What to do about trusts?

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A INTRODUCTION

There are two critical issues for any matrimonial or relationship property division regime: Which property of the parties to the relationship is to be captured by the regime? And how is that property to be divided? These are fundamentally questions of policy that once decided, give way to questions of implementation by law. In modern times, implementation is usually a matter of statutory law. The primary policy currently applicable in New Zealand and commonly ascribed to elsewhere is that property owned by either party that was shared within the relationship or produced by the relationship ought to be divided equally between the parties upon dissolution of the relationship. Indeed, Prof Atkin suggests in his paper that the goal should be complete sharing within the relationship and that the starting point ought to be that all property owned by the parties is relationship property.  

There are obviously many questions of detail that arise out of this approach but a basic presupposition is that the relevant property to which the regime can apply must be owned by either or both of the parties. Yet, one of the most controversial issues relating to property division regimes in recent times is whether such regimes can and should extend to property held on trust where neither partner has a fixed or vested beneficial property interest.

There are various ways to respond to the problem. One might say that the question of what a spouse or partner owns ought to be decided in accordance with orthodox rules of trust and property law for reasons of certainty and sanctity of property rights and that a property division regime must apply consistently with those rules. Alternatively, it can be argued that our notion of property may need to be broadened to recognise not only legal ownership but real or practical control over assets so that a spouse who has such control or access ought to be considered owner of the assets or at least the owner of something of value. This raises subsequent questions about the validity or otherwise of the trust and whether this approach is specific to the relationship dissolution context or extends to claims by other parties. Another response might be to leave the rules as they are but to provide the courts with an overriding discretion to vary property rights. This raises questions about the extent of such a power and the objectives that a variation ought to pursue.

This essay seeks to analyse these methods both for their effectiveness in achieving the underlying policy of equal sharing in a property division regime and for their effect on the law

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1 A more recent but important question arising for such schemes concerns which relationships the scheme ought to apply to: see papers for this colloquium by P Parkinson and M Briggs.

2 Property (Relationships) Act 1967, ss 1M and 1N.

3 Cite Eng, Canada, SA, Aus.

more generally. Before this is done, it is necessary however to explain why the discretionary trust has become the “supreme problem de jour” for relationship property regimes.

**B THE NATURE OF THE DISCRETIONARY TRUST AND ITS MODERN USE**

A trusts lawyer will say that the exercise of defining a trust is not an easy one and gives rise to difficult theoretical questions. But, for the purposes of this essay, it is sufficient to say that the trust is an obligation on the legal owner of property, the trustee, to hold the property for the benefit of others, the beneficiaries. The trust is not an entity in itself. The trustee may have declared themself trustee over assets that they had initially owned beneficially or the trustee may have had the property transferred to them on trust by the original owner, the settlor. Although the trustee has legal ownership of the property, their ownership is significantly fettered and the property cannot be used to meet any personal claims against the trustee.

The label “discretionary trust” has no fixed meaning. It is a description of a type of express trust in which certain dispositive discretions are conferred on the trustee: they may have the discretion to determine the type or extent of trust property to be distributed to each beneficiary and often which of the beneficiaries will receive trust property. A discretionary beneficiary thus has no proprietary interest in the trust property, only a right to compel the due administration of the trust and demand the trustee to consider exercising their discretion in his favour. As a matter of property theory then, neither a trustee’s interest nor a discretionary beneficiary’s interest amounts to beneficial property capable of being the subject of a proprietary claim.

The discretionary trust has become a very popular mechanism for the holding of property within families in the past 50 years. These trusts have been used to avoid death duties, to take advantage of differential tax rates or governmental subsidies, and to safeguard significant assets from creditors where the income earners (the settlors) were professionals at risk of being sued for negligence. While trusts no longer offer the same fiscal and tax benefits as they once did, they are still used to protect more generally against claims of creditors and spouses. The common structure is for the husband and wife to declare themselves trustees, often along with an independent trustee or corporate trustee, of property with themselves and their children as discretionary beneficiaries.

The modern discretionary trust can be seen to thwart the policy of relationship property division regimes in two particular respects. The first relates to one of the most notable features of modern discretionary trust practice: the range of broad powers that are often vested in the settlor or a third party called the protector. Such powers include, for example, powers to appoint and remove trustees and/or beneficiaries; powers to direct trustees to act; powers to veto trustees’ decisions and powers of revocation. While these powers are usually non-dispositive, they are nevertheless significant because of the degree of control they confer on the holder to affect the

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7 Fischer v Nemske Pty Ltd [2016] HCA 11 at [118] per Gordon J; Chief Commissioner of Stamp Duties (NSW) v Buckle (1998) 192 CLR 226 at 234 per curiam.
8 Whaley v Whaley [2011] EWCA Civ 617 at [112] per Lewison LJ.
affairs of the trust. These trusts have been met with a measure of popular suspicion. It has become increasingly common for creditors and spouses of both settlors and beneficiaries to seek ways to attribute trust property to the controlling party. The general gist of the claim is that the reality is quite different from the appearance: property apparently held in trust is really subject to the control or directions of one party (who is usually the settlor and also a beneficiary) who should thus be considered the real owner for the purpose of property division in relationship dissolution. For the purpose of this essay, I shall refer to these trusts as controlled trusts.

The second respect in which discretionary trusts are a cause for concern in this context is what can be called dynastic trusts. These are discretionary trusts used as a “dynastic” or multi-generational ownership structure common in family-run businesses with significant asset holdings, such as farms. The income producing assets are held in trust for the benefit of parents, children and grandchildren. As the children grow up and work in the business, alongside their spouses, they contribute significantly to the wealth accumulation of the family business but are not strictly legal owners of that wealth. Particularly difficult are those dynastic trusts where the assets include not solely business assets but also the parties’ homes and other domestic assets.

There are various ways in which the law has responded to these trusts. In some jurisdictions, various statutory means of access to the trust assets are employed. But in the absence of such legislation, counsel and courts have turned to the common or judge-made law of trusts and property to find a justification for drawing in trust assets to the estate of either or both of the partners to the relationship. My analysis begins with the common law methods because if these are effective, there may be no need for legislative intervention.

C SOLUTIONS FROM WITHIN THE COMMON LAW

In the absence of appropriate statutory intervention, the various attempts resorted to by the courts can be grouped in to two categories. Some cases are directed to the veracity of the trust itself. The trust may be held to be invalid as a sham; or pierced as the alter ego of the controlling party; or it may simply be regarded a non-trust because essential trust features are compromised or absent. Other cases instead recognise a property right distinct from the property of the discretionary trust itself: the controlling party’s powers are deemed in combination to be themselves a property right or a separate (constructive) trust in favor of the disadvantaged spouse is said to be imposed over part of the property on account of contributions made to the property by that spouse. These methods have been the subject of detailed academic scrutiny elsewhere that shows that none of them measures up to orthodox principles of trust and property law, despite their varied success in the courts.

Looking through the trust

Several different claims have been made on a similar theme that on account of the settlor’s control of the trust, the trust property is in reality the property of the settlor and the trust should be disregarded.

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11 These will be discussed further below in Part E.
12 By common law here, I mean judge-made law that may sound in either or both of the jurisdictions of equity and of the common law proper.
First, the claim of sham has been regularly invoked in popular commentary and raised in several cases. However, its application is in fact fairly limited. As a matter of principle, a trust is a sham because there was no true trust intention shared by the settlor and trustee, but rather an intention to create a façade or pretence. A settlor’s control of the trust is neither a necessary nor sufficient element in establishing a sham. It may serve as evidence of a sham intention but where a formal trust deed and other related documentation exist (even with the inclusion of significant retained powers), the presumption of trust intention is very difficult to rebut. De facto or practical control of trust affairs whereby a settlor continues to treat the property as his own and does not defer to the trustees on decisions in relation to the property might suggest a lack of trust intention but this too will usually fall short of establishing a sham. Courts tend to require not just an absence of a positive trust intention, but a fraudulent intention to deceive. The sham trust doctrine then is not responding directly to the problem of controlled trusts; it should not be, and usually is not, used to invalidate such trusts without more.

The nature of the settlor’s intention plays no part in the second type of claim to be considered: the trust as the alter ego of the settlor. The alter ego idea is well known in company law and has been applied to trusts in several jurisdictions. The settlor’s control over trust affairs is said to render the trust the alter ego of the settlor, enabling parties claiming against the settlor to access trust property or at least to claim the value thereof. In evaluating the legitimacy of the alter ego claim, it is important to distinguish factual or unauthorised control from authorised control by virtue of powers conferred on the settlor by the trust deed. Acts of unauthorised control might include a failure to separate trust funds from a settlor’s personal assets; a failure to pay rent for the use of trust property where no such benefit has been formally appointed by the trustee or where the settlor is not a beneficiary; or an understanding between settlor and trustee that the trustee will act in whatever way it is commanded to by the settlor without exercising due consideration of the beneficiaries’ interests. The alter ego notion effectively converts this conduct into actions of ownership.

But this is inconsistent with how property rights generally operate. Exercising factual, yet unauthorised, control over trust property cannot result in a proprietary interest in that property.

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19 It was recently applied to companies in the context of matrimonial property litigation: Prest v Petrodel Resources Ltd [2013] UKSC 34.

vesting in the controlling party.\textsuperscript{21} Indeed, where someone exerts factual control over trust assets, equity will consider him or her to be a trustee de son tort for the beneficiaries, not an absolute owner.\textsuperscript{22} Reliance on the alter ego idea is permissible in Australia because its matrimonial property regime extends beyond the parties’ property to the parties’ “financial resources”.\textsuperscript{23} The alter ego is not being used to subvert property rights because property rights are not required in order for property to be captured by the statutory framework there. But in jurisdictions where the regime is limited to property more traditionally formulated, such as New Zealand and South Africa, “actual control alone does not provide justification for looking through/invalidating a trust”.\textsuperscript{24}

An alter ego claim may look more promising in respect of authorised control because the settlor has chosen to retain some ownership-type powers by means of the very instrument that determines the ownership arrangement between the parties to the trust. However, powers of control should only substantiate an alter ego claim if those powers entitle the settlor to access the trust property and treat it as their own without such access being fettered by obligations owed to the beneficiaries. Of the powers retained by settlors (powers to appoint and remove trustees and/or beneficiaries; powers to direct trustees to act; powers to veto trustees’ decisions and powers of revocation), only the power of revocation would enable the settlor to take back the property without having to rely on the trustee also exercising a power to distribute the property to the settlor. The role of the trustee is crucial because, unlike the settlor, the trustee’s powers are restrained by its fiduciary obligations to the beneficiaries to exercise the powers in what it believes to be in the best interests of the beneficiaries.\textsuperscript{25} It is because it has this obligation that a trust exists and that it cannot be said to be an absolute owner of the trust property.\textsuperscript{26} And neither can it defer entirely to the demands of the settlor without exercising its own consideration. It would be entirely inconsistent with this trust relationship between trustee and beneficiary to say that a settlor’s powers equate to ownership of the trust property when those powers do not in fact enable direct and unfettered access to the trust property. Of the powers that settlors do retain, only the power of revocation allows the settlor to bypass the trustee. Where such a power is reserved, it may therefore very well be open to a court to treat the trust as the alter ego of the settlor. Unsurprisingly, in the US the Uniform Trust Code provides that where these powers are present, the trust property is subject to claims by creditors of the settlor.\textsuperscript{27} In New Zealand, trusts practitioners advise against retaining such a power.

Despite these conceptual difficulties, the alter ego notion has been embraced in several South African cases.\textsuperscript{28} Its application there does, however, highlight a further difficulty. It is not clear whether the effect of an alter ego finding is to invalidate the trust altogether, or to permit the court to treat the trust property as if it belonged to the settlor, or only to attribute the value of

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\item \textsuperscript{21} \textit{Sharrment v Official Trustee} (1988) 18 FCR 449 at 470-471.
\item \textsuperscript{22} \textit{Lyell v Kennedy} [1889] 14 AC 437.
\item \textsuperscript{23} Family Law Act 1975 (Cth), ss 79(4) and 75(2)(b).
\item \textsuperscript{24} \textit{Official Assignee v Wilson} [2008] 3 NZLR 4 [2008] 3 NZLR 4, at [70] per Robertson J; see also [126] per Glazebrook J.
\item \textsuperscript{25} L Smith, “Fiduciary relationships: ensuring the loyal exercise of judgement on behalf of another” (2014) 130 LQR 608.
\item \textsuperscript{26} J Palmer, “Controlling the Trust” [2011] OtagoLR 47.
\item \textsuperscript{27} UNIF. TRUST CODE § 505(a)(1) (2010).
\item \textsuperscript{28} \textit{Badenhorst v Badenhorst} 2006 (2) SA 255 (SCA); \textit{BC v CC and Others} 2012 (5) SA 562 (ECP); \textit{Land and Agricultural Bank of South Africa v Parker} 2005 (2) SA 77 (SCA); \textit{RP v DP and Others} 2014 (6) SA 243 (ECP).
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the assets to the settlor. If seems to me that logically it must be the first but courts are extremely hesitant to deem the trust out of existence especially when both trust intention and form are clearly present. The second is perhaps a neat compromise but it merely begs the question. Does the trust property in specie now fall in to the relationship property pool or only its value? The third, which is clear that it is only the value and not the property itself that can be attributed to the settlor, does not sit well with a property division regime that is concerned with dividing property.

A further problem for the alter ego claim is that, unlike a company, the trust is not an entity or a legal person but a relationship of rights and obligations. It makes little sense to say therefore that the trust is an “other self” of the settlor, just as a contract cannot be someone’s alter ego. Hence, the claim must really be that the trust property is being controlled to such an extent that it should be treated as the property of the controlling settlor and the trust must be ignored. It is not that the trust is the settlor’s alter ego, but that the trust is effectively little more than an illusion.

This leads nicely to the third type of claim that has been tried in an attempt to look through the trust but has met with little success: the illusory trust. It is conceivable that despite a settlor’s intention to create a trust, and despite the existence of a trust deed, trustees and even of regular trust administration, that the substance of the arrangement created by the settlor does not in fact create the trust relationship that is crucial to the trust. If, by a combination of strong powers and reduced trustee duties, the settlor could effectively appoint trust assets to himself without having any accountability to the beneficiaries in so doing, it is surely arguable that the notion of accountability fundamental to the trust is absent and that a trust has not in fact been created. Such cases will likely be rare but they are not unheard of.

For example, in BQ v DQ, the settlor, who was also initially the sole trustee, had reserved to himself powers to revoke the trusts, to appoint and remove trustees, and to release the trustee from any liability. The trustee had the power to appoint income and capital to the settlor during his lifetime. Ground CJ, sitting in the Supreme Court of Bermuda, ruled that “the concatenation of rights and powers in the settlor, when coupled with the fact that he was the sole trustee at the time of the constitution of the Trusts, rendered this trust illusory during his lifetime.” His Honour placed significant weight on the fact that as both settlor and trustee, “he could not effectively be called to account”. Had there been an independent trustee, the indication was that the trust would have been valid.

But surely the identity of the trustee mattered not. The substance of the “trust” had the effect of enabling the settlor to vitiate any of the obligations owed by any trustee to the beneficiaries so that there was no absolute and enduring accountability. Trust law tells us that the trustee must act honestly and in good faith at all times, without exception. The relevant clause provided as follows:

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32 [2010] SC (Bda) 40 Civ (16 April 2010) at [29].
33 [2010] SC (Bda) 40 Civ (16 April 2010) at [29].
34 [2010] SC (Bda) 40 Civ (16 April 2010) at [7].
The written approval of [the settlor] of any trust transaction during his lifetime shall be a complete release of the Trustee (including the [settlor]) of any liability or responsibility of the Trustee to any person with respect to this transaction.

The effect of this clause is to render the beneficiary’s right to hold the trustee to account meaningless or at least dependent on the whim of the settlor. The trust was illusory.

It could be argued that up until such time as the settlor chooses to release the trustee from liability, the trustee is accountable to the beneficiaries. Likewise, although the trust was revocable, it was nevertheless effective until revocation. These claims can only be evaluated by comparison with the essentials of a trust to see whether the trust construct has been compromised by the provisions of the deed of not. Unfortunately, there is no accepted definitive statement beyond the core duty of the trustee being to act honestly and in good faith but that should have been sufficient to decide BQ v DQ: where a settlor purports to create a trust relationship but reserves to himself the ability to allow the trustee to escape liability for breach of the core duty, one of the essential features of a trust is thus missing.

The notion of the illusory trust was considered very recently by the New Zealand Supreme Court but the Court was unable to agree on a unanimous approach. In Clayton v Clayton, the husband was both settlor and sole trustee. In his personal capacity, he had powers to add and remove trustees and beneficiaries. The deed provided that as trustee, he had an absolute discretion to appoint any or all of the income and capital to any of the discretionary beneficiaries without considering the interests of all beneficiaries and could exercise dispositive powers contrary to the interests of any beneficiary. The trust deed included a clause expressly permitting trustees who were also beneficiaries to exercise any of the powers or discretions in their own favour.

In my view, the question of whether an apparent trust is in substance not a trust, but illusory, must be answered by comparing the content of the arrangement with the essential or core features of the trust construct. Identifying a complete list of those features is not without controversy but I suggest they must include an alienation of the property from the settlor’s own personal estate; an ultimate dispositive power that vests only in the trustee; and an enduring accountability of the trustee to the beneficiary. Without these, the trust is just a form of revocable agency or gift. Here, the settlor had the ability to dispose of property to himself without having to consider or act in the interests of other beneficiaries. This effectively stripped the arrangement of any real accountability to the other beneficiaries. Indeed, the Court ruled that he could distribute property to himself “unrestrained by fiduciary obligations”.

While the Court accepted the theoretical possibility of an illusory trust, it could not agree on whether the present case was one and so made no ruling, preferring to decide the case on an alternative basis that the combination of powers and entitlements held by the husband amounted to a general power of appointment (discussed further below). It noted two competing views on the illusory trust: either the settlor had failed to dispose completely of the property and the trustee was not sufficiently accountable to the beneficiaries such that there was no

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37 Clayton v Clayton [2016] NZSC 29 at [58].
38 Clayton v Clayton [2016] NZSC 29 at [123], although rejecting the label in preference for speaking more simply of there being no valid trust.
trust;\textsuperscript{39} or the trust was effectively defeasible on the exercise of particular powers but nevertheless still valid up until such exercise.\textsuperscript{40} But, if, as the Court had already found, he was not bound by any fiduciary obligation to the beneficiaries, how could there have been a trust?\textsuperscript{41} The fate of the illusory trust remains unclear.

2 Property rights external to the trust
An alternative means of increasing the share of relationship property available for division to take account of the parties’ connection to trust property is to recognise property rights external to the trust that do not compete with or attack the trust as such. In respect of controlled trusts, courts have in some cases recognised the particular powers themselves as amounting to a distinct property interest. Likewise, the courts have recognised a beneficial interest by means of a constructive trust in favour of parties who have made contributions to property that is held on an express trust and hence otherwise unavailable for division. This second technique could be particularly useful for those partners and spouses who have worked on property that is subject to a dynastic trust. Nevertheless, both approaches ought to be treated with suspicion, in my opinion.

a) Powers as property
Courts have accepted that bundles of powers and entitlements as well as individual powers may amount to property where they enable the settlor or other power-holder to access trust property without any applicable obligations or restrictions on the exercise of those powers.\textsuperscript{42} To that extent the claim is very similar to that underlying the alter ego claim already discussed except that the outcome is not to treat him as the owner of the trust property, but rather as the owner of powers, albeit that they are usually said to carry the same value as that of the trust assets.

In \textit{TMSF v Merrill Lynch},\textsuperscript{43} the Privy Council described a power of revocation retained by the settlor as “tantamount to ownership” and therefore subject to receivership. As mentioned earlier, the US UTC provides that where such a power exists, the trust property is made subject to claims by the settlor’s creditors despite the existence of the trust.\textsuperscript{44}

In \textit{Clayton}, the New Zealand Supreme Court ruled that the combination of powers and entitlements held by the settlor amounted to a general power of appointment that came within the statutory definition of property in the Property (Relationships) Act 1967 as “a right or interest”.\textsuperscript{45} The value of the interest equated to the value of the trust assets.\textsuperscript{46} In reaching its conclusion, the Court drew support from \textit{TMSF} and from several other cases from jurisdictions with a wider ambit of property caught by the scheme that extends beyond orthodox ownership.\textsuperscript{47} The Supreme Court’s approach has been praised as being “consistent with the

\textsuperscript{39} \textit{Clayton v Clayton} [2016] NZSC 29 at [124].
\textsuperscript{40} \textit{Clayton v Clayton} [2016] NZSC 29 at [125].
\textsuperscript{43} [2011] UKPC 17, [33].
\textsuperscript{44} UNIF. TRUST CODE § 505(a)(1) (2010).
\textsuperscript{45} Property (Relationships) Act 1976, s 2.
\textsuperscript{46} \textit{Clayton v Clayton} [2016] NZSC 29, [104]-[107].
PRA’s goal to reflect the equal contributions of the parties and to address economic disadvantage.48 It certainly represents a less formalistic approach to the meaning of property. The Court spoke of the need for “worldly realism”,49 similar to that taken in the Privy Council in TMSF, where Lord Collins made clear that equity might at times consider the holder of a general power as owner “for all practical purposes”.50

It is accepted that property can be a very broadly construed construct,51 and that the general understanding that powers are not property is not a universal rule. Property subject to a general power of appointment exercised by will, for example, can be treated as property of the appointor for the purpose of satisfying his or her debts.52 However, there is a significant difference between the powers recognised as property in each of TMSF and Clayton. While in TMSF the settlor was free to exercise the power of revocation as he liked unfettered by any duty to the beneficiaries, that did not affect the trustee’s fiduciary duty to carry out the trust in what it believed to be in the best interests of the beneficiaries.53 Hence a trust existed, despite the inclusion of the power of revocation. But in Clayton, the effect of the combination of powers and entitlements bestowed on the settlor/trustee meant that there was no effective accountability of the trustee to beneficiaries. The trustee’s fiduciary duties had been so watered down as to be non-existent. There was no trust in the absence of this fundamental characteristic. He was entirely free, as trustee, to appoint trust assets to himself. That is an anathema to a trust. It was both unnecessary and unnecessarily complicated to hold that the powers amounted to property distinct from, but equal to the value of, the trust assets. The husband was already holding the assets beneficially despite the apparent form of the trust.

If the response is that some sort of trust duty nevertheless applied to the trustee, then it cannot be said that the powers provided direct and unfettered access to the trust property. A power that comes with duties attached can’t be beneficial property.

A secondary problem that arises from the recognition of powers as property is the determination of the value of such powers. The powers are usually given a value equal to the net worth of the trust assets on the basis that a general power of appointment enables the holder to access the trust assets for his own benefit at any time.54 All sorts of difficult questions arise here. Why is the full value of the trust assets to be ascribed to the powers when it is often not likely that the settlor will in fact distribute the property to himself? Why not a discount for likelihood? When the Supreme Court referred to the sale price in Clayton, who would such powers be sold to?55 And would they really be willing to pay full price? And what difference does the identity of the trustee make to the value? What if the settlor is not also the trustee? Are the powers then worth less to acknowledge that the trust assets cannot be accessed without the trustee’s accession?

49 Clayton v Clayton [2016] NZSC 29 at [77].  
50 [2011] UKPC 17 at [33].  
51 Jones v Skinner (1835) 5 LJ CH (NS) 87 at 90 per Lord Langdale MR.  
52 Beyfus v Lawley [1903] AC 411, 413; see also A Molloy, “The vulnerability of asset protection trusts revocable by the settlor” (2011) 17 Trusts & Trustees 784. But it is understood to be an exception granted by equity, rather than a rule of property law: O’Grady v Wilmot [1916] 2 AC 231.  
54 Clayton v Clayton [2016] NZSC 29 at [104], [105].  
55 Clayton v Clayton [2016] NZSC 29 at [105].
b) Constructive trusts on express trusts

In New Zealand relationship property litigation, there has been a growing trend to resort to a constructive trust in order to convert contributions made to property held in a valid trust into property interests of the spouse or partner who is locked out of the express trust. Where qualifying contributions were made to the property before it was settled on trust, the claim is against the original owner and the resulting property right is traced through to the trustees now holding the property. The claim in this instance is simply a vindication of property rights that arose prior to the settlement of the express trust and is not controversial.

Courts have also showed a willingness to extend the constructive trust to claims directly against trustees for contributions made to property when it was already owned by the trustees. If a spouse or partner can show that in the circumstances, the trustees should reasonably expect to yield an interest in the trust property to the spouse, then a constructive trust will arise. While this might at first sight appear to be a logical development, it is in fact conceptually inconsistent with the trust construct and risks subverting established trust principles.

Remembering that the trust is nothing more than a relationship between trustee and beneficiary, it is misleading to talk of a constructive trust against or over an express trust. The question is whether a constructive trust obligation can arise not on the express trust but on or against the trustee’s title. Put another way, is it possible for the trustee to hold the benefit of his title on trust for the plaintiff?

Immediately, the problem becomes clear. What the spouse is seeking is the beneficial value of the property, but it is not something that the trustee has to give. The trustee does not have any right to benefit from the property which he could be obliged to hold for the plaintiff. The benefit belongs to the beneficiaries of the express trust. Even if one considered it possible for the trustee to bind the property in equity to the plaintiff, the result would be a situation effectively of competing equities. The trustee is already obliged by equity to hold that for the trust beneficiaries and cannot redistribute it, so to speak. The beneficiaries of the express trust have the earlier equitable right to that benefit and so would trump the spouse’s later title.

This is not to say that the common law countenances no relief for a spouse in this situation. Claims against the trustee might potentially be mounted in estoppel or unjust enrichment but the relief available will be a personal order against the trustee. As a matter of trust principle, a proprietary interest cannot arise. Yet, the New Zealand Court of Appeal has made it plain that despite the logic of this argument, the modern context in which trusts are operating to defeat partnership claims demands a response:

It is acknowledging the reality of the New Zealand trust landscape as it has developed that has justified the recognition of the constructive trust beneficiary’s claim. It is a further reality of that landscape that the trustees of family discretionary trusts are more often than not the beneficiaries of those trusts and in control of them. It is common in many trusts in New Zealand

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56 Marshall v Bourneville [2013] 3 NZLR 766; the claim being good against all but the bona fide purchaser for value.
57 Foskett v McKeown [2000] UKHL 29.
59 For a detailed discussion, see C Rickett, “Instrumentalism in the Law of Trusts - The Disturbing Case of the Constructive Trust Upon an Express Trust” (2016) 47 VUWLR 463.
60 Vervoort v Forrest [2016] NZCA 375 at [68].
61 Vervoort v Forrest [2016] NZCA 375 at [70].
"for the settlor to retain some extent of control or to vest that control in someone other than the trustee". The effect is that the reality of a trustee's ability to give a third party expectations (in return for that third party's contributions) over trust property, which that trustee deals with as if their own, must be recognised. There is no misappropriation of property in that the beneficiaries of the express trust have no claim in conscience to the increases in value resulting from the contributions. Beneficiaries cannot expect trustees to retain for them an unearned benefit, extracted by expectations engendered by the trustees. The express trust beneficiaries should reasonably expect to yield the third parties an interest.

While their Honours’ motivations are understandable, the mechanisms being employed are, with the greatest of respect, inappropriate and ultimately serve to undermine established principles of private property rights.

D  THE CASE FOR LEGISLATIVE INTERVENTION

The problems of controlled trusts and dynastic trusts are real for many partners on the dissolution of relationships and the efforts made by lawyers and courts to massage the common law in order to look past trust structures in the absence of express legislation are understandable. Nevertheless, those efforts are ultimately unconvincing. In respect of controlled trusts, control does not render the trust illusory or an alter ego so long as a trustee remains accountable to the beneficiaries. And recognising as separate property rights powers of control on the basis that they permit direct access to trust property undermines the trust indirectly. Either the powers are fettered by the trustee’s fiduciary obligations or the powers are unfettered and there is therefore no trust in substance. In relation to the problem of dynastic trusts, such trusts commit no offence against general trust principles and recourse to the notion of a constructive trust over the express trust as a corrective measure is incoherent. It is therefore problematic to look to equity and the common law to provide justification for redistributing trust property to a spouse or partner. The result is an incoherent law of trusts.

Yet, the problems remain and a solution ought to be found. There is certainly an emerging judicial consensus that these types of trusts are being used inappropriately to enable parties to avoid the claims of their spouses, as is evident from the cases discussed above. In describing the Australian approach to this problem where authorising statute exists to look through trusts, Bryant J, writing extra judicially, says:62

Family law rightly preferences reality over doctrinal purity when the two are in conflict. I do not believe that we are ‘outriders’ or that our use of de facto control to look behind trust structures to treat assets as property in appropriate circumstances is heterodox, and I am not alone in that view. But if it be heterodoxy, let it be heterodoxy. To my mind, the law should be reflective of the realities of the way people order their lives, and in the context of the discretionary trust as it has developed in Australia, that has been as a vehicle to maximize parties’ wealth and to receive favourable tax treatment. In fact, it seems heterodox to me to remove significant assets that have accumulated over the life of a marriage from the reach of one party, to the benefit of the other, simply because of the purported sanctity of trusts law and purity of principle.

It must nevertheless be remembered that setting aside or looking through a trust because it is subjected to significant control by a non-trustee63 or for any reason of perceived unfairness or

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63 This may include a settlor or other party who is also a trustee but who holds significant powers other than in their capacity as trustee and therefore without any fiduciary obligations attaching that would fetter their powers.
practical reality amounts to judicial appropriation of property rights from the legal owner. It ought not to be done without authorising legislation. Trusts have always been a mechanism to ring-fence property from the claims or demands of others but it is open to Parliament to limit the reach of trusts where a conflicting policy is considered of greater value.

There would seem to be two obvious policies that justify Parliament acting to enable recourse to trust assets in the context of relationship dissolution. First, if the underlying policy of the applicable matrimonial property statute is indeed to effect equal sharing, this should extend to all property that was available to and used by both parties indiscriminately during the relationship if that property will otherwise continue to be used and enjoyed by one of the parties once the relationship has ended. The parties’ access to, rather than strict ownership of, the trust property may be the better criteria to determine its inclusion. Secondly, an economic argument can be made that in many situations, shutting one party off from property to which they would otherwise have continued to have access involves costs to society at large in effectively subsidising that party, usually by various allowances and benefits. As Schenkel has argued, “[t]hese laws should reduce the social costs of trusts, not leverage their benefits to the few who can enjoy them”.65

It is for these reasons of policy that the “doctrinal purity” of trusts law ought not to prevail in the context of relationship property. But such policy competes with the principles of autonomy and security of receipt that are so important to property doctrine. For this reason, any recourse to trust assets is more appropriately regulated and implemented by Parliament and not the courts. Legislation is required to correct or improve upon the common law. I turn now to consider in more detail the varying forms of legislative intervention that can be employed to deal with the problems of controlled trusts and dynastic trusts.

E THE CONTENT OF LEGISLATIVE INTERVENTION
There are three types of statutory intervention commonly employed to claw back property from trusts for inclusion in the pool of property divisible upon relationship dissolution. The first concerns provisions that reverse fraudulent dispositions, the second is a judicial discretion to vary a settlement that effectively frustrates the rights or expectations of the disadvantaged partner following the ending of the relationship; and the third is the adoption of a broader definition of property that extends beyond strictly legal (and equitable) property rights.

1 Voidable dispositions
Statutory provisions to reverse dispositions undertaken with the intent to defeat another party’s property rights are common in many jurisdictions in both insolvency legislation and matrimonial property schemes. These types of provision have a wider application than the sham trust doctrine because they regulate a party’s motivations for settling property on trust. A decision of the New South Wales Court of Appeal, , provides a good illustration.66 There, the trustee of a bankrupt estate argued that a trust of which the bankrupt was a discretionary beneficiary was a sham, because it was alleged to have been set up to deceive the bankrupt’s husband and the Family Court, and to avoid tax. But those dishonest motives did not mean that the trust was a sham. The uncontroverted evidence was that the bankrupt intended to create a trust on the terms set out in the trust deed so that she would not appear to own the property. The trust deed was not a false front. It was genuine. The courts in

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64 See further the arguments made by Bill Atkin in his paper.
66 Lewis v Condon [2013] NSWCA 204.
England and Wales have adopted a similar approach.\textsuperscript{67} While these trusts are not shams, they could nevertheless still be caught by voidable transaction provisions.

In respect of the New Zealand provision in the Property (Relationships) Act,\textsuperscript{68} the courts initially required proof of a fraudulent motive\textsuperscript{69} but that has recently been reinterpreted in line with the intention test used in the equivalent provision in insolvency legislation.\textsuperscript{70} In that context, proof of intent has been held by the Supreme Court not to depend on evidence of a fraudulent motive or purpose.\textsuperscript{71} The required intent can be established by showing that the debtor knew or ought to have known at the time that by disposing of the property there was a risk that creditors would not be able to recover payment of the debts owing to them. While this test of intention may ease the burden on creditors seeking to set aside a debtor’s dispositions, the onus of proving the required knowledge at the time of the disposition can still be a significant obstacle to creditors’ recovery of payments. The test is less demanding but proving that the transferor knew that a consequence of the disposition was that it would defeat the rights of the particular spouse still sets a reasonable hurdle.\textsuperscript{72} It is particularly difficult in relation to trusts settled before a relationship was entered into or where the trust is a dynastic one having been settled by someone other than either of the parties to the relationship.

It is possible to legislate for the reversal of dispositions where the effect of such dispositions is to defeat the interests of the other partner, even in the absence of any intention to defeat. A broader voidable transactions provision of this kind represents a significant limitation of the freedom of property owners to dispose of property as they so choose. Hence when s 44C of the PRA was introduced in New Zealand, it was deliberately restricted in its reach and in the relief available in order to balance the competing policy considerations.\textsuperscript{73} So, while the disposition itself is not reversed, compensation can be ordered but only from the income of the trust property and only where the trust was settled over relationship property by either or both of the parties to the relationship. It is therefore ineffective against the problem of dynastic trusts and of limited effect as a response to the problem of controlled trusts.

A more effective response to these problems might be a more flexible variation provision, exercised at the court’s discretion. That is in some sense what s 44C is, albeit that it is too limited in scope and so amounts to an awkward interposition on the deferred community nature of the New Zealand scheme.

2 Variation of nuptial settlements
Statutory provisions permitting courts to vary trusts are reasonably common in relationship property regimes.\textsuperscript{74} Variation powers are a very effective way to deal with the perceived injustice of the use of trusts to limit either or both parties’ shares of relationship property in

\textsuperscript{67} A v A [2009] WTLR 1 (HC (FamD)).
\textsuperscript{68} Property (Relationships) Act 1976, s 44.
\textsuperscript{69} Coles v Coles [1987] 4 NZFLR 621 (CA).
\textsuperscript{70} Property Law Act 2007, s 344 to 350; Ryan v Unkovich [2010] 1 NZLR 434 at [33].
\textsuperscript{72} See for example, K v V [2012] NZHC 1129.
\textsuperscript{74} For example, s 182 Family Proceedings Act 1980 (NZ); s 24(1)(c) Matrimonial Causes Act 1973 (E&W); s 6(1)(c) Matrimonial Proceedings and Property Ordinance (HK).
situations where, had the relationship continued, both parties would have benefitted. While they are, of course, a significant interference with the right of owners to deal with property as they so choose, it must be remembered that statutory property division schemes are generally, by their very nature, an interference in the property rights of owners albeit that they are accepted as an important feature of a just society. Variation powers should not be eschewed but their scope and the criteria upon which they may be exercised ought to be carefully and clearly prescribed.

Several issues require careful thought. First, it is necessary to determine to which trusts can such a power be applied. Often confined to “nuptial settlements”, courts have increasingly moved away from requiring that the trust was settled in contemplation of or resulting out of the particular marriage, requiring instead a connection or proximity between the settlement and the marriage. This means it is entirely possible that trusts settled long before the marriage was formed or without a particular spouse in mind can be subject to variation. If, as has been discussed already, the property division regime is to give effect to the underlying policy that property owned or available to the parties as if it were owned by them must be shared upon dissolution of the relationship, it seems inevitable that “nuptial settlement” should also be read to include settlements made by parties other than those of the particular relationship where such settlement was of property of which the relationship parties enjoy the benefit. This would mean that dynastic trusts would be covered. So, the variation power should extend to settlements entered into by other parties where there is a sufficient connection between the relationship parties and the property.

In addition, the power should be applicable to all relationships to which the property division scheme applies including, in New Zealand, de facto couples. There is no reasonable justification to so restrict it and thereby discriminate against one type of relationship that is otherwise treated alike for the purpose of property division.

Secondly, is it necessary to identify the criteria or objective that a variation ought to satisfy. Variations could be made in order to meet the needs of the party disadvantaged by the settlement following the relationship break-down, or to give effect to the general intentions or expectations of the settlor and/or the trustees either at the time of the settlement or before the relationship ended, or simply to effect equal sharing. In exercising the discretion in *P v P*, the English Court of Appeal saw need as more important than the sharing principle in contrast to the view of the High Court.

In New Zealand, the variation power sits within a statute separate to the relationship property framework and was originally enacted in the time of fault-based divorce when the power was used to deny entitlements to the party at fault. The Supreme Court in *Clayton (No 2)* has very recently considered the New Zealand variation power in detail. The Court described the purpose of the power this way.

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76 *P v P* [2015] EWCA Civ 447.
77 Family Proceedings Act 1980, s 182.
78 *Clayton v Clayton* [2016] NZSC 30 (*Clayton (No 2])*). Although concerning the same parties and argued in the same hearing, the application for variation was in respect of a different trust than in the *Clayton* decision discussed earlier and a separate judgment was issued.
79 *Clayton v Clayton* [2016] NZSC 30 (*Clayton (No 2))* at [51].
The purpose of s 182... is to empower the courts to remedy the consequences of a failure of the premise (a continuing marriage) on which the settlement was made.

The Court rejected an approach based solely on the subjective expectations of the parties at the date of settlement of the trust. Instead, it said, the Court must make an objective assessment of what the applicant would have received of the trust property if the relationship had continued and compare that to the applicant’s actual position following the dissolution of the relationship.\(^{80}\) In this way, variation is being undertaken in response to a frustrating event and factors relevant to whether it will be ordered include\(^{81}\) the terms of the settlement and how the trustees are likely to exercise their powers including current and future benefit to the family unit; the type of assets; the relevant social context;\(^{82}\) the interests of children in particular; and the parties’ own expectations, which are relevant but not determinative.\(^{83}\)

Variation of settlements is a significant judicial power that amounts to a very real challenge to owner autonomy. It represents a concession to the competing policy of the applicable relationship property regime that should only be granted in order to give necessary and sufficient effect to it. Where that policy is the equal division of property that would otherwise have been owned by or used for the benefit of the partnership, as it is in New Zealand, the settlement ought to be varied to achieve that objective. So the inquiry must not be directed to the parties’ needs but rather to a consideration of what would likely have been done with the property and if it would likely have benefitted the partnership while it was in existence, then an equal sharing of the extent of the benefit is required.

In respect of controlled trusts, if it is likely the controlling partner would have effected a distribution to either of the parties which would have benefitted both had the relationship continued, then it ought to be shared. In respect of dynastic trusts, if it is likely that the trustee would have done something similar, then the same result should apply.

This leads to the third issue: the likely form of variation that should be permitted and any limits. The content of relief should be a reflection of what would have been the case had the relationship not failed. For example, in respect of a dynastic trust, where the parties’ home was a trust asset, it may be appropriate to settle half of the relevant assets of the trust on a separate trust or it may be appropriate to limit the order to the monetary equivalent of a life interest in the house if a life interest is what the party was effectively receiving or was likely to receive prior to the dissolution.\(^{84}\) In other words, there should be no assumption that assets of the trust sought to be varied will be shared equally. Care must also be taken to identify the right parties against which variation can be sought, particularly if the relevant property is held in a dynastic family trust of which neither party to the relationship is a trustee. The presence of third party beneficiaries likely to be affected by variations means that proprietary orders should be subject to prior changes of position made in good faith.\(^{85}\)

\(^{80}\) Clayton v Clayton [2016] NZSC 30 (Clayton (No 2)) at [48]-[49], [53].
\(^{81}\) Clayton v Clayton [2016] NZSC 30 (Clayton (No 2)) at [57]-[68].
\(^{82}\) This was said to be that parties to a marriage contribute in different but equal ways.
\(^{83}\) Although no order was made because the Claytons settled their claim before judgment was issued, the Supreme Court said that it would have made orders to resettle property of the trust on two separate trusts.
\(^{84}\) P v P [2015] EWCA Civ 447.
\(^{85}\) Property (Relationships) Act 1976, ss 44(4), 44C(3); Family Proceedings Act 1980, s 182.
Finally, it must be asked whether parties may contract out of the variation power. In my opinion this is both unnecessary and difficult. It is unnecessary because the exercise of discretion involved in making a variation is itself a restriction on the use of trusts to avoid ring-fencing property from the pool of relationship property. It would be logically incoherent to enable parties to contract out of the court’s discretion to vary settlements. Secondly, it would also be difficult for some parties to achieve in practice if the variation discretion is to cover settlements made prior to a relationship when the parties may not even have known each other or if it is extended beyond settlements made by the parties to the relationship to dynastic trusts. 

A judicial discretion to vary relationship settlements seems an appropriate means of limiting the nuisance of controlled trusts and dynastic trusts where they would otherwise prevent the policy of equal sharing from being achieved. However, clear statutory guidance on the criteria for variation would help to limit what could otherwise be arbitrary or inconsistent exercises of discretion. The approach taken by the Court in Clayton 2 would serve well as the basis for codification.

3 Extended property definition
A third means of statutory intervention to combat the problem of losing what would otherwise likely be relationship property to trusts is to extend the property division regime beyond fairly orthodox conceptions of property in order to include the trust assets.

An extended definition could be fairly narrow and prescriptive, so as to respond only to the particular nuisance sought to be eliminated. Examples of this approach are taken in some Canadian provinces. In British Columbia and Ontario, property subject to division includes trust assets which a party has power to transfer to himself. It excludes, however, trust property settled by someone else except to the extent of any increase in value to such property which must be shared. In Manitoba, trusts settled by others are also excluded unless they are intended to benefit the parties to the relationship.

An even more prescriptive definition has been suggested by a South African commentator:

Property which is deemed to be property of the parties includes –
(a) property of which any party was immediately prior to the divorce competent to dispose for his own benefit or for the benefit of his estate.
(b) For purposes of paragraph (a) a person shall be deemed to have been competent to dispose of assets if (i) he had such power as would have enabled him, if he were sui generis, to appropriate or dispose of such property as he saw fit whether exercisable by will, power of appointment or in any other manner; or (ii) if under any deed of donation, settlement, trust or other disposition made by him he retained the power to revoke or vary the provisions thereof relating to such property.

86 An additional issue arises in relation to the variation by an onshore court of an offshore foreign-law trust, see further A Lynn “Applying the Charman test to trusts in divorce the decision of the Hong Kong Court of Final Appeal in Kan Lai Kwan v Poon Lok To Otto and HSBC International Trustee Limited” (2015) 21 Trusts & Trustees 285 at 299. This is certainly a significant matter but not one that can be resolved by the domestic law of the onshore court and not one that should prevent the appropriate development of the relationship property regime of each individual jurisdiction.

87 Family Law Act 1990 (Ont), s 4(1); Family Law Act 2011 (BC), ss 84, 85.

88 Family Property Act (CCSM c F25) (Manitoba), s 7.

89 F du Toit “South Africa - Trusts and the Patrimonial Consequences of Divorce Recent Developments in South Africa” (2015) 8(2) JCLS 655, at 173.
While these approaches can be commended for the added certainty they provide which limits the judicial discretion involved, their success depends upon how strictly the trust deeds are read. Most trusts will not give an unrestrained power to a trustee or settlor to transfer or dispose of property. It will usually be the trustee with the power to distribute the property and that power is moderated by fiduciary duties to act in the interests of the beneficiaries, not to profit and not act in one’s own interest. Where all of these are absent, there is no trust in the first place and the property already belongs beneficially to the controller. These narrower provisions do not properly capture the nuisance of parties who have de facto control and influence.

A broader definition can be employed that, although necessarily leaving greater discretion for the courts to determine whether in any given case a trust asset should be counted as that of one of the parties, enables the court to respond to the factual reality of the situation. Such approaches are taken in the United Kingdom, Australia and Hong Kong where orders can be made in relation to the parties’ “financial resources”.

While this is certainly a departure from an approach based specifically on dividing up only assets which the parties legally own, it is one that is clearly permitted by the relevant statutory frameworks. The emphasis is on access to resources, and not formal ownership of property. It is said to better reflect the modern nature of wealth accumulation and takes an approach of substance over form to ownership.

[The legislation] represents an acknowledgement by Parliament that if justice is to be achieved between spouses at divorce the court must be equipped, in a society where the forms of wealth holding are diverse and often sophisticated, to penetrate outer forms and get to the heart of ownership.

Legislation of this broader style exists in specific contexts in New Zealand. For example, s 58 of the Criminal Proceeds (Recovery) Act 2009 allows the court to treat a person as having an interest in property if they have “effective control” over the property, notwithstanding that they may not have either a legal or equitable interest in it. Less explicit but still effective are provisions in the Child Support Act 1991 and the Legal Services Act 2000 that enable the court to take into account “financial resources” and prior settlements into trust when assessing liability for child support and “financial means” when assessing eligibility for legal aid. The approach of the Supreme Court in Clayton shows that it was very willing to take a broader view of what property includes when it ruled the particular mix of powers and the lack of duties amounted to a general power of appointment capable of being regarded as property.

Generally inherent in the broader approach is the need to identify an appropriate test to determine whether the particular assets will count as resources. The test that has been

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90 Matrimonial Causes Act 1973, s 25(2)(a).
91 Family Law Act 1975 (Cth), ss 79(4) and 75(2)(b). See also Kennon v Spry (2008) 238 CLR 366; Public Trustee & Smith [2008] NSWSC 397 at [125].
92 Matrimonial Proceedings and Property Ordinance (Cap 192), s 7. See also Kan Lai Kwan v Poon Lok To Otto and HSBC International Trustee Limited (2014) 17 HKCFAR 414 (CFA).
93 Whaley v Whaley [2011] EWCA Civ 617 at [113] per Lewison J.
94 Thomas v Thomas [1995] 2 FLR 668 at 670 per Waite LJ.
95 Section 105(2)(C)(i) and (ii).
97 Clayton v Clayton [2016] NZSC 29 at [84].
developed in England and Wales asks whether if the party were to request the trustee to advance the whole (or part) of the capital of the trust to him [or her], the trustee acting in accordance with its duties, would on the balance of probabilities be likely to accede to that request. 98 The Australian cases refer to property being in the de facto control of the party; of the party controlling the property as if they were the owner. 99 Although the underlying concern is indeed to capture assets over which one or other of the parties has control, using control alone as the criteria is not sufficiently nuanced nor informative. It provides little guidance as to how to assess which powers of control justify such a response. For example, does the power to appoint and remove trustees amount to control sufficient to give quasi-ownership of the assets? What of the power to add and remove beneficiaries? These powers could no doubt be used to influence a trustee to act in certain ways in relation to the trust property but is it enough to justify disregarding the beneficiaries’ ownership in favour of the settlor?

I suggest that it is not the presence of such powers but how those powers are likely to be exercised that can determine whether the trust property should for practical purposes be considered property of the power-holder. The English test is preferable because it looks to the effect of control. Focusing on whether it is more likely than not that if the party wanted the property, they would be given it provides greater explanation for why they should be considered the owner in practice. This test is also not limited to formal reserved powers. A beneficiary of a dynastic trust with no powers as such may nevertheless still have significant influence over trustees to have requests granted. Likewise, this approach also permits of the possibility that powers of control may not be sufficient if a trustee can show that, in spite of the party’s influence, the trustee is unlikely to make a distribution to the party. This might be because a distribution is, for example, detrimental to the interests of other beneficiaries or to the value of the trust property. 100

There are, however, two qualifications that ought to be made to the likely accession test. First, an assumption or condition must hold that in (hypothetically) acceding to the party’s request, the trustee would still be acting in compliance with its duties to the other beneficiaries. It is “very common that trustees will have perfectly properly acceded to all the requests of a settlor without in any way abdicating their fiduciary duties and responsibilities”. 101 If not, the party’s property right would really be no more than the result of coercion or of a breach of the trustee’s duty to exercise genuine consideration in making a distribution. The trust must be treated as having been validly performed.

The second qualification to the likely accession test is that it ought to be necessary not only for the trustee to be likely to accede to a party’s request to advance the property to him, but also that the party is likely to so request. It is possible that a settlor has reserved certain powers to himself not to ensure they will benefit personally from the trust property, but to ensure that the trustees act in accordance with the purpose of the trust as the settlor expected it to be carried out. In other words, it is possible that the settlor has retained powers of control not to secure

100 A v A [2007] 2 FLR 467 at [97]–[98] per Munby J.
himself a benefit but to protect the beneficiaries’ prospects of benefit. Likewise, it is possible that the influential beneficiary of the dynastic trust would not want to see the trust depleted and so would not request any advances.

A broader definition of property that includes resources likely to be made available to either of the parties is an effective way to enable trust assets to be drawn in to the pool of relationship property. But not all trust assets should be caught. Only those of which the party to the relationship is likely to request a distribution and which request is likely to be approved by the trustee should really be counted as property in fact of one of the parties. Such requirements operate to allow the court to anticipate the distribution of assets to one or other of the partners. This is surely a preferable approach to concluding that the relevant control or influence renders the trust the alter ego of the controller, drawing into question the validity of the trust. The approach here is effectively one of performance of the trust, rather than frustration of it.

F THE BEST METHOD?
If, as this paper has accepted, controlled trusts and dynastic trusts are indeed creating very real barriers to the effective implementation of the policy of equal sharing that is fundamental to the New Zealand property division regime, it is necessary to find a means of including trust assets in the process of property division. I have argued that this cannot be done in the absence of authorising legislation. General principles of trusts and property law for the most part tolerate these trusts unless it can be shown that one party’s control is so pervasive that there is in substance no real trust obligation. While the trust in *Clayton v Clayton* should have been seen in this light, it is a rare occurrence.

Statutory mechanisms include voidability of fraudulent dispositions; judicial powers of variation; and a broader definition of property that extends beyond traditional property conceptions to identify which assets should be capable of being divided between the parties to the relationship. The first should always be available to reverse the effects of fraud but it is not sufficient to deal with the problems of controlled and dynastic trusts where there is no fraud present. I have suggested ways in which both the statutory variation power and the wider definition of relevant property can be appropriately controlled to enable the policy of equal sharing to be met without unreasonably trampling on either owner autonomy or the utility of trusts more generally.

I recommend an expanded variation discretion that applies to settlements affecting de facto relationships as well as marriages and civil unions. The variation discretion should be capable of being applied not just to trusts settled by either of the parties to the relationship, but to trusts with other settlers as long as the settlement is in connection with the relationship. Dynastic trusts should be capable of variation to the extent they affect the interests of the parties to the relationship. The wide application of the power should be moderated somewhat by the inclusion of provisions that set out the purpose of the variation and the relevant factors to consider in deciding whether to exercise the discretion. The ultimate objective should not be to meet the needs of the disadvantaged party but to attempt to give effect to what would have been the likely application of the trust assets had the settlement not been effectively frustrated by the dissolution of the relationship.

102 It must be remembered too that the property will not necessarily be subjected to equal sharing or any other division. That is a second order question. The concern here is simply with whether and how property in which a party has no beneficial interest can nevertheless be treated as their property.
A broadened definition of assets that can be caught by the property division regime is also an effective means to dealing with the perceived unfairness that arises from controlled trusts and dynastic trusts. I have made recommendations as to appropriate control mechanisms. To some extent the inquiry under each method is similar: they are giving effect to anticipated distributions of trust property. However, the risk of differing objectives, inconsistent applications and resulting uncertainty is perhaps greater with a broad definition of property than it is with a power of variation that can be accompanied more easily by statutory guidance as to the purpose of such variations and a list of valid factors to consider.

Ultimately, it must be borne in mind by courts and legislators that the powers to vary and expand property rights can have significant adverse effects on private ordering and security of receipt, crucial features of the harmonious and productive functioning of our society. As such, they must be carefully constrained with only as much discretion as is necessary and as much clarity of their purpose and limits as is possible without unduly limiting their application in the inevitable event of future innovations created by lawyers looking for alternative ways to enable their clients to retain control and benefit without responsibility and burden of property ownership.