Intervention to Prevent the Abuse of Trust Structures

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Trusts are very common in New Zealand, but they are increasingly detrimentally affecting the rights of creditors and spouses or partners when their relationship ends. This article examines the current statutory and common law remedies available to creditors and spouses or partners whose rights are defeated by trusts. It concludes that the existing law does not adequately protect such persons. The article considers options for reform and recommends that Parliament review the balance between socio-economic imperatives and the protection provided by the general principles of trust law.

I Introduction

Trusts have been around for centuries, but possibly not on the scale that they are today in New Zealand. While it is impossible to be precise about the total number of trusts in New Zealand, statistical information from the Inland Revenue Department (IRD) shows that the number of tax returns filed by trusts and estates has risen from 145,900 in the 2000–2001 tax year to 237,500 in the 2007–2008 tax year.¹ Trusts holding only non-income producing assets, such as the family home, do not have to file a tax return. Anecdotal evidence suggests that there are many such trusts. Estimates that

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put the total number of trusts between 300,000 and 400,000 may, therefore, not be far off the mark. In view of the size of New Zealand’s population, there is no doubt that trusts have become enormously popular.

Key changes in legislation in the past few decades have made trusts increasingly attractive as a mechanism for securing tax benefits, protecting assets from creditors and other unwanted claims, avoiding means testing for state subsidies, and providing for future generations. The ability of spouses to divide their assets under the Matrimonial Property Act 1976 — since renamed the Property (Relationships) Act 1976 — without incurring gift or estate duty, and the abolition of estate duty in 1992, made it possible for property owners to divest themselves of assets without losing control or enjoyment of those assets. Property owners can now reserve to themselves extensive powers of control over the trust and appoint themselves as primary beneficiaries of their discretionary trust. They may even have the power to vest the entire trust capital in themselves. Nothing much changes for these types of settlor. Life carries on as before. But if they run into personal or financial difficulties, they have the advantage of knowing that their assets are safe. The trust then operates as a protective shield against claims by disgruntled beneficiaries, unpaid creditors and excluded former spouses or partners. Little wonder that trusts have become so popular. With careful planning, settlors have nothing to lose and everything to gain from placing their assets in trust.

Therein lies the problem for the modern express trust. There is a growing sense of unease in some quarters that the modern trust is being abused and that the law does not adequately protect legitimate rights and interests.

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2 Maria Kazmierow “When not to trust” (2007) 63 NZLawyer 12 at 12; Rob Stock “Please sir, can we have some more … of our own money” Sunday Star-Times (New Zealand, 24 August 2008) at D1.

3 For an overview of the modern history of the express trust in New Zealand, see WM Patterson “When is a Trust a Trust?” (paper presented to the Legal Research Foundation Conference, Auckland, 2009). The proposal to repeal gift duty is likely to make trusts even more attractive; see Taxation (Tax Administration and Remedial Matters) Bill 2010, cl 110.

4 Estate and Gift Duties Act 1968, ss 31A (now repealed) and 75A.

5 Estate duty ceased to be payable in respect of deaths occurring on or after 17 December 1992; see Estate Duty Abolition Act 1993, s 3. Section 5 of the Estate Duty Repeal Act 1999 repealed Parts 1–3 of the Estate and Gift Duties Act 1968. Prior to the abolition of estate duty, trust assets were treated as part of the settlor’s estate for the purposes of estate duty if the settlors derived any benefit from the trust they had settled; see Estate and Gift Duties Act 1955, s 5(1); Estate and Gift Duties Act 1968, ss 11–12.

6 See, for example, Harrison v Harrison (2008) 27 FRNZ 202 (HC) [Harrison]; Isolare Investments Ltd v Featherston HC Auckland CIV-2002-404-1791, 15 September 2006 [Isolare].
Relief of beneficiaries, creditors and spouses or partners. This article does not examine the rights of beneficiaries. Its focus is on the rights of third parties, in particular creditors and spouses of a settlor or beneficiary of a trust. It considers the circumstances in which it is appropriate either to disregard a trust or to treat trust assets as beneficially owned by a settlor or beneficiary who has no property in the trust in order to give effect to the claims of creditors or spouses.

Creditors of a settlor or beneficiary of a discretionary trust are outside the trust relationship, but they can be detrimentally affected by the trust if the debtor has no property in the assets of the trust. They may be unable to recover what is owed to them without access to the assets held in trust. Former spouses and partners may not technically be outside the trust relationship. They may still be discretionary beneficiaries of the trust after separation, but they are unlikely to receive any ongoing benefit from the trust. They too may be detrimentally affected by the trust if they are denied a share of the trust property to which they have contributed during the relationship.

Creditors and former spouses or partners would argue that the current law does not adequately protect their rights and expectations. They would say that trusts easily and unjustly defeat their rights. Settlers and those benefiting from trusts would probably respond that Parliament recently changed the law governing the rights of creditors and spouses, and that beyond the limits imposed by those statutes trusts should be allowed to perform their role. The question that this article seeks to address is whether the law governing trusts adequately protects the legitimate rights and expectations of creditors and former spouses or partners. If not, how should it be changed?

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7 See, for example, Donna Chisholm “Bye Bye Love — Hello Lawyers” North & South (Sydney, 1 August 2009) at 30–36; Rob Stock “Mum and dad trustees face wake-up” Sunday Star-Times (New Zealand, 1 August 2010) at D1; Rob Stock “DIY trusts under siege: Government urged to take action over poorly run trusts” Sunday Star-Times (New Zealand, 1 August 2010) at D5.

8 In terms of the general law, the beneficiary of a discretionary trust has no property in the assets of the trust until the trustees exercise their discretion in the beneficiary's favour; see Gartside v Inland Revenue Commissioners [1968] AC 553 (HL); Hunt v Muollo [2003] 2 NZLR 322 (CA) [Muollo]; Johns v Johns [2004] 3 NZLR 202 (CA); Nation v Nation [2005] 3 NZLR 46 (CA) [Nation].

9 See, for example, Nation, above n 8; Ward v Ward [2009] NZCA 139, [2009] 3 NZLR 336 [Ward (CA)], aff’d Ward v Ward [2009] NZSC 125, [2010] 2 NZLR 31 [Ward (SC)]. In both cases, the wives received no benefit from the trust after separation, while their husbands continued to benefit from the trust.

10 The Property (Relationships) Amendment Act 2001, the Insolvency Act 2006 and the Property Law Act 2007 provide protection and remedies to spouses, partners and creditors.
Creditors and spouses or partners are often grouped together in relation to claims against trusts. Yet, their rights and interests are fundamentally different. Creditors and debtors normally approach each other as strangers and have a choice whether to enter into a financial arrangement. Their relationship is contractual in nature, though creditors may insist on security to protect against the risk of non-payment. Spouses or partners, by contrast, do not approach each other at arm’s length. They both contribute directly or indirectly to the accumulation of their assets and expect to share the beneficial ownership of those assets when their relationship ends. In view of these differences, it is necessary to deal with creditors and spouses or partners separately.

II Creditors

Creditors have remedies under the Property Law Act 2007 and the Insolvency Act 2006 if their debtor has disposed of assets into trust, thereby defeating those creditors’ rights. There are also remedies under the general law. Creditors have invoked the sham and alter ego doctrines in an attempt to vest the trust property in the debtor, rather than the beneficiaries of the trust. Where the trustees have incurred debts in administering the trust, their creditors have also relied on subrogation to the trustee’s right of indemnity against the trust to secure payment. The creditors’ aim in pursuing these remedies is to recover assets from the trust to enable their debts to be paid. However, the problem with these remedies is that they are either difficult to pursue or limited in scope or effect. As a result, creditors may be left with unpaid debts, while their debtors continue to enjoy the benefits of the trust.

A Existing statutory remedies

Section 60 of the Property Law Act 1952 and its successor, subpart 6 of Part 6 of the Property Law Act 2007, allow property dispositions to be set aside

that were intended to defeat the rights of creditors.\textsuperscript{13} Proving the required fraudulent intent at the time of the disposition is difficult. It is a question of fact to be determined on all the evidence before the court.\textsuperscript{14} However, the recent decision of the New Zealand Supreme Court in \textit{Regal Castings Ltd v Lightbody} (Lightbody) has liberalised this requirement to some degree by clarifying that a fraudulent purpose or motive is not required to establish fraudulent intent.\textsuperscript{15} Rather, it is the debtor's knowledge of the consequences of the disposition for the creditors that determines whether it was made with the intent to defeat creditors.\textsuperscript{16}

Mr Lightbody and his wife transferred their home into trust at a time when Mr Lightbody was the personal guarantor of his company's indebtedness to Regal Castings. There was no suggestion at the time of the disposition that his company was in financial difficulty or that Mr Lightbody's personal guarantee would be enforced. It was accepted that Mr Lightbody's purpose or motive in making the disposition was not to defeat his creditors, as it was not his wish to cause them loss. The Supreme Court nonetheless held that he intended to defeat his creditors because the circumstances at the time of the disposition were such that Mr Lightbody must have known that, by disposing of his own asset of value into trust, he was exposing his creditors to a significantly enhanced risk of hindering, delaying or defeating recovery of the amounts owing to them. That knowledge equated to a fraudulent intent.

It was not necessary to show that Mr Lightbody was insolvent as a result of the disposition, though arguably he was, given his lack of other assets at

\textsuperscript{13} Section 47(1) of the Property (Relationships) Act 1976 has the same aim, but is limited to transactions between spouses or partners. It does not apply to transactions with third parties, such as trustees.

\textsuperscript{14} There is some uncertainty whether the irrebuttable presumption of intent to defraud, established in \textit{Freeman v Pope} (1870) 5 Ch App 538 [\textit{Freeman v Pope}] in respect of dispositions made by insolvent debtors, applies in New Zealand. The Court of Appeal in \textit{Regal Castings Ltd v Lightbody} [2007] NZCA 396, [2008] 2 NZLR 153 at [55] and [91], and Elias CJ in \textit{Regal Castings Ltd v Lightbody} [2008] NZSC 87, [2009] 2 NZLR 433 [\textit{Regal Castings (SC)] at [5]–[9], were of the view that it did not, as it had the potential to work considerable injustice. On the other hand, Tipping J, in \textit{Regal Castings (SC) at [104], endorsed the rule in \textit{Freeman v Pope} as "a very salutary rule". The other three Supreme Court Justices in \textit{Regal Castings (SC) did not express an opinion on the matter. Subsequently, in \textit{Taylor v Official Assignee} HC Auckland CIV-2006-404-7115, 26 August 2009, Heath J declined to follow Tipping J's view, holding that the rule in \textit{Freeman v Pope} did not apply in New Zealand.

\textsuperscript{15} \textit{Regal Castings (SC), above n 14, affirming the distinction between "knowledge" and "purpose" made by the Court of Appeal in \textit{Swann v Secureland Mortgage Investment Nominees Ltd} [1992] 2 NZLR 144 (CA). See also \textit{Redmond Trustees No 5 Ltd v Official Assignee} HC Auckland CIV-2010-404-0007, 27 August 2010.

\textsuperscript{16} Ibid, at [54]. See also Elizabeth Toomey "Gifting the family home to a trust" (2009) NZLJ 131.
the time from which he could have satisfied his personal guarantee to Regal Castings. Nor was it necessary to show that the disposition was made for inadequate consideration, although in this case it was because Mr Lightbody immediately forgave NZ$27,000 of the debt owed by the trustees in respect of the disposition. The Court held that the required intent would exist if the debtor knew that a transaction exposed creditors to risk in circumstances where the debtor remained able to pay his or her debts as they fell due, but there was a high level of probability that the situation would not continue. The relevant circumstances at the time of the disposition from which the Court inferred Mr Lightbody’s intent to defeat his creditors were as follows:

- His explanation for the disposition was inadequate. If he had wanted to provide for his children, he could have done so in other ways — for example, by will;
- His personal guarantee was a major liability that he did not have the ability to meet at the time of the transfer;
- His company was also unable to meet its indebtedness from earnings at that time;
- He exchanged his interest in the family home for a debt that was not repayable for seven years. That was bound to hinder or delay Regal’s recourse to Mr Lightbody’s only significant asset — the debt owing by the trustees;
- He immediately forgave NZ$27,000, which meant that the disposition was at an undervalue;
- He and his wife forgave the entire debt before it was due for repayment. There was therefore no effective consideration for the disposition;
- The disposition was done without telling Regal even though Mr Lightbody’s company depended on Regal’s ongoing support. That was a well-recognised badge of fraudulent intent. Had Mr Lightbody told Regal he was transferring his home into trust, Regal would have withdrawn its support; and
- The Lightbodys’ continued occupation of the house as discretionary beneficiaries of the trust was another badge of fraudulent intent.

While creditors will no doubt welcome this decision, the onus of proving a fraudulent intent is still a tough one. Furthermore, even if they do prove that the disposition was made to defeat their rights, the disposition will not

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17 *Lloyds Bank Ltd v Marcan* [1973] 1 WLR 1387 (CA), cited with approval in *Regal Castings* (SC), above n 14, at [58].
18 *Regal Castings* (SC), above n 14, at [56].
be set aside if the recipients were bona fide purchasers for value without notice. That was not the case in *Regal Castings*. Although at the time of the disposition the independent trustee did not know of the debt to Regal Castings, Mr Lightbody was also a trustee. His knowledge tainted the trustees’ receipt of the property. They received it as a unity, taking title as joint tenants. Mr Lightbody could, therefore, not take advantage of his independent co-trustee’s ignorance.

In cases where the debtor has been declared bankrupt, the Official Assignee has the power to invalidate dispositions made to a trust in the five years immediately before the bankrupt’s adjudication. Recovery of the property is also subject to the bona fide purchaser exception and the change of circumstance defence.

None of these remedies would have assisted the creditors of Gary Reynolds, the bankrupt entrepreneur in *Official Assignee v Wilson* (Wilson). Mr Reynolds was not long discharged from his first bankruptcy when he bought a house in Invercargill for NZ$64,000 in March 1996. Wanting to protect the property from future business risks, he signed the purchase agreement as agent for a trust yet to be formed. He settled the GM Reynolds Family Trust in May 1996 and the trustees completed the purchase. Mr Reynolds paid the deposit and the balance was financed by a mortgage, a personal guarantee from Mr Reynolds, and a loan from a company that he controlled. The trustees were Mrs Harvey, who was the mother of Mr Reynolds’ de facto partner, and Mr Wilson, who had been Mr Reynolds’ solicitor for many years. The three children from his de facto relationship with Ms Clyma were the beneficiaries, as well as any future children and grandchildren of Mr Reynolds. Mr Reynolds and Ms Clyma were neither trustees nor beneficiaries of the trust, but they lived in the home with their three children and paid all the outgoings, including the mortgage. There was no lease or other documentation to support that arrangement.

In late 1996, Mr Reynolds and Ms Clyma decided that they wanted to renovate the house. The trustees declined approval, but they orally agreed to sell the home back to Mr Reynolds for the same price that they had bought it for earlier in the year. Mr Reynolds refinanced and spent NZ$50,000

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19 Property Law Act 1952, s 60(3); Property Law Act 2007, s 349.
20 *Regal Castings* (SC), above n 14, at [70] and [128].
21 Insolvency Act 1967, s 54; Insolvency Act 2006, ss 194, 204 and 205. The Official Assignee has an unconditional power to cancel gifts within two years of bankruptcy. Between two and five years prior to bankruptcy the Official Assignee may cancel only if the debtor was unable to pay his or her debts at the time of the gift or at any time thereafter up to adjudication without the aid of the property that was gifted.
22 Ibid, ss 54(6) and 58(6); Insolvency Act 2006, s 208.
23 *Official Assignee v Wilson* [2006] 2 NZLR 841 (HC), aff’d Wilson, above n 11.
renovating the house. The property was transferred to Mr Reynolds in April 1997, by which time most of the renovations were complete.

In February 1998, Mr Reynolds bought a property in Queenstown for NZ$215,000, signing the agreement on behalf of the trustees and paying the deposit. He arranged for the purchase price and some additional funds for his business to be financed by two mortgages and an unsecured loan from Ms Clyma's company. The mortgages were secured over both the Queenstown and Invercargill properties. The Reynolds family moved into the Queenstown house in 1998 and paid the outgoings. As with the Invercargill property, the arrangement in relation to the Queenstown house was not recorded in writing, nor was there a lease entitling Mr Reynolds and Ms Clyma to reside there. With the agreement of the trustees they renovated the property, financed by an interest-free loan from Ms Clyma to the trustees. In 2000, the Invercargill property was sold for NZ$135,000.

The following year, Mr Reynolds was adjudicated bankrupt for the second time, owing over NZ$500,000, mostly to the IRD. He had no assets. The only asset of value was the house in Queenstown, but it was in trust and Mr Reynolds was not a beneficiary. A valuation obtained in 2005, six months before the High Court hearing, put the value of the property at NZ$680,000 with an equity of NZ$270,000 after deduction of the mortgage and Ms Clyma's unsecured advances.

Section 60 of the Property Law Act 1952 — the applicable statute at the time — was of no use to the Official Assignee because Mr Reynolds did not alienate the Queenstown property to the trustees. The trustees acquired the property directly from the vendor, with Mr Reynolds acting as the trustees' agent. Besides, there was no evidence to suggest that Mr Reynolds had creditors at the time whose rights he intended to defeat by settling the trust.

The Insolvency Act 1967, which was in force at the time of Mr Reynolds' bankruptcy, was also of little use. Section 42 vests property “belonging to or vested in the bankrupt at the commencement of the bankruptcy” in the Official Assignee. Section 101 of the Insolvency Act 2006 is to the same effect. As Mr Reynolds was not a beneficiary of the trust, the Queenstown property did not belong to, or vest in, him. While it is tempting to argue that it did “belong” to him, because he treated it as his own, that would give him rights in property to which he was not legally entitled and it would deprive the beneficiaries of their rights. If that had been Parliament's intent, one would expect a clear direction to that effect.

Capital payments made in respect of the property up to five years before Mr Reynolds' second bankruptcy would have been vulnerable to challenge by the Official Assignee, but those amounts were small. It would not have

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24 Settlement of the purchase was not effected until March 1999, but Mr Reynolds arranged to rent the property from the vendors until settlement.
entitled the Official Assignee to take the Queenstown property. Nor could the Official Assignee rely on the trustees' right of indemnity because Mr Reynolds was not a trustee. Even if he had been, it is not clear that the debts were incurred in the administration of the trust, let alone its proper administration.

Mr Reynolds was neither a trustee nor a beneficiary of the trust. He had no legal or beneficial rights in respect of the trust property. Yet, he controlled the trust, enjoyed all the benefits of living in the property and treated the house as his own. After the Invercargill property was transferred back to Mr Reynolds, the trustees displayed little independence or active administration. They did not meet. There were no resolutions, records or minutes. Mr Reynolds' personal finances were intermingled with the trust's finances. The bank statements relating to the trust property were addressed and sent to Mr Reynolds, not the trustees. It seems that shortly after the trust was settled all decisions pertaining to the trust were taken by Mr Reynolds and the trustees bowed to his wishes, executing documents as and when called upon to do so. The trust was a sham in fact, but not in law.

B Sham trusts

Both the High Court and the Court of Appeal held that the Reynolds Trust was not a sham because, when it was set up, Mr Reynolds and his trustees did not intend the transaction to be anything other than a trust. Citing Diplock LJ's well-known dictum in *Snook v London and West Riding Investments Ltd*, the Court of Appeal described the essence of a sham trust as follows:

A trust will be held to be a sham where there is an intention to have an express trust in appearance only. ... The absence of an intention to create a genuine trust prevents the trust from being valid, because one of the essential ingredients for its creation is missing. The trust is void for the lack of intention to create a trust.

The Court found no such intention in relation to the Reynolds Family Trust. It was set up as a genuine trust and, to start with, it functioned as such. Mr Reynolds sought to protect the family home from future business risks by putting it into trust and the trustees accepted their trusteeship. Mr Wilson

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26 *Re Johnson; Shearman v Robinson*, above n 12, at 555–556; *Levin v Ikiia*, above n 12; *AMP General Insurance*, above n 12.
27 *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 (CA) [Snook].
28 *Wilson*, above n 11.
acted as a trustee when he refused Mr Reynolds’ request to renovate the Invercargill property. That decision illustrated that Mr Wilson was acting independently from Mr Reynolds. As the trust was intended to be genuine, it was not a sham and could not later become a sham. Beneficial interests had been created that could not be undone by subsequent failures on the part of the trustees to perform their obligations. Poor administration could not convert a valid trust into a sham. Unless the later appearance of a sham could be traced back to the settlor’s intention at the time of the trust’s creation, the trust was valid and remained so.²⁹

It followed that there was no such thing as an “emerging sham”, in the sense of an existing trust becoming a sham at a later point.³⁰ However, the Court conceded that a subsequent transfer of property to the trustees could be a sham.³¹ Each settlement creates a fresh trust, albeit on the same terms as the original trust. If the subsequent settlement was intended to be a sham, it would be void for lack of intention to create a trust, but only with respect to that settlement. The remainder of the trust would be valid.

C The meaning of common intention

The Court of Appeal held in Wilson that in bilateral trusts, where the trustee and the settlor are not the same person, both the settlor and the trustee must have intended the transaction to be a sham.³² The Court rejected Jessica Palmer’s argument that only the settlor’s intention is relevant.³³ Following overseas precedent and preferring the views expressed by Matthew Conaglen, the Court held that the settlor and trustee must have a common intention to create a trust in appearance only.³⁴ Furthermore, the intention must be ascertained subjectively, not objectively as would be usual when construing

²⁹ Ibid, at [55]-[57].
³⁰ Ibid. The Court distinguished Marae Finance Ltd v Virtue [1981] 1 NZLR 586 (CA), where Richardson J suggested that a document that was bona fide at its inception could become a sham if the parties later departed from their initial agreement and allowed the document to mask their new arrangement, on the ground that the document at issue in that case was a financing agreement, not a trust.
³¹ Wilson, above n 11, at [57].
³² Ibid, at [29]-[54].
³⁴ Matthew Conaglen “Sham Trusts” [2008] CLJ 176 at 189–190 accepts Palmer’s argument in relation to unilateral declarations of trust because the settlor is then the trustee. In relation to the more common bilateral declaration of trust, however, he rejects Palmer’s view as being against the weight of authority.
commercial documents. By insisting on a common intention, it would be more difficult to establish that the transaction was a sham. The Court in Wilson thought that was appropriate because it promoted commercial certainty and protected the interests of beneficiaries.

What is meant by a “common intention” to create a sham? Must the settlor and the trustees be subjectively ad idem? Must they be dishonest, as the word “sham” seems to imply? The settlor and trustees in Begum v Ali appeared to meet both of these elements. The husband, Mr Ali, transferred the family home into trust when his marriage to Ms Begum was in trouble. His brother and a friend were the trustees, and Mr Ali had the power of appointment. Mr Ali did not tell his wife about the transfer and she was not a beneficiary of the trust. Mr Ali and his son from an earlier marriage were the beneficiaries. When the couple separated the wife brought relationship property proceedings, alleging inter alia that the trust was a sham. The Court rejected the husband’s reasons for creating the trust and found that the husband and the trustees never intended the husband to relinquish his interest as proprietor of the home. The Judge held:

I find it impossible to avoid the conclusion that the trust and the transfer were devices not seriously intended for the purposes referred to in the trust deed itself and to that extent amount to no more than a fiction. ... It was never the intention of the first respondent [the husband] to dispose of his interest in the ... property to the second respondents [the trustees] ... The view that I take is that the transfer to the second respondents was not a genuine “disposition” and that the Court is entitled to look at the reality of the situation rather than be bound by the apparent consequences of what the first respondent did rather than what he intended to do. ... In my view, the second respondents themselves were at all times aware that it was never intended that they should become the owners of the property and it was always understood by them that the [first] respondent would in fact retain his interest therein ... .

35 Wilson, above n 11, at [50]; Hitch v Stone (Inspector of Taxes) [2001] EWCA Civ 63 [Hitch] at [65]. See also Conaglen, above n 34, at 181–183, where the author explains that when construing a genuine transaction the parties’ subjective intentions and subsequent conduct are irrelevant, whereas it is precisely those matters that the court looks at when deciding whether a transaction is a sham.

36 Wilson, above n 11, at [53].


38 She also brought proceedings under s 44 of the Property (Relationships) Act 1976 alleging that Mr Ali had disposed of the home to defeat her rights under the legislation. That claim was successful and it was upheld on appeal; see Ali v Begum HC Auckland CIV-2005-404-496, 1 June 2005.

39 Begum v Ali, above n 37, at [58]–[60].
Although this case predates Wilson, the Court’s conclusions would appear to meet the high threshold set by the Court of Appeal for a sham trust. The husband as settlor and the trustees had a common intention that the trust would be one in appearance only. The trustees knew that they were expected not to act as independent trustees and they did not do so. They were conscious and active participants in the settlor’s sham. Mr Ali and his trustees had a common intention in the sense of being subjectively ad idem about the nature and purpose of the transaction. Furthermore, they were dishonest. They knew they were creating a false impression of ownership so as to defeat Ms Begum’s rights to the property under the Property (Relationships) Act 1976.

Other cases where transactions have been held to be shams have not been as clear cut. What sort of intention did the shammer have in those cases? And what sort of intention did the recipients of the property have to satisfy the common intention requirement? Midland Bank v Wyatt (Wyatt)⁴₀ and Official Assignee v Sanctuary Propvest Ltd (Propvest)⁴¹ shed some light on these questions.

(1) The shammer’s intent

The shammer in Wyatt was Mr Wyatt. He and his wife were joint owners of their family home when they declared themselves trustees of the property in 1987. The beneficiaries were Mrs Wyatt as to 50 per cent and the couple’s two daughters, then aged 11 and 17, as to the other 50 per cent. Mr Wyatt’s purpose was to gift his share of the equity in the home to his children to provide for them and to safeguard his family from the long-term commercial risks associated with a business venture that he was planning. Mr and Mrs Wyatt both signed the trust deed, but Mrs Wyatt had no recollection of doing so. Her evidence was that she left all financial matters to her husband and probably signed it without knowing what it was. Mr Wyatt put the trust deed into the safe at home where it remained until the Midland Bank obtained judgment against him in 1991. He then produced the deed to show that he had no beneficial interest in the home.

Mr Wyatt had not previously mentioned the trust to the bank, despite arranging several loans between 1987 and 1991 for which the bank’s existing mortgage over the property was to provide security. Mr Wyatt saw no reason to tell the bank about the trust even though it was clear from correspondence that the bank was under the impression that he was still a beneficial owner of the property. Nor did he tell his business partner or his daughters. When he separated from his wife in 1989, he did not tell his solicitor of the trust. He did not even remind his wife of the trust when they agreed to sell the

⁴₀ Midland Bank v Wyatt [1995] 1 FLR 696 (Ch) [Wyatt].
⁴¹ Propvest, above n 11.
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The Court held that the first declaration of trust was a sham. Mr Wyatt purported to divest himself of property by means of a trust, but once he had executed the trust deed, he placed it in a safe for a rainy day. He did not act upon it in any way whatsoever. He continued as though he remained a joint beneficial owner of the property, not changing his attitude with regard to his dealings involving the house. When it was expedient to do so he allowed both the bank and his solicitors to remain ignorant of the true position. The Court concluded that he either forgot about the trust or deliberately concealed it. This led the Court to infer that when Mr Wyatt executed the trust deed he had no intention of endowing his children with his interest in the house. His subsequent conduct indicated that his declaration of trust was a sham from the start.

The Court’s finding that Mr Wyatt may have forgotten about the trust was irrelevant. It could not have converted a validly created trust into a sham, any more than a valid trust can become a sham as a result of poor administration. In any event, Mr Wyatt did not forget about the trust. His own evidence revealed that he had remained fully aware of the trust’s existence, but did not think he had to mention it to anyone. The Court found that he did not have a fraudulent motive, but nor did he treat the trust as real, in the sense of it being an impediment to his ability to deal with the property as beneficial owner. His conduct following the execution of the trust showed that he did not intend the trust to take effect according to its terms. He had no intention of divesting himself of his equity in the property. He dealt with the property as if he was still the beneficial owner, ignoring his earlier declaration of trust. It was not until the bank sought to execute its judgment debt that he suddenly produced the trust deed, claiming not to own the property.

The Oxford English Dictionary defines a “sham” as a thing that is not what it is purported to be, a pretence, something that is bogus or false. Case law has used similar descriptions. They suggest an element of dishonesty, short of actual fraud. Mr Wyatt’s conduct had an element of dishonesty. Although he did not have a fraudulent motive, he knew that the bank was

42 Snook, above n 27; Hitch, above n 35, at [66]; Wilson, above n 11; AG Securities v Vaughan, Antoniades v Villiers [1990] 1 AC 417 (HL); Hadjiloucas v Crean [1988] 1 WLR 1006 (CA); A v A [2009] WTLR 1 (HC (FamD)) at [53].

relying on his equity in the home as security for the loans it was making to support his business. His failure to mention the trust to the bank would by any objective standard constitute dishonesty. He also did not remind his wife of the trust when, after separation, they agreed to sell the house and divide the proceeds equally between them. Clearly, he did not treat the trust as genuine. His conduct revealed that he never saw the trust as an obstacle to his dealings with the property. He still saw himself as a beneficial owner of the property. The declaration of trust was therefore a pretence from the start because he had no intention of acting on it.

(2) The recipient’s intent

The prevailing view is that in bilateral trusts both the settlor and the trustees must have a common intention that the transaction be a sham. Accordingly, for the Wyatts’ trust to be a sham, Mrs Wyatt in her capacity as trustee had to share her husband’s sham intent. The Court found that Mrs Wyatt was not aware of the import or effect of signing the declaration of trust. She would have signed whatever was put in front of her without reading it. She knew nothing of the trust when, after separating from Mr Wyatt, she agreed to the sale and equal division of the house. Nor did she remember the trust when she signed the second declaration of trust. She believed Mr Wyatt was still a beneficial owner of the property. The Court held, however, that her ignorance did not prevent the declaration of trust from being a sham. A transaction was still a sham even if one of the parties to the transaction merely “went along with the ‘shammer’ not either knowing or caring about what he or she was signing”. Such a person was still a party to the sham.

In subsequent cases such conduct has been held to constitute recklessness, not in the criminal sense of a conscious awareness of risk, but in the sense of carelessness or indifference to the consequences of one’s actions. Mrs Wyatt’s conduct in signing whatever her husband put in front of her could be characterised as reckless in that sense. Whatever she was thinking when she signed the declaration of trust, the evidence suggests that neither she nor her husband intended the document to take effect as a trust. It seems that at all times she regarded her husband as her beneficial co-owner, not her daughters. By signing the declaration of trust she assisted her husband to create a false impression that a trust had been established, when neither of them intended the declaration to take effect as a trust.

44 Wilson, above n 11.
45 Wyatt, above n 40.
46 Re Esteem Settlement (Abacus (CI) Ltd as Trustee), Grupo Torras SA and Culmer v Al Sabah [2003] JLR 188 (Royal Court) [Esteem] at [58]; A v A, above n 42, at [52]. See also Conaglen, above n 34, at 190–192.
Mr Dunn in Propvest was in a somewhat similar position to Mrs Wyatt.\textsuperscript{47} In 2001, during Mr Armitage's second bankruptcy, Mr Dunn agreed to Mr Armitage's request to accept appointment as the sole trustee of the Sanctuary Trust (the Trust) and the sole director and shareholder of Sanctuary Propvest. Both structures were set up on Mr Armitage's instructions. His children were the primary and final beneficiaries of the Trust, but Mr Armitage was also a discretionary beneficiary and he had the power to appoint and remove trustees. Soon after the appointments were formalised, Mr Dunn declared that he held the company shares on trust for the beneficiaries of the Trust. In 2002, the company bought a property in Manurewa. When Mr Armitage went bankrupt for the third time in 2007, the Official Assignee lodged a caveat against the Manurewa property claiming that both the company and the Trust were shams and that the Manurewa property was held on trust for Mr Armitage.

In proceedings that the caveat not lapse, Asher J had little difficulty accepting that both the company and the Trust were arguably shams. Mr Dunn was a truck driver whom Mr Armitage knew from the bowling club. Mr Armitage enticed him to take on the trusteeship and directorship by the promise of a good credit rating that would enable him to buy a home. Mr Dunn had no idea what he was doing and knew nothing about the company's dealings. He referred everything to Mr Armitage and followed his instructions, signing documents and even blank cheques on Mr Armitage's instructions. Mr Dunn's involvement was clearly a façade to hide Mr Armitage's control. Mr Armitage never intended Mr Dunn to function as a trustee or a director and Mr Dunn never did so.\textsuperscript{48} Mr Armitage was obviously the shammer and his intentions were dishonest. But what about Mr Dunn's intentions?

Mr Dunn knew he was a trustee and director, but he did not appear to have any idea of the import or effect of these appointments. He did not seem to understand that, as a trustee, he had fiduciary obligations to Mr Armitage's children, who were the primary beneficiaries of the trust, or that his obligation as director was to the company, not to Mr Armitage personally. Like Mrs Wyatt, he went along with Mr Armitage in creating a false impression, neither knowing nor caring about the consequences of his actions. He simply did as he was told with indifference to the possibility that what he was doing was a fraud on Mr Armitage's creditors.\textsuperscript{49}

\textsuperscript{47} Propvest, above n 11.
\textsuperscript{48} Ibid, at [31].
\textsuperscript{49} In Agip (Africa) Ltd v Jackson [1990] Ch 265 (Ch), Millett J described that sort of conduct as dishonest.
These cases suggest that the dominant intent for a sham is that of the settlor\textsuperscript{50} and that intent must have an element of dishonesty about it. The intention required of the recipients of the property is less stringent. It can be satisfied by showing that they were reckless in the sense of being careless or indifferent about their participation in the shammer’s actions. The recipients’ intent can be established by showing that they never accepted or performed the core duties of trusteeship.\textsuperscript{51} It is not necessary for the recipients to be consciously aware that they are participants in the settlor’s sham intent. Nor do they have to realise that the settlor’s intent is dishonest. It is sufficient if they comply with the settlor’s expectation that they not act as trustees, being at least indifferent as to the consequences of such conduct. It is in that sense that the common intention required for a sham must be understood. If the test for the recipients’ intent is put any higher, transactions such as those of the Wyatts and Mr Armitage would be valid. That would be an undesirable outcome given the fraudulent intention of Mr Wyatt and Mr Armitage, and their trustees’ careless or indifferent assistance therein.\textsuperscript{52}

The Reynolds Trust in Wilson was not a sham because the Court found that there was insufficient evidence that Mr Reynolds had a sham intent when he settled the trust and Mr Wilson accepted his trusteeship, as evidenced by his refusal to renovate the Invercargill property. Even if Mr Reynolds had intended the trust to be one in appearance only — which is entirely plausible given his subsequent conduct — the trust would still have been valid if Mr Wilson had not been aware of Mr Reynolds’ sham intent and had treated the transaction as a genuine trust. The prevailing view is that Mr Reynolds’ objectively manifested intention to create a genuine trust would have sufficed to ensure the trust’s validity.\textsuperscript{53}

What if Mr Wilson had known from the start that Mr Reynolds intended the transaction to be a sham, but had decided to give effect to the trust anyway and ignore Mr Reynolds’ dishonest intent? If a sham requires a common intention, the trust would not be a sham, but nor could the trust be valid, since Mr Wilson knew that Mr Reynolds did not intend to create a genuine trust. By treating the transaction as a genuine trust, Mr Wilson would be depriving Mr Reynolds of property that Mr Reynolds had no intention of alienating. Mr Wilson’s own dishonesty would justify the imposition of a constructive

\textsuperscript{50} While Armitage may not technically have been the settlor, the evidence showed that he arranged the settlement and incorporation of the company, using others as a front to conceal his involvement.

\textsuperscript{51} Armitage v Nurse [1998] Ch 241 (CA) per Millett LJ.

\textsuperscript{52} See also Conaglen, above n 34, at 191.

\textsuperscript{53} Esteem, above n 46; Shalson v Russo [2003] EWHC 1637, [2005] Ch 281; Wilson, above n 11. See also Jessica Palmer “What makes a trust a sham?” [2008] NZLJ 319, where she argues that the trust would be upheld on estoppel grounds.
trust for the benefit of Mr Reynolds. This conclusion supports the view that a sham requires a common intention. If the settlor and trustee have different intentions, the trust may well be invalid, but it will not be a sham.

If the settlor does not evince a sham intent from the start and the trustees accept their trusteeship, the trust is valid and remains so, even if the trustees shortly thereafter abandon their trust obligations and allow the settlor to control the trust. The trust is not a sham, even though it may have ceased to function as a trust. The beneficiaries would have the right to hold the trustees to account for failing to perform their duties, but they will have no incentive to do so if they are benefiting from the settlor’s control. The settlor’s creditors are not their concern.

This conclusion may leave us with a sense of unease. The Reynolds Trust barely functioned as a trust, but it was sufficient to safeguard the trust property against Mr Reynolds’ creditors. Mr Reynolds may have largely ignored the trust and assumed all the enjoyment of a full beneficial owner, but in the eyes of the law he did not own the property. The trust fulfilled its purpose — it protected the family home from Mr Reynolds’ creditors. Protection against creditors is a common and accepted reason for establishing trusts. That being so, why the unease? What justification is there for intervening in a trust such as Mr Reynolds’ trust, thereby potentially undermining commercial certainty and defeating beneficial interests?

The Reynolds Trust was unusual in several respects, in particular because Mr Reynolds was neither a trustee nor a beneficiary of the trust. His control over the trust and the benefit he derived from it was not authorised by the trust deed. It is more common for settlors to reserve control over the trust and be beneficiaries of the trust.54 They appoint themselves as trustees with the power to appoint and remove trustees, and they are commonly the primary beneficiaries of the trust. They may even have the power to vest the entire capital in themselves. With such extensive powers over the trust, settlors can legitimately treat the property as their own. There may be more reason to intervene in these sorts of trusts than in a trust in which the debtor has no beneficial interest.

Some judges have questioned the validity of trusts that give effective control to the settlors with the ability to vest the entire trust capital in themselves.55 One or two have ignored the trusts in those circumstances, but they are the exception.56 Observations made by the Supreme Court in Kain v

54 For discussion of the problem of settlor control, see Donovan Waters “Settlor control — what kind of a problem is it?” (2009) 15 Trusts & Trustees 1, referring inter alia to Harrison, above n 6.
55 Isolare, above n 6.
56 Harrison, above n 6; Matarangi Beach Estates Ltd v Dawson (2008) 6 NZ ConvC 194,667 (HC).
Hutton\textsuperscript{57} in regard to Mrs Couper's Ponui Trust suggest that there is nothing wrong with such trusts. If the courts see no reason to intervene in these sorts of trust, it will be up to Parliament to do so if it is of the view that trusts unjustly defeat creditors' rights.

D Options for reform: amending trust law generally

If Parliament wishes to curb the use of the modern trust in order to protect creditors, it could reintroduce the disincentives that previously prevented settlors from retaining benefits in the trust.\textsuperscript{58} That option now seems highly unlikely, given the Government's announcement on 10 June 2010 that it intends to repeal gift duty.

An alternative option would be to reform trust law generally to limit settlor control and restrict the benefits that settlors can derive from their trusts. But that may introduce an undesirable inflexibility into trust law and have ramifications well beyond the mischief of inadequate creditor protection. Most trusts serve a useful purpose and do not defeat creditors' rights. To amend trust law generally to afford better protection for creditors is akin to cracking a nut with a sledgehammer. If creditor protection is a legitimate concern, it would be better to expand the existing remedies available to creditors and introduce measures that would make trusts more visible, rather than to impose general constraints on trusts.

E Options for reform: amending the Insolvency Act 2006

One option would be to amend s 101 of the Insolvency Act 2006 to broaden the scope of property that would vest in the Official Assignee on bankruptcy. It could include a bankrupt's discretionary interest in a trust if the bankrupt is likely to benefit from the trust. There is legislative precedent for taking these sorts of interests into account in the Child Support Act 1991\textsuperscript{59} and the Legal Services Act 2000.\textsuperscript{60} Those interests are included when assessing a person's ability to pay child support or fund their legal proceedings, but in neither case does the assessment give rise to a power to remove assets from the trust. No orders are made against the trustees. The person being assessed is merely prevented from asserting that they have no property, when

\textsuperscript{57} Kain v Hutton [2008] NZSC 61, [2008] 3 NZLR 589 [Kain].
\textsuperscript{58} See above n 4.
\textsuperscript{59} Child Support Act 1991, s 105.
\textsuperscript{60} Legal Services Regulations 2006, regs 8(4)-(5), made under the Legal Services Act 2000, s 113(1)(j).
in reality they can access property as and when they choose to do so. If the Insolvency Act 2006 were amended to include a bankrupt’s discretionary interest in a trust, Parliament would have to go a step further and give the Official Assignee the power to sell trust assets to the value of the bankrupt’s interest in the trust. Deeming the trust assets to be part of the bankrupt estate would obviously not be enough.

The likelihood of a discretionary beneficiary benefiting from a trust will depend on the terms of the trust and who controls it. Discretionary beneficiaries technically have no more than a hope of benefiting from the trust, but if they have direct or indirect control over the trust, they are able to benefit themselves, possibly to the extent of vesting the entire capital in themselves.61 This kind of discretionary interest is clearly of much greater value than one where the beneficiary has no control over the trust. If the Insolvency Act 2006 were amended to include discretionary interests, the effect may be to strengthen the independence of trustees and curb the broad powers of control commonly retained by settlors. Settlors would not be precluded from retaining control, but they would run the risk of trust assets being included in their estate if they went bankrupt.

This amendment would not have assisted Mr Reynolds’ creditors. He was not a discretionary beneficiary of the trust. He was living in the property, presumably as a guest of his children! Amending the scope of the bankrupt’s property would not vest the Queenstown property in Mr Reynolds. The only way to achieve that would be to treat Mr Reynolds as a beneficial owner of the trust property on the grounds that it reflected the reality of the situation, even though he was not a beneficiary and had no legal entitlement to any of the assets in the trust. The current financial crisis may provide the impetus for such a bold measure to protect creditors.

F Options for reform: amending trust formalities

In addition, or as an alternative, to enhanced remedies for creditors, consideration could be given to introducing formal requirements for the creation of express trusts to make them more visible and protect creditors from unknown risks.

Trusts can be created with little or no formality. If there is no land involved, it does not even require writing, and where land is involved the Land Transfer Act 1952 does not provide for trustees to be identified as such on the register. A couple could draw up a document declaring themselves trustees of their family home without anyone knowing about it, and without

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61 See, for example, Harrison, above n 6 and Mrs Couper’s Ponui Trust in Kain, above n 57.
the need to change the register to reflect the change in beneficial ownership.\(^{62}\) Creditors dealing with the couple would be none the wiser, much like the bank in *Wyatt*.

Amending the Land Transfer Act 1952 to include on the register that a proprietor holds the property as trustee would alert anyone dealing with the proprietor to the fact that there were off-register beneficial interests in the land and that the proprietor may have no beneficial interest in the property. It would also provide a more transparent mechanism through which a change in the beneficial ownership of a registered proprietor could be managed. Registered proprietors who have declared themselves trustees of their property would have to formalise the change through registration. Failure to do so would result in their ownership as trustees being defeasible.\(^{63}\) While this option for reform would affect land only, the widespread use of trusts to protect the family home could make a significant number of trusts more visible.

Consideration might also be given to a register of express trusts, possibly along the lines of the Personal Property Securities Act 1999. It would have to record not only the names of the trustees, the beneficiaries and the property that was subject to the trust, but also any changes to the trustees, beneficiaries or trust property. The consequences of not registering a trust would have to be considered as well. This may prove to be too complex and costly.

Finally, a requirement to give notice of an intention to establish a trust could be imposed, as in the Joint Family Homes Act 1964. That would have alerted Regal Castings to the Lightbodys' intention to transfer their family home into trust. The Court found in that case that Regal Castings would have taken steps to protect its interests. As it was, they did not know about the trust until Mr Lightbody went bankrupt more than four years later.

These formalities would have the advantage of making trusts easier to detect and alerting creditors to the debtor's asset position. The formalities might also increase the awareness of settlors and trustees of the legal consequences of trusts. Settlors might finally realise that they no longer own the assets they have transferred into trust, and trustees might have a better appreciation of their fiduciary obligations. However, even if all these formalities had existed when Mr Reynolds established his trust, it would not

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62. Such a declaration would at present attract gift duty if no, or inadequate, consideration were provided, but it would not affect the validity of the trust. Because of gift duty declarations of trust are not normally used. But if gift duty is abolished, as proposed by clause 110 of the Taxation (Tax Administration and Remedial Matters) Bill, declarations of trust could become common and make trusts even less visible.

63. Land Transfer Act 1952, ss 62–63. Note, however, that the Law Commission recommends that trusts should continue to be off the register; see Law Commission *A New Land Transfer Act* (NZLC R116, 2010) at 33.
have made any difference, because his principal creditor was the IRD, his indebtedness arose after he had settled his trust and the Land Register would have revealed that he did not own the Queenstown property where he lived. Parliament could give the IRD special powers to recover unpaid taxes from trusts that include assets contributed by a defaulting taxpayer, regardless of the debtor's interest in the trust. However, the confiscation of property from innocent third parties may jeopardise commercial certainty to the detriment of the economy.

It seems then that trusts, such as the Reynolds Trust, will provide an effective shield against the insolvency of a settlor. That may well be appropriate. After all, most creditors have a choice whether to advance funds to a debtor and can insist on security. The case for radical intervention to protect creditors may therefore not be very strong.

III Spouses and Partners

There is a stronger case for intervening in trusts to protect relationship property rights of spouses and partners. They accumulate assets through their joint efforts and expect to share those assets equally when their relationship ends. That expectation derives from the Matrimonial Property Act 1976 and has been strengthened by the Property (Relationships) Amendment Act 2001. The Property (Relationships) Act 1976 (as the Matrimonial Property Act 1976 is now called) entitles spouses and partners to share equally in all relationship property unless one of the narrow exceptions applies, or the parties have formally contracted out of the legislation.64

A Trust busting under the Property (Relationships) Act 1976

Assets held in a trust of which the parties are merely discretionary beneficiaries are normally beyond the court's jurisdiction under the Property (Relationships) Act 1976.65 Section 44 can be invoked to set aside dispositions to trusts, but it requires evidence of an intention to defeat the relationship property rights of a spouse or partner. In the past, that was notoriously difficult to prove, because it required evidence of a fraudulent

64 Property (Relationships) Act 1976, ss 13–14AA and 85.
65 Ibid, at ss 21 and 21A.
66 For the relevant definitions of "owner" and "property", see Property (Relationships) Act 1976, s 2. Nation, above n 8, held that a discretionary interest in a trust was not property for purposes of the Property (Relationships) Act 1976, as discussed further below.
motive or purpose. The Supreme Court decision in Lightbody will ease that burden, but only slightly.

Parliament acknowledged that trusts were undermining the social purpose of the relationship property regime and, in an attempt to redress that problem, inserted s 44C into the Property (Relationships) Act 1976 as part of the 2001 amendments. That provision empowers the court to award compensation if dispositions of relationship property to trusts have the effect of defeating the rights or claims of one of the spouses or partners under the legislation. However, the scope of s 44C is narrow, both as regards its jurisdictional requirements and its compensation powers. The section applies only if either or both spouses or partners have transferred relationship property into trust since the relationship began. It does not apply to dispositions of separate property nor to property transferred before the relationship began, even if those assets would have become relationship property, but for the trust — for example, the family home. Nor does it apply to property that is acquired by the trustees directly from third parties. With careful planning, it is relatively easy to circumvent s 44C.

Even if the jurisdictional requirements are met, the compensation powers do not entitle the court to make orders against the capital of the trust. Its powers in relation to the trust are limited to diverting income from the trust, and then only as a last resort if the respondent’s separate property and share of relationship property are insufficient to provide adequate compensation to the applicant. Ward v Ward (Ward) is a good example of the ineffectiveness of the compensation powers under s 44C.

In 2000, Mr and Mrs Ward entered into a matrimonial property agreement under s 21 of the Property (Relationships) Act 1976, vesting 50 per cent of the husband’s shares in a farming company in his wife. They then transferred

68 Regal Castings (SC), above n 14. The test in Regal Castings (SC) was held to apply to s 44 of the Property (Relationships) Act 1976 in Ryan v Unkovich [2010] 1 NZLR 434 (HC) at [33].
69 A similar provision exists for dispositions to companies; see Property (Relationships) Act 1976, s 44E.
71 P v B [Relationship Property] [2009] NZFLR 773 (HC).
73 Property owners who disposed of assets into trust before s 44C was inserted could be more vulnerable because of the retrospective effect of the amendments; see Property (Relationships) Act 1976, ss 4C and 97. See, for example, Nation, above n 8; O v S (2006) 26 FRNZ 459 (FC).
74 Property (Relationships) Act 1976, s 44C(2).
75 Ward (SC), above n 9.
their shares to a discretionary trust for NZS$540,000 with a debt back to each spouse of NZS$270,000. They forgave some of the debt in the following years. When they separated in 2003 there was only NZS$198,000 owing to each of the spouses. Mr and Mrs Ward were trustees together with an independent trustee. The spouses were also the primary beneficiaries of the trust. After separation, Mr Ward continued to run the farm and live in the homestead, while his wife moved out and received no support from the trust. By the date of the hearing, the farm property had increased substantially in value, although the financial position of the farming partnership had deteriorated because the farm was producing little income. In an attempt to share in the increased value of the farming shares, Mrs Ward sought compensation under s 44C of the Property (Relationships) Act 1976.

She had no difficulty meeting the jurisdictional requirements. The shares were transferred into trust during the marriage and they were relationship property at the time of the disposition because “the s 21 agreement” classified them as such. Had the agreement classified the shares as separate property of each spouse, the disposition would have been outside the ambit of s 44C. The transfer was not one to which s 44 applied because it was not made with the intention of defeating Mrs Ward’s rights under the legislation. It did have the effect of defeating her rights. If it had not been for the disposition into trust, Mrs Ward would have shared equally in the increased value of the shares, rather than being entitled only to an equal share of the outstanding debt. She was not receiving any benefit from the trust either, whereas Mr Ward was. As the Court of Appeal said in Nation v Nation (Nation) in relation to broadly similar facts: “This is not a case where an asset has been exchanged for another asset of similar worth, with equal scope for increase in value and risk of loss of value.”

The disposition of relationship property produced an inequality of benefit as between the spouses, justifying an award of compensation in favour of Mrs Ward. However, unlike Mr Nation, Mr Ward had no separate property and insufficient relationship property to compensate Mrs Ward for her loss of entitlement. Nor did the farm produce any surplus income that could be diverted to her. Without access to the trust capital, the Court was unable to award her adequate compensation for her loss of relationship property entitlement.

76 Section 44 of the Property (Relationships) Act 1976 takes priority over s 44C; see Babylon v Babylon HC Auckland CIV-2006-404-3217, 12 October 2007.
77 Nation, above n 8.
78 Ibid, at [149].
79 The only relationship property was the debt owing by the trustees to each of the spouses. But for gift duty, there would not have been a debt back. The proposed repeal of gift duty is, therefore, likely to further reduce the effectiveness of s 44C.
Parliament’s decision to protect the trust capital was a conscious rejection of the recommendation by the 1988 ministerial Working Group on Matrimonial Property and Family Protection to empower the courts to distribute capital from the trust or claw back specific assets from the trust if other sources of compensation were inadequate.\textsuperscript{80} The Working Group reasoned that such powers would sometimes be necessary to give effect to the social purpose of the relationship property regime, but Parliament decided that trusts were created for legitimate reasons and should be permitted to fulfil that purpose if there was no intention to defeat the spouse’s claim.\textsuperscript{81} Private ordering of property through trusts was thus accorded priority over the social aims of the relationship property regime.

Frustrated by the constraints of ss 44 and 44C, parties have explored other arguments in an attempt to bring trust assets within the scope of the Property (Relationships) Act 1976, but they have had limited success. Challenges against the trust on the basis of the sham doctrine or alter ego concept have been severely curtailed by \textit{Wilson}.\textsuperscript{82} On the other hand, the Court of Appeal’s decision in \textit{Walker v Walker},\textsuperscript{83} where the wife’s discretionary interest was held to be part of a bundle of assets capable of valuation, is offering renewed hope for claimants. However, the Court made that comment in the context of valuing a debt owed by the trust to the husband, which was relationship property. It did not say that discretionary interests per se were property for purposes of the Property (Relationships) Act 1976. More importantly, the Court did not suggest that such interests could equate to beneficial ownership of the trust assets.\textsuperscript{84} That would have been a radical departure from conventional equitable principles and would have contradicted the earlier dicta of the Court in \textit{Nation}.\textsuperscript{85} The spouse or partner could at most argue that he or she had the right to be considered and the right to hold the trustees to account. Even if the spouses or partners had control over the trustees, their rights as beneficiaries do not translate into ownership of the

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\textsuperscript{81} Matrimonial Property Amendment Bill (109-2) (select committee report) at xii.
\textsuperscript{82} \textit{Wilson}, above n 11.
\textsuperscript{84} Compare \textit{R v R FC} Auckland FAM-2009-004-1627, 19 November 2009, where the Court relied on the bundle of rights argument to classify the spouses’ discretionary interests in mirror trusts as relationship property and held further that the spouses’ right to occupy the family home was capable of classification and division under the Property (Relationships) Act 1976.
\textsuperscript{85} \textit{Nation}, above n 8, at [74]. It is only when the trustees make a distribution to the discretionary beneficiary that the beneficiary acquires an interest in the property; see \textit{Muollo}, above n 8, at [11].
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trust assets themselves. To do so would be to ignore the trust and defeat the rights of the other beneficiaries.

In Australia, the High Court has moved away from the conventional view of discretionary interests. In an attempt to give proper effect to the aims of its property adjustment regime in the Family Law Act 1975 (Cth), the Court held in *Kennon v Spry* 86 that Mrs Spry’s discretionary interest in the trust that her husband had settled was “property of the marriage” for purposes of the Family Law Act 1975 (Cth). Most of the assets were accumulated during the marriage and her husband, in his capacity as sole trustee, had the power to vest the entire income and capital in his wife. All of the trust capital was, therefore, treated as property of the marriage. 87 But that decision must be seen in the context of the definition of property ownership in the Family Law Act 1975 (Cth) and the discretion given to the court to take account of financial resources available to either of the parties. 88 In contrast to that legislation, the policy and scope of the Property (Relationships) Act 1976 militate against such an expansive view of discretionary interests. At present, therefore, the Property (Relationships) Act 1976 does not provide an adequate remedy for couples whose relationship assets are held in trust.

**B Trust busting under s 182 of the Family Proceedings Act 1980**

Some spouses and civil union partners are able to use s 182 of the Family Proceedings Act 1980 to access trust assets. This provision empowers the court upon, or within a reasonable time of, an order dissolving a marriage or civil union to inquire into the existence of any ante-nuptial or post-nuptial settlement made by the parties to the marriage or civil union and make such orders with respect to the application of the property settled or the variation of the settlement as the court thinks fit. 89

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87 Section 4 of the Family Law Act 1975 (Cth) defines “property” as property to which the parties to a marriage or de facto relationship “are, or that party is, as the case may be, entitled, whether in possession or reversion”.
88 Ibid, at s 79, which empowers the court to alter the parties’ property interests and requires the court to take account of various matters, including the matters in s 75(2), which refers to the parties’ financial resources in s 75(2)(b). For a similar warning, see Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at 216.
89 Section 182 of the Family Proceedings Act 1980 was amended by s 44(1) of the Civil Union Act 2004 to include civil unions. In view of this provision’s long history in relation to marriage and the lack of case law pertaining to civil unions, this article will refer only to marriage in its discussion of s 182. It is highly likely that the precedents in relation to marriage will apply in the same way to civil unions.
Although s 182 of the Family Proceedings Act 1980 is commonly invoked alongside the Property (Relationships) Act 1976 to resolve property claims between the parties, the two jurisdictions are fundamentally different in purpose and scope. Section 182 is available only on divorce, not on separation, and can therefore not be used by de facto partners. It is the change brought about by divorce that gives the court jurisdiction to intervene. Furthermore, the trust must be a nuptial settlement. A full bench of the High Court held in *Kidd v Van den Brink*[^90] that a trust will have the required nuptial character only if it was settled in respect of a particular marriage and was primarily directed towards and provided for the benefit of the particular family unit: the husband, wife and their children.[^91] Trusts aimed at providing income and capital to an indeterminate class of beneficiaries do not come within the ambit of s 182, even if the applicant-spouse qualified as a beneficiary of the trust by virtue of her marriage, as Ms Kidd did. This view was endorsed by the Court of Appeal in Ms Kidd’s application for leave to appeal.[^92] However, it did see merit in the argument that subsequent settlements made during the marriage on the original trust could qualify as nuptial settlements, and granted leave to appeal on that ground. Even if that argument is successful, however, s 182 remains narrow in scope. It is not a general trust-busting provision.

These constraints reflect the provision’s history, which dates back to the mid-19th century. It was introduced in England in 1859 as an amendment to the Matrimonial Causes Act 1857[^93], and was imported into New Zealand by the Divorce and Matrimonial Causes Act 1867[^94]. As divorce was fault-based in those days, there was power to take account of the parties’ conduct in making property orders, particularly the wife’s conduct.[^95] If her adultery was the reason for the divorce, her husband might not be ordered to pay alimony and any property she was entitled to in possession or on reversion might be settled on her husband and children.[^96] The power in s 37 of the Divorce and Matrimonial Causes Act 1867 to make orders in respect of ante-nuptial

[^91]: Ibid, at [28].
[^93]: Matrimonial Causes Act 1857 (UK) 20 & 21 Vict c 85.
[^94]: Divorce and Matrimonial Causes Act 1867, s 37. The Australian States also imported this provision into their statutes and it is now in the Family Law Act 1975 (Cth), s 85A.
[^95]: The husband could petition the court for a decree of dissolution on the basis of his wife’s adultery, while the wife could do so only if her husband’s adultery was incestuous, bigamous or coupled with bestiality, sodomy, rape or cruelty or with desertion without reasonable cause for two or more years; see Divorce and Matrimonial Causes Act 1867, ss 17–18.
[^96]: Divorce and Matrimonial Causes Act 1867, s 38.
and post-nuptial settlements was part of this package of powers to deal with property matters on divorce. Although s 37 did not refer to the parties’ conduct, the court did take misconduct into consideration when making orders in respect of nuptial settlements. That accorded with the expectations of the time. Settlements were varied for the benefit of the innocent party and children and were aimed at restoring them to the position they enjoyed during the marriage. After the divorce grounds were expanded to include insanity and other no-fault grounds, misconduct ceased to be a condition of the court’s jurisdiction to vary nuptial settlements. In 1948, the New Zealand Court of Appeal held in Coutts v Coutts that the power should be exercised where “it is shown that continuance unvaried of the settlement has been rendered unjust by the divorce or the conduct which occasioned the divorce”. When New Zealand adopted the Matrimonial Property Act 1963, the power to vary nuptial settlements was not included in the legislation. This was inserted into the Matrimonial Proceedings Act 1963, thus cementing its association with divorce, rather than matrimonial property claims. That association was retained when the Family Proceedings Act 1980 replaced the Matrimonial Proceedings Act 1963. The Property (Relationships) Amendment Act 2001 left s 182 of the Family Proceedings

97 March v March and Palumbo (1867) LR 1 P & D 437 (Courts of Probate and Divorce) [March]; Worsley v Worsley and Wignall (1869) LR 1 P & D 648 (Courts of Probate and Divorce); Sykes v Sykes and Smith (1870) LR 2 P & D 163 (Courts of Probate and Divorce); Gladstone v Gladstone (1876) 1 PD 442 (Probate, Divorce and Admiralty Division); Benyon v Benyon and O'Callaghan (1876) 1 PD 447 (Probate, Divorce and Admiralty Division) [Benyon]; Clifford v Clifford (1884) 9 PD 76 (CA) [Clifford]; Prinsep v Prinsep [1930] P 35 (CA); Soler v Soler (1898) 17 NZLR 49 (CA); Coutts v Coutts [1948] NZLR 591 (CA) [Coutts].

98 March, above n 97; Benyon, above n 97; Hartopp v Hartopp and Akhurst [1899] P 65 (Probate, Divorce and Admiralty Division); Hodgson Roberts v Hodgson Roberts and Whitaker [1906] P 142 (Probate, Divorce and Admiralty Division); Coutts, above n 97.

99 Insanity was introduced as a ground for divorce in New Zealand by s 3(2) of the Divorce and Matrimonial Causes Act Amendment Act 1907, and separation by mutual consent by s 4 of the Divorce and Matrimonial Causes Amendment Act 1920. In England, insanity was added as a ground for divorce by the Matrimonial Causes Act 1937 (UK) 1 Edw 8 & 1 Geo 6 c 57, ss 2–3.

100 Coutts, above n 97.

101 Ibid.

102 Ibid, at 607 per O'Leary CJ, citing in support Clifford, above n 97. See also ibid, at 619 per Callan J.

103 Matrimonial Proceedings Act 1963, s 79.

104 Family Proceedings Act 1980, s 182.
Act 1980 untouched, which Atkin and Parker note as being curious in the circumstances.\(^{105}\)

Even though the power to vary nuptial settlements was never part of the Matrimonial Property Act 1963 or the Property (Relationships) Act 1976, it was increasingly used where most of the couple’s matrimonial assets were in trust.\(^{106}\) Orders did not necessarily give the applicant an equal share of the matrimonial assets in trust, but the applicant’s relationship property entitlement was commonly cited as the justification for varying the trust.\(^{107}\) In view of Parliament’s decision in 2001 not to go down the trust-busting route in s 44C, this use of s 182 was questionable.

In *Ward*,\(^{108}\) the New Zealand Supreme Court warned against using s 182 of the Family Proceedings Act 1980 to circumvent constraints in the Property (Relationships) Act 1976, as the Court of Appeal had suggested.\(^{109}\) Referring to the historical purpose of the section, the Supreme Court held:\(^{110}\)

[Nuptial settlements] envisaged and were premised on the continuance of the marriage. If that premise ceased to apply, a fundamental change in circumstances came about. Parliament recognised that injustices could arise as a consequence and it was desirable to empower the Court to review the settlement on dissolution of the marriage.

Accordingly, the Court held that the jurisdiction should be exercised if the applicant’s expectations of the settlement have been wholly or partially defeated by the dissolution of the marriage. The relief should seek to restore to the extent possible the reasonable expectations that the parties had of the settlement immediately after it was made.\(^{111}\) That approach reflected earlier decisions of New Zealand’s Court of Appeal\(^{112}\) and English case law dating back to 1867.\(^{113}\)

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105 Atkin and Parker, above n 88, at 208. Both authors made submissions to the select committee on this point.
107 See cases cited ibid.
109 *Ward* (CA), above n 9, at [52].
110 *Ward* (SC), above n 9, at [15].
111 Ibid, at [27].
112 *Coutts*, above n 97; *Preston v Preston* [1955] NZLR 1251 (CA).
113 See the cases cited above n 97.
Section 182 should, therefore, not be used to put the parties in the position they would have been in but for the trust, as some courts had been doing in recent times. Rather, it should be used to restore the parties to the position they would have been in, but for the dissolution of the marriage. In Ward, that aim was satisfied by resettling 50 per cent of the trust capital on the same terms as the original trust, but under the wife’s control. Equality was appropriate in this case because the wife was an equal shareholder with her husband prior to the shares being settled on trust and, as primary beneficiaries of the trust, the spouses had benefited on an equal footing from the trust immediately after it was settled. A resettlement of the trust, rather than an outright award of capital, was also in keeping with the wife’s reasonable expectations. As one of the settlors of the trust, she could not expect to be in a better position on divorce than she would have been in if the marriage had continued.\footnote{114}{See also Williamson v Williamson (1998) 16 FRNZ 580 (FC) at 591–592 per Judge Inglis QC.}

While this approach clarifies the role of s 182 of the Family Proceedings Act 1980 and distinguishes it from the jurisdiction under the Property (Relationships) Act 1976, the fact remains that Mrs Ward was able to achieve an outcome equivalent to her relationship property entitlement. She was able to do that only because she was married and the trust qualified as a nuptial settlement. If she had been a de facto partner, or if the trust had not been a nuptial settlement, the Court would not have had jurisdiction to make orders against the trust capital and she would not have shared in the assets produced by the marriage partnership. Section 182, therefore, provides a remedy for some couples, but not for others. It gives rise to inconsistencies in terms of policy and produces unjust outcomes. Comprehensive reform is needed to determine the rights of spouses and partners in respect of trusts holding relationship assets.\footnote{115}{For further recommendations for reform, see Atkin and Parker, above n 88, at ch 9.}

C Options for reform: trusts override relationship property rights

If trusts are to be accorded primacy over relationship property rights, then s 182 of the Family Proceedings Act 1980 should be repealed. That would remove any inconsistency and allow trusts to perform their role in accordance with the general law. Spouses and partners who were excluded from the trust would then be in the same position as any other outsider. Their status as spouse or partner would not give them any greater rights to the trust assets than any other person who was not a beneficiary of the trust or had ceased to be one.
That would not necessarily leave them entirely without rights to the trust assets. Like any other outsider, they could invoke the general law, such as the resulting trust or constructive trust, to claim a share of the trust property. They would have to show that they contributed to the property in trust and that the trustees were under some obligation to yield an interest to them. Prior to 2001, de facto partners commonly relied on constructive trust principles to claim a share of assets legally owned by their partners. The parties' reasonable expectations were at the heart of this jurisdiction.\textsuperscript{116} In view of the nature of de facto relationships, the Court of Appeal accepted in \textit{Gillies v Keogh}\textsuperscript{117} that if the owning partner was silent it was reasonable for the non-owning partner to expect an interest in property to which he or she had made a direct or indirect contribution. The onus was on the owner to rebut the presumption, which Ms Gillies did successfully by making it clear to Mr Keogh throughout their relationship that the family home was hers.

A presumption of shared beneficial ownership is understandable where the dispute is between former de facto partners in respect of property legally owned by one of them. It recognises that in those sorts of relationship the parties do not approach each other at arm’s length and often do not discuss their respective interests in assets legally owned by only one of them. But, where the claim is made against strangers, such a presumption has no place. The claimant has the onus of proving all the elements of the reasonable expectation test. If the claim is made against trustees, that burden may be particularly difficult to satisfy, not only because the trustees may be remote from the claimant, and thus unaware of the claimant’s contributions and expectations,\textsuperscript{118} but also because they are under an obligation to hold and deal with the trust assets for the benefit of the beneficiaries. By creating a reasonable expectation that a non-beneficiary has an interest in the trust property, the trustees could be in breach of their fiduciary duties. Outsiders, therefore, have a tough burden of proving that their expectation of an interest is reasonable in view of their contributions and that the trustees should reasonably expect to yield an interest in the trust property.


\textsuperscript{117} Ibid, at 333.

\textsuperscript{118} See, for example, \textit{Boys v Calderwood} HC Auckland CIV-2004-404-290, 14 June 2005 [\textit{Calderwood}], where the trustees were professionals.
The de facto partners in *Prime v Hardie*\(^{119}\) and *Glass v Hughey*\(^{120}\) were successful in their claims against the trustees because in each case the applicant's partner was one of the trustees and controlled his co-trustees. The trusts functioned as the alter ego of the partner trustees who treated the trust assets as beneficially belonging to them. In those circumstances, neither the partners nor their “independent” co-trustees could deny the reasonableness of the claimants’ expectations of an interest in the trust property. If a trust has been properly administered and the trustees have not given a spouse or partner any reason to expect a share of the beneficial ownership, then the trustees cannot reasonably be expected to yield an interest.\(^{121}\)

Spouses and partners could also argue that the trust was a sham, but the high threshold set in *Wilson* makes it very difficult to succeed with that argument.\(^{122}\) The trust may be void for other reasons, such as uncertainty of subject matter or objects.\(^{123}\) Or the trust may be precatory in nature, and thus lack the required intent to impose an obligation on the owner of the assets.\(^{124}\) But those sorts of vitiating ground are not common and may in any event not bring the assets within the ambit of the Property (Relationships) Act 1976. The general law, therefore, does not offer former spouses and partners much hope of sharing the beneficial ownership of trust assets that they have helped to acquire, improve or sustain. In terms of the general law, trusts are a very effective way of protecting assets against relationship property claims.

In view of those consequences, consideration should be given to requiring spouses and partners who wish to establish a discretionary trust to obtain independent legal advice about the effect and implications of having their assets in trust. By settling a trust, spouses and partners are in effect contracting out of the Property (Relationships) Act 1976. The assets transferred into trust cease to be relationship property and are not subject to the equal-sharing regime. If the parties have been properly advised, they cannot later complain about their lack of relationship property rights.

Failure to obtain independent advice could invalidate the settlement and, if the trust causes serious injustice, the court could be given the power to set it aside on similar grounds to those for setting aside “s 21 agreements”.\(^{125}\) Invalidating the trust will of course affect the interests of the

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\( ^{119} \) *Prime v Hardie* (2002) 22 FRNZ 553 (HC).

\( ^{120} \) *Glass v Hughey* [2003] NZFLR 865 (HC).

\( ^{121} \) See, for example, *Calderwood*, above n 118; *Endres v Glendinning* HC Palmerston North CIV-2003-454-189, 25 November 2003.

\( ^{122} \) *F v W* HC Wellington CIV-2009-485-531, 3 August 2009; *Wilson*, above n 11.

\( ^{123} \) *Palmer v Simmonds* (1854) 2 Drew 221, 61 ER 704; *McPhail v Doulton* [1971] AC 424 (HL).

\( ^{124} \) *Re Burton (Deceased), Public Trustee v Burton* [1965] NZLR 712 (SC).

\( ^{125} \) Property (Relationships) Act 1976, s 21J.
trust’s beneficiaries. As they are usually volunteers, the invalidation power would only need to be subject to a change of circumstance defence. This option would not protect future spouses or partners of the settlor(s) or the beneficiaries.

D Reform options: support obligations

If trusts are to be protected and accorded priority over relationship property rights, there is a real risk that spouses or partners excluded from trusts will become dependent on the State for support. 126 This risk may be ameliorated by amending the maintenance provisions in the Family Proceedings Act 1980 to empower the court to impose support obligations on trustees where either the applicant was a beneficiary of the trust or the applicant’s former spouse or partner is likely to benefit from the trust. When assessing maintenance, s 65 of the Family Proceedings Act 1980 requires the court to have regard to the “means” of each spouse or partner. This has been held to include income and assets of a trust that are readily available to the liable spouse or partner. 127 But the order is made against the liable spouse or partner, not against the trustees. The suggested amendment would allow the court to make the order against the trustees.

If the trust was supporting the spouses or partners during the relationship, as is normally the case, then this option has the advantage of restoring that support. The disadvantage is that the provision is in the nature of a support obligation, not a property entitlement. It is aimed at meeting the reasonable needs of the applicant until he or she is able to be self-supporting. That is hardly adequate compensation for the loss of an equal share of the fruits of the relationship.

E Reform options: relationship property rights override trusts

In view of the large number of trusts holding relationship assets, and the lack of relationship property outside the trust, there are good reasons for revising the current policy to allow the relationship property regime to fulfil its social purpose. That could be achieved by amending the Property (Relationships) Act 1976 to empower the court to make orders against trustees to secure an equal division of relationship assets, unless the relationship was of short duration, or there were extraordinary circumstances making equal sharing repugnant to justice or the parties had contracted out of the equal-sharing

126 See, for example, the former wife in Kidd (HC), above n 90.
regime. In other words, the ordinary relationship property rules governing classification and division would apply to the assets held in trust.

This change would have the advantage of simplicity, but it would also have potentially far-reaching consequences. Not only would trusts cease to protect assets against relationship property claims, it could also destroy sensible succession plans and detrimentally affect the interests of other beneficiaries. Trusts comprising family farms and family businesses, for example, could be rendered economically unviable. Spouses and partners may be encouraged to contract out of the Property (Relationships) Act 1976, but if they have not done so, the trust assets would be vulnerable to relationship property claims on separation, divorce and death.

It may be preferable to replace s 44C of the Property (Relationships) Act 1976 with a provision similar to s 182 of the Family Proceedings Act 1980 to empower the court to make orders in respect of a trust that holds relationship assets for the benefit of a former spouse or partner. The court could vary or resettle the trust to secure ongoing provision for a former spouse or partner, or it could vest property in the former spouse or partner. The provision could include a restriction that the power be exercised only as a last resort, when there is no other property from which a just division can be ordered.

This type of provision would remove the jurisdictional requirements in s 44C that currently enable spouses and partners to circumvent the section. Jurisdiction should not depend on dispositions of relationship property by either of the parties, but on the existence of relationship assets in the trust. As the orders would be made against the trustees, it would not matter whether the trust was settled by the former spouses or partners or by others, such as parents of a spouse or partner. The claim would be confined to those assets that would be classified as relationship property if they had not been in trust. By putting such a provision into the Property (Relationships) Act 1976, it would be available to de facto partners, as well as spouses and civil union partners, and orders could be made on separation and on death. Conceptually, it would be more appropriate to deal with relationship property claims through that legislation. After all, it purports to be a code.128

IV Conclusion

Trusts have been around for centuries. For much of that time, they have been used to protect assets from unwanted claims and provide for future generations. In his famous lectures on equity, Maitland described the development of the “use” in the 13th and 14th centuries from which the modern

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trust originates. Even then they were used to protect against creditors and spousal rights, particularly the wife’s dower. The rights of spouses and creditors have featured ever since in trust law. The current problem is, therefore, not new, but the socio-economic environment has changed.

Discretionary trusts are now common and settlors are able to control and benefit from the trusts they have created. They no longer truly divest themselves of their assets. They commonly treat the trust’s assets as their own until it is expedient to recognise the trust’s existence. It is the ability to create a sham in fact, if not in law, that offends creditors and former spouses and partners. Is their sense of grievance sufficient to justify intervening in trusts? That is the question that Parliament has to answer.

In this article, I have suggested some reforms that may reduce perceived abuse and provide a better outcome for creditors and spouses or partners. Some of those suggestions are preventive measures, such as the proposed formalities for creating trusts and independent advice for spouses and partners wanting to settle a trust. They could apply to all trusts. Suggestions of a remedial nature would give the courts power to invade trusts and override beneficial interests. They should be available only where Parliament identifies a socio-economic need that outweighs the value of trusts and the interests of beneficiaries. It is up to Parliament to decide which socio-economic needs should be accorded that priority. Creditors and spouses or partners would obviously be worthy of consideration.