

*Trusts and the Property (Relationship)  
Act 1976*  
*An update on the Law Commission  
Review*

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ZARA MATHESON

BARRISTER

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*The PRA has both reflected and shaped societal values in the way people enter, conduct and leave relationships (p1)*

# Changing Times

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- 1976 – Marriage rate 35 per 1,000 unmarried adults
- 2016 – Marriage rate 11 per 1,000 unmarried adults
- 2016 – 46% of all births to unmarried parents
- Single parent households almost double than in 1976
- Remarriages 29% of all marriages in 2016 cf 16% in 1976
- Children now ten times more likely to identify with more than one ethnicity than older New Zealanders

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*If New Zealand has changed so much, is the policy of the PRA still sound and are the right principles guiding its rules?*

# Why Now?

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- No comprehensive review since 1976
- 2001 review – extension to de facto relationships and same sex relationships

# Overall PRA Framework Remains Sound

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*While there may be different views on how the PRA framework ought to be implemented through rules, we consider that the just division of property at the end of a marriage remains appropriate for New Zealanders both now and into the future*

# Trusts and the PRA

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- 300,000-500,000 trusts in NZ (Law Comm Trust Review [2.3])
- 2013 Census – 14.8% homes in trust

*“The growth of trusts in New Zealand over the past two decades has been nothing short of phenomenal. Trusts seem to be on a par with motor vehicles – every family has one and in some cases two.”*

*J Cron Family Trusts in NZ (2010)*

# The Law As It Stands

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- PRA only applies to “property” owned by partners to the relationship
  - S2 – property includes any “estate or interest” in property or “any other right or interest”
- BUT
- Ownership as trustee is not property (not beneficial owner)
  - Discretionary interest not property (cf vested or contingent interest)
  - Powers can be property – *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29 - extensive powers of appointment and distribution gave Mr Clayton an interest in the trust and its assets.
  - Acquired after the relationship began so were relationship property

# Current Remedies

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- S 44 PRA
- S44C PRA
- S182 Family Proceedings Act 1980
- High Court power to ensure trust operates properly
- Claim trust invalid or sham
- Constructive trust over property held on express trust

# S 44 PRA

- Disposed of property to trust to defeat a partner's claim or rights under PRA
- Court can unwind the disposition and recover property from trust or order compensation
- Need intention to defeat the other person's rights – doesn't have to be the only purpose and knowledge of risk is enough

# S44C PRA

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- Applies when a disposition of property to a trust has the effect of defeating a partner's rights or claims under the PRA
- Proof of intention not required
- Property must have been relationship property
- Disposition must have been after relationship began
- Must only defeat rights of one partner, not both
- Compensation only from relationship property or separate property or income of the trust (not capital)

# S182 Family Proceedings Act 1980

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- “Nuptial settlements” – not de factos
- Property held on discretionary trust can be a nuptial settlement provided there is a sufficient connection between the trust and the marriage
- Can vary the trust for the benefit of children of the marriage or the spouses
- *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30

# High Court

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- Trustee Act and inherent jurisdiction
- Eg s51 removal of trustees/s68 review of trustee actions
- But cannot divide and distribute trust property which remains within trustee discretion

# Invalid or Sham

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- Invalid – settlor did not intend to create a trust – no trust and potentially relationship property
- Sham – trust instrument a sham – settlor and trustee
- Very difficult to prove

# Constructive Trust

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- Direct or indirect contributions to the property
- Expectation of an interest in the property
- Expectation was reasonable
- Owner should reasonably expect to yield an interest in the property (*Lankow v Rose* [1995])

# Problems with Trusts and the PRA

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- PRA may be powerless to ensure a just division of significant amounts of property
  - Partner may have strong legal or moral claim to trust property eg family home
  - Trust may be unsuitable upon separation
  - Trust may be controlled by one partner
- Many people ignore trusts – PRA doesn't authorise common practice
- Inconsistency – cf contracting out agreements

# Problems with Trusts and the PRA 2

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- Uncertainty – is an interest in a trust property?
- Inconsistency in application of s44C
- *Clayton v Clayton [VRPT]* did not resolve these issues – fact specific and complex
- Remedies outside the PRA are inconsistent, different in focus and procedurally difficult eg s44C v s182 FPA, differing jurisdictions of the Family Court and High Court

# Reform is needed!

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“We are conscious that there is no “silver bullet” solution. Given the competing interests at stake in this area, it is challenging to craft an option for reform that will perfectly balance all the issues at stake. There does not seem to be any consensus on how the law in this area should be reformed...In short, there is no obvious answer as to how to find the right balance between enabling a just division of property and the preservation of trusts” (p489)

But – s182 FPA should be repealed

# First Option for Reform

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- Revise the definition of “property” to include all beneficial interests in a trust if it is likely and permissible that the partner will include a distribution of trust property
- Interest will then be classified as usual – RP or separate property
- Would need to ensure legitimate interests of children not neglected
- Addresses a partner’s “true” interest in the trust
- But – trusts could be structured to conceal a partner’s true interest

# Option Two

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- Focus on the underlying trust property, not the interest
- Relationship property would include that portion of the trust property that is “attributable to the relationship” – eg as with superannuation
- The Court would need to be satisfied it is just to treat that portion of the trust property that is attributable to the relationship as relationship property
- Trust will be preserved if there is clear evidence it was established with knowledge and informed consent

But – issues with causation, uncertainty re “attributable to the relationship”

# Option Three

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- Broaden s44C:
  - Remove requirements that disposition must be RP and after relationship
  - Compensation can be payable from trust property (money or transfer of property but capital as a last resort)
  - Must have regard to whether transfer to trust was with informed mutual consent to irrevocably settle the property for the benefit of third party beneficiaries and needs of minor or dependent beneficiaries

BUT – could still be circumvented and constructive trust remedies would still apply

# Option Four

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A new provision modelled on s182 FPA to apply to “relationship settlements”

*...it is an implicit principle of the PRA that a single, accessible and comprehensive statute should regulate the division of property when partners separate (p506)*

“Respects” the trust, greater flexibility but inconsistency between PRA principles and s182 principles

# Where to from here?

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- Over 300 submissions received
- Preferred approach paper due October 2018