



The Future of Trusts in New Zealand

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What is a trust?

Trust is a Relationship:

- between Trustees and beneficiaries
- imposing fiduciary duties on trustees
- for which trustees are accountable to beneficiaries

Core elements of a trust

- Alienation of beneficial ownership
- Accountability of trustees

Minimum duty on trustees:

Perform the trust honestly and in good faith according to its terms

History of use of trusts

- **Matrimonial Property Act 1976**
- **Abolition of estate duty 1993**
- **Property Relationships (Amendment) Act 2001**
- **Abolition of gift duty 2011**

Modern Family Trust

- **Settlor** = trustee or co-trustee & primary beneficiary
- **Trustee:** Power to distribute income & capital
Power to resettle trust assets
Power to advance vesting date
Default duties reduced
- **Settlor:** power to appoint & remove trustees & beneficiaries

Trust numbers

2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
222,163	237,464	245,819	253,782	248,913	252,322	249,124	256,132	261,602	263,144

Estimate: 400,000 – 500,000 trusts

Vulnerability of trusts



Protecting the State Purse

- **Access to financial resources:**

Child Support Act

Legal Services Act

- **Ignore dispositions of assets:**

Social Security Act 1964

Protecting the private purse

- **Creditors:**

 - Property Law Act: recover certain dispositions

- **Spouses & Partners**

 - **Property (Relationships) Act:**

 - Recover certain dispositions

 - Compensate for certain dispositions

 - **Family Proceedings Act: vary nuptial settlements**

Law Commission Review of Trusts

- Clarify what express trust is & its core characteristics
 - State mandatory and default duties of trustees
 - Simplify administrative procedures
 - Modernise legal regulation of trusts
- **New Trusts Act not a code of rules!**
- **Act deals with trust law, not other policy areas**

Trusts Bill

Purpose: restate and reform NZ trust law by—

- (a) setting out core principles of the law relating to express trusts;
- (b) providing for default administrative rules for express trusts;
- (c) providing for mechanisms to resolve trust-related disputes;
- (d) making the law of trusts more accessible.

Judicial Response to modern family trust

- Shams
- Powers invalidating trusts
- Powers as property

Clayton v Clayton

2011-2016



Clayton v Clayton 2016 NZSC

- 17 year marriage, two daughters
- \$500,000 Mr C's separate property
- \$28m assets at end of marriage, all in trusts and companies, except family home

Vaughan Road Property Trust:

- Mr Clayton sole trustee
- Mr & Mrs C & kids discretionary beneficiaries
- Kids final beneficiaries

Vaughan Road Property Trust

Clayton's powers as trustee & personally:

- Appoint income & capital
- Appoint & remove trustees & discretionary beneficiaries
- No duty to consider all beneficiaries' interests
- No duty to act evenhandedly
- No duty to avoid conflict of interest
- **Power to self benefit!**

Clayton v Clayton 2016 NZSC

- **Sham?**

No! Trust deed was
not a false front



- **Did powers make trust invalid?**

No consensus

Clayton v Clayton

Mr C's powers were property!

“He can, unrestrained by fiduciary obligations, exercise the VRPT powers to appoint the whole of the trust property to himself.”

Powers had value of trust assets!

What about creditors?

No reason to limit “powers as property” argument to relationship property claims.



JSC Mezhdunarodnyy Prom Bank v Pugachev

2017 High Court England

Four NZ based trusts

As protector, Pugachev could

- veto proposed distributions to any beneficiary
- Appoint and remove trustees without cause

➤ Powers not subject to duties: **No Trust!**



Law Commission Review of PRA

No change to:

- Relationships covered
- Equal sharing principle
- Contracting out

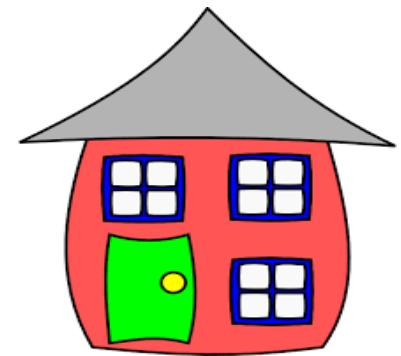
Change to:

- Classification of family home
- Trust remedies

Law Commission Review of PRA

Reform Classification of family home:

- Family home not automatically shared
- Pre-relationship home separate property unless replaced during relationship
- Share only increase in value during the relationship



Law Commission Review of PRA

Reform of trust remedies

**Orders against trustees
if relationship property
rights would otherwise
be defeated.**



Reform of trust remedies

1. **Disposition of any property to trust**

by either/both parties when relationship reasonably contemplated or since it began that has the effect of defeating the rights of either or both parties under the Act

2. **Trust property sustained or enhanced by**

- Application of relationship property
- Actions of either/both parties

Reform of Trust remedies

Remedy will apply to

1. Trusts settled by either spouse/partner
2. Trusts settled by third party, eg parents
3. Dynastic trusts

Unless spouses/partners contract out!

Future of Trusts?

- Trusts preserve entitlements to state benefits only to a very limited extent
- Trusts unlikely to protect against claims by spouses and partners, especially after PRA reform
- Settlor controlled trusts less likely to protect against claims by creditors.
- Trusts will protect against claims on death



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Questions?

