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TRUSTS AND THE PROPERTY (RELATIONSHIPS) ACT: THE NEED FOR A CLEAR AND RATIONAL REGIME TO AMELIORATE THE PROBLEMATIC INTERACTION

RESEARCH PAPER

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Abstract

The interaction between aspects of relationship property and trust law is problematic and in desperate need of reform. Trust use in Aotearoa, both nefarious and legitimate, is pervasive, especially as it relates to dispositions of relationship property outside the scope of the relationship property regime. The recent enactment of the Trust Act 2019 and proposed changes to the Property (Relationships) Act 2001 have highlighted these concerns but are yet to result in meaningful change to the operation of the respective regimes. This paper analyses the current framework, proposed reforms and considers the necessity of a clearer and more rational regime to both reduce the 'necessity' of trust use and afford the courts adequate discretion in looking through the trust to reverse certain dispositions.

Key Terms: trust, relationship property, look-through provisions, family home, accessibility, Trusts Act, Property (Relationships) Act.

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I Introduction

The use of trusts in Aotearoa is ubiquitous; not limited by socio-economic status or the quantity of assets over which one seeks protection. The primary motivation for the use of trusts is asset protection: the preservation and enhancement of wealth for the benefit of current and future generations.[1]

The Aotearoa trust regime is considered infamous for its usage in sheltering and protecting assets against the often-legitimate claims made by creditors or ex-partners.[2] The primary motivation for the use of trusts, combined with their prevalence in Aotearoa, has resulted in the trusts' frequent usage as an avoidance mechanism.[3]

This research paper intends to focus on this use of trusts within the property relationship context. The use of trusts as an avoidance mechanism can be said to have been exacerbated by the introduction of the Property (Relationships) Act (PRA).[4] This saw a marked increase in the use of trusts to shield property and avoid obligations.[5] Provisions within the PRA, and relevant aspects of trust law, have attempted to remedy this. This paper would, however, question their effectiveness in upholding the Act's equal sharing regime.

The law which governs the interaction between the PRA and relevant trust law is overly complex, inaccessible and constantly subject to change. This has resulted in difficulties for both lawyers and potential settlors. Whilst the Law Commission has conducted reviews into both areas of law respectively, few recommendations have been acted upon in a manner which meaningfully improves this interaction.[6]

This paper will provide a discussion of relevant aspects of trust law and the PRA to identify the difficulties which have arisen out of this interaction. Part II will detail relevant aspects of trust law, outlining both legitimate uses and use as an avoidance mechanism. Part III will explain and detail relevant aspects of the PRA and its interaction with trust law. Parts IV, V and VI considers the existing remedial provisions under the PRA, trust law and the Family Proceedings Act (FPA) respectively, discussing their adequacy in achieving the purposes of

[1] Henry Brandts-Giesen and Sarah Kelly "Rethinking Traditional Asset Planning in New Zealand" [2018] NZLJ 263 at 263.
[2] Sue Tappenden "The role of equity in changing society: from Ancient Greece to present day New Zealand" (2015) 21 Trusts & Trustees 389 at 396.
[3] Law Commission *Review of the Law of Trusts: Some Issues with the Use of Trusts in New Zealand* (NZLC IP20, 2010) (IP20) at [3.1].
[4] Property (Relationships) Act 1976 (PRA). Note the law as introduced was contained within the Matrimonial Property Act 1976.
[5] IP20, n 3, at [2.11] and [3.1].
[6] At October 2021, the time this paper was authored.

the equal sharing regime. Part VII will then conduct a comparative analysis with other areas of law which contain 'trust busting' provisions. Part VIII outlines the relevant reviews conducted by the Law Commission into these areas of law, identifying possible concerns with the proposed reform. Part IX comprises a case study on the family home, outlining approaches under current and proposed legislation and identifies key areas of concern. Part X identifies the principled approach this paper would suggest for the reformed operation of law within this area, suggesting additional areas which should be the focus of further development.

II Trust Law

A Fundamental Tenets and Obligations

To ensure that the ensuing discussion on the interaction between trusts and relationship property is well founded, it is first necessary to outline the fundamentals and status of trusts. Trusts are considered the 'centrepiece' of family planning in Aotearoa.[7] It is estimated that there are as many as half a million trusts in Aotearoa; one of the world's highest amounts when considered as a proportion of total population.[8]

Despite the frequency of trust usage, there is an established lack of understanding of the structure, fiduciary duties and associated powers. This confusion is pervasive, extending to solicitors, settlors and beneficiaries under the trust structure.[9] A significant portion of this confusion likely stems from the difficulty in defining a trust. The difficulty in establishing a clear definition arises owing to the inherent adaptability and flexibility of the structure.[10]

The modern trust has increased in popularity as a result of the perceived need to protect against claims by unsecured creditors, ex-partners or the Official Assignee, to minimise tax liabilities or to take advantage of state benefits.[11] The discretionary nature of these trust structures further exacerbates the difficulty in defining 'what is a trust' as there are varying degrees of settlor control and involvement as beneficiaries and trustees.[12]

The modern trust most commonly takes the form of a discretionary trust. The discretionary trust effectively enables the trustee to determine who benefits from the assets and income of

[7] Brandts-Giesen and Kelly, n 1, at 264.
[8] Law Commission *Dividing Relationship Property – Time for Change?* (NZLC, IP41, 2017) (IP41) at [20.4].
[9] Brandts-Giesen and Kelly, n 1, at 264.
[10] Law Commission *Review of Trust Law in New Zealand: Introductory Issues Paper* (NZLC, IP19, 2010) (IP19) at [3.2].
[11] Frances Gush "Relationship Property and Trusts: the 'Bundle of Rights' Theory" (LLM Dissertation, Victoria University of Wellington, 2011) at 12.
[12] IP19, n 10, at [1.15].

the trust. There is usually no obligation to distribute, and no set distribution allocation. It is an inherently flexible structure which can meet changing circumstances and needs of beneficiaries. The prevalence of these trusts, combined with the trust landscape in Aotearoa, makes defining the trust more difficult. The trust landscape in Aotearoa differs in several key ways from other jurisdictions, though the most notable relates to trustees. In Aotearoa, trustees are commonly also beneficiaries and/or settlors, such that they are intimately connected with the trust. Comparatively, to avoid the 'undesirable' outcome of effective settlor control, other jurisdictions frequently appoint professional trustees.[13]

A valid trust can be established where there is alienation of property to a trustee, who holds that property on trust for the benefit of a beneficiary. A trust can often be identified through the irreducible core of obligations - essentially the two fundamental tenets of a trust.[14] These tenets are identified as the fiduciary relationship under which the trustee holds property for the beneficiary, and the accountability of the trustee to the beneficiary.[15] The tenets are reflected in the characteristics of an express trust as outlined in the Trusts Act.[16]

The trustee has legal ownership but cannot use the property for their own benefit as the beneficiary has beneficial ownership. The tenets ensure that the beneficiaries can rely on the trustees exercising powers for a proper purpose, in good faith and in the interests of those beneficiaries.[17]

Creation of a valid trust requires the settlor to satisfy the 'three certainties'.[18] These are the certainty of intention to create a trust, certainty of trust property and certainty of beneficiaries or permitted purpose.[19] Without these obligations and certainties being satisfied, the structure in existence could not be considered a valid trust.

These core obligations are relatively well-established, particularly in light of the recent reform and modernisation of the Trusts Act. However, difficulties often arise on the fringes of the doctrine, with boundaries increasingly extended to meet settlor demands.[20] As this

[13] Brandts-Giesen and Kelly, n 1, at 264.
[14] James Penner *The Law of Trusts* (10th ed, Oxford University Press, Oxford, 2016) at 21.
[15] Graham Virgo "The Principles of Equity and Trusts" (1st ed, Oxford University Press, Oxford, 2012) at 48.
[16] Trusts Act 2019, s 13.
[17] As mandated duties in ss 25-27 of the Trusts Act, n 16.
[18] Andrew Butler "Creation of an Express Trust" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 69 at 74.
[19] Trusts Act, n 16, s 15(1)(b).
[20] James Webb "An ever-reducing core? Challenging the legal validity of offshore trusts" (2015) 21 Trusts & Trustees 476 at 486.

research paper will discuss, settlors are exercising ever-increasing control over trust property, despite the requirement for alienation.

B Use as an Avoidance Mechanism

The ability to be utilised as an avoidance mechanism is often touted as a significant benefit of the trust.[21] This includes its use in shielding assets from creditors, ex-partners and the Official Assignee, providing a means of intergenerational wealth transfer and the minimisation of taxable income for individuals.[22]

At its core, the usage of the trust as an avoidance mechanism relies on the basic separation of legal and beneficial title: legal title is passed to the trustee and beneficial title to the beneficiaries.[23] The settlor, who passes both legal and beneficial title, can be said to have no interest in the trust property. The property therefore becomes out of reach of those claims listed above.

Pugachev, a decision of the High Court of England and Wales, considered the uses for a trust that a so-called "unscrupulous person" may have.[24] The trust may enable the settlor to "hide their relationship with the property… [and] truly state they have no proprietary interest in, or beneficial ownership of, the property".[25] The intent of the 'unscrupulous' settlor is not to alienate their interest in, or control over, the property. It is to 'protect' their property against the legitimate claims of creditors, or others. In the context of relationship property, it is to circumvent claims consistent with the PRAs' statutory scheme.

The use of trusts as an avoidance mechanism can only be furthered by the shroud of secrecy associated with trusts in Aotearoa. There is no trust register.[26] As such, there is remarkably little knowledge surrounding trust numbers and ownership in Aotearoa. Statistics on trust numbers are estimates, and there is often little known about trust settlors, trustees, beneficiaries and property.

It is pertinent to mention that the nefarious uses for trusts are compounded by the rise in discretionary family trusts. These trusts are particularly common in the relationship property context this paper focuses on. They are considered more 'intimate' in nature as the settlor will

[21] Pey-Woan Lee "Remedying the Abuse of Organisational Forms: Trusts and Companies Considered" [2019] 13 Journal of Equity 211 at 214.
[22] IP41, n 8, at [20.23].
[23] IP41, n 8, at [20.9].
[24] *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* (*Pugachev*) [2017] EWHC 2426 (Ch) at [178].
[25] *Pugachev*, n 24, at [178].
[26] Except for charitable trusts, per Law Commission *Review of the Law of Trusts: Preferred Approach* (NZLC, IP31, 2012) (IP31) at [15.4].

often occupy more than one role: frequently being settlor, trustee and discretionary beneficiary.

The main point of difference between discretionary and other express trusts relates to the lack of 'fixed interest' allocated to the beneficiary. The beneficiaries have no fixed interest. The trustee can, in their absolute discretion, decide whether to make a distribution to any beneficiary, but they need not.[27] The discretionary beneficiaries have no set interest and therefore no set entitlement to any portion of trust property. It is often claimed that these discretionary trusts interfere with the division of property at the end of the relationship, which results in injustice for one partner.[28]

The nature of trust usage as an avoidance mechanism is key to understanding how problematic the interaction can be between trusts and relationship property. The orthodox view is that trust assets cannot fall within the definition of property under the PRA.[29] Therefore, property that would otherwise be available for sharing under the PRA can be made unavailable by virtue of its transfer to a trust. The result is often that the pool of available property is significantly lessened, meaning one partner can be deprived of their legitimate interest. Often, this deprivation will further the wealth disparity between the two partners to the relationship which arises out of the assumption of typical gender roles.[30] This paper will in Part III expand further on the interaction between the trust structure and the PRA.

The trusts' use as an avoidance mechanism has, over time, become subject to numerous anti-avoidance measures. These measures look beyond the trust structure in certain circumstances to determine the real beneficial ownership.[31] This paper intends to expand on these measures, focusing on both the relationship property context and other areas of law.

C Legitimate Uses for Trusts

The above discussion is not intending to say that the trust is inherently associated with nefarious purposes and attempts to undermine legitimate claims. The utility of the trust is often identified with reference to its flexibility in structuring legal ownership separately from

[27] See discussion in *McPhail v Doulton* [1970] 2 All ER 288 at 240.
[28] IP41, n 8, at [20.3].
[29] Gush, n 11, at 17.
[30] Usually, the wife assuming household responsibilities and the husband assuming income responsibilities. As an example, see the facts in *M v B* [2006] 3 NZLR 660.
[31] Mark Bennett "The Illusory Trust Doctrine: Formal or Substantive?" (2019) 51 VUWLR 193 at 201.

beneficial rights.[32] A particular benefit of the trust is as an avoidance mechanism for those legitimate claims which arise out of outdated or otherwise unfair law.

The adaptability of the trust has assisted in the structure being used to meet various settlor demands and various legitimate purposes. It can be argued that there is a legitimate place for the trust in ensuring assets are adequately protected and wealth preserved for the benefit of future generations. The popularity of the trust in Aotearoa sees it recommended by legal practitioners in a variety of situations. The heavy promotion, marketing and commodification of trusts sees their frequent usage in the family law context. The Law Society suggests reasons for establishing a trust in the family law context as including:[33]

(a) ensuring assets, such as a farm or business, are transferred intact;
(b) ensuring assets are retained for funding hospital or rest home care;
(c) managing assets for those, due to age or infirmity, who cannot do so themselves; and
(d) protecting assets against the high-risk occupation or business conducted by one family member.

The legitimacy of some of these uses are questionable. While they appear legitimate on their face, they often have the consequence of preventing legitimate claims. In addition, many trusts in Aotearoa are settled in the absence of any meaningful understanding of the trust structure and associated benefits.[34] A trust may be settled where legitimate justifications sit alongside those that are not so legitimate. For example, a family farm may be placed into a trust to ensure it is passed down intact to future generations.[35] A concurrent intention is to ensure that a claim cannot be made against the farm by an ex-partner or disgruntled family member. In this sense, it may be argued that preventing against a claim is the real reason for settling.

In other cases, these uses hold up to criticism. A trust is a useful mechanism for ensuring that those in need of care or protection can be provided for without reliance on an individual's personal assets. It is therefore important to recognise that attempts to 'look through' the trust structure ought to be balanced against legitimate uses, such as those identified above. The interests of the beneficiaries to such trusts are another relevant consideration in this balancing

[32] Mark Bennett "Competing Views on Illusory Trusts: The *Clayton v Clayton* litigation in its wider context" (2017) 11 J Eq 48 at 49.
[33] New Zealand Law Society "Common Legal Issues: The Family Trust" (17 March 2020).
[34] IP41, n 8, at [20.25].
[35] IP41, n 8, at [20.19].

act. It cannot be said that the trusts' use as an avoidance mechanism should justify other interests being prioritised over the beneficaries' in every circumstance.

III PRA and the Interaction

A Purposes of the PRA

The PRA as introduced sought to reform the common law approach to marital property, which vested title, control and ownership in the male partner.[36] Marital property acquired during the marriage was to belong to both spouses, enforceable on separation or death. The PRA's introduction reflected changing societal perceptions, as seen with the Act's expansion to include civil unions and de facto relationships.[37]

The purpose of the PRA in this context is to recognise the equal contributions of both partners and provide for the just division of relationship property.[38] It recognises that both partners have an entitlement to a share in relationship property, presuming the contributions both have made to the property pool are of equal worth.[39] Questions which arise under the Act were intended to be resolved in a manner consistent with justice – inexpensive, simple and speedily.[40]

To achieve this, the PRA differentiates 'relationship property' and 'separate property' for the purposes of division. 'Relationship property' is defined as including the family home and chattels, all property owned jointly, all property acquired after the relationship began, certain property owned prior to the relationship and any increase in value of any such property.[41] 'Separate property' is defined as all property which is not relationship property, and the gains or proceeds associated with such property.[42] The purposes of the PRA are said to be furthered through all relationship property being subject to division. However, as the definitions have been the subject of significant discourse, the intervention of the courts has often been required to resolve disputes.[43]

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[36] Gush, n 11 at 13.
[37] PRA, n 4, ss 2B and 2D respectively, as introduced in 2005 and 2002.
[38] PRA, n 4, s 1M.
[39] Jacinta Ruru "Family Property" in Mark Henaghan and Bill Atkin (ed) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 193 at [5.5.3].
[40] PRA, n 4, s 1N(d).
[41] PRA, n 4, s 8.
[42] PRA, n 4, s 9.
[43] See, for example, *Clayton v Clayton [Vaughn Road Property Trust]* (*Clayton*) [2016] NZSC 29, [2016] 1 NZLR 563 at [21].

B PRA and Trusts

The uncertainty surrounding the PRA and trusts relates to when trust property can be considered 'relationship property' and therefore be available for division. The orthodox view, that trust property is not relationship property, is no longer considered a legitimate position. However, the potential inclusion of trust property in the relationship property pool is dependent on the nature of the interest.

The general consensus is that property held on trust cannot be relationship property unless it is *beneficially* owned by a party to the relationship.[44] A party who has a vested interest in trust property – an interest which is recognised as belonging to that party – is treated as beneficially owning that property.[45] A party who has a contingent interest in trust property – an interest which vests once a condition is met – is also treated as beneficially owning that property, though its value is determined by the nature of the contingency.[46] A party who has a discretionary interest in trust property is not treated as beneficially owning that property. There is no certain interest in the property unless or until the trustee elects to exercise their discretion in the beneficiary's favour. A discretionary interest is not property under the PRA; the nature of this interest is better characterised as a 'mere hope or expectation' that discretion will be exercised in one's favour.[47]

It is not, however, as simple as determining the nature of a beneficiary's interest in ascertaining whether trust property is relationship property. Case law has indicated that other rights which exist in relation to trust property may also be included.

C The Clayton Judgement

The Supreme Court in *Clayton* held that powers to control a trust will, in certain circumstances, be considered property.[48] This case turned on several critical clauses within the Vaughn Road Property Trust deed. Mr Clayton was settlor, sole trustee, 'Principal Family Member' and a beneficiary.[49] In this capacity, he had broad powers to resettle the trust, to appoint all trust capital and income to himself, to remove all other discretionary beneficiaries, to exercise his discretion as trustee in his own favour even where contrary to the interests of the beneficiaries and to act essentially unconstrained by any fiduciary duty to the final

[44] Jessica Palmer and Nicola Peart "Trust Principles Overlooked" [2011] NZLJ 423 at 423.
[45] Palmer and Peart, n 44, at 423.
[46] For relevant discussion, see *Hunt v Muollo* [2003] 2 NZLR 322 and *Kain v Hutton* [2008] 3 NZLR 589.
[47] Palmer and Peart, n 44, at 423.
[48] *Clayton*, n 43, at [98].
[49] *Clayton*, n 43, at [51].

beneficiaries.[50] The Court held that within the PRAs' statutory context, these powers were properly classified as "rights that give Mr Clayton and interest in the [trust] and its assets".[51] The value of these powers was equivalent to the value of the net assets in the trust.[52]

Case law within this area is still developing. However, it has been suggested that powers to control a trust will constitute relationship property under the PRA where they permit "unfettered discretion of trust property, uncontrolled by fiduciary duties".[53] Essentially, the powers must not be subject to fiduciary obligations to be considered property.[54] Later case law can be summarised as indicating the finding in *Clayton* as unusual, with the reasoning largely constrained to the broad powers on the facts.[55] While some of the powers in *Clayton* are commonly found in Aotearoa trust deeds, the combination of powers is likely not so common. As such, it is unlikely that there are many trust deeds with which a direct analogy could be made. However, it is important to note that an analysis under this approach may still result in trust property being relationship property for the purposes of division under the PRA.

This case does however indicate the significant complexities in determining what property, powers, or collection thereof, in a trust may constitute relationship property under the PRA. The reliance on a still-developing area of case law, considered in light of the statutory context, has likely resulted in difficulties amongst practitioners and settlors in determining the nature of relationship property, and the extent trust property can be included.

D The Mischief of PRA Avoidance

The aim of the PRA is to ensure the just division of relationship property. The general presumption is one of equal sharing.[56] For this to be achieved, it is necessary that all property, which is properly considered relationship property, is available for division. The mischief arises where trusts are used to deliberately circumvent this aim, such that property held on trust is not divided equally between the partners when the relationship ends.

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[50] *Clayton*, n 43, at [51]-[58].
[51] *Clayton*, n 43, at [80].
[52] *Clayton*, n 43, at [107].
[53] See, for example, *Da Silva v Da Silva* [2016] NZHC 2064 at [53]; *Goldie v Campbell* [2017] NZHC 1692, [2017] NZFLR 529 at [73] and *Darlow v Raymond* [2017] NZHC 269, 3 NZLR 353 at [127], cited in Law Commission *Review of the Property (Relationships) Act 1976* (NZLC, R143, 2019) (R143) at [11.4].
[54] *P v C* [2020] NZHC 1178.
[55] Rhona Powell "Variations on a theme by *Clayton*" [2020] NZLJ 6 at 9.
[56] PRA, n 4, s 1C(3).

A conventional example is one in which one partner settles property on trust. As legal ownership is passed to the trustees, the property is only divisible to the extent that partner is the beneficial owner. In the case of a discretionary trust, there is no such ownership. The result is that there is little to no property available for division as the PRA has no application to this property.[57]

This example illustrates the unfairness associated with PRA avoidance. The aim of equal sharing is circumvented with the result that one partner is disadvantaged. Separation itself can impose disproportionate economic disadvantages to one partner, which is exacerbated where they do not receive an equal share of property settled on trust.[58] Additionally, the nature of trust use in Aotearoa is such that the partner may not even be aware that the trust existed, thinking that the property was relationship property. In the absence of intervention, trusts can be utilised to move property outside the scope of the PRA, meaning only one partner to the relationship can benefit from it.

The operation of law will intervene in some circumstances to disregard certain dispositions which have the effect of avoiding legitimate public policy considerations, such as the equal sharing regime.[59] These interventions are found within the PRA, FPA and the court's powers arising out of trusts. This paper intends to traverse each in turn.

IV PRA Interventions

There are two provisions within the PRA intended to address the issue of trust structures being used to circumvent the equal sharing regime. These so called "trust busting" provisions are found within ss 44 and 44C.[60] Each has notable limitations in its ability to address injustices arising from the use of trusts as will be detailed below.

A Section 44

This section applies where a person has disposed of property to defeat one partner's claim, or rights, under the PRA.[61] It provides the court a power to reverse the disposition and recover

[57] IP41, n 8, at [20.5].
[58] IP41, n 8, at [4.39].
[59] IP20, n 3, at [1.11].
[60] Josie Te Rata "Fortifying Family Protection: The Need for Anti-Avoidance Provisions in the Family Protection Act 1955" (LLB(Hons) Dissertation, University of Otago, 2016) at 24.
[61] PRA, n 4, s 44(1).

the property, or order compensation, to satisfy the partner's rights in the relationship property.[62] A disposition under this section includes the settling of property on trust.

A fundamental element of this section is the requirement that the person who disposed of the property must have done so with the *intention* to defeat that partner's rights.[63] This requirement will be met if the person makes the disposition knowing that, as a consequence, their partner risks losing rights to that property; it is not a requirement that they wish to cause the loss.[64] As a general principle, an intention to defeat future claims can be construed as an operative intention to defeat that claim.[65] This essentially equates the partner knowing the likely consequences of the disposition with the partner having an intention to bring those consequences about.

Commentators have noted that this test represents a "significant hurdle".[66] It requires the assessment of the intention of the person who made the disposition *at the time that disposition was made*. It is arguable that there are minimal cases in which a partner will have sufficient evidence to show that the disposition was made with the knowledge that their rights would be defeated.[67] This is particularly true in cases where the disposition was made prior to the relationship. The nature of trust use in Aotearoa makes this section even more difficult to satisfy. Many in such circumstances settle trusts solely on the advice of professionals, rather than any intention, as they do not understand fully the nature and implications of settling property on trust. As a result, it can be argued that the limitations of this section are such that it is of little use in many situations.

B Section 44C

This section was introduced in 2001 to overcome the limited usefulness of section 44 when dealing with trusts. It was regarded as necessary due to the difficulties in proving the requisite intention under section 44. The difficulties meant that property which would otherwise be relationship property was being shifted outside the jurisdiction of the PRA to the frustration of the Act.[68] The power contained within is similar but specifically targeted at dispositions to

[62] IP41, n 8, at [20.43].
[63] *Ryan v Unkovich* [2010] 1 NZLR 434 at [10].
[64] *Ryan*, n 63, at [33], which applied *Regal Castings Ltd v Lightbody* [2009] NZSC 87, [2009] 2 NZLR 433 at [53].
[65] *Ryan*, n 63, at [52].
[66] Nicola Peart, Mark Henaghan and Greg Kelly "Trusts and Relationship Property in New Zealand" (2011) 17(9) Trusts & Trustees 866 at 869.
[67] See, for example, Mark O'Regan and Andrew Butler "Equity and Trusts in a Family Law Context" (paper presented to the New Zealand Law Society Family Law Conference, November 2011) 269 at 271.
[68] IP20, n 3, at [3.28].

a trust. It applies where the disposition of property to a trust has the *effect* of defeating the claim, or rights, of one partner under the PRA.[69] It does not require the claimant to prove any intention.

There are notable limitations on this applicability of this section. It applies only to distributions of relationship property (so not property acquired direct from third parties), made after the relationship began. The disposition must also only defeat the rights of *one* partner, not both.[70] There are also limitations on its remedial effect. Section 44 only grants the court a power to order one party to compensate the other, be it through relationship property, separate property or the income of the trust.[71] The power does not extend to ordering the recovery of the property from the trust capital.[72]

Whilst the courts have, in some circumstances, been able to grant relief through this section, it remains an ineffective remedy.[73] The ability to award compensation can be of little remedial effect where there is little or no available property from which it can be awarded. In addition, the property may have been disposed of to the trust prior to the parties living together, meaning the section does not apply.[74] As a result, this section is also of limited use in upholding the aim of the PRA.

V FPA Intervention

A broader power is located in s 182 of the FPA. This remedy is founded on different principles than the PRA, such that they involve different powers and procedures made available to the courts.[75] The principles of this section reflect that of the legislation which initially introduced the power, which pre-dated the equal sharing aim of the PRA.[76] It can be traced back to a time where marital settlements were commonly made to benefit the wife, children and grandchildren on the basis that the marriage would continue.[77] As opposed to an aim of equal sharing, this section focuses on returning the parties to a position that fairly reflects their expectations on winding up, based on initial contributions.[78]

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[69] PRA, n 4, s 44C(1)(b).
[70] IP41, n 8, at [20.46].
[71] PRA, n 4, s 44C(2).
[72] IP41, n 8, at [20.46].
[73] Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC, R130, 2013) at [19.12].
[74] Ruru, n 39 at [5.5.6].
[75] Nicola Lambie "Review of the Property (Relationships) Act 1976" [2019] NZLJ 304 at 306.
[76] Divorce and Matrimonial Causes Act 1859, s 45.
[77] Peter Eastgate and Penny Henderson "Section 182 FPA" [2012] NZLJ 32 at 32.
[78] Eastgate and Henderson, n 77, at 33.

It provides the court with a broad power to make orders with respect to any pre- or post-nuptial settlements.[79] It requires a settlement made on the premise that the marriage, or civil union, would continue. The courts have taken a broad approach to 'settlement', including any arrangement which makes a form of continuing provision for one or both parties.[80] It can therefore include settlements to a trust.

The section permits the courts to intervene where they see fit, which has been interpreted as meaning where necessary to achieve fairness and justice.[81] The breadth of this power allows the courts to radically re-shape the trust in a manner not permitted by the PRA, including discretionary trusts. [82]

There are also limitations on the applicability of this section. In comparison with the PRA interventions, the FPA has not evolved with changing societal views to give equal recognition to de facto relationships. In modern times, this distinction seems arbitrary and wholly inconsistent with the policy of other relationship property law. It also only applies post-dissolution, rather than post-separation.[83] Additionally, some commentators believe it is "a matter of luck" whether the claimant receives a fair share of wealth generated during the relationship.[84] The power is limited to situations in which a *sufficient connection* can be demonstrated between the trust and the marriage, such that it can be considered a nuptial settlement. A final point of concern is that it appears somewhat unclear whether 'settlement' refers to the trust itself or the disposition to the trust.[85]

While this section provides the courts with a broader power, it is also significantly limited. It further exemplifies the concern that seeking a remedy in the relationship property context where trusts are involved is complex and inaccessible. As others have noted, it is difficult to reconcile this far-reaching discretion and inconsistent application with the PRA.[86]

VI Trust Law Interventions

In addition to those statutory remedies prescribed in the PRA and FPA, the courts have relied on elements of trust law to bring trust property into the pool of relationship property available

[79] Family Proceedings Act 1980, s 182(1).
[80] *Ward v Ward* [2009] NZCA 139, [2009] 3 NZLR 336 at [27].
[81] *Dyer v Gardiner* [2020] NZCA 385, [2020] NZFLR 293 at 296.
[82] This analysis was established in *Ward v Ward* [2010] 2 NZLR 31 and *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, 1 NZLR 590.
[83] Ruru, n 39, at [5.5.6].
[84] Ruru, n 39, at [5.5.6].
[85] This is discussed further in IP41, n 8, at [20.51] and n 81.
[86] Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (LexisNexis, Wellington, 2009) at 208; Peart, Henaghan and Kelly, n 66, at 873.

for division. As with the FPA, the focus of trust law interventions is not the promotion of the PRAs' equal sharing regime. These interventions instead focus on preserving the integrity of the trust structure and preventing that structure being upset owing to its inconvenience under other statutes.[87]

The trust structure is most commonly attacked through one of two claims:

(a) that the arrangements are a sham; or
(b) that there is no valid trust (that the trust is an illusion).

The objective of such claims is to have the court declare either that there is no trust or that no valid trust exists. Should this objective be met, the property that is purportedly held on trust will revert back to the person who purportedly settled it. The likely outcome is that the property may become relationship property for the purposes of division under the PRA.[88]

A Claim that Arrangements are a Sham

That which purports to establish a trust is instead said to be a sham where the 'trust' deed or transaction is more correctly described as a cloak, façade or mask.[89] It is so described because the document or transaction is intended to give the appearance of creating a trust (and the associated legal rights and obligations) despite there being no actual intention to create that trust, right or obligation.

The courts have required a common intention that the act or document does not create the rights or obligations which they give the appearance of creating.[90] This requires that *all* parties to the transaction share this intention. It has been argued that finding a sham only requires the intention of the settlor, but this has been rejected in the Aotearoa courts.[91]

This has proven to be a high evidential threshold. Case law has indicated that a sham will not be found solely based on extensive intermingling between the affairs of the trust and affairs of the settlor.[92] It has also indicated that it is insufficient that the trust is poorly administered, or ever that there is a breach of trust, without something additional which indicates that a common intention was in existence.[93] The finding of a sham can also not be made where

[87] Ruru, n 39, at [5.5.6].
[88] IP41, n 8, at [20.65].
[89] See *Paintin and Nottingham Ltd v Miller Gale and Winter* [1971] NZLR 164 at 168.
[90] *Snook v London & West Riding Investments Ltd* [1967] 1 All ER 518 at 528.
[91] Jessica Palmer "Sham Trusts" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009).
[92] *Official Assignee v Wilson* [2007] NZCA 122, [2008] 3 NZLR 45 (*Wilson*).
[93] *Wilson*, n 92, at [92].

another inference is equally open on the evidence.[94] From this, it can be determined that the subsequent conduct, or changes in the intention, of the parties will not be relevant to the finding of a sham.

The courts have expressed a hesitance to accept arguments about the trust being a sham. This hesitancy can be traced back to the requirement for certainty in transactions involving property.[95] The decision of the Court of Appeal in *Official Assignee v Wilson* best illustrates the reluctance of the courts to find a sham or extend the grounds upon which a trust may be considered a sham.[96] In *Wilson*, there was evidence of substantial intermingling of the financial arrangements between the settlor and trustees and a general lack of engagement by the trustees.[97] The Court held that the court required either direct evidence or compelling material to draw the inference of a sham.[98] The finding was that, even if the settlor did not understand the implications of the trust or contemplated a breach of terms where it suited, there was likely a subjective intention to establish a trust.[99]

In the relationship property context, the evidentiary threshold for finding a sham would be difficult to meet. The partner would need to prove that there was a common intention between the settlor and the trustees to create this façade, as opposed to a genuine trust. As this is a high evidential burden, some commentators have termed it "virtually impossible" for the partner to satisfy.[100]

The claim that an arrangement is not a trust, but a sham, is likely to be of limited use in most relationship property disputes. Take the situation where a settlor receives the benefit of access to, or directing management of, trust property, but none of the liabilities of legal ownership. A claim has been made in such a situation, but this argument was unsuccessful.[101] The claim would only succeed where the partner could also prove that the settlor and trustees intended that the arrangement not be a trust. It would be very difficult for the partner to provide sufficient evidence to illustrate this, particularly where they would need to discount any other probable intentions.

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[94] *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449
[95] IP20, n 3, at [4.11].
[96] *Wilson*, n 92. Note that this case occurred within the insolvency context.
[97] *Wilson*, n 92, at [91].
[98] *Wilson*, n 92, at [93].
[99] *Wilson*, n 92, at [95].
[100] IP31, n 26, at [2.33].
[101] IP31, n 26, at [2.34].

B Claim the Trust is Invalid

The claimant can instead argue that there was no valid trust. This is essentially the claim that the arrangement was not, in fact, a trust despite any language which suggest as such.[102] This usually arises as the settlor never intends to pass legal ownership of the assets purportedly settled on trust.

To that effect, this line of argument can likely also be addressed through the Trusts Act; namely whether the requirements of s 15 are satisfied. Where there is such a claim, there is often an available concurrent claim that the trust did not meet the essentials of a trust and therefore no intention to create a trust existed.[103] Such an argument would likely encounter similar evidential difficulties as in s 44, such that this paper would question its potential effectiveness in such situations. Additionally, as this Act was only given the royal assent in 2019, most judgements in the higher courts have considered the issue prior to the relevant section coming into force. To this extent, it is relevant to consider this law as it may inform the manner in which these sections are interpreted, and the line of argument may be pursued outside of the Act.

This argument can also be formulated as an illusory trust. This claim is essentially the same but terms the appearance of a trust as an illusion. Essentially, the trust has all attributes of a trust, but the powers given to the trustee are so broad that they may "basically… do whatever [they] want with the property".[104]The Supreme Court recently observed that they saw little value in this label; it is preferable to state that there is no valid trust.[105]

However framed, the courts have expressed hesitance in declaring that no trust exists, such that very few arguments have succeeded.[106] The *Clayton* judgement provides a useful example of this hesitance. The Supreme Court outlined the two potential arguments which could be made on the point that the trust was invalid or illusory:[107]

(a) that such broad powers relating to the property were reserved by Mr Clayton that he cannot be said to have alienated the trust property to the trustees; and
(b) that the trust is effectively defeasible but there is no principled reason for it to not be regarded as a trust *until* the powers are exercised in that manner.

[102] Bennett, n 31, at 207.
[103] IP41, n 8, at [20.66].
[104] *Clayton v Clayton* [2013] NZHC301, 3 NZLR 236 at [90] as cited in *Clayton*, n 43, at [119].
[105] *Clayton*, n 43, at [123].
[106] IP41, n 8, at [20.66].
[107] *Clayton*, n 43, at [124]-[125].

Ultimately, as the case was settled prior to the judgement being released it became unnecessary to determine the issue.[108] They considered that it was a matter of much complexity upon which they were not unanimous.

The status of this argument is uncertain; it may in fact be that even where such powers exist, they only make the trust *defeasible upon exercise*, rather than invalid ab initio. This illustrates the extreme complexity of such an argument, and questions whether the argument could even assist to invalidate the trust and reach that which would otherwise have been relationship property.

VII A Comparative Approach – Interventions in other Areas

The approach to trusts within the relationship property context as described is not based on any one standard approach under trust law. There is no general "look-through" provision or consistency in approach between the relationship property context and other areas of law. To illustrate this inconsistency, this paper intends to briefly canvas the approaches in other areas of law where the operation of trusts to defeat legitimate interests, or conceal assets, is of concern.

A Insolvency

Insolvency law broadly relates to situations in which an individual or company is insolvent in the sense that they are unable to repay their debts as they fall due. The aim of this area of law is effects based, considering the effect of any disposition on all creditors, including where one is given a preference.[109]

As with relationship property, dispositions to a trust can be made so as to defeat legitimate claims, such that intervention is required to ensure this property can still be reached. In the insolvency context, the affected interests are those of creditors. It is similar to relationship property in that these provisions are located across several statutes, rather than through one comprehensive section.

It is first important to note that what constitutes property in insolvency law is markedly similar to the PRA, though has a slightly narrower interpretation.[110] It does not include the interest held by a discretionary interest, nor any power in relation to a trust. It also does not include the interest an insolvent individual or company may have as trustee of a trust.

[108] *Clayton*, n 43, at [127].
[109] Companies Act 1993, s 287.
[110] See the definition of property in the Insolvency Act 2006, s 3.

The key clawback provisions are located in ss 194, 204 and 211 of the Insolvency Act 2006.[111] These provisions apply to reverse transactions termed 'insolvent', and therefore voidable, in certain circumstances. This includes the disposition of property to a trust where considered to be "conveying or transferring" that property.[112] The aim of s 194 is to clawback a disposition made to a trust if made at a time the insolvent is unable to pay their due debts and enables a creditor to receive more than they would otherwise receive.[113] The aim of s 204 is similar; applying to gifts made within two years prior to adjudication.[114] This would therefore act to reverse any gift made to a trust. The aim of s 211 is to recover the difference in value where a transaction was made at an undervalue.[115] This is limited in a similar manner to s 44C in that it cannot recover disposed of to a trust but could allow for the value of that property to be returned.

There are additional clawback provisions within the Property Law Act (PLA).[116] The intent behind these provisions is to enable the courts to restore property acquired under prejudicial dispositions for the benefit of creditors.[117] The court has the power to set aside dispositions of property which includes a disposition made with the intent to prejudice, a disposition without equivalent value in exchange and an insolvent transaction.[118]

The aim of these clawback provisions is to balance security of title, as is fundamental to the Torrens system, against the need to preserve the interests in that property which were unfairly defeated by the transfer. They therefore allow dispositions to be reversed where the reality of the circumstances, namely the indebtedness to creditors, is such that the property was not truly the insolvents to transfer. However, they are limited. They do not apply where there was a *bona fide* transfer for value, where the need for security of title overrides.[119] In such circumstances, a creditor may instead choose to rely on trust law, such as detailed above, to assert that the trust was not valid.[120]

[111] These provisions relate to the insolvency of an individual. For completeness, there are provisions which relate to the insolvency of a company, which are largely similar, located within ss 292, 293 and 297 of the Companies Act 1993.
[112] Insolvency Act, n 110, s 195(2)(a).
[113] Insolvency Act, n 110, s 195(1).
[114] Insolvency Act, n 110, s 204.
[115] Insolvency Act, n 110, s 211.
[116] Property Law Act 2007.
[117] Property Law Act, n 116, s 344.
[118] Property Law Act, n 116, s 348.
[119] Property Law Act, n 116, s 349.
[120] IP20, n 3, at [3.21].

This can be likened to the relationship property context, though the wider policy concerns do differ. They both focus on the intent and circumstances of the disposition, including the interest of the settlor in the trust property.[121] The insolvency context is focused on ensuring the provision of credit by protecting creditor interests, whereas the relationship property context is concerned with ensuring the equal division and recognition of contributions to relationship property.

The time constraint on these provisions is such that they would be of limited use if applied to the relationship property context. The dispositions at issue in this context may occur early on in, or even prior to, the qualifying relationship, such that a two-year period would often be insufficient to catch the disposition where the relationship breaks down over time. Additionally, there would be similar concerns with these provisions as in s 44, with the difficulties in proving the requisite intention.

B Government Financial Support

The focus in this area differs slightly from that in the relationship property and insolvency contexts. Instead of protecting the interests of legitimate claimants, the focus is instead on protecting the government interest in not providing financial support to those with sufficient financial means to support themselves. The intent in doing so is not to reverse any disposition, or the effect thereof, but to protect such support systems from exploitation.

1 Social Welfare and Rest-Home Subsidies

The Ministry of Social Development (MSD) has a broad discretion in the context of social welfare, such as benefits and rest-home subsidiaries, to take account of any assets which were disposed of to a trust.[122] These social welfare benefits and rest-home subsidies are 'means-tested'. For benefit-recipients, this usually requires that they have "no or minimum income".[123] For rest-home subsidiary recipients, this requires assessment of both the income and assets of the individual to determine if they are below the applicable threshold.[124]

The relevant Acts for both have a power to consider any deprivation of income or property as a factor in determining eligibility.[125] For benefit applicants, if MSD is satisfied if the applicant or their spouse has, directly or indirectly, deprived themselves of income or

[121] IP20, n 3, at [3.41].
[122] IP20, n 3, at [3.60].
[123] Social Security Act 2018 (SSA), ss 24, 50, or 56, as examples.
[124] Residential Care and Disability Support Services Act 2018 (RCDSSA), s 31.
[125] SSA, n 123, sch 3 cl 16, and RCDSSA, n 124, ss 39-40.

property and the result is the qualification for a benefit (or an increased rate thereof), they may refuse to grant the benefit, cancel the benefit or reduce the amount.[126] For subsidiary applicants, if MSD is satisfied that the applicant, or their spouse or partner, has directly or indirectly deprived themselves of any income or property, they may include that income or property as if the deprivation had not occurred.[127]

This reflects the aim of such legislation in providing financial and other support, whilst ensuring that support is only provided where necessary – such that available resources are utilised prior to the provision of support.[128] The 'clawback' in this context operates, not to return the property to its position pre-disposition, but to recognise that property as included in the applicant's means in determining eligibility. The focus is on preserving the financial interests of the government, in ensuring only those truly eligible have their applications approved. It operates to prevent exploitation through dispositions, especially where there are legitimate reasons for the applicant's non-eligibility.

The power is therefore wide, with significant discretion to look at any dispositions which may be seen to have deprived the applicant of an interest. However, in comparison with other clawback provisions, the power is fairly limited. It does not permit much more than the recognition of disposed property in determining eligibility, such that it cannot reverse these transactions and return the property to its former ownership.

2 Legal Aid

A similarly wide discretionary power applies to consider the financial position of an applicant for legal aid. The relationship between an applicant and a trust is considered in assessment of their ability to fund legal proceedings.[129]

The assets available to the applicant includes any interest in a trust or any benefit the applicant may receive in connection with a trust.[130] It therefore allows consideration of vested, contingent and discretionary interests in a trust. The value of such an interest is assessed with regard to numerous factors including how the trust arose, the persons who have

[126] SSA, n 123, sch 3 cls 16(1) and 16(2).
[127] RCDSSA, n 124, at s 39
[128] SSA, n 123, s 3.
[129] Nicola Peart "Intervention to Prevent the Abuse of Trust Structures" [2010] NZLRev 567 at 584.
[130] Legal Services Regulations 2011, cl 8(4).

powers of appointment and removal, any changes to beneficiary classes and the history of trust transactions.[131]

There is an additional power in cl 9 that permits the inclusion of any resources which the applicant has disposed of, directly or indirectly, to be eligible for legal aid or to reduce or avoid repayments.[132] This includes resources transferred to another person and resources converted into resources which would be partly disregarded, such that it would likely include property disposed of to a discretionary trust which would reduce its value.

This power again reflects the aim of providing financial support, through the funding of legal services, to *people of insufficient means*.[133] The look-through power exists to ensure that those with sufficient means cannot circumvent the aim of the Act by disposing their resources to a trust.

Notably, this legislation differs in purpose from the insolvency and relationship property contexts. It is not focused on, nor does it give a power to, remove assets from the trust or 'clawback' in the sense of reversing the transaction. It merely acts to prevent the applicant from, asserting they have insufficient means when, in reality they have disposed of property they can still access.[134] The focus is therefore on preserving government interests and reducing the costs of the legal aid regime by ensuring it applies only to those who cannot fund their own litigation.

One may argue that this prioritises governmental interests over the integrity of the trust structure. However, it cannot be said that the purpose of trusts is to conceal assets so as to make an otherwise ill-founded claim for financial assistance. It has been argued that such provisions, through their operation, place 'illegitimate' pressure on trustees to relieve the burden shifted back to the beneficiary.[135] Again however this burden was always the beneficiaries to bear, such that the operation of these provisions is arguably to ensure objective fairness in the allocation of financial resources.

C Different Contexts, Different Provisions, Different Outcomes?

There is a common overriding policy objective which exists across the clawback provisions; the operation of trusts should not be permitted to frustrate legitimate and fundamental policy

[131] Legal Services Regulations, n 130, cl 8(4).
[132] Legal Services Regulations, n 130, cl 9.
[133] Legal Services Act 2011, s 3(a).
[134] Peart, n 129, at 584-585.
[135] Tobias Barkley "Valuing Discretionary Interests and Accompanying Rights" [2013] NZFLJ 223 at 225.

objectives found in legislation.[136] As an example, settlor control is a concern in all areas, with settlors retaining enjoyment of, and control over, assets transferred to a trust, whilst able to benefit from not 'owning' those assets – be it through obtaining social assistance or not having those assets brought forward for division. However, the provisions through which this can be achieved differs across legislation as this part has detailed.

The result of having different policy concerns dealt with in different contexts and through different legislation is that some legislation is more effective than other legislation.[137] Trust property is treated differently across legislation, meaning a trust can be settled in a manner intended to circumvent the requirements of certain legislation. The different requirements have the potential to be confusing for settlors, impacting the accessibility of the law.

Comparative to the relationship property regime, the powers founded within other areas are significantly broader in scope to determine an interest but limited in that the interest is recognised rather than the disposition reversed. This indicates that a simple transplanting of the relevant clawback provisions into other areas of law would result in an unfair outcome. It further indicates that any one lookback provision would be difficult to draft in a manner which could encapsulate all the different contexts and approaches. Additionally, there is concern that such a provision would further enable the use of trusts as avoidance mechanisms for various claims and obligations.[138]

As indicated, the approaches detailed above would likely be insufficient in the relationship property context as compensation, or recognition for the purposes of determining economic inequality, would not assist in the return of that property to the relationship property pool. It is necessary in such a context to ensure one partner is not disadvantaged, and their economic situation worsened, by the interaction between trusts and the PRA.

VIII Legislative Review and Proposed Reform

The Law Commission has engaged with many of these issues in two, relatively recent, reviews within which they outlined key issues and proposed reform. The first focused on the law of trusts, culminating in the Trusts Act 2019. The second focused on relationship property law. This review proposed numerous recommendations but has yet to result in new law.

[136] IP20, n 3, at [3.77].
[137] IP20, n 3, at [5.16].
[138] IP20, n 3, at [5.20].

This part will outline each reform project in turn, identifying relevant proposed recommendations and summarising those concerns which gave rise to the necessity of reform. As of yet, neither reform has had a significant practical impact on the concerns detailed within this paper, for the reasons detailed below.

A Review of the Law of Trusts

This project aimed to review the Trustee Act 1956 and trust law more generally.[139] The review produced five issues papers on various aspects of the law of trusts, some of which this paper has already referred to, a preferred approach issues paper and the report which recommended a new Trusts Act for Aotearoa.[140]

For the purposes of this paper, this review can be described as limited in scope. It focused on issues squarely within trust law, rather than those which arose out of interactions between trusts and other areas of law. Whilst it did touch on issues discussed in this paper, namely the look through provisions and judicial responses, it made few recommendations in this area. Notably, the final report was written in 2011; a time prior to several significant developments in case law, such as the *Clayton* litigation, as well as the review of relationship property law.

Within the area of interaction between trusts and relationship property, the Commission made two recommendations:

(a) that the power in s 44C(2)(c) of the PRA be broadened to enable the court to order that the trustees of a trust pay one spouse a specified sum from trust property, or transfer any property of the trust to one spouse;[141] and
(b) that the power to vary nuptial settlements in s 182 of the FPA be amended to also include de facto relationships.[142]

The Commission in this review also suggested that it was a limitation of the PRA in that its operation failed to deliver just and equitable outcomes where trusts were involved.[143] They suggested, on that basis, that a more targeted review of relationship property law was required to ensure just outcomes where trusts are involved.

[139] Beginning in 2009 and ending in 2013.
[140] IP19, n 10; IP20, n 3; Law Commission *Perpetuities and the Revocation and Variation of Trusts* (NZLC, IP22, 2011); Law Commission *The Duties, Office and Powers of a Trustee: Review of the Law of Trusts Fourth Issues Paper* (NZLC, IP26, 2011); Law Commission *Court Jurisdiction, Trading Trusts and Other Issues: Review of the Law of Trusts Fifth Issues Paper* (NZLC, IP28, 2011); IP31, n 26; and R130, n 73.
[141] R130, n 73, at R50.
[142] R130, n 73, at R51.
[143] IP20, n 3, at [4.55].

These recommendations were not acted upon by the Government upon their presentation to the House in 2013. The Government noted that these recommendations would allow the setting aside of trusts so that assets can be distributed to the partner who makes the relationship property claim.[144] They therefore concluded that, as the recommendations would make significant changes to legislation, they required further investigation and analysis of the possible effects prior to any decision being made.[145] As the PRA has since been reviewed, these recommendations have essentially been retracted by the Commission.

B Review of the PRA

This project aimed to review relationship property legislation in Aotearoa and determine whether, despite the social change which has occurred over the last 40 years, the PRA still operates effectively and appropriately.[146] The review produced an issues paper, a study paper, the preferred approach paper and the report, which made 140 recommendations.[147]

The Commission referred to a survey on public attitudes toward relationship property division in deciding on their recommendations.[148] They referred to several key themes which arose from public submissions, including:

(a) that trusts are often used to avoid the PRA's sharing rules, with existing remedies complex;[149] and
(b) that greater awareness about the PRA is needed amongst the public, experts and practitioners, particularly a better understanding surrounding the division rules.[150]

The Commission's overall conclusion was that the PRA is no longer fit for purpose given the societal change undergone in Aotearoa since its enactment.[151]The key recommendation which arose out of the project was the development of a new relationship property Act.[152] This new

[144] Ministry of Justice *Government Response to Law Commission Report on Review of the Law of Trusts: A Trusts Act for New Zealand* (March 2014) at 5.
[145] At 5.
[146] This review began in 2016 and concluded in 2019.
[147] IP41, n 8; Law Commission *Relationships and Families in Contemporary New Zealand* (NZLC, SP22, 2017); Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach* (NZLC, IP44, 2018); R143, n 53.
[148] Ian Binnie and others *Relationship Property Division in New Zealand: Public Attitudes and Values – A General Population Survey* (Michael and Suzanne Borrin Foundation, October 2018).
[149] R143, n 53, at [2.28].
[150] R143, n 53, at [2.31].
[151] R143, n 53, at [2.15].
[152] R143, n 53, at R1.

Act ought not to be so "unwieldy and complex" as the PRA and should be the principal source of law for relationship property division.[153]

Rather than canvas all the Commission's recommendations, this paper intends to focus on those specific recommendations which impact the interaction between relationship property and trusts. The Commission first determined that the existing definition of property in the PRA should be retained in the new Act; proposing to deal with issues relating to property held on trust through other recommendations.[154]

Secondly, they held that s 44C would be retained but amended so that it could provide a "single comprehensive remedy that will enable a court to grant relief where a trust holds property that was produced, preserved or enhanced by the relationship".[155] The situations in which this new section would apply can be summarised as:[156]

(a) where either or both parties disposed of property to a trust after the relationship began, or was reasonably contemplated, and that disposition defeats the rights of either or both partners;
(b) where trust property is sustained by relationship property or the actions of either or both partners; and
(c) where any increase in the value of, or income or gains derived from, trust property is attributable to the application of relationship property or the actions of either or both partners.

The 'new' s 44C would allocate broader powers to the courts, including requiring one party to pay the other a sum of money, transfer relationship or separate property, require the trustees to pay either or both a sum of money, require the trustees to transfer trust property to either or both, vary the terms or the trust or resettle trust property on one or more new trusts.[157] In doing so, the court must be satisfied that making the order is just, considering the extent the disposition of property to a trust defeated the claim or right of either or both, any benefit either or both received from the trust, whether the disposition was made with the

[153] R143, n 53, at [2.34] and [2.39].
[154] R143, n 53, at [3.10].
[155] R143, n 53, at R58.
[156] Henry Brandts-Giesen and Sarah Kelly "Reviewing the Property (Relationships) Act 1976" [2020] NZLJ 170 at 175.
[157] R143, n 53, at R60 and 503-504 (where the proposed s 44C is produced).

informed consent of both partners and whether trust property was intended to meet the needs of dependent or minor beneficiaries.[158]

The amendment expands the existing section in several meaningful ways. This includes the applicability of the section to dispositions at a time where the relationship was meaningfully contemplated, such as when the partners are dating, and to dispositions of both separate and relationship property.[159]

Thirdly, the Commission recommended that s 182 of the FPA be repealed.[160] They were satisfied that their recommended changes to s 44C would eliminate the need for the provision, which they noted had been described as "archaic" and a "relic of the past".[161] Keeping s 182 would prevent the new Act from serving as a comprehensive regime and would retain too much of the complexity and difficulties with the existing regime.[162]

Finally, it was recommended that s 44 of the PRA be retained as a remedy for other avoidance mechanisms.[163] It remains useful to dispositions to other third-party ownership structures. They declined to amend this section to address the difficulties in providing intention as this paper discussed above. In doing so, they noted that the issues with other structures were less widespread than trusts; they often fall within the definition of property in the PRA,[164] and that a lower threshold, such as effects-based[165], would place too significant a limitation on property rights.[166]

These recommendations also remain tabled by the Government. The Government noted that the Commissions' recommendations generally represented a significant departure from existing law.[167] They accepted the recommendation that a broader review of succession law was needed, concluding that the remaining recommendations ought not be given effect to

[158] R143, n 53, at R61.
[159] R143, n 53, at [11.71] and [11.77].
[160] R143, n 53, at R66.
[161] See discussion in *Thakurdas v Wadsworth* [2018] NZCA 516, [2018] NZFLR 835 at [13] and Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 203.
[162] R143, n 53, at [11.108].
[163] R143, n 53, at R64.
[164] Atkin, n 161, at 215.
[165] An amendment to have s 44 apply to "any disposition with the effect of defeating the claim or rights of a partner under the new Act" was considered as an alternative to the proposed s 44C amendments.
[166] R143, n 53, at [11.105].
[167] Ministry of Justice *Government Response to the Law Commission Report on Review of the Property (Relationships) Act 1976* (November 2019) at 1.

until the completion of that review.[168] The succession law review began in late 2019 and at the time of writing has recently produced its initial issues paper.[169]

It is likely to be some period of time before this review is completed and therefore the relationship property recommendations acted upon, despite the law as it stands being unfit for purpose. Additionally, there is a risk that the PRA review may become outdated in terms of possible developments during this time.

C Summarised Concerns

The complexities within this area have contributed to settlors, practitioners and the public generally disagreeing or misunderstanding the nature of trusts and the extent to which the PRA can be utilised to disregard the trust structure.[170] The reliance on various statutes and case law, combined with the need to pursue legislative interventions under various areas of law, makes this law inaccessible and likely unable to achieve its intended purpose.

The pervasive use of trusts within Aotearoa makes this concern significant, with the relationship property context often seeing less desirable outcomes as settlors become wiser to the limitations of the PRA interventions. The legislature's decision not to address these issues immediately will likely result in further litigation, developments and complexities, especially where settlors may rush to dispose of property to trusts prior to the recommendations being enacted.

The complexity and confusion which exists will likely impact the advice given, and actions taken, in practice. There is concern that, to avoid the time and burden in litigation where the outcome is uncertain, couples are dividing trust property on separation as if the trust did not exist.[171] Equally likely is the use of the trust as a bargaining chip in negotiations, even where it would not otherwise be considered relationship property under the PRA.

In the absence of clear guidelines within both areas of law, advantage may be taken by one partner to settle a trust to ensure that any future partner has no claim to their property. Further, as no action is being taken on the Commission recommendations, injustice is likely to occur through further litigation, case law developments and complexities, especially where some may choose to settle trusts in an attempt to avoid the more inclusive provisions in the new Act.

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[168] At 2.
[169] Law Commission *Review of Succession Law: Rights to a person's property on death* (NZLC, IP46, 2021).
[170] Brandts-Giesen and Kelly, n 1, at 264.
[171] R143, n 53, at [11.18].

This has the potential to impact rights beyond those of the partners to the relationship. A trust in this context will often have beneficiaries aside from the partners, such as children or other close family members. The legitimate interests of these beneficiaries are a key consideration, such that the law must be flexible enough to adjust for the differing expectations and intentions for which the trust was created.

As this paper has discussed, the protection of these beneficiaries is a legitimate use of trusts. The complexities, and the resulting actions by settlors and separating partners, may result in beneficiaries being inappropriately deprived of their interest. The law, and any reform as enacted, must be flexible enough to consider the purposes and expectations for which the trust was settled and the interests beyond the partners.

IX The Family Home – A Case Study

The 'family home' provides a useful example of where trusts are used in the relationship property context and the motivations for doing so. This part aims to utilise the family home as an example to illustrate the statutory framework of the PRA in action, the motivations for settling trusts, the effectiveness of existing remedies and the potential effectiveness of proposed reform.

A The Current Position of the Family Home

Under existing law, the PRA states that the family home will *always* be relationship property for the purposes of division.[172] The current framework follows a 'family use' approach to classification. The exact justification for classifying property under this approach is unclear.[173] The justification could be that the use as the family home and chattels signals an intention to treat as joint property, that it identifies property central to family life which necessitates equal entitlement or that it recognises the importance of core family assets to the support of children at the end of the relationship.[174]

The use of the property is the determining factor under this approach, rather than the source of the property. As such, partners are required to share property obtained prior to the relationship, gifted property and property that they inherited solely due to its use by the couple as their family home or chattel.[175] It has been argued that this approach is no longer fair; particularly where one partner brings significantly more property, or their property

[172] PRA, n 4, s 8(1)(a).
[173] R143, n 53, at [3.20].
[174] R143, n 53, at [3.20].
[175] R143, n 53, at [3.22].

comes from an external source.[176] This has been reflected in changing public attitudes, with the majority of respondents in a recent survey thinking that the family home should not be shared equally where it was one partner's pre-relationship property. [177]

There is concern that this approach results in unjust outcomes, particularly as the family home is used to the benefit of both parties. In the case where both partners own a home prior to the relationship, the designation of one as the family home may be made for a variety of reasons, such as convenience, proximity to workplaces or size, such that there is not necessarily a consideration that one partner will be effectively disadvantaged by this decision. The respective familiarity of partners with the PRA will often impact the extent of this injustice. For example, should both partners own a home prior to the relationship, the partner with superior knowledge would ensure their property is not used as the family home such that it remains separate property.[178] The other partner will have their property become the family home and therefore be subject to division.

The trust is one mechanism through which partners seek to avoid or mitigate these unjust outcomes. A partner may, prior to the relationship becoming a qualifying one, settle their property on trust to avoid it becoming relationship property due to the operation of the PRA. In this sense, the avoidance function of the trust is arguably legitimate in circumventing the unfairness of the current law.[179] It leads to the consideration of why the family home ought to be caught where derived from one partner, especially where the foundational concerns relating to inequality in property ownership have lessened over time. The avoidance function of the trust cannot necessarily be faulted here, indicating the popularity of this structure to ensure there is no interest capable of being relationship property.

To illustrate this, take the example of a couple, Nick and Ruby. This paradigm example will be continued throughout this part, with variations made to indicate the ability of the current and proposed law to mitigate any injustices.

Prior to the relationship, Nick purchased a house in Wellington outright. The couple moved in together quickly due to Ruby struggling to afford Wellington rental prices. They shared expenses equally. After six years, the couple separated. Under the PRA, the Wellington house

[176] Robert Fisher "Relationship Property – Should New Zealand's Regime be Mandatory or Optional?" (paper presented at the Colloquium on the PRA, University of Otago, 9 December 2016) at 7.
[177] Binnie, n 148, at 37.
[178] R143, n 53 at [3.25].
[179] Nichola Lambie and John-Luke Day "Law Commission recommends a new Act for dividing property when people separate" (2019) 932 LawTalk 49 at 49.

would be considered the family home, such that it would be shared equally between the partners regardless of who acquired it initially. This would likely be perceived by Nick as unfair as he alone purchased the home but would lose 50% of the equity to Ruby on their separation. The situation would be perceived as equally, if not more, unfair where Nick received the home through either a gift or inheritance.

As a variation, consider that Nick was advised by a solicitor to purchase the house through a trust.[180] He followed the advice of his solicitor that the trust was useful for asset protection, establishing the NB Family Trust. The relationship between Nick and Ruby then plays out as above. Under the PRA, the Wellington house would not be considered the family home as it is not owned by either partner, but by the trust. However, Ruby may attempt to make a claim under ss 44, 44C or 182 as outlined above. Section 182 will not apply as the couple were not married. It would be difficult for Ruby to show that Nick had the requisite intention for s 44 as the couple were not together at the time the trust was settled and Nick appears to have simply followed his solicitor's advice. It is also unlikely that s 44C will be satisfied as the home was not relationship property at the time of disposition, and even if it were, the court could not order the property to be recovered from the trust. This would likely be perceived as unfair to Ruby as the existence of the trust has prevented her from receiving an equal share of the property to which she would otherwise be entitled.[181]

Under both examples, there is a perceivable injustice to one of the partners. The partner who initially purchased the property would see the operation of the PRA as unfair as the result of the relationship ending would be the effective loss of 50% of the home they alone purchased. Further, the house only gained the family home designation out of necessity, due to the housing crisis, rather than any intention for it to be used as such. The other partner would see the operation of the trust as preventing the operation of the PRA, with the remedial provisions unable to assist. The legitimate expectations of equal sharing founded in the PRA would not eventuate due to the inability of the PRA to operate effectively where trusts are involved.

B As Under the Proposed Reform

In addition to the reforms discussed above, specific recommendations were made with respect to the family home. This part intends to outline those recommendations and then

[180] This variation is based on the 'E Family Trust' case study outlined in IP41, n 8, at [20.45]-[20.46].
[181] Note that Ruby in this case may have a constructive trust claim for any work done to improve the value of the home, see *Vervoort v Forrest* [2016] NZCA 375, [2016] 3 NZLR 807, but that line of inquiry is outside the scope of this paper.

provide some examples to consider their effectiveness when considered in combination with the reforms already discussed in this paper.

1 The Commission's Recommendations

The Commission recommended that the 'family use' approach be abolished in respect of the family home.[182] Under the proposed new Act, the approach would see the family home classified based on a variant of the 'fruits of the relationship' approach. A pure 'fruits of the relationship' approach would see the partners retain the original value of the separate property they contribute to the relationship, even where used to purchase new property for the common use or benefit.[183]

The Commission recommended that the family home be treated as any other property, and that property owned by either or both partners would be relationship property if acquired for common use or benefit, during the relationship (other than third-party gifts or inheritance) or as a family chattel.[184] As such, the family home would not be relationship property in certain circumstances; where owned before the relationship was contemplated, where received as a gift or inheritance and in respect of increases in the value. The original value of the pre-relationship property, or if a gift or inheritance, is classified as separate property.[185] If the home was acquired in contemplation of the relationship or during the relationship, it will be relationship property.[186] Where the home is separate property, any increase in value during the relationship will be relationship property.[187]

2 Operation as Intended by the Commission

The intent behind these reforms is to address situations like that explained above, where the imposition of equal sharing on the family home resulted in increasingly unfair outcomes and was no longer necessitated by the social context of Aotearoa. In addition, the reforms should ensure that the trust is no longer necessary to shield certain property from the unfair operation of the PRA. In essence, if the law was reformed to operate fairly, there ought to be no need for avoidance mechanisms.

Consider again the first example as it relates to Nick and Ruby. As the property was purchased prior to the relationship, it would not be relationship property under the proposed

[182] R143, n 53, at [3.69].
[183] R143, n 53, at [3.69].
[184] R143, n 53, at R9 and [3.73].
[185] R143, n 53, at [3.74].
[186] R143, n 53, at [3.80]-[3.82].
[187] R143, n 53, at R14.

reform. The outcome would be the same if the property formed part of a gift or inheritance. The burden for establishing that the property was separate property, and the relevant value, would be on Nick.[188] Ruby would be entitled only to a share in the gain in value of the property during the relationship.

The operation of these reforms is such that property purchased prior to the relationship being contemplated, or received as a gift or inheritance, would no longer be relationship property by virtue of its communal use during the relationship. The property would only be relationship property if acquired during the relationship, or in respect of any increases in value of separate property during the relationship. The unfairness which currently encourages the use of avoidance mechanisms would be avoided and the other partner would no longer see the trust as preventing their otherwise legitimate claim.

3 Concerns with this Operation

On its face, these reforms appear to result in a comparatively fairer outcome. The partner who purchased the property prior to the relationship coming into existence retains that property, while the other partner shares in the gains, or income derived from, the property during the relationship. However, as will be discussed, the determination of whether property is separate or relationship property is not so clear-cut under the proposed reforms as at first glance, with the potential to nevertheless result in unfair outcomes. They do not, therefore, entirely negate the justification for avoidance when dealing with relationship property.

Consider again the paradigmatic example of Nick and Ruby. During the relationship, the parties decide to sell the home, which is Nick's separate property under the proposed reforms, to purchase a new property. This purchase is funded entirely by the proceeds of the sale of Nick's separate property. Under the proposed reform, the status of that property (or the value associated with it) as separate property will be lost, meaning the new property in its entirety becomes relationship property. This represents a similar unfairness as the initial example; the act of moving house is such that the property becomes subject to equal division, despite being purchased by Nick alone.

Peart submitted concern with this, as the intention to use the property for the common benefit of both parties remains the same, such that substituting one home for another should not have

[188] R143, n 53, at R16 and [3.76].

such a detrimental impact on its status.[189] The status change will occur regardless of the reasoning for purchasing the second home – be it necessity due to fire, flood or earthquake, moving for employment commitments or other changes in circumstances.[190] Further, one cannot argue that it is usual for parties to remain in one home from purchase until death, such that this ought not to have such a significant impact on the property's status. It is difficult to argue that there is some material change such that the value considered separate must now be considered relationship property by virtue of one property being substituted for another, especially where not intended by the parties.

The unfair nature of the consequences of this proposed reform mimic those seen under the current law, whereby virtue of the parties changing their living situation, they share equally in that property. Moving home in this circumstance would have the same outcome that the partner gives up an equal share in property that would otherwise remain separate. It would therefore be difficult to attribute fault to a party who would seek out the trust as an avoidance mechanism in contemplation of such a situation.

When considered in their entirety, combined with the likelihood that the parties will move house at some point during the relationship, it cannot be said that these reforms negate the unfairness of the existing law. As such unfairness would remain pervasive, it is likely that trusts would remain as an avoidance mechanism for those equal sharing obligations many would seek to avoid.

The issue with trusts would therefore still persist; acting to defeat the otherwise legitimate claims under the new Act to equal sharing. Even with the proposed expansions to s 44C, trust usage would remove property where settled prior to the relationship being reasonably contemplated, such as at the time the property is initially purchased. The effect would therefore remain the same, just in more limited circumstances.

X A Suggested Approach

This part will set out the author's thoughts on what the law ought to be in this area, seeking to find an appropriate balance between the application of the PRA and the operation of trust law. It will first consider the key elements of the reform, making suggestions of areas which need improvement and will then consider the need for a significant education effort to ensure

[189] Nicola Peart "Submission to the Law Commission on *Review of the Property (Relationships) Act 1976: Preferred Approach*" at [2.1.4].
[190] At [2.1.4].

that both settlors and partners to qualifying relationships are aware of their obligations and the implications of relevant areas of law.

A Key Principles of Reform

A clear and rational regime for resolving the interaction between the PRA and the trust ought to be sought. The law ought to be both coherent and promote fair and equitable outcomes where relationships end, with particular focus on those situations which involve a trust.

The reform not only ought to modernise relationship property law but move towards negating the so-called necessity of the trust structure as an avoidance mechanism within this area of law. Many settlors in the relationship property context deem a trust as necessary where the operation of the law produces an unfair outcome. This is not to say that it is possible to create a reformed law which *completely* negates the need for, and use of, trusts, but it ought to minimise the circumstances within which a potential settlor may deem trust usage justified in the interests of fairness.

As this paper indicated in Part VII, it would be difficult to achieve this through the implementation of a look-through or clawback provision comparative to those within other areas of law.[191] Whilst a clawback provision, such as that proposed within s 44C, will be of some assistance, it must be assisted by wider reform that aims at preventing unfair outcomes and situations within which avoidance can be viewed as legitimate. As such, this paper will discuss both the reform generally, then the look-through provision, to discuss how each ought to be improved to minimise the need for avoidance and maximise the fairness of outcomes.

1 Relationship Property Generally

Returning to the case of the family home, it is clear that some difficulties remain in defining relationship and separate property in a manner which prevents the necessity of avoidance. As indicated, it would be difficult to fault the use of trusts in a manner to avoid a seemingly nonsensical point at which separate property would become relationship property. From this a conclusion can be drawn that this distinction will not provide the clarity and fairness the law in this space needs to be effective.

An alternative to this is to always exclude that separate property from forming part of the relationship property pool. This would likely mitigate the necessity of trusts to avoid having to share equally when the initial house needs to be sold. The value of the initial property

[191] R130, n 73, at [4.15].

would be the separate property of the contributing partner, whilst any gain or income is shared between the partners equally. In allowing a partner to trace their contribution through subsequent properties, the 'separate property' status is not arbitrarily lost, such that there is a lesser likelihood of trust involvement to mitigate unfairness. Further, this would improve certainty as the parties would be required to keep track of their contribution. It would avoid issues arising where a partner who becomes aware of the potential change in status refuses to move, despite it being in the best interests of the pair.

The proposed model cannot be said to reduce the likelihood that trusts will be used as an avoidance mechanism. It appears contrary to common sense and fairness where a necessary move could change the intended separate status of property, such that many would view trust use here as justified. For the reasons this paper has traversed, the trust is the likely mechanism to remedy this unfairness.

This paper would therefore suggest that this approach is instead considered to ensure a fairer approach to the division of relationship property generally. It cannot be said that trust usage will be negated by these new provisions, such that the common interactive issues will continue to pervade.

2 The 'Look-Through' Provision

Should the proposed reform to relationship property law generally continue instead with that proposed above, it would likely also be necessary to expand s 44C. Where the justification or necessity for trust usage is removed from the statute, it is likely that most remaining trust usage falls within the 'nefarious' use categorisation detailed above. It is therefore necessary that the look-through provision be sufficiently wide in scope to capture these uses, in combination with being clear in what dispositions would be captured.

Whilst the proposed amendments to s 44C will remedy some of the unfairness with the current framework, there is a concern that nefarious settlors will still work around this provision to dispose of what would otherwise be relationship property to a trust. The lack of clarity within this proposed provision is also a contributing factor, which may further muddy partner's understanding of the law and encourage the use of trusts.

The proposed s 44C will apply to dispositions made at a time the relationship was reasonably contemplated. It is not, from the Commission's reports, overtly clear when this will apply.

The provided example is where the parties are 'dating', being a time after they have met.[192] Given the modern landscape, with online-dating applications and 'hook-up' culture, it can be exceptionally unclear when two individuals began 'dating', especially if this is to be determined by their subjective belief at the time. It is likely that interpretative guidance will be necessary here, with significant discretion based on individual circumstances, such that many will continue to favour the trust over the inherent 'risk' that they will be caught by s 44C. The result is that the section may not be effective at capturing these dispositions.

As alluded to above, and discussed further below, the continued inaccessibility of these provisions will likely continue to promote unfair outcomes. The partner of lesser means is often the one will less knowledge and access, such that this 'shifting of the goalposts' in terms of expanding s 44C may do little to prevent relationship property being moved outside the relationship property pool by the partner with greater means.

As an alternative, a discretionary approach could be considered. In Australia and the United Kingdom, relationship property regimes permit a discretionary power to the courts to adjust property interests in the case of a relationship breakdown.[193] Despite such an approach allowing outcomes to be tailored to individual circumstances, the Commission preferred the certainty and predictability of the existing rules-based approach.[194]

It is arguable that the prevalent use of trust in Aotearoa would justify a discretionary power with relation to the look-through provisions. A fairer approach generally may permit the courts to look beyond any trust structure to consider the realities of the parties' respective property interests. In essence, it would permit the court to consider the structuring of the arrangements, the likely intention in so structuring, and the effect of doing so on both partners to the relationship.

However, it must be noted that there are well-known concerns with such a discretionary approach, including such an approach being to the detriment of certainty and efficiency, and placing a further burden on the partner seeking redress due to the prolonged time and cost associated with litigation.

As opposed to a fully discretionary approach, it may be possible to define situations where the existence of a trust places the court 'on notice' to consider whether any dispositions ought to be captured by a look-through provision. Within this context, most trusts are discretionary

[192] R143, n 53, at [11.77].
[193] R143, n 53, at [2.40].
[194] R143, n 53, at [2.42].

family trusts connected to one partner in some manner – be it as settlor, trustee or beneficiary. A wider power is likely necessary to ensure such a look-through provision has sufficient scope to capture those dispositions made with the intention or effect of countering the rights of the other partner. It cannot be said that the settling of trusts to prevent legitimate relationship property claims is a legitimate use of trusts. The integrity of the trust is arguably compromised more by misuse than through the widening of provisions such as s 44C.

This provision may not go so far as to bring the assets into the pool for disposition but may consider the interests in those assets in a manner akin to the legal aid procedure, for example. Instead of the distribution of relationship property, this may instead be relevant to the proposed income sharing arrangements, the determination of child support or other measures to avoid inequality as a result of separation and ensure any children are adequately provided for.

As an example, the court may have the discretion to consider any trust that is somehow related to the relationship partner, including as the settlor, which would be likely to capture most family or other trusts in the relationship property context. It could then be left to the courts discretion to determine the effect of such a trust, taking account of factors such as the time of creation, the possible intentions for settling, the practical effect of settling and allow for a balancing of the affected rights and interests.

B Ensuring Accessibility

The inaccessibility of both areas of law, but particularly concerning their interaction, is a major concern capable of inhibiting the operation of both existing law and any proposed reform. Without significant improvements in accessibility, necessarily combined with a substantial public education effort, it is unlikely that any reform will have the intended impact.

Currently, the law has proven itself largely inaccessibility to much of the general public, which can only be said to have created further difficulties and issues with the operation of the law. This includes the misunderstanding of obligations owed by trustees, the improper administration of trusts and the operation of trusts contrary to rights and obligations under other statutes. This is further complicated by the extent settlors in Aotearoa remain involved with the trust and trust property after purporting to alienate that property.

The Commission itself has noted a prevalent misconception amongst settlors regarding their involvement with the trust: believing that they remain the ‘owner’ of property settled on trust,

referring to "their trust" or that they "have a trust".[195] This concern is even greater within the relationship property context, where one partner may be completely unaware of the existence of the trust, and its impact should the relationship breakdown.

The results of both reviews considered throughout this paper have indicated that there is a significant lack of understanding surrounding the trust structure[196]. This is likely a combination of the inaccessibility of the law and misconceptions surrounding the implications of settling property on trust, particularly for settlors and potential settlors.[197] Many even settle property on trust on the advice of their solicitor, such that they may not understand the implications of doing so.[198] Within the relationship property context alone, this has led to substantial litigation where one partner seeks to attack the validity of the trust on the basis of the other partner exercising control over the assets purportedly held within.

Although improving trust law accessibility was a focus of the Trusts Act, this paper would argue that that Act does not sufficiently improve the accessibility of this area of law. This continued lack of accessibility and need for education has been acknowledged by the Commission. In the relationship property reform, they suggested several mechanisms the Government could consider in relation to the proposed new Act; including a public education campaign, education requirements for financial advisers and planners, information provided to those interacting with certain government departments (such as applicants for a marriage licence), requirements for registered professionals to prescribe certain information to those engaged in certain transactions (such as property or accounts) and the provision of online information.[199]

The concern with the lack of accessibility generally can also be illustrated as it allows one partner within the relationship property context to gain an advantage through superior knowledge. Take the example of a partner advantages by being 'forward-thinking' enough to settle property on trust prior to the contemplation of a qualifying relationship. The outcome would differ greatly should they not have this knowledge or foresight, leading to inequality in the application of the law. A disparity in knowledge, particularly in how the law responds to certain actions, should not form the basis for differences in outcomes: as is currently the case where trusts are involved.

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[195] IP41, n 8, at n 125.
[196] As an example, see R143, n 53, at [11.37]-[11.38].
[197] R130, n 73, at [2.38].
[198] R143, n 53, at [11.37].
[199] R143, n 53, at [2.72].

Further consideration is necessary on how the currency inaccessibility will be combatted prior to the new legislation's enactment. Any proposals to improve accessibility must promote fair and equitable outcomes, such that both partners must be adequately and equally informed, not only once they enter the qualifying relationship but prior to doing so. The education and accessibility effort must span, not only the new Act, but also how that Act interacts with trusts to ensure that the partners are not as disadvantaged by the existence of the structure.

Improving access to trusts, and the scope of any new relationship property statue, will require more than simply making information available. To ensure that all relationships begin on equal footing, this may require a 'grassroots' education effort to ensure people are better informed, from a younger age, as to the impacts of the law and that at any relevant stage in their lives they receive that information and advice necessary to ensure they remain informed.

XI Conclusion

This research paper has intended to provide an overview of relevant aspects of trust and relationship property law, illustrating how the current interaction is unsatisfactory and in need of urgent reform. It is complex, inaccessible and inconsistent with the aims of the PRA. The current state of the law is continuing to result in unfair outcomes under the PRA where trusts are involved, and the reform proposals for both relevant Acts are yet to have any meaningful impact in improving these outcomes.

The law is currently in a state of limbo, awaiting the review of succession law, such that the author believes this is an appropriate time to consider whether the Commission's proposals will work as intended. The family home is one such example where the proposed law will still failure to uphold fairness, instead promoting the use of the trust to avoid the statutory obligations. This paper makes recommendations in ways to improve the proposals, noting that the necessary reform must promote just and equitable outcomes. In the absence of a substantial effort towards education and accessibility however, much of the proposed reform cannot be expected to greatly improve outcomes in situations involving relationship breakdowns.

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