely with the division of property whilst the Family Proceedings Act deals with spousal maintenance and financial needs: see pt 6. In England, both financial provision orders and property adjustment orders can be made following an order for divorce, nullity of marriage or judicial separation: Matrimonial Causes Act, ss 23 and 24.

[283] *White v White* [2001] 1 AC 596 (HL); *Miller v Miller*; *McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [4]-[6].

[284] *Miller v Miller*; *McFarlane v McFarlane*, above n 283, at [10], [13] and [16]. The same principles apply in civil partnership cases: *Lawrence v Gallagher* [2012] EWCA Civ 394, [2012] 2 FLR 643.

[285] Matrimonial Causes Act, s 25(2)(a). "Financial resources" are concerned with resources rather than ownership, so it is irrelevant that discretionary beneficiaries have no proprietary interests in trust assets: *Whaley v Whaley*, [2011] EWCA Civ 617, [2012] 1 FLR 735, at [113] per Lewison J.

[286] *Charman v Charman* [2005] EWCA Civ 1606, [2006] WLR 1053 at [12]-[13]; *Whaley v Whaley*, above n 285, at [113] per Lewison J.

[287] *Whaley v Whaley*, above n 285, at [113] per Lewison J.

powers in the partner's favour to enable him or her to comply with the financial order,[288] as long as it does not amount to undue pressure on the trustees.[289] In *Whaley v Whaley*, the pool of property available to the parties amounted to £10.4 million, of which, £7 million consisted of the husband's trust assets.[290] The husband was ordered to pay a £3 million lump sum to his wife,[291] although he only had about £3 million of net assets outside the trust. Although trustees can refuse to make distributions to a partner subjected to a judicial encouragement order, trustees are generally required to take the partner's request into account and often will make the distributions.[292]

(b) Australia

In Australia, section 79 of the Family Law Act 1975 (Cth) permits the court to alter the property interests of the partners. Trust assets may be considered "property" (and increase the pool of property for division) if a partner has legal or de facto control over the trust. Legal control refers to a partner who, as trustee, can appoint trust assets for their own benefit.[293] De facto control includes having the power to appoint oneself as trustee (then being able to appoint trust assets for one's benefit),[294] or where there are co-trustees but the other trustee essentially defers to the partner/trustee's will.[295] *Kennon v Spry* widened this definition of "property" to include a situation where one partner has the power to appoint trust assets to the other partner, but not themselves.[296] Where a partner does not have the requisite legal or de facto control over trust assets for it to amount to property, it may still be considered as the partner's "financial resources",[297] which does not increase the pool of property, but may increase the other partner's share in the property pool.[298]

Like England, the court may only make personal orders against the partner under section 79, it cannot make orders against trust assets. However, if trust assets form part of the property pool, a partner may be ordered to pay the other partner a sum of money that exceeds their net non-trust assets. For instance, Dr Spry was ordered in his personal capacity to pay $2,182,302 to his wife, despite his net assets only amounting to $1,732,381.[299] In that case, section 90AE

[288] *Thomas v Thomas* [1995] 2 FLR 668 at 670-671 per Waite LJ, at 678 per Glidewell LJ.
[289] *Whaley v Whaley*, above n 285, at [114] citing *Thomas v Thomas*, above n 288, at 670-671 per Waite LJ, at 678 per Glidewell LJ.
[290] *Whaley v Whaley*, above n 285.
[291] Amongst other orders: at [6]-[10]. These figures help illustrate how judicial encouragement orders may operate; the orders made were in fact much more complicated.
[292] At [114] citing *Lewin on Trusts* (18th ed, Sweet & Maxwell, London, 2007) at [29]-[157].
[293] *In the Marriage of Ashton* (1986) 11 Fam LR 457 at 462.
[294] *In the Marriage of Harris* (1991) 15 Fam LR 26 at 34. See also *Ogden v Ogden* (2010) 245 FLR 1 at [82]-[83] where it was held the wife had de facto control over one-fifth of the trust assets.
[295] *In the Marriage of Stein* (1986) 11 Fam LR 353 at 357-358.
[296] Dr Spry was not a beneficiary himself, but his power to appoint all the trust property to his wife coupled with the wife's rights to due consideration as a discretionary beneficiary and due administration of the trust were considered to be "property of the parties to the marriage": *Kennon v Spry* [2008] HCA 56, (2008) 238 CLR 366 at [78]-[79] and [81] per French CJ, at [126] and [137] per Gummow and Hayne JJ. See also Patrick Parkinson "Family Trusts and Third Parties Under the Family Law Act 1975" (2012) 26 AJFL 5 at 10.
[297] Family Law Act, ss 79(4)(e) and 75(2)(b).
[298] *In the Marriage of Kelly (No 2)* (1981) 7 Fam LR 762 at 768.
[299] *Kennon v Spry*, above n 296, at [111] per Gummow and Hayne JJ.

enabled the court to make an order that Dr Spry could satisfy his personal liability to his wife (arising from the section 79 order) from the trust assets.[300] However, section 90AE can only be used to effect a section 79 order,[301] it cannot be used to distribute assets from the trust to a partner to increase the property pool for division.[302]

(c) Clause 44C

In comparison to the English and Australian approaches, clause 44C is radically invasive. Although trust assets may be indirectly considered as financial resources to increase a partner's share of the property pool (England and Australia), or increase the pool of property available for division (Australia), both jurisdictions only allow personal orders to be made against the partner; orders cannot be made against the trustees. In Australia, orders against the trustees are limited to enabling a section 79 order to be effected. Clause 44C enables the court to make direct orders against the trustees to achieve a just division of property; not simply to give effect to a property order. A court may order trustees to transfer trust property to a partner, pay trust income to a partner, or to resettle a trust or vary trust terms in favour of a partner, who may not even be a beneficiary of that trust. Although such radical powers may be necessary to achieve a just division of property between the partners, as illustrated by *Ward*,[303] those powers must be subject to adequate safeguards to ensure the principles of proprietary autonomy, commercial certainty, and the rights of third-party beneficiaries are protected. The relevant matters expressed in subclause (3) offer inadequate protection to these principles.

Firstly, subclause (3) does not direct the court to consider the purpose in which *the trust* was settled or the nature of the trust. Whether the trust is a spousal trust, dynastic trust, charitable trust etc. provides different levels of justification as to the extent the court should interfere with that trust for the benefit of a partner. Such an inquiry would also enable the court to consider matters such as whether the trust assets would have been subject to the RPA but for the trust, whether one of the partners is the settlor, the partner(s) powers in relation to the trust and whether (and to what extent) the partner(s) stand to benefit from the trust.[304] Subclause (3) only suggests an inquiry into the purpose of the *disposition*. This is indirectly suggested through considering whether the disposition was made with the informed consent of both parties,[305] and the date of disposition.[306] Furthermore, the indirect inquiry into the purpose of the disposition is only relevant for a clause 44C(1)(a) claim, not a claim under clauses 44C(1)(b) or (c).[307] Because a clause 44C(1)(b) or (c) claim enables courts to interfere with trusts settled by third parties or before the relationship was reasonably contemplated, it is even more important for a court to consider the purpose of a disposition in those cases.

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[300] *Stephens v Stephens (Enforcement)* [2009] FamCAFC 240, (2009) 42 Fam LR 423 at [354]-[355].
[301] *B Pty Ltd and Ors & K* [2008] FamCAFC 113, (2008) 39 Fam LR 488 at [28].
[302] See Patrick Parkinson, above n 296, at 21-23.
[303] *Ward* (SC), above n 27.
[304] Property (Relationships) Amendment Bill, cls 44C(1)(3)(a)(iii) and (b)(iii) only refer to the benefits received by the partners, not future benefits the partner(s) may hope to receive.
[305] Clause 44C(3)(a)(iv).
[306] Clause 44C(3)(a)(ii).
[307] Clauses 44C(3)(b)(ii) and (iv) do not deal with the disposition of the trust property, they only deal with the partners' acts of sustaining or preserving the trust property.

Secondly, it is unsatisfactory to only consider the interests of minor or dependent beneficiaries. Although the purpose of singling out minor and dependent beneficiaries was most likely to ensure that children's interests are looked after, in trust law, trustee(s) hold onto the beneficial interest of trust assets for *all* the beneficiaries, not just minors or dependent beneficiaries. All discretionary beneficiaries have the same rights under trust law – a hope or expectation of a potential property interest and the right to hold trustees to account. To avoid distorting trust law principles, courts should consider the interests of all beneficiaries. In considering all the beneficiaries' interests, however, a court may decide to give more weight to the interests of minor or dependent beneficiaries, if it considers that it is just to do so. Importantly, the court should also be directed to consider whether the partners, particularly the claimant, is a beneficiary of that trust.

Finally, clause 44C does not prescribe a hierarchical ranking of remedies. Because there are good reasons to protect trusts,[308] the court should only interfere with the trust as a last resort, if orders relating to the partner's separate property or relationship property would be insufficient. If it is necessary to interfere with a trust, the payment of trust income should be considered first. Only if a just outcome cannot be achieved through that, should the courts then be permitted to consider whether there should be a transfer of trust assets, resettlement of the trust or variation of its terms. This hierarchical ranking of remedies is already found in section 44C, which provides that an order requiring trustees to pay trust income to a claimant should not be made if the claimant can be compensated through a payment of money or transfer of property derived from the defendant partner's separate property or relationship property.[309] A hierarchical ranking of remedies in clause 44C would help protect trusts as it ensures that trusts are only interfered with if the claimant cannot obtain justice in any other way.

(d) Conclusions

Clause 44C enables the court to make direct orders against trustees to provide relief where trusts have had the effect of defeating RPA entitlements. This more extensive in comparison to the manner in which English and Australian courts have exercised their discretion to alter the partners' property rights at the end of a relationship. Although clause 44C aims to better uphold relationship property rights, there are inadequate safeguards to protect the principles of proprietary autonomy and commercial certainty, and the rights of third party beneficiaries. In particular, subclause (3) does not direct the court to consider the purpose in which the trust was settled, and the interests of all beneficiaries. There is also a lack of a hierarchical ranking of remedies to ensure trusts are only interfered with as a last resort.

[308] See page 33.
[309] Section 44C(2)(a).

V Conclusion

Although the Law Commission proposal to amend section 44C is heading in the right direction, it still does not strike the right balance between giving effect to the RPA's public policy and protecting trusts. Issues with clause 44C's jurisdiction mean that in some cases, it does not provide relief where trusts have the effect of defeating relationship property rights; whilst in other cases, it provides relief where it ought not to. These jurisdictional issues prevent clause 44C from effectively upholding the RPA's public policy. The proposal to repeal section 182 of the FPA further prevents the RPA's public policy from being upheld situations that fail to meet clause 44C's jurisdiction. Furthermore, whilst clause 44C confers upon the courts extensive powers that may be necessary to protect the RPA's public policy, it fails to provide adequate safeguards for trusts.

VI Appendix

Property (Relationships) Act 1976

44C Compensation for property disposed of to trust

(1) This section applies if the court is satisfied—

(a) that, since the marriage, the civil union, or the de facto relationship began, either or both spouses or partners have disposed of relationship property to a trust; and

(b) that the disposition has the effect of defeating the claim or rights of one of the spouses or partners; and

(c) that the disposition is not one to which section 44 applies.

(2) If this section applies, the court may make 1 or more of the following orders for the purpose of compensating the spouse or partner whose claim or rights under this Act have been defeated by the disposition:

(a) an order requiring one spouse or partner to pay to the other spouse or partner a sum of money, whether out of relationship property or separate property:

(b) an order requiring one spouse or partner to transfer to the other spouse or partner any property, whether the property is relationship property or separate property:

(c) an order requiring the trustees of the trust to pay to one spouse or partner the whole or part of the income of the trust, either for a specified period or until a specified amount has been paid.

(3) The court must not make an order under subsection (2)(c) if—

(a) an order under subsection (2)(a) or (b) would compensate the spouse or partner; or

(b) a third person has in good faith altered that person's position—

(i) in reliance on the ability of the trustees to distribute the income of the trust in terms of the instrument creating the trust; and

(ii) in such a way that it would be unjust to make the order.

(4) The court may make 1 or more orders under subsection (2) if it considers it just to do so, having regard to—

(a) the value of the relationship property disposed of to the trust:

(b) the value of the relationship property available for division:

(c) the date or dates on which relationship property was disposed of to the trust:

(d) whether the trust gave consideration for the property, and if so, the amount of the consideration:

(e) whether the spouses or partners, or either of them, or any child of the marriage, civil union, or de facto relationship, is or has been a beneficiary of the trust:

(f) any other relevant matter.

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