

Clayton v Clayton: a step too far?

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Introduction

The relationship property proceedings between Mr and Mrs Clayton have given rise to some controversial decisions about trusts and the Property (Relationships) Act 1976 (PRA). The Family Court and the High Court both concluded, for different reasons, that the main trust, the Vaughan Road Property Trust, was “illusory”.¹ The effect was that the assets in that trust were treated as beneficially belonging to Mr Clayton and thus subject to the PRA’s equal sharing regime. The Court of Appeal overruled the lower courts on this point, but held that the power to add and remove discretionary beneficiaries that Mr Clayton held in his personal capacity was property within the meaning of the PRA.² The power was classified as relationship property and accorded the same value as the net value of the trust assets. Not surprisingly, these decisions have caused consternation, particularly among trust lawyers.

This paper will begin with a brief discussion of the claims that Mrs Clayton made against the various trusts under s 44 of the PRA and s 182 of the Family Proceedings Act 1980. The main focus of this paper is on the Court of Appeal’s rulings that the Vaughan Road Property Trust was not illusory but that Mr Clayton’s power to add and remove beneficiaries was property.

Facts of Clayton v Clayton

Mr and Mrs Clayton lived in a de facto relationship from 1986 until they married in 1989. They had two daughters, Stacey and Anna, born in 1990 and 1994 respectively. The parties separated in 2006 and dissolved their marriage in 2009. When the parties met, Mr Clayton owned a fledgling timber supply business and three blocks of land on one of which the parties built their family home. Six weeks before the parties married, Mr Clayton had a s 21 agreement drawn up to protect his properties as his separate property, including the family home, the family chattels and his business assets. In the event of a separation Mrs Clayton would receive \$10,000 for each year of marriage up to a maximum of \$30,000. After receiving independent advice from their respective solicitors, the parties signed the agreement.

When the parties separated 17 years later, Mr Clayton had built up significant sawmilling and timber processing interests, allegedly worth \$28 million. Apart from the family home, which he owned personally, his assets were mostly held in a complex web of trusts and companies. Central to the proceedings in this case were four trusts settled during the marriage:

- the Vaughan Road Property Trust (VRPT), which owned the land and buildings from which Mr Clayton operated his businesses;
- the Claymark Trust, which owned land adjoining the sawmill; and

- an education trust for each of his daughters. After the parties had separated, Mr Clayton settled four more trusts, which were also subject to proceedings.

The claims

Mrs Clayton brought relationship property proceedings, challenging the validity of the s 21 agreement and claiming an equal share of all the assets held in the trusts and companies. Mr Clayton conceded that the s 21 agreement had become unfair in some respects and, accordingly, the Family Court set it aside under s 21J as seriously unjust.³ That ruling was upheld on appeal.⁴

Mrs Clayton then mounted a range of arguments in respect of the trusts. She argued inter alia that dispositions to the children’s education trusts and the post-separation trusts should be set aside under s 44 of the PRA. She claimed that the Claymark Trust was a nuptial settlement that should be varied under s 182 of the Family Proceedings Act 1980. In regard to the VRPT she argued that its assets belonged beneficially to Mr Clayton, because the trust was a sham or otherwise invalid.

Property (Relationships) Act, s 44

Mrs Clayton claimed that dispositions made to the two children’s education trusts and the four post-separation trusts should be set aside under s 44 of the PRA, because Mr Clayton had made those dispositions with the intention of defeating her rights under the Act. Mrs Clayton was successful in relation to the children’s education trusts and two of the four post-separation trusts.

To succeed in a claim under s 44 the claimant must show that a disposition was made to a third party, that the transferor intended the disposition to defeat the applicant’s rights under the PRA,⁵ and that the disposition had that effect.⁶ Establishing the requisite intention used to depend on evidence of a fraudulent motive.⁷ Following the Supreme Court decision in *Regal Castings Ltd v Lightbody*,⁸ in which the Court ruled that an intent to defraud creditors in the context of s 60 of the Property Law Act 1952 did not require a fraudulent motive or purpose, it has been held that a fraudulent motive is no longer required for purposes of s 44 of the PRA.⁹ The wording of s 60 being sufficiently similar to s 44, the courts have accepted that knowledge that a disposition is likely to hinder, delay or defeat a spouse or partner of their relationship property entitlement is sufficient to establish intent.¹⁰

In regard to the children’s education trusts, the Courts were unanimous that there was ample evidence of dispositions being made to defeat Mrs Clayton’s rights under the Act. The trusts were settled in 2004, after Vivienne Ullrich QC gave advice that Mr Clayton’s business interests were vulnerable to relationship property claims in the event of a separation. The trusts acquired properties for which Mr Clayton paid deposits and provided interest free loans. The VRPT also provided some of the funding by means of interest free

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loans. As there was no evidence that any of these payments were to be repaid, they were held to be dispositions for purposes of s 44.¹¹

The defeating intent was inferred from Mrs Clayton's exclusion from the wide ranging list of discretionary beneficiaries, which included not only the children and their issue, but also Mr Clayton, any of his relatives, any nominated business associates, employees or consultants of any businesses associated with Mr Clayton, as well as companies, trusts and charitable organisations. The exclusion of Mrs Clayton following the receipt of Ms Ullrich's advice led to the irresistible conclusion that defeating Mrs Clayton's interests was uppermost in Mr Clayton's mind.¹²

Section 44(2) empowers the Court to order a recipient, who received the property otherwise than in good faith and for valuable consideration, either to transfer the property to such person as the Court directs or to pay that person a sum of money. To give effect to an order under s 44(2), the Court may make "such further order as it thinks fit".¹³ Rather than set aside the offending dispositions, the Family Court held that Mrs Clayton was entitled to half the equity of the property held in the two trusts.¹⁴ The High Court and Court of Appeal upheld this order.¹⁵ However, the analysis in support of this order is lacking. The effect of the dispositions on Mrs Clayton's rights was not discussed.

For Mrs Clayton to succeed, the dispositions must have the effect of defeating her rights under the Act. The effect is determined at the end of the relationship on the basis of a "but for" test.¹⁶ But for the dispositions into the children's trusts, would Mrs Clayton have been entitled to share equally in the assets of the trusts? She probably would have been entitled to share in the dispositions made by Mr Clayton personally, because those dispositions were in all likelihood relationship property. Her entitlement to share in the dispositions from the VRPT could be justified if the trust did not exist, as the Family Court and the High Court concluded.¹⁷ Mr Clayton would then have been the owner of the assets and, as they were acquired during the marriage, they would have been relationship property. But the Court of Appeal overruled the lower courts on the invalidity of the trust. The VRPT was a genuine trust.¹⁸ The advances were legitimate exercises of the trustee's powers and discretions.¹⁹ Even if they were not to be repaid, they were permissible distributions to discretionary beneficiaries of the VRPT.²⁰ Although the Court of Appeal held that Mr Clayton's power to add and remove beneficiaries was property, it clearly stated that did not mean that the trust assets beneficially belonged to Mr Clayton or that they were relationship property.²¹ It is therefore unclear what rights Mrs Clayton had to the advances and thus the extent to which her rights under the Act were defeated by the VRPT making advances to the children's trusts. The order vesting half the equity in the children's trusts in Mrs Clayton may therefore have exceeded her entitlement under the Act.

In regard to the post-separation trusts, Mrs Clayton's claim was hampered by difficulties in obtaining relevant information from Mr Clayton, despite orders requiring disclosure. She was unable to prove that the trusts had been settled with property to which she had a claim under the Act. Mrs Clayton invited the Court of Appeal to adopt the broader approach to a claimant's onus taken by the United Kingdom Supreme Court in *Prest v Petrodel Resources Ltd*, where, in claims for ancillary relief in matrimonial proceedings, the court was prepared to draw inferences adverse to a party

who failed to make full disclosure of all relevant information.²² The public interest considerations lying behind the purpose and principles of the PRA required parties to make full and frank disclosure of all relevant information to ensure that the court was in a position to make appropriate orders for the ascertainment and division of relationship property under the PRA.²³ Accordingly, the Court of Appeal held that if a party who had relevant information failed to disclose it in proceedings, the court could draw such inferences as it considered appropriate, including the adverse inference that the information would not have assisted that party if it had been disclosed.²⁴ Using that approach, the Court of Appeal held that in the absence of evidence that property transferred to two of the post-separation trusts was Mr Clayton's separate property, the inference could be drawn that if the relevant information had been disclosed it would not have supported his case that there was no jurisdiction to make orders under s 44.

This ruling could be of considerable assistance to claimants frustrated by their former partner's lack of cooperation in resolving relationship property questions "inexpensively, simply and speedily".²⁵ However, as the Supreme Court warned in *Prest v Petrodel Resources Ltd*, the special nature of relationship property proceedings does not give the courts licence to engage in pure speculation.²⁶

Family Proceedings Act 1980, s 182

The application under s 182 of the Family Proceedings Act 1980 related to the Claymark Trust, which Mr Clayton settled in 1994 to acquire two properties adjoining the sawmill. Mr Clayton and two independent professionals were the trustees. Mr and Mrs Clayton were both discretionary beneficiaries and their children were the final beneficiaries.²⁷ Mrs Clayton argued that the trust was a nuptial settlement and that it should be varied to give effect to her expectations of benefit from the trust. The High Court and Court of Appeal upheld the Family Court finding that the trust was not a nuptial settlement and that there was therefore no jurisdiction to make an order under s 182.²⁸

For purposes of determining whether a settlement is nuptial in character, it is not enough that either or both spouses are beneficiaries. The central issue is whether the spouses expected the settlement to make provision for them by virtue of their marriage. If that expectation is wholly or partially defeated by the dissolution of their marriage, the settlement can be varied under s 182 to give effect as far as possible to the parties' reasonable expectations of the settlement when it was made.²⁹ If the dissolution of the marriage does not affect the applicant's expectations of the settlement, there is no reason for the Court to intervene.

Even though the Claymark Trust was settled during the marriage, ostensibly for the benefit of the parties and their children, Mr and Mrs Clayton had no expectation that it would provide for them during their marriage. The trust was settled for strategic business purposes to acquire two properties adjoining the sawmill to create a buffer between the mill and its neighbours to reduce difficulties with obtaining resource consent for operating hours of the mill. The trust was not formed as a means by which Mrs Clayton would acquire an interest or expectation in business assets.³⁰ Furthermore, having signed the s 21 agreement, Mrs Clayton could not have reasonably expected to benefit from any of the business assets. Although the agreement was eventually set aside, the relevant expectations were those at the time the

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trust was settled. The dissolution of the parties' marriage therefore did not defeat their expectations.

Sham or illusory trust

The VRPT was the most valuable of the trusts settled by Mr Clayton. It held the land and buildings from which the businesses operated and acted as a banker by borrowing from the Bank of New Zealand to make advances to other trusts and entities. Mrs Clayton's principal argument was that this Trust was a sham.³¹

Mr Clayton established the VRPT by executing a declaration of trust in 1999 to protect the land and buildings from the risks associated with his business operations.³² He was the sole trustee and a discretionary beneficiary, along with his wife and their two children. The children were the final beneficiaries.³³ As Trustee, Mr Clayton had the power to appoint any of the income and capital to any of the discretionary beneficiaries.³⁴ In his personal capacity as "Principal Family Member" he held the power to appoint and remove trustees, and the power to add and remove discretionary beneficiaries.³⁵ Unusually, perhaps, there was a clause permitting a trustee who was also a beneficiary to exercise any of the powers and discretions in favour of him or herself.³⁶ Mr Clayton was thus entitled to appoint any of the capital and income to himself.

The High Court held that the trust was not a sham.³⁷ Mr Clayton genuinely intended to create a trust and he did so for legitimate business purposes. The trust deed was not a façade or pretence intended to conceal the true nature of the transaction. However, the High Court agreed with the Family Court that by virtue of the powers reserved to Mr Clayton the trust was "illusory".³⁸

The Family Court relied on the trustees' unfettered discretion and power to act partially to conclude that the trustees could not be held to account in the exercise of their powers.³⁹ Furthermore, the deed included a power to revoke, vary and amend the provisions relating to trust administration and management which, the Family Court held, allowed Mr Clayton to revoke the trust and re-vest the trust assets in himself.⁴⁰

The High Court did not agree that those powers rendered the trust illusory. It pointed out that the revocation power in the VRPT was limited to administration and management of the trust, and did not give Mr Clayton the power to bring the trust to an end.⁴¹ Instead the wide dispositive powers in relation to income and capital, and the power to self-benefit led the High Court to conclude that the trust was "illusory".⁴²

Mr Clayton effectively retained all the powers of ownership [and had the power] ... to do whatever he wants with trust property. ... [He] is able to deal with trust property just as he would if the trust had never been created.

The Court of Appeal also rejected the sham trust allegation. The trust could not be a sham because the requisite "shamming intention" was not present. In so holding, the Court took the view that a sham trust depended on a specific intention of pretence and deceit and not on the mere absence of trust intention.⁴³

The concept of an illusory trust as something distinct from a sham was firmly rejected by the Court of Appeal. It referred to the treatment of illusory trust in academic writings as a

trust that "looks like or appears to be a trust but has no real substance or effect so that no trust was intended".⁴⁴ The Court interpreted this to mean the same thing as sham intention, saying:⁴⁵

Both terms focus on the real or true intentions of the settlor. The question in both cases is, notwithstanding the existence of a trust deed, did the settlor genuinely intend to create a valid, enforceable trust. In the absence of the requisite genuine intention, there will be no trust at all. As we have already noted, this question involves an examination of all the relevant evidence relating to the determination of the settlor's real or true intentions. The inquiry focuses not on the legal form of the otherwise valid trust deed but on those intentions.

On application, the Court ruled that a valid discretionary trust had been created.⁴⁶ The VRPT met the three certainty requirements for a trust: intention, subject matter and objects. Mr Clayton's wide powers as trustee to deal with the property for his own benefit and without regard to the interests of other beneficiaries did not eliminate his trust obligations to the beneficiaries to act honestly and in good faith, and to account for the trust property. Given the appearance of a valid trust and no sham intention arising on the facts, the trust could not be said to be an illusion.

In our opinion, however, there is an important distinction between sham and illusory trust. A sham requires an active intention to deceive — the sham is intended to look like a trust but it is deliberately not intended ultimately to operate as one. A sham allegation is justifiably a difficult one to prove and successful cases are few.⁴⁷ An illusory trust, on the other hand, does not depend on an intention to deceive. Rather, an analysis of the terms of the trust deed shows that actually no trust was intended.

A settlor often wishes to create a trust but also wishes to retain significant control over the trust property. A legitimate balance between these two aims is sought using a variety of clauses in the deed. On analysis of the powers and restrictions in a particular deed, it may become clear that a true trust was in fact not intended after all. There was no intention that the trust be a pretence; there was simply a misunderstanding or lack of knowledge about what is required for a trust to be a trust. The settlor may have genuinely thought he was settling a trust, but if there was not an absolute and effective alienation of property to the trustee for the benefit of beneficiaries, he did not intend a trust after all.

Power as property

The rejection of the illusory trust concept did not conclude consideration of Mrs Clayton's claims against the VRPT. The Court of Appeal invited counsel to present arguments on the power to add and remove discretionary beneficiaries, and ruled that this power was a "general power of appointment" that amounted to property in the hands of Mr Clayton.⁴⁸ The power gave him "the unfettered right to remove the other 'Discretionary Beneficiaries' of the trust, including those who were also the 'Final Beneficiaries', and to leave himself as the sole beneficiary entitled to receive the income and capital of the trust" during the existence of the trust and under the power of appointment on vesting day.⁴⁹ If Mr Clayton exercised his power in this way, "he would become both the legal and beneficial owner of the trust assets and there would then be no trust at all".⁵⁰ Mr Clayton's intention had been to confer the power on himself in his personal capacity⁵¹ and, as

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such, neither the doctrine of fraud on a power nor any fiduciary duties applied to restrict the exercise of the power in his own favour and prevent it from being analysed as property.⁵²

Accordingly, the power was property that fell within the pool of relationship property to which Mrs Clayton had a claim. The value of the power was said to be the value of any property that would be received in the event that the power was exercised, namely the trust property.⁵³

This ruling is troubling in several respects. First, while Mr Clayton had the power to add and remove discretionary beneficiaries, he did not have the power to remove final beneficiaries. He could remove final beneficiaries only in their capacity as discretionary beneficiaries. The Court was therefore wrong to say, repeatedly, that Mr Clayton could exercise this power to become the "sole beneficiary" of the trust. There would always be final beneficiaries to whom he would continue to owe fiduciary duties. In contrast to Mr Clayton himself, who was merely a discretionary beneficiary, the final beneficiaries had a contingent interest in the trust property against which advances could be made under s 41 of the Trustee Act 1956.

Second, the Court of Appeal likened the power to add and remove beneficiaries to the power to revoke a trust. It drew support from the Privy Council decision in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank & Trust Co (Cayman) Ltd*.⁵⁴ There, a power of revocation was recognised as a property right because it was a "completely"⁵⁵ or "truly"⁵⁶ general power. It was capable of vesting in the Official Assignee on bankruptcy because it enabled the holder of the power to re-vest the subject-matter of the power, the trust property, in himself. While this decision undoubtedly expands the notion that powers can be property in certain circumstances, the power to revoke differs significantly from the power to add and remove beneficiaries. The purpose of a broad power of revocation is to enable the settlor to retract the trust at any time without any limitation on the exercise of the power. Indeed, it could be argued that where such a power has been conferred, it is questionable whether there can be a trust at all. Besides, Mr Clayton's power to add and remove beneficiaries could not be used to bring the trust to an end, because he could not remove the final beneficiaries. Contrary to the Court of Appeal's ruling, he could not have effectively revoked the trust by means of this power.⁵⁷

Third, we are not persuaded that the power was property in the hands of Mr Clayton simply because the power was vested in him in his personal capacity. The capacity in which a power of appointment is held is not determinative. For example, the power to appoint and remove trustees is generally held to be fiduciary in nature, even when someone holds it in their personal capacity.⁵⁸ The significance that the Court of Appeal attaches to the capacity in which the power is held is therefore misplaced in our view.

Rather, it is the nature of the power that should determine whether it is fiduciary or not. If the power can be exercised in a manner that could adversely affect beneficial interests, it ought to be constrained by a fiduciary obligation to ensure that it is exercised with those interests in mind. Allowing a settlor to construct a trust that enables him or her to reorganise the distribution of the property or change the beneficiaries after the trust is settled risks undermining the institution of the trust. For that reason, the power should be fettered so that any exercise of it will give effect to the trust.⁵⁹ The power must not be exercised in bad faith; capriciously or

irrationally; outside of the scope or proper purpose of the power (known as fraud on a power); or otherwise in breach of fiduciary duty.

Fourth, the Court did not explain why the power was relationship property. It held that the power came within the extended definition of "property" in the PRA, which includes "any other right or interest".⁶⁰ Mr Clayton's power was a "right" that created an "interest", which was property and hence "relationship property" under the Act when the parties separated.⁶¹ Even if the power was property, that did not automatically mean it was relationship property. No reason was given for this classification. The classification of the power as relationship property cannot be made by reference to the assets in the trust, because they were not relationship property. It would be a contradiction to the Court's ruling that gifts from the VRPT to the Claymark Trust were not dispositions of relationship property.⁶² The alternative is that the power was relationship property because it was acquired during the marriage. Property acquired by either party during the marriage is relationship property under s 8(1)(e) of the PRA. But that approach runs the risk of treating a power as property even where the trust was settled with separate property. It would give the successful applicant greater rights than he or she would have had under the Act. It could even mean that strangers holding the power to add and remove beneficiaries might find the power included in their own relationship property proceedings, even though none of the assets held in trust were contributed by the stranger and there was no expectation that the stranger would exercise the power to remove all the other beneficiaries and appoint only him or herself! The classification of this power as relationship property is thus not without difficulty and is already giving rise to problems in other relationship property cases.⁶³

Our fifth objection relates to the valuation of the power. The Court ruled in Clayton that the value of a power such as this will be the value of the property received in the event that the power is exercised.⁶⁴ There are at least two problems with this. First, the assumption is being made that the power will indeed be exercised in the donee's favour and without any appointments of trust property being made to other beneficiaries.⁶⁵ A future possibility is being valued as a certainty.⁶⁶ Second, when a power to remove beneficiaries is exercised, it does not automatically have the effect of entitling the remaining beneficiary to receive the property. That will depend upon the terms of the trust deed. In Mr Clayton's case, this analysis held true only because he was also the sole trustee and could exercise the power to appoint all the trust property to himself. Yet, the Court's comments on valuation do not indicate that Mr Clayton's role as sole trustee or his power to appoint property, or his power to self-benefit were crucial for the power to add and remove beneficiaries to have any real value. It is not obvious that the power to add and remove beneficiaries should necessarily be valued at the net value of the trust assets.

Powers and duties

While the Court focused on the power to add and remove beneficiaries, it actually relied on a combination of powers. The power to remove other discretionary beneficiaries could not alone have given Mr Clayton access to the trust property. His power to appoint income and capital, and his power to self-benefit were crucial to this outcome, as was the exclusion of the duty to act impartially and consider all beneficiaries.⁶⁷ Indeed it could even be said that Mr Clayton did not need the

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power to add and remove beneficiaries to gain access to the trust property. It was, in a sense, a red herring. The only means by which Mr Clayton could access the trust property was through his power to appoint income and capital to himself. But he held this power as a trustee and hence was subject to fiduciary duties in the exercise of the power. He was not free and that power was therefore not property either.

The only way in which the Court could have legitimately concluded that the trust property beneficially belonged to Mr Clayton was by finding that no trust was really intended. One could say that because the powers Mr Clayton conferred upon himself were so wide-ranging, he was the sole trustee and important fiduciary duties were excluded, arguably there was little evidence of any meaningful accountability. Such accountability is central to the existence of a trust and might suggest a lack of trust intention. The reality of how the trust was structured and what the various powers conferred on Mr Clayton allowed him to do were all but ignored for the purpose of identifying trust intention. The difficulty arises because the Court's approach to establishing trust intention is rather formalistic and narrow.

Interestingly, the Court did note equity's preference for substance over form but only in relation to ascertaining a sham intention.⁶⁸ The substance here did not go so far as to amount to a sham because there was no intention to disguise or conceal an alternative true intention. It appears that two very different approaches are being taken to establishing intention. Where the enquiry concerns trust intention, the Court is satisfied with a fairly formulaic analysis. When the enquiry moves to sham intention, it changes to take account of substance and conduct. In our view, the inquiry as to substance should apply to both trust intention and sham intention. In doing so, it becomes clear that there is room for the illusory trust notion. Where the substance of a trust was not really intended but there is no suggestion that the settlor was acting fraudulently, the result is neither a valid trust nor a sham trust, but rather no trust for want of intention. If Mr Clayton had the power to remove discretionary and final beneficiaries, as the Court of Appeal seemed to suggest he did, as well as his powers as sole trustee to appoint all the income and capital to himself without having the duty to act impartially or consider all beneficiaries, then his intention to create a trust would surely be in doubt. However, trust deeds with such terms are likely to be uncommon.

Conclusion

When Parliament adopted the Property (Relationships) Amendment Act in 2001 it decided against giving the courts the power to make orders against the trust capital to give effect to relationship property entitlements. Trusts were "created for legitimate reasons and so should be permitted to fulfil that purpose".⁶⁹ Parliament made this decision knowing that trusts were undermining the social aims of the PRA.⁷⁰ Yet, it chose to protect trusts against relationship property claims.

Since then a string of cases has, in effect, challenged that legislative policy by pursuing alternative arguments to access trust property. Most of these arguments have failed on trust law principles. *Clayton* is another example of such a challenge. But in this case the Court of Appeal has singled out the power to add and remove beneficiaries and held it to be property because Mr Clayton held it in his personal capacity, not as trustee. In this article we have explained why we believe that decision is wrong. If a trust was intended, as the

Court of Appeal found, then the powers must be constrained so that the trust can be given effect and not easily undermined. Even if the power were not so constrained, its exercise would not have given Mr Clayton access to the property.

The Court of Appeal's decision comes in the wake of the Law Commission Report, *Review of the Law of Trusts: A Trusts Act for New Zealand*, which identified the effect of trusts on the relationship property regime as particularly problematic.⁷¹ It recommended review of the Act and, in the meantime, amendments to s 44C of the PRA and s 182 of the Family Proceedings Act.⁷²

Parliament might have been right to tread cautiously in 2001 in relation to trusts. But in light of the mounting judicial challenges and the Law Commission's concerns, that policy decision may now have to be reviewed. The appropriate body to do that is Parliament where all the competing interests can be debated.

Footnotes

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1. *MAC v MAC FC Rotorua* FAM-2007-063-652, 2 December 2011; *Clayton v Clayton* [2013] NZHC 301, [2013] 3 NZLR 236, (2013) 29 FRNZ 306 [*Clayton HC*].
2. *Clayton v Clayton* [2015] NZCA 30, [2015] NZFLR 233, (2015) 30 FRNZ 1 [*Clayton CA*].
3. Mr Clayton offered to vary the agreement to treat the home, family chattels, some accounts and advances to trusts as relationship property. But in the absence of Mrs Clayton's agreement to such a variation, the Court had no jurisdiction to vary the agreement. The agreement was either valid or invalid.
4. *Clayton HC*, above n 1, at [13]. While the agreement may not have been unreasonable or unfair at the time it was made, after 17 years of marriage, the birth of two children, and the work that Mrs Clayton had put into the business, it had become unfair and unreasonable.
5. For purposes of establishing intent, it is not enough to show the effect of the disposition was to defeat a claim under the Property (Relationships) Act 1976: *SM v ASB Bank Ltd* [2012] NZCA 103, [2012] NZFLR 641, (2012) 28 FRNZ 782, 201260705; *Clayton CA*, above n 2, at [134].
6. *Bourneville v Bourneville* HC Auckland CIV-2007-404-2656, 24 April 2008; *Gray v Gray* [2013] NZHC 2890; *SMW v MC* [2013] NZHC 396, [2014] NZFLR 71.
7. *Coles v Coles* (1987) 4 NZFLR 621, 3 FRNZ 101 (CA).
8. *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 at [53].
9. *Ryan v Unkovich* [2010] 1 NZLR 434, [2009] NZFLR 948 (HC), where French J held at [33] that "in so far as the Coles formula fails to distinguish between intention and motive, it is contrary to the reasoning of the Supreme Court [in *Regal Castings*] and should not be followed. Knowledge of a consequence can be equated with an intention to bring it about." This view was endorsed in *Patterson v Davison* [2012] NZHC 2757 at [38]; *Gray v Gray*, above n 6, at [28]; *SMW v MC*, above n 6, at [68]–[69].
10. *Ryan v Unkovich*, above n 9, at [33]; *MAC v MAC*, above n 1, at [92].

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11. The term “disposition” in s 44 is broadly construed to include all forms of alienation, whether for value or not: *Re Polkingborne Trust* (1988) 4 NZFLR 756, (1988) 3 FRNZ 636; *Clayton CA*, above n 2, at [133]. It includes a deed of nomination, gifts, sales of property, payments of mortgage installments, interest free loans and advances. The dispositions can be made by the defendant spouse or partner, or by someone else on behalf or at the direction, or in the interests of the defendant spouse or partner
12. *MAC v MAC*, above n 1, at [92]; *Clayton HC* above n 1, at [102]; *Clayton CA*, above n 2, at [142].
13. Property (Relationships) Act 1976, s 44(3).
14. *MAC v MAC*, above n 1, at [93].
15. *Clayton HC* above n 1, at [93]–[103] and [150]; *Clayton CA*, above n 2, at [144]–[146].
16. *SMW v MC*, above n 6, at [73]–[76]. In that case the husband transferred land that was his separate property into trust. The family home was subsequently built on the land. But for the disposition into trust, the land would have become relationship property. The disposition thus had the effect of defeating the wife’s rights. In *Bourneville v Bourneville*, above n 6, the wife’s rights were not defeated, because the disposition concerned a house that had been the family home for six months, but had reverted to being the husband’s separate property.
17. *MAC v MAC*, above n 1, at [85]; *Clayton HC*, above n 1, at [90]. See further the discussion below.
18. *Clayton CA*, above n 2, at [85]. See further the discussion below.
19. As is common in discretionary trusts, the Vaughan Road Property Trust Deed [VRPT Deed] gave the trustee the power to deal with the trust fund as if he were the absolute owner, including doing any act or thing or enter into any obligation whatever: cl 12.1.
20. The “Discretionary Beneficiaries” listed in cl 2.1 of the VRPT Deed included any trust, of which any of the beneficiaries of the Vaughan Road Property Trust [VRPT] were beneficiaries,
21. *Clayton CA*, above n 2, at [162], where the Court concluded that distributions from the VRPT to the Claymark Trust were not distributions of relationship property.
22. *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415 at [45] and [85].
23. *Clayton CA*, above n 2, at [186].
24. *Clayton CA*, above.
25. Property (Relationships) Act 1976, s 1N(d).
26. *Prest v Petrodel Resources Ltd*, above n 22, at [45].
27. The VRPT made three gifts of \$27,000 to the Claymark Trust and Mr Clayton advanced \$60,000 as a personal interest free loan. The Family Court held that none of these dispositions were made to defeat Mrs Clayton’s rights, because she was a discretionary beneficiary of the trust: *MAC v MAC*, above n 1, at [70]. Nor did these dispositions come within s 44C. The gifts from the VRPT were not relationship property and the loans remained as Mr Clayton’s assets: *Clayton CA*, above n 2, at [160]–[164].
28. *Clayton HC*, above n 1, at [137]–[143]; *Clayton CA*, above n 2, at [165]–[178]
29. *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31 at [25].
30. *Clayton CA*, above n 2, at [177].
31. It is unlikely that Mrs Clayton could have successfully argued that dispositions to this trust should be set aside under s 44 of the Property (Relationships) Act 1976, because none of the evidence on which the Court relied in relation to the children’s trusts was present in relation to this trust. Mrs Clayton was a discretionary beneficiary of the trust and Ms Ullrich’s advice on Mr Clayton’s vulnerability to claims in the event of separation postdated the settlement of the VRPT by several years.
32. *MAC v MAC*, above n 1, at [73]. The Claymark Group had been undergoing financial difficulties during the 1990s and there was a risk of receivership.
33. VRPT Deed, cl 2.1.
34. VRPT Deed, cl 4.1 and 6.1.
35. VRPT Deed, cl 17.1 and 7.1, respectively. There was no power to remove the final beneficiaries.
36. VRPT Deed, cl 14.1
37. *Clayton HC*, above n 1, at [79]. The Family Court made no finding as to whether the trust was a sham, but its finding that the trust was illusory suggests that it did not accept the sham allegation.
38. *MAC v MAC*, above n 1, at [85]; *Clayton HC*, above n 1, at [79]–[91].
39. *MAC v MAC*, above n 1, at [75]–[78].
40. *MAC v MAC*, above n 1, at [79]–[82].
41. *Clayton HC*, above n 1, at [83]–[84].
42. *Clayton HC*, above n 1, at [90].
43. *Clayton CA*, above n 2, at [64]–[69], quoting *Glazebrook J in Official Assignee v Wilson* [2008] 3 NZLR 45 at [108].
44. *Clayton CA*, above n 2, at [77].
45. *Clayton CA*, above n 2, at [78].
46. *Clayton CA*, above n 2, at [50]–[56].
47. *Official Assignee v Sanctuary Propvest Ltd HC Auckland CIV-2009-404-852*, 11 June 2009; *Rosebud Corporate Trustee Ltd v Bublitz* [2014] NZHC 2018.
48. *Clayton CA*, above n 2, at [88].
49. *Clayton CA*, above.
50. *Clayton CA*, above n 2, at [101].
51. *Clayton CA*, above n 2, at [102].
52. *Clayton CA*, above n 2, at [103]. The Court also noted that a property analysis of the power was consistent with the broad definition of property used in the Property (Relationships) Act 1976: [111].
53. *Clayton CA*, above n 2, at [113].
54. *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank & Trust Co (Cayman) Ltd* [2011] UKPC 17, [2012] 1 WLR 1721.
55. Above, at [42].
56. At [43].
57. *Clayton CA*, above n 2, at [101].
58. *Carmine v Ritchie* [2012] NZHC 1514.
59. For detailed development of this argument, see Jessica Palmer and Nicola Peart “Double Trouble: the power to add and remove beneficiaries and the power to appoint and remove trustees” (paper presented to New Zealand Law Society CLE Ltd Trusts Conference, Auckland and Wellington, June 2015).
60. Property (Relationships) Act 1976, s 2. *Clayton CA*, above n 2, at [111].
61. *Clayton CA*, above n 2, at [111].
62. *Clayton CA*, above n 2, at [162].

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63. Personal communication from legal practitioners around the country.
64. *Clayton CA*, above n 2, at [113].
65. In *Clayton*, the parties agreed as to the date at which the trust assets were to be valued. But it is not at all clear how this would be determined in the absence of an agreement.
66. For similar criticism made in response to the bundle of rights notion, see Shelley Griffiths, "Valuing 'bundles of rights' for the Property (Relationships) Act 1976; when neither art nor science is enough" (2011) 7 NZFLJ 98.
67. *Clayton CA*, above n 2, at [88]. VRPT Deed, cll 4.1, 6.1, 10.1(a) and 11.1(a).
68. *Clayton CA*, above n 2, at [61]–[62].
69. Matrimonial Property Amendment Bill 1989 (109–2) (select committee report) at xii.
70. See the Department of Justice Report of the Working Group on Matrimonial Property and Family Protection (October 1988) at 28, where the problem of trusts was identified.
71. Law Commission Review of the Law of Trusts: A Trusts Act for New Zealand (NZLC R130, 2013) at ch 19.
72. Law Commission Review of the Law of Trusts: Preferred Approach (NZLC IP31, 2012) at 17.4.