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**HOW CAN THE PROPERTY (RELATIONSHIPS) ACT  
BE ‘TRUSTED’?  
AN ANALYSIS OF TRUST LAW AND ITS INTERFACE  
WITH RELATIONSHIP PROPERTY LAW**

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**Abstract:**

*Deficiencies in the Property (Relationships) Act 1976 (PRA) have led to allegations of sham trusts, alter ego trusts, the bundle of rights doctrine and illusory trusts. These claims are not the correct means to deal with the failure of legislation to fulfil its intention. They are ill-suited for trust law and are indicative of a growing pressure to allow access to trust capital, and to prevent excessive control of trusts defeating the rightful entitlement of a spouse to equal sharing of relationship property. In order to clarify the law of trusts and of relationship property this article recommends reform to s 44C of the PRA, to allow access to trust capital. It recommends repealing s 182 of the Family Proceedings Act. This article stands for the proposition that these reforms alone are insufficient. Indications of what constitutes intent to defeat rights should be included in s 44. Effective control of trust property by a defendant who is the claimants spouse or partner, should be an indication of intent to defeat rights that will allow the disposition to be set aside. These reforms will give effect to the purpose of the PRA and clarify trust law.*

**Keywords:** Trust, sham, illusory, alter ego, relationship property

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## *I Introduction*

*Clayton v Clayton* signaled a turning point in trust law.<sup>1</sup> The Supreme Court was there unconvinced that the trust in question (the ‘VRPT’ trust) was illusory. This was the first time the concept of an ‘illusory trust’ had been before the Supreme Court, but the essence of the argument would have been familiar. An illusory trust is a claim that the court should disregard an apparently valid trust due to the particular combinations of power and control by one party, rendering the trust invalid. In claims of sham trust, alter ego trust and the bundle of rights doctrine the argument is similar; that despite the appearance of a valid trust, the particular combination of powers, and structure of the trust, or control exercised by one party means the trust is void. The illusory trust was a new means to a common end.

The illusory trust claim failed not only on the facts of *Clayton v Clayton* but also as a way of challenging a trust in the New Zealand Supreme Court. The preferred approach is now simpler. A trust is either valid or it is not.<sup>2</sup> However this should be of little relief to those frustrated with attacks from the sham trust, alter ego trust and bundle of rights doctrine. Despite achieving little success these claims are prominent in relationship property disputes, and regardless of *Clayton v Clayton* a change of approach to analysing a trust is not sufficient. The prominence of the sham trust, alter ego trust and the bundle of rights doctrine, as well as the appearance of the illusory trust are indications of a tension within the law. Without legislative reform this pressure will mount.

This article proposes legislative reform to the Property (Relationships) Act 1976 (PRA). Case law developments have revealed that, the current regime does not adequately provide for equal sharing when significant assets are held on trust, and out of reach of court orders for a disadvantaged spouse or partner. This frustrates the equal sharing premise of the PRA. It has led to claims of sham trusts, alter ego trusts, the bundle of rights doctrine and illusory trusts. These claims are not the correct means to deal with the failure of the legislation to fulfil its intention. They are an uncomfortable fit for trust law but indicate a pressure to allow access to trust capital. This is often to prevent one spouse exercising excessive control of trust property, while still defeating the

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<sup>1</sup> *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29 [2016] 1 NZLR 551.

<sup>2</sup> At [123].

rightful entitlement of the other spouse to equal sharing of relationship property. These claims are not the correct solution. Legislative reform will provide better direction.

These matters will be addressed in the following way. Part II will serve as a background to trust law. It will illustrate briefly the means with which to establish a valid trust. It will then deal with the nature of the sham trust, alter ego trust, illusory trust and bundle of rights doctrine. Part III will explain why these sit uncomfortably within trust law. Part IV will suggest the reason for these causes of action is because the current PRA is flawed. Part V will provide three recommendations for legislative reform. Part VI concludes.

## *II Background*

### *A Establishing a trust*

The trust is integral to the legal landscape of modern New Zealand society. It is estimated that in New Zealand there are between 300,000 and 500,000 trusts.<sup>3</sup> According to the pecuniary interests register of Parliament, 76 ministers of parliament (nearly two-thirds of all ministers of parliament) hold a beneficial interest in a trust or serve as a trustee.<sup>4</sup> This prevalence is reflective of the traditional view in society that: “Every successful man should have a trust”.<sup>5</sup>

The trust is a historic institution (derived from ‘the use’) and powerful legal mechanism.<sup>6</sup> It is an “institute of great elasticity and generality”.<sup>7</sup> A person may settle a trust for various reasons ranging from, settling land and assets for future generations of a family, to reducing tax, or avoiding creditors.<sup>8</sup>

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<sup>3</sup> Law Commission *Review of the Law of Trusts: A Trusts Act for NZ* (NZLC R130, 2013) at 6.

<sup>4</sup> Sam Sachdeva “How many NZ politicians are using trusts for their assets?” (4 April 2016) Stuff [www.stuff.co.nz](http://www.stuff.co.nz).

<sup>5</sup> R C Pope *The Practice and Pitfalls of Trusts and Wills* (NZ Society of Accountants, Wellington, 1972) at 7.

<sup>6</sup> Andrew S Butler “The Trust Concept, Classification and Interpretation” in Andrew Butler (ed) *Equity and Trusts in NZ* (2<sup>nd</sup> ed, Thomson Reuters, Wellington, 2009) 44 at 45.

<sup>7</sup> FW Maitland *Equity – a Course of Lectures* (1936, Cambridge University Press, Cambridge, 1936) at 32.

<sup>8</sup> Bill Atkin and Wendy Parker *Relationship Property in NZ* (Butterworths, Wellington, 2001) at 172.

Whatever definition one accords the trust it is an elusive term without one wholly satisfactory definition.<sup>9</sup> It has been described as a fiduciary relationship<sup>10</sup> that enforces an: <sup>11</sup>

Equitable obligation binding a person (...a trustee) to deal with property over which he has control (...the trust property) for the benefit of persons (... the beneficiaries) of whom he may himself be one and any of whom may enforce the obligation.

To establish a trust the settlor must satisfy the ‘three certainties’.<sup>12</sup> These are: certainty of intention by the settlor to part with their beneficial interest; certainty of subject matter as to what constitutes trust property and certainty of object as to whom the trust is intended to benefit: <sup>13</sup>

Certainty of intention is necessary to ensure the onerous burdens of trusteeship are not lightly imposed, while subject matter and objects is necessary to ensure the possibility of judicial supervision over the actions of the trustees and ultimately to ensure the court can administer the trust if the trustees cannot be found or fail to act properly.

The sham trust, alter ego trust, illusory trust and bundle of rights doctrine are means to have an otherwise valid trust according to the three certainties be deemed invalid.

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<sup>9</sup> N Richardson *Nevills Law of Trusts, Wills and Administration in NZ* (9<sup>th</sup> ed, Butterworth, Wellington, 2004) at 1.

<sup>10</sup> Nicola Peart “Can your Trust be Trusted” (2009) 12 Otago LR 59 at 60.

<sup>11</sup> A Underhill and DJ Hayton *Underhill & Hayton: The Law Relating to Trusts and Trustees* (15<sup>th</sup> ed, Butterworth, London, 1995) at 3.

<sup>12</sup> *Knight v Knight* [1840] 49 ER 58.

<sup>13</sup> Andrew S Butler “Creation of an Express Trust” in Andrew Butler (ed) *Equity and Trusts in NZ* (2<sup>nd</sup> ed, Thomson Reuters, Wellington, 2009) 69 at 74.

## B Challenging a trust

### 1 Sham

In the case of *Official Assignee v Wilson* a claim of sham trust was unsuccessful on the facts.<sup>14</sup> Regardless of the outcome the comments on sham trusts remain the leading case law authority in New Zealand.<sup>15</sup> The definition of a sham from *Snook v London and West Riding Investments Ltd* was relied on by the court:<sup>16</sup>

Acts done or documents executed by parties to the sham which are intended...to give to third parties or to the court the appearance of creating between the legal parties rights and obligations different from the actual legal rights and obligations (if any) which the parties intended to create.

A sham arises when the transaction or document is a mask of the true position between the parties.<sup>17</sup> *Official Assignee v Wilson* set a high standard for such a claim to succeed. It has been suggested that for any chance of success in a sham claim a starting point is that there must be a sole trustee who is also the settlor.<sup>18</sup> For an allegation to succeed there must always be mutual sham intention between the settlor and trustee.<sup>19</sup> This usually requires a type of fraudulent intention. Indications of a sham trust include broad powers vested in the settlor or significant control by the settlor, inadequate administration or submissive trustees. These factors alone are not sufficient to prove a sham trust.<sup>20</sup> A sham can arise over time (an emerging sham) if the settlor and trustee form a mutual sham intention, and depart from the initial trust deed without making new provisions in the documentation.<sup>21</sup>

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<sup>14</sup> Jessica Palmer “Dealing with the emerging popularity of sham trusts (NZ)” (2007) 1 NZ L Rev 81 at 83.

<sup>15</sup> *Official Assignee v Wilson* [2007] NZCA 122, [2008] 3 NZLR 45.

<sup>16</sup> *Snook v London and West Riding Investments Ltd* [1967] 1 All ER 518 at 802.

<sup>17</sup> Palmer, above n 14, 85.

<sup>18</sup> Andrew Watkins and Simon Weil “The Property Lawyers’ Dilemma – has the PRA undermined Trusts?” (paper presented to NZ Law Society Continuing Legal Education, June 2014) 1 at 16.

<sup>19</sup> At 16.

<sup>20</sup> Jessica Palmer “Controlling the Trust” (2011) 12 Otago LR 473 at 477.

<sup>21</sup> Kerry Ayers and Peter Wyllie *Trusts and Relationship Property* (Thompson/Brookers, Wellington, 2003) at 45.

## 2 *Alter Ego*

When assets of a trust are dealt with and treated as if they were the absolute property of a person or under a person's absolute control, the trust is the alter ego of that person.<sup>22</sup> This means that person is the controlling hand of a trust and the trust is essentially a façade.<sup>23</sup>

The alter ego trust and sham trust are distinct doctrines. Unlike a finding of a sham an alter ego trust is insufficient to justify invalidating the trust on a stand-alone basis. However this was not the case in *Prime v Hardie* and *Glass v Hughey*.<sup>24</sup> The sham trust and alter ego trust were used to establish a finding of a constructive trust (a *Lankow v Rose* claim) over the trust assets in favour of the disadvantaged partners.<sup>25</sup>

In *Glass v Hughey* the parties were in a de facto relationship for four and a half years. The husband ran a franchising business and the wife assisted. The business shares were owned by a family trust formed by the husband. Upon dissolution of the relationship the husband did not legally own any business assets to which the division of relationship property could relate.<sup>26</sup> But the assets held by the trust were treated as if they were the property of the husband who would in time become the legal owner of the shares. He had also received direct financial benefit from the trust's assets.<sup>27</sup> Priestley J, in the High Court, found that the trust had:<sup>28</sup>

For all intents and purposes been disregarded by the husband so far as his operation of [the company] is concerned and... should be regarded as a sham or more particularly the husband's alter ego.

In the case of *Prime v Hardie* the parties were in a de facto relationship for nine years. All property

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<sup>22</sup> *O v S* FC Dunedin FAM 2004-002-000080, 12 Dec 2006 at [44].

<sup>23</sup> Watkins and Weil, above n 18, at 15.

<sup>24</sup> *Prime v Hardie & Ors* HC Auckland CP 248-SD01, 25 February 2003; *Glass v Hughey* [2003] NZFLR 865 (HC).

<sup>25</sup> *Lankow v Rose* [1995] 1 NZLR 277 (CA).

<sup>26</sup> *Glass v Hughey*, above n 24, at [8] – [10].

<sup>27</sup> Palmer, above n 14, at 87.

<sup>28</sup> *Glass v Hughey*, above n 24, at [28].



was held on trust including the family home. The decision was that the trust was the defendant's alter ego.<sup>29</sup> The defendant husband was the principal beneficiary and financier of the trust; borrowing money to enable the trustees to buy properties, and servicing the loans, rates and the insurance on the properties.<sup>30</sup> The family home was treated as though it was owned by the defendant.<sup>31</sup> Therefore the assets could be treated as the husband's property, and the finding of an alter ego trust justified the imposition of a constructive trust allowing for access to the relationship property.<sup>32</sup>

An alter ego trust alone is now insufficient to justify invalidating a trust. According to Robertson and O'Regan LJ: "The assumption of factual control by someone other than a trustee...or by someone without legal right to exercise such power cannot of itself invalidate a trust".<sup>33</sup> An alter ego argument must be based on a provision of the trust deed such as a power to appoint and remove beneficiaries that could be exercised so as to give the holder total right to trust property.<sup>34</sup> Otherwise the alter ego evidence must meet the high threshold required for a sham.<sup>35</sup>

This is because according to New Zealand property law a party cannot acquire complete ownership by factual control alone.<sup>36</sup> A stranger who takes control of trust assets will be considered a trustee de son tort and be liable to account for the property to the beneficiaries.<sup>37</sup> While claims that control should equate to ownership are unsuccessful their presence is indicative of concern about the extent of control some parties are able to exercise over trust assets, while also eliminating valid third party claims to relationship property.<sup>38</sup>

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<sup>29</sup> Palmer, above n 14, at 82.

<sup>30</sup> Watkins and Weil, above n 18, at 29.

<sup>31</sup> At 29.

<sup>32</sup> Palmer, above n 14, at 88.

<sup>33</sup> *Official Assignee v Wilson* [2006] 2 NZLR 841 (HC) at [69] - [70].

<sup>34</sup> Vanessa Bruton and Isaac Hikaka "Trusts Conference" (paper presented to NZ Law Society Continuing Legal Education, June 2015) at 8.

<sup>35</sup> Peart, above n 10, at 67.

<sup>36</sup> Palmer, above n 20, at 474.

<sup>37</sup> Palmer, above n 14, at 89.

<sup>38</sup> Palmer, above n 20, at 474.

New Zealand’s approach to alter ego trusts is in line with the United Kingdom.<sup>39</sup> In the case of *Prest v Petrodel* it was argued the power of control by the husband over assets owned by companies, equated with property and as such order could be made over those assets. The United Kingdom Supreme Court rejected this and said such claims would cut across statutory schemes of company and insolvency law. It would be unfair to creditors whose claims would then sit below the wife.<sup>40</sup>

### 3 *Bundle of Rights*

The bundle of rights doctrine is a concept developed by the courts.<sup>41</sup> It categorises powers of control, and a discretionary beneficiary’s interest, as part of a bundle of rights capable of being considered property of value under the PRA.<sup>42</sup>

In the case of *Walker v Walker* the trustee was a company of which the husband was the only director. The husband and wife were settlors and discretionary beneficiaries and had transferred relationship property to the trust. They had powers to appoint and remove directors and to appoint themselves trustee. Upon separation the husband wanted to buy the wife’s interest in the debt owed to her by the trust. The issue was as to the value of this debt. The court found that the debt:<sup>43</sup>

“Had to be understood as part of a bundle of rights that included the following “items of property”...The court described these assets together with the debt as forming a “very valuable package” because they conferred control over the business, the major subject of the trust.

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<sup>39</sup> *Prest v Petrodel Resources Limited* [2013] UKSC 34 at [40] – [41].

<sup>40</sup> At [40] – [41]; Watkins and Weil, above n 18, at 13.

<sup>41</sup> The bundle of rights arose from comments of High Court in *B v M* [2005] NZFLR 730 (HC) at [97]; *M v B* [2006] NZLR 660 (CA) at [112]; *Walker v Walker* [2007] NZFLR 772 (FC); *Harrison v Harrison* [2009] NZFLR 587(FC); *JG v JDG* FC North Shore FAM-2007-044-591, 13 July 2010; *LR v JR* [2011] NZFLR 797 (FC) as cited in Watkins and Weil, above n 18, at 13.

<sup>42</sup> Palmer, above n 20, at 489.

<sup>43</sup> At 489.

Like alter ego the bundle of rights doctrine may not be a successful argument alone.<sup>44</sup> The case of *Financial Markets Authority v Hotchin* did not support the bundle of rights doctrine.<sup>45</sup> In that case the power of appointment of trustees and beneficiaries over several trusts did not equate to beneficial ownership of the assets.<sup>46</sup> This has been termed the “death knell” for the bundle of rights argument.<sup>47</sup>

However the bundle of rights doctrine proved successful in *Clayton v Clayton*. There, the particular powers held by Mr Clayton over the trust were deemed ‘property’ for the purpose of the PRA.<sup>48</sup>

#### 4 Illusory

For a trust to be illusory there must be:<sup>49</sup>

Genuine intention to create a trust but in light of the provisions of the trust deed it is apparent the settlor retains such control that the proper construction is that he did not intend to...part with control over the property sufficient to construct a trust.

An illusory trust is therefore distinct from a sham trust (where there is no genuine intention to create a trust). If a trust is illusory the property is considered to be owned by whoever owned it prior to the creation of the trust.<sup>50</sup> In the case of *Harrison v Harrison* the husband and wife were settlors and beneficiaries.<sup>51</sup> Under the trust deed they had significant power to appoint and remove trustees. The sole trustee was a company which the settlors effectively controlled as major shareholders. The parties had intended to create a trust. But according to Fogarty J.<sup>52</sup>

The husband and wife have the ability...to vest the entire assets of the ‘trust’ to themselves...the intention of the husband and wife...was to retain complete control over the

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<sup>44</sup> Watkins and Weil, above n 18, at 21.

<sup>45</sup> *Financial Markets Authority v Hotchin* [2012] NZHC 323.

<sup>46</sup> Palmer, above n 20, at 489 – 490.

<sup>47</sup> Watkins and Weil, above n 18, at 13.

<sup>48</sup> *Clayton v Clayton*, above n 1, at [98].

<sup>49</sup> *Clayton v Clayton* [2013] NZHC 301, [2013] 3 NZLR 236 at [79].

<sup>50</sup> Watkins and Weil, above n 18, at 17.

<sup>51</sup> *Harrison v Harrison* (2008) 27 FRNZ 202 (HC).

<sup>52</sup> At [26].

use and enjoyment of all the assets transferred to the trustee; until at some later date when they might decide to transfer some or all of the assets...Given the ability and the apparent intention, there is a serious argument...that...the legal and equitable estates unite in the husband and wife.

The illusory trust claim has been dismissed by the New Zealand Supreme Court in *Clayton v Clayton*.<sup>53</sup> This was a relationship property dispute that was eventually settled out of court. Mr Clayton acquired many assets during the relationship and settled four large trusts. One of these was subject to a claim that it was a sham or illusory. The Supreme Court's preferred approach was that a trust is either valid or it is not: "For our part we do not see any value in using the 'illusory label': if there is no valid trust that is all that needs to be said".<sup>54</sup>

### *III Issues with these claims*

The sham trust, alter ego trust, illusory trust and bundle of rights doctrine are not the correct means by which to invalidate a trust.

#### *A Sham*

The sham doctrine as it arose in *Snook v London and West Riding Investments Ltd* is inapplicable to trusts. The case of *Snook* was about a commercial arrangement. A trust is not always an arrangement involving more than one party, so application of sham reasoning can be difficult.<sup>55</sup> When constructing the requirements for a sham in the context of private vehicle refinancing arrangements, Diplock LJ likely did not have trust law in mind.<sup>56</sup> His use of the sham doctrine came with a warning that:<sup>57</sup>

As regards the contention of the plaintiff that the transactions...were a sham, it

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<sup>53</sup> *Clayton v Clayton*, above n 1, at [129].

<sup>54</sup> At [123].

<sup>55</sup> Edwin Simpson and Miranda Stewart "Introduction: Sham Transactions" in Edwin Simpson and Miranda Stewart (eds) *Sham Transactions* (Oxford University Press, Oxford (UK), 2013) 3 at 16; Law Commission, above n 3.

<sup>56</sup> At 16.

<sup>57</sup> Matthew Conaglen "Sham Trusts" (2008) 67(1) C.L.J 176 at 178.

is...necessary to consider what if any legal concept is involved in the use of this...word.

The application of the sham doctrine to a trust is conceptually incorrect and means that beneficiaries cannot rely on the validity of trusts. A sham amounts to a failure of certainty of intention.<sup>58</sup> Yet the claim often comes after certainty of intention has been supposedly satisfied. The Law Commission recommends a valid trust should fulfill the ‘three certainties’ and evidence of a sham could go towards the intention requirement.<sup>59</sup> Steven Li agrees that:<sup>60</sup>

The phrase “sham trust” is a misnomer. Sham and trust are mutually exclusive concepts...sham is no more than a descriptive label attaching to a transaction, which appears to be something that it is not. Therefore, on any given set of facts, there is either a trust or no trust and there is no such thing as a sham trust.

### *B Alter Ego*

Like the sham trust the alter ego trust has origins in commerce. It applied in relation to companies said to be under the control of an individual or other company. It can hold an individual personally liable for actions theoretically attributable to that company, or prevent the company denying liability incurred as a result of the controlling individual’s actions.<sup>61</sup> Like the sham trust the alter ego trust is now being used in a context distinct from that where it originated.

It is now clear that effective control will not equate to ownership. However orthodox property law was ignored to provide justice in *Prime v Hardie* and *Glass v Hughey*. Because of pressure on the court to provide access to property in a trust rather than leave one spouse disadvantaged, the alter ego claim was not sufficiently scrutinised. While this has now been corrected the level of control exercised by some settlors remains objectionable as a matter of social consensus.<sup>62</sup> Claims under the

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<sup>58</sup> Simpson and Stewart, above n 55, at 17.

<sup>59</sup> Law Commission “*Some issues with the use of trusts in New Zealand: Review of the law of trusts second issues paper*” (NZLC IP20, 2010) at 5.31.

<sup>60</sup> BoHao (Steven) Li “There is no such thing as a sham trust” (2013) 44 VUWLR 115 at 117.

<sup>61</sup> Butler, above n 13, 407.

<sup>62</sup> Palmer, above n 20, at 493.

heads of sham trust, alter ego trust, illusory trust and the bundle of rights doctrine are highlighting this level of control as an issue. However these claims cannot provide the solution because they are ill-suited to trust law.

### *C Bundle of Rights*

The Law Commission was not persuaded that the bundle of rights concept was the best way forward because of the difficulties posed by legal principle as to whether purely discretionary interests can ever be classified as proprietary interests.<sup>63</sup> The claim that powers of appointment under a trust should be considered property bears much resemblance to the claim that effective control renders the trust an alter ego and therefore the property of the owner. This is contradictory as the alter ego claim is deemed to contravene property law, while the bundle of rights claim found success in *Clayton v Clayton*. This shows that excessive control of a trust is a recurring problem the courts are faced with, despite clear indication in *Official Assignee v Wilson* that effective control is insufficient to invalidate a trust. Pressure for judicial intervention to provide justice is resulting in confusion.

### *D Illusory*

The illusory trust is still controversial and there is some debate as to whether it is distinct from the sham trust. It is of small significance in the legal field.<sup>64</sup>

If the notion of illusory trusts was well known in the law and able to invalidate large numbers of trusts you'd expect to find it wrapped in lights in all the leading text books on trusts – but it isn't. For example it isn't referred to in the current editions of: Lewin on Trusts; Waters Law of Trusts in Canada; Thomas & Hudsons Law of Trusts, ONG's Trust Law in Australia.

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<sup>63</sup> Law Commission, above n 59, at 5.39.

<sup>64</sup>Anthony Grant "Illusory Trusts" – a new tool to invalidate Trusts? Part 4" Anthony Grant Barrister <[www.anthonygrant.com](http://www.anthonygrant.com)>.

The Supreme Court in *Clayton v Clayton* held that there was a distinction between these two causes of action and overturned the Court of Appeal decision saying otherwise. However, the commentary supporting the Court of Appeals decision to deny the illusory claim, is indicative of a dissatisfaction with these types of arguments:<sup>65</sup>

The...decision is to be commended for correcting the development of an ‘off-shoot’ in trust law, which could have undermined established trust law principles and resulted in uncertainty for settlors and beneficiaries beyond the relationship property context.

The argument is one the court has heard before and been clear to clarify; that effective control is insufficient to invalidate a trust. This is clear by the high standard for a sham trust, the ineffectiveness of the alter ego trust and (until *Clayton v Clayton*) the bundle of rights doctrine. The appearance of the illusory trust in 2016 shows that where one cause of action is dispelled by the court, the same concerns about trust practice will appear under a different guise. It remains a lottery as to which claim will find success, and the recurring issue should be dealt with instead.

*E Example: Vervoort v Forrest*

Despite the difficulty to prove a claim under these heads they are by no means extinct. In 2016 an unsuccessful sham claim was heard in the case of *Vervoort v Forrest*.<sup>66</sup> In that case the appellant and respondent were in a relationship for 12 years. The respondent settled a family trust well in advance of the relationship. The trust had shares in various companies and also purchased a lifestyle block with the intention of this being the family home of the couple. It was argued that the trust was a sham. The husband was the settlor with power to appoint new trustees and beneficiaries. But he did not have the power to appoint himself sole trustee or to change existing beneficiaries.<sup>67</sup>

The court followed the *Clayton v Clayton* approach that “there is either a valid trust or there is

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<sup>65</sup> Jeremy Bell Connell “Clayton v Clayton: Nipping the illusory trust in the bud” (2015) 7 NZLJ 261 at 262.

<sup>66</sup> *Vervoort v Forrest* [2016] NZCA 375.

<sup>67</sup> At [4].

not”.<sup>68</sup> The High Court decision affirmed by the Court of Appeal was that there was no evidence to suggest lack of intent to create a valid trust. The Court of Appeal accepted that the husband had exercised de facto control of the trust but because there was no deliberate creation of a deception, and the trust continued to show the features of a trust there was no court order could be. While the wife could not access the substantial amount of property on trust she had already received a large payment under a mutual agreement between the couple. This meant a claim to the small personal assets remaining with the husband was inefficient.<sup>69</sup> Other claimants without such an agreement would find themselves less fortunate.

Despite *Official Assignee v Wilson* indicating the facts of *Vervoort* would be insufficient to meet the high standard of a sham trust, the claim was still brought to court. This is inefficient use of court time that indicates a desperation on the part of claimants for their equal share entitlement. This entitlement is promised under the PRA but can be defeated by dispositions to a trust. The defendant enjoys the guise of a trust and thus prevents access to property for relationship property division. In the meantime the defendant often maintains de facto control over the assets that without a trust the disadvantaged spouse or partner would be entitled to half of.

#### *F Summary*

The continued prevalence of such claims regardless of their success is concerning. This is because sham trust, alter ego trust, the bundle of rights doctrine and illusory trust claims are ill-suited for trust law, their use is conceptually flawed and is creating an uncertain system.

Allowing a trust that appears valid according to the three certainties to be deemed invalid at a later date due to a sham trust, illusory trust, alter ego trust or the bundle of rights doctrine is bad law. Firstly it is uncertain and may detrimentally affect beneficiaries' entitlements. It leads to concern about the stability of a trust. Secondly having sham trust, alter ego trust and illusory trust arguments as separate causes of action is conceptually confusing. The claims are based on the true intent of the settlor and should not be considerations in themselves but should go towards

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<sup>68</sup> At [37].

<sup>69</sup> At [85].



certainty of intention. The task of the court should be: “Simply to ascertain the genuine intention of the party or parties”.<sup>70</sup>

Further, giving credence to these causes of action masks the real issue. There is clear pressure on courts to allow access to trust capital particularly in relationship property disputes, where placement of property on trust takes it out of reach of the division of property under the PRA. The sham trust, alter ego trust, illusory trust and bundle of rights doctrine are not the correct way to deal with this issue.

#### *IV Reasons For The Claims*

It has been said the biggest and most vocal dissatisfaction with the settling of a trust is from an affected partner or spouse following separation.<sup>71</sup> The PRA is inadequately dealing with such settlements of trust property. This is the reason for sham trusts, alter ego trusts, illusory trusts and the bundle of rights doctrine.

##### *A Issues with PRA*

Sweeping reforms were made to the Matrimonial Property Act 1976 resulting in the PRA. The Act provides for how the property of married couples, civil union couples and couples who have lived in a de facto relationship is to be divided when they separate.<sup>72</sup> All other enactments are to be read subject to the act.<sup>73</sup> The reforms resulted in a conceptual shift from a system of deferred participation to a system of deferred community of property.<sup>74</sup> All relationship property was from that point onwards to be equally shared unless, extraordinary circumstances make this unjust or

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<sup>70</sup> Matthew Conaglen “Trusts and Intention” in Edwin Simpson and Miranda Stewart (eds) *Sham Transactions* (Oxford University Press, Oxford (UK), 2013) 122 at 122.

<sup>71</sup> Watkins and Weil, above n 18, at 53.

<sup>72</sup> Property (Relationships) Act 1976, s 1C.

<sup>73</sup> Section 4A.

<sup>74</sup> Nicola Peart “The Property (Relationships) Amendment Act 2001: A Conceptual Change” (2009) 39(4) VUWLR 813 at 824.

the relationship is of a short duration.<sup>75</sup> The distinction between domestic and non-domestic property was removed and ‘relationship property’ given a wide definition for the purposes of division.<sup>76</sup> A party to a relationship has a right to an interest in the family home and, is given a right to separate property that may have turned into relationship property.<sup>77</sup> This Act was a clear commitment to an assertive and far reaching equal sharing regime and one that must be honoured.

Claims being brought to court have allowed judges to identify that the equal sharing promise heralded with the introduction of the PRA is not being upheld. The problem is the lack of access to trust assets during relationship property proceedings.<sup>78</sup> The claims brought are not the correct mechanism with which the judges should provide justice. But because the legislation does not allow access to trust property where necessary, claims under the heads discussed have been brought where the result would otherwise not give effect to the equal sharing regime of the PRA:<sup>79</sup>

A number of commentators believe that the problem is not with trust law which is based on a core set of settled principles that can be used for particular purposes but rather with the ineffectiveness of the anti-avoidance rules protecting creditors, spouses and partners. Rather than changing the settled trust principles...the PRA should be amended to ensure that both parties to the relationship share more equitably in all of the assets created from that relationship whether or not they are held personally or by trust.

Where assets cannot be reached under the PRA the courts are showing:<sup>80</sup>

Increased willingness to consider alternative avenues to reach an outcome that broadly reflects the entitlement that the parties would have received if the assets had been subject to the Act.

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<sup>75</sup> Sections 13 - 14AA.

<sup>76</sup> Section 8.

<sup>77</sup> Sections 20B and 9A.

<sup>78</sup> Law Commission, above n 13, at 5.39.

<sup>79</sup> Andrew Watkins and Simon Weil “Trusts for Property Lawyers” (paper presented to NZLS CLE seminar, November 2012) 1 at 97.

<sup>80</sup> Butler, above n 13, at 1164.

Judges are struggling to give effect to the equal sharing regime New Zealand has committed to.<sup>81</sup>  
Family Court judges:<sup>82</sup>

Have for years resisted the constraints that Parliament imposed on them concerning the extraction from family trusts of assets that would otherwise have been classified as relationship property. They have resorted to the notion of alter ego trusts, sham trusts, illusory trusts, and constructive trusts and the... bundle of rights doctrine.

Where the courts have allowed development of principles to remedy the injustice they are flawed and lack legal foundation.<sup>83</sup> The Law Commission recognised this frustration at the limits of the PRA provisions.<sup>84</sup>

### *B Issues with s 44*

Section 44 of the PRA requires intent to defeat the rights of the other party by disposition to a trust.<sup>85</sup> This section is of little use because intention to defeat rights is hard to prove. This can be contrasted with provisions in the Property Law Act 2007 (PLA).<sup>86</sup> In this Act dispositions that prejudice creditors can be restored for the benefit of creditors.<sup>87</sup> This is a similar idea to dispositions that are intended to defeat rights.<sup>88</sup> However the PLA provides guidance as to what constitutes a disposition that prejudices creditors.<sup>89</sup> The relevant provisions of the PRA do not have such indications. In this regard commercial creditors have greater chance of success of property being restored for their benefit than spouses or partners.

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<sup>81</sup> Property (Relationships) Act s 11(1).

<sup>82</sup> Anthony Grant “The fate of family trusts following Clayton v Clayton” (27 May 2016) ADLS Independent Voice of Law < [www.adls.org.nz](http://www.adls.org.nz) >.

<sup>83</sup> Nicola Peart and Mark Henaghan and Greg Kelly “Trusts and relationship property in NZ” (2011) 17 T.&T. 866 at 873.

<sup>84</sup> Law Commission, above n 13, at 4.33.

<sup>85</sup> Sections 43, 44.

<sup>86</sup> Sections 344 – 350.

<sup>87</sup> Property Law Act, s 344.

<sup>88</sup> Property (Relationships) Act, s 44.

<sup>89</sup> Section 345(1).

### *C Issues with s 44C*

If intention cannot be proven (as is often the case) s 44C allows the court to set aside a transfer of relationship property to a trust even if there was no intention to defeat rights but the transfer had that effect.<sup>90</sup> The court can make orders requiring one spouse to pay the other a sum of money from separate property, or for the sum of money to be paid from the income of the trust.<sup>91</sup> However, s 44C does not provide access to trust capital for payment of this sum. There have been cases where s 44C applied but there was insufficient relationship property or separate property outside of the trust from which to compensate the claimant.<sup>92</sup> Most trusts under consideration contain no more than residential properties and therefore there is no income.<sup>93</sup> Where a trust does generate income it could take years to reach the amount ordered by the court.<sup>94</sup> This does not uphold the purpose of the PRA to bring resolution “inexpensively, simply, and speedily”.<sup>95</sup>

When Parliament enacted s 44C it deliberately chose not to follow the recommendations of the *Working Group on Matrimonial Property and Family Protection Report* to allow access to trust capital.<sup>96</sup> Similar recommendations (to allow access to trust capital) came from the Family Law Section of the New Zealand Law Society when the PRA was being reformed.<sup>97</sup> Parliament instead confined s 44C. The argument for this restriction was that trusts are created for legitimate reasons and should be permitted to fulfil their purpose.<sup>98</sup> However it is necessary to be able to address the cases where the purpose for which a trust was settled is in fact interfering with the fulfillment of the policy of the PRA. The Act is a code that applies instead of the rules of common law and equity.<sup>99</sup> If a trust is settled that contravenes the equal sharing regime of the PRA it is not unjust

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<sup>90</sup> Property (Relationships) Act, s 44C.

<sup>91</sup> Section 44C(2).

<sup>92</sup> Law Commission R 130 at 235.

<sup>93</sup> At 235.

<sup>94</sup> Peart, Henaghan and Kelly, above n 83, at 871.

<sup>95</sup> Section 1N(d).

<sup>96</sup> Working Group on Matrimonial Property and Family Protection “Report of the Working Group on Matrimonial Property and Family Protection 1988” at [28] – [31].

<sup>97</sup> The Family Law Section NZ Law Society “Submissions from Family Law Section of the NZ Law Society on the Matrimonial Property Amendment Bill and the De Facto Relationships (Property) Bill” at [22].

<sup>98</sup> Watkins and Weil, above n 79, at 60.

<sup>99</sup> Property (Relationships) Act, s 4.

to access trust capital. This is because the enactment of the PRA signaled a promise to couples that there would be equal sharing of relationship property. This was irrespective of all things.<sup>100</sup>

Because trust capital cannot be accessed under the legislation sham trust, alter ego trusts, illusory trusts and bundle of rights arguments have arisen:<sup>101</sup>

Where the property has been placed beyond the reaches of ss 44 and 44C, applicants have employed arguments of sham trusts, alter ego trusts, illusory trusts and the bundle of rights.

In some cases the partner could make an alternative application under s 182 of the Family Proceedings Act 1980 (FPA).<sup>102</sup> In other cases the claimant will be left with no alternative means by which to assert their promised right to an equal share of relationship property.<sup>103</sup>

#### *D Issues with s 182 Family Proceedings Act*

Section 182 of the FPA gives the court the power to remove capital from the trust. However this power is restricted.<sup>104</sup> Section 182 applies to marriages and civil unions not to de facto relationships. Application can only be made within a reasonable time after the marriage or civil union is dissolved and s 182 cannot be used when the order dissolving the marriage was made in a foreign court.<sup>105</sup> The section is useful when the parties have been married and their relationship property has been transferred into trust and there is little relationship property to which s 44C can apply. Section 182 allows access to trust capital, potentially resettling that capital onto a new trust so that the expectation can be fulfilled.<sup>106</sup> The section is not useful when the trust is ante-nuptial and the spouse is one of a large number of beneficiaries.<sup>107</sup> Most importantly the section excludes de facto couples.

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<sup>100</sup> Parts 2, 4.

<sup>101</sup> Law Commission, above n 3, at 235.

<sup>102</sup> Family Proceedings Act 1980, s 182; *Ward v Ward* [2009] NZSC 125, [2009] 2 NZLR 31.

<sup>103</sup> Law Commission R 130 at 235.

<sup>104</sup> Section 182.

<sup>105</sup> Watkins and Weil, above n 79, at 70 – 71.

<sup>106</sup> Watkins and Weil, above n 79, at 75.

<sup>107</sup> At 76.

The policy of s 182 distribution does not start from an equal sharing basis. This therefore contravenes the policy of the PRA, despite other enactments needing to be read subject to the PRA.<sup>108</sup> Exclusion of de facto couples means that married and civil union couples have more access to compensation than unmarried couples. This is unjust and is in conflict with the policy of the PRA.<sup>109</sup>

## *E Examples*

### *1 Ward v Ward*

The policy of the legislative landscape is equal sharing. This purpose is being frustrated and some claimants left without compensation. In the case of *Ward v Ward* the court declined to make an order under s 44C. The couple were married for 14 years, during which the husband inherited a farming business. Under legal advice the couple vested half the shares in the wife with an agreement under s 21 of the PRA.<sup>110</sup> They both transferred the shares into trust and began forgiving the debts owed by trustees. Upon separation they were each owed the same amount but in that time the farm had increased significantly in value. Upon separation the wife was left with her entitlement to a share of outstanding debt from the disposition of the farming shares to the trust. This was drastically less than her relationship property entitlement would have been if they had retained ownership of the shares. The husband derived great benefit from the trust and the wife derived none. Because she was party to the plan the wife could not claim under s 44 that the disposition was intended to defeat her rights. The balance of the debt owed outside of the trust was not sufficient to cover the wife's entitlement. Section 182 provided compensation and 50% of the trust was ordered to be resettled on a separate trust.<sup>111</sup> Had the claimants not been married s 182 would not have applied and Mrs Ward would have been left without redress.

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<sup>108</sup> Property (Relationships) Act, s 4A.

<sup>109</sup> Sections 1C, 1M, 1N.

<sup>110</sup> *Ward v Ward* [2009] NZSC 125, [2009] 2 NZLR 31; Section 21.

<sup>111</sup> Peart, Henaghan and Kelly, above n 83, at 869 – 872.

## 2 *Kidd v Van den Brink*

In the case of *Kidd v Van den Brink* a trust was settled by the father-in-law before the wife met and married his son.<sup>112</sup> It held all of the couple's assets and she had contributed to the assets in various ways. Upon separation the trust lacked the nuptial character required by s 182 as settlements must be in relation to a particular marriage.<sup>113</sup> The parties later settled and the appeal was abandoned.<sup>114</sup> It was only because of the out of court settlement that the wife's claim received recognition. The court could not have assisted her with an order from the PRA or s 182.

## 3 *O v S*

In the case of *O v S* the parties were in a de facto relationship for 10 years.<sup>115</sup> The trust was found to be an alter ego and this justified a successful constructive trust claim of \$75,000. Despite this the judge gave priority to the PRA.<sup>116</sup> There was intention to defeat rights under s 44 but because the second respondents received the property in good faith the claim was defeated. Order was made under s 44C to compensate. The husband had no separate property from which order could be made and there was no income from the trust. The judge decided the husband would have the ability to raise the funds based on past business evidence. Therefore, despite there being \$75,000 in the trust to which the wife was entitled and that would provide swift redress the wife had to wait for the funds to be raised by the husband. This contravenes the principle of the PRA.<sup>117</sup>

## F *Summary*

The current regime must be altered. The trust while popular is at a time of revolution. The Law Commission has critiqued the Trustee Act and proposed reform.<sup>118</sup> We are entering a 'trust-

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<sup>112</sup> *Kidd v Van Den Brink* HC Auckland CIV 2009-404-4694, 26 November 2009.

<sup>113</sup> At [32].

<sup>114</sup> Peart, Henaghan and Kelly, above n 83, at 872.

<sup>115</sup> *O v S* FC Dunedin FAM-2004-002-000080, 20 July 2006.

<sup>116</sup> Section 4.

<sup>117</sup> Section 1N(d).

<sup>118</sup> Law Commission, above n 3.

busting' era and as such the trust may face further attacks.<sup>119</sup> This article is in favour of upholding the integrity of the trust as well as the integrity of New Zealand's relationship property legislation. In order to do this access to trust capital must be legislated for. Trust law is no longer clear and coherent. It has become confused by claims of sham trust, alter ego trust, illusory trust and the bundle of rights doctrine. This is because the purpose of the PRA is being frustrated and undermined. The law no longer fulfils its policy goals.

## *V Solution: Reform PRA*

The recommendations of this article will uphold the purpose of the PRA and its equal sharing regime as well as serve to clarify the law of trusts. Some may argue access to trust capital to allow equal division is unfair but the present policy is one of equal sharing and this article argues from the basis that this policy should be upheld.

### *A Recommendation 1*

Section 44C should be reformed so trust capital can be accessed by court order where there is insufficient income from the trust, or no separate property to award payment from. This would extend the current powers of the court in order to compensate a partner whose rights were defeated by disposition of relationship property to a trust. The power to order compensation would be available only when it was not possible to otherwise compensate the defeated partner.<sup>120</sup>

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<sup>119</sup> Martin Hawes "Say hello to the trust-busting era" (3 May 2015) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>.

<sup>120</sup> Working Group on Matrimonial property and Family Protection, above n 97, at [28] –[ 31]; Law Commission, above n 3, at 69; Peart, above n 10, at 74; Watkins and Weil, above n 18.



*1 Draft*

**Key:**

- This is inserted text

**44C Compensation for property disposed of to trust**

(1) ...

(2) If this section applies, the court may make 1 or more of the following orders for the purpose of compensating the spouse or partner whose claim or rights under this Act have been defeated by the disposition:

(a) ...

(b) ...

(c) ...

(d) An order, requiring the trustees of the trust to pay to one spouse or partner the whole or part of the capital of the trust until a specified amount has been paid.

### *B Recommendation 2*

Section 182 of the FPA should be repealed. The Law Commission suggests reform of this provision to include de facto couples.<sup>121</sup> Reform is not sufficient. Section 182 is ancient and:<sup>122</sup>

It was enacted at a time when the law didn't recognise the legitimacy of people co-habiting. To do so was to live in sin and the law would not validate immoral arrangements.

The PRA was enacted to provide a comprehensive property relationship system. It takes precedent over conflicting legislation and has an equal sharing policy. Section 182 does not begin from this position of equal sharing and therefore its policy is in conflict with the PRA. It should be repealed to resolve this conflict.<sup>123</sup> Provision for division of relationship property for clarity and fairness should be made in one piece of legislation. The reformed s 44C would have the same 'trust busting' effect as s 182 once did.

### *C Recommendation 3*

The reform that is currently suggested in discourse does not sufficiently address the issues that are presenting in trust law. It is clear that some settlors are taking advantage of the system and also maintaining effective control of trust property. This control does not justify intervention on the basis that the property be deemed to be owned by the controlling party. However it should justify intervention in some way. The effective control of trusts by a party is the common theme in claims under sham trust, alter ego trust, illusory trust and the bundle of rights doctrine. Rather than merely allowing access to trust capital when this occurs there should be explicit legislation stating that this type of control is not condoned.

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<sup>121</sup> Law Commission, above n 3, at 71.

<sup>122</sup> Anthony Grant "The fate of family trusts following Clayton v Clayton" (27 May 2016) ADLS Independent Voice of Law < [www.adls.org.nz](http://www.adls.org.nz)>.

<sup>123</sup> Peart, Henaghan and Kelly, above n 83, at 881.

To do this indications of intention to defeat interests should be included in s 44. If a defendant has effective control of trust property this should be an automatic indication of presumed intention to defeat rights. Too much focus has been placed on the fact that effective control does not equate with ownership of property. Nevertheless effective control still undermines the trust structure as well as the promise of equal sharing under the PRA. It is unjust that no remedy can be provided in a situation like *Vervoort v Forrest* (as discussed p. 16) where the court recognised that the defendant had de facto control. Effective control does not need to equate to ownership and contravene established property law principles. It can equate to intention to defeat rights which allows the court to look through the trust and give effect to the relationship property regime of equal sharing.

Other indications of intent could include a time limit. If a disposition to trust is made within two years before termination of a relationship then it will be presumed to have been intended to defeat rights. There is a strong emphasis in the PRA that the family home should always be available for division.<sup>124</sup> Therefore if the family home is placed on trust and out of reach of one spouse or partner it will be deemed to have been intended to defeat rights. An exception to this could be if both parties have the same rights under the trust (both trustees, beneficiaries etc.) therefore allowing these dispositions to take place if they occur legitimately.

The Law Commission did not propose any legislative action in regard to sham trust, alter ego trust, illusory trust and the bundle of rights doctrine, as reform to s 44C was assumed to be sufficient. But it is not. This article directly addresses the pressing issue, that the trusts in New Zealand are increasingly being controlled to the extent that the trust structure is being exploited, and the policy of the PRA is undermined. Accessing trust capital is not enough to make New Zealand trust law and relationship property law reliable once more. An explicit legislative provision is needed to give clear parliamentary direction.

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<sup>124</sup> Sections 1C, 8, 11A, 11B.

*1 Draft*

**Key:**

- This is inserted text

**44 Dispositions may be set aside**

(1) Where the High Court or a District Court or a Family Court is satisfied that any disposition of property has been made, whether for value or not, by or on behalf of or by direction of or in the interests of any person in order to defeat the claim or rights of any person (**party B**) under this Act, the court may make any order under subsection (2).

(2) In deciding (1) the following factors shall raise a presumption that the disposition was made in order to defeat the rights of any person (party B) under this Act:

(a) The family home of the relationship has been put on trust either before or during the relationship or;

(b) The trust was settled within 2 preceding dissolution or separation or;

(c) Party A is the spouse or partner of any person (Party B) under this Act and exercises de facto control over trust property.

## *D Implications*

### *1 Trust Law*

As the system stands the sanctity of trust is at greater risk of being undermined without a ‘trust busting’ provision than with one. Without this the trust will continue to come under attack from conceptually uncertain doctrines such as sham trust, alter ego trust, the bundle of rights doctrine and illusory trust. It is better for legislation not ad hoc causes of action to determine when a trust can be accessed. To look through a trust there must be valid reason to do so. Legislation gives clear direction to courts as to when this should occur. This may disrupt beneficiary interests but if it is fair to make an order it should be done.<sup>125</sup> Parties could still contract out of this regime under s 21 of the Act.<sup>126</sup>

This article has proven the PRA is being circumvented and the legislation is deficient. By reforming the PRA claimants will have the opportunity to access trusts if it is just for this to occur. It will prevent claims based on ill-suited and conceptually uncertain doctrines. It will streamline the legal system and provide clear legislative direct as to when it is justified to look through a trust. This strengthens the sanctity of trust rather than undermining it.

### *2 PRA*

This will re-invigorate the equal sharing regime of the PRA. The PRA will no longer be circumvented by placing property on trust yet maintaining effective control. The reform to s 44 will mean that the section extends its utility. Married, civil union and de facto couples will be equally entitled to benefit from a ‘trust busting’ provision and the policy of the PRA will be strengthened and no longer confused by conflicting legislation. This upholds the principles of the act.<sup>127</sup> The proposed amendments will serve as a symbol of re-commitment to the equal sharing

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<sup>125</sup> Nicola Peart “Intervention to Prevent the Abuse of Trust Structures” (2010) 3 NZ L Rev 567 at 599.

<sup>126</sup> Watkins and Weil, above n 79, at 97.

<sup>127</sup> Property (Relationships) Act, ss 1C, 4, 4A.

regime of the PRA. This is an integral element to New Zealand's legislative landscape and its workability must be closely monitored.

### *3 Alignment with other jurisdictions*

Allowing access to trust capital and recognising effective control as a basis for court intervention will align New Zealand with the discretionary regimes of Australia and the United Kingdom.<sup>128</sup> Some alignment with the United Kingdom is already apparent in this area of law, with the similar approaches of New Zealand and the United Kingdom in regards to the alter ego doctrine.<sup>129</sup> However these countries recognise assets in a trust as part of a person's wealth available in relationship property disputes. In Australia the court can take into account the financial resources of either partner when making an order. This has been interpreted to include property over which the spouse has de facto control.<sup>130</sup> Rather than mimicking these countries and deeming effective control of property to mean it is owned by the controlling party, the proposed approach does not contravene property law while still gaining the benefits that the approach has had in these jurisdictions.

### *4 Alignment with existing legislation*

This proposal will align the provisions in the PRA with the approach of other New Zealand statutes. Providing indications of intention to defeat rights aligns the provisions for spouses with those of creditors under the PLA.<sup>131</sup> It is fair that spouse's access to relationship property is no harder to establish than that of creditors. Other pieces of New Zealand legislation allow access to

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<sup>128</sup> Family Law Act 1975 (AUS), ss 79(4), 75(2) (b); Matrimonial Causes Act (UK) 1973, s 24(1)(c); *Charman v Charman* [2006] 2 FLR 422; Watkins and Weil, above n 79, at 97.

<sup>129</sup> *Prest v Petrodel Resources Limited*, above n 39.

<sup>130</sup> Family Law Act 1975 (AUS), ss 79(4), 75(2)(b); *Kennon v Spry* [2008] HCA 56 gave expansive meaning to 'property'.

<sup>131</sup> Section 350.

property if there is effective control, and there should be a streamlined approach across all areas of law.<sup>132</sup>

## *VI Conclusion*

The Law Commission is at work on a review of relationship property law and must find a middle ground between the sanctity of trust and the policy of equal sharing of relationship property in the relationship property legislation. The recommendations of this article traverse this and arrive at a suitable compromise. It is time for a true ‘trust busting’ provision. Claimants are within their rights to attempt to access the equal share they are entitled to under the PRA but trust law should not weather these claims. Legislation is an appropriate means of directing these claims and giving effect to the law as it stands.

The amendments proposed by this article would clarify trust law, strengthen the PRA and provide certainty to both. It would uphold the credibility and authenticity of the trust as a legal instrument, while also recognising the valid rights of spouses or partners on dissolution of a relationship. The balancing act is complicated but the time has come for a Property (Relationships) Act that fulfils its promise.

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<sup>132</sup> Criminal Proceeds Recovery Act 2009, s 58; Child Support Act 1991, s 105(2)(c)(i)(ii); Legal Services Act 2000.

## *VII Bibliography*

### *A Cases*

#### *1 New Zealand*

*AKR v SP* HC Auckland CIV-2001-404-2998, 10 October 2011.

*B v M* [2005] NZFLR 730 (HC) at [97].

*Clayton v Clayton* [2016] NZSC 29 [2016] 1 NZLR 551.

*Clayton v Clayton* [2015] NZHC 301.

*Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293.

*F v W* HC Wellington CIV-2009-485-531, 3 August 2009.

*Financial Markets Authority v Hotchin* [2012] NZHC 323.

*Grant v Grant* HC Auckland CIV-2010-404-5158, 31 March 2011.

*Harrison v Harrison* [2009] NZFLR 587 (FC).

*JG v JDG* FC North Shore FAM-2007-044-591, 13 July 2010.

*Kidd v Van Den Brink* HC Auckland CIV 2009-404-4694, 26 November 2009.

*LR v JR* [2011] NZFLR 797 (FC).



*M v B* [2006] NZLR 660 (CA).

*Marac Finance Ltd v Virtue* [1981] 1 NZLR 586 (CA).

*O v S* FC Dunedin FAM-2004-002-000080, 20 July 2006.

*Paintin and Nottingham Ltd v Miller Gale and Winter* [1971] NZLR 164 (CA).

*Vervoort v Forrest* [2016] NZCA 375.

*Walker v Walker* [2007] NZFLR 772 (FC).

*Ward v Ward* [2009] NZSC 125, [2009] 2 NZLR 31.

## 2 *Australia*

*Kennon v Spry* [2008] HCA 56.

## 3 *United Kingdom*

*Charman v Charman* [2006] 2 FLR 422.

*Knight v Knight* [1840] 49 ER 58.

*Prest v Petrodel Resources Limited* [2013] UKSC 34.

***B Legislation***

*1 New Zealand*

Child Support Act 1991.

Criminal Proceeds Recovery Act 2009.

Family Proceedings Act 1980.

Legal Services Act 2000.

Property Law Act 2007.

Property (Relationships) Act 1976.

*2 Australia*

Family Law Act 1975.

*3 United Kingdom*

Matrimonial Causes Act (UK) 1973.

### ***C Books and Chapters in Books***

Bill Atkin and Wendy Parker *Relationship Property in NZ* (Butterworths, Wellington, 2001).

Andrew S Butler “Creation of an Express Trust” in Andrew Butler (ed) *Equity and Trusts in NZ* (2<sup>nd</sup> ed, Thomson Reuters, Wellington, 2009).

Andrew S Butler “The Trust Concept, Classification and Interpretation” in Andrew Butler (ed) *Equity and Trusts in NZ* (2<sup>nd</sup> ed, Thomson Reuters, Wellington, 2009).

Garth Cameron *Solving Relationship Property Problems in NZ: a practical guide* (Rainshadow Press, New Zealand, 2015).

Matthew Conaglen “Trusts and Intention” in Edwin Simpson and Miranda Stewart (eds) *Sham Transactions* (Oxford University Press, Oxford (UK), 2013).

G E Dal Pont *Equity and Trusts Commentary and Materials* (6<sup>th</sup> ed, Thomson Reuters, Australia, 2015).

BH Davis *Introduction to Property Law* (Butterworths, Wellington, 1979).

Belinda Fehlberg and Juliet Behrens *Australian Family Law The Contemporary Context* (Oxford Uni Press, Australia, 2008).

Kevin Gray *Matrimonial Property in Australia and New Zealand: Towards More Effective Bargaining on Divorce* (Canberra, 1979).

Milton Grundy, John Briggs and Joseph Field *Asset Protection Trusts* (2<sup>nd</sup> ed, Key Haven Publications, London, 1993).

David Hayton (ed) *Modern International Developments in Trust Law* (Kluwer Law International, The Hague, 1999).

JD Heydon and MJ Leeming *Jacobs Law of Trusts in Australia* (7th ed, Lexis Nexis Butterworths, Australia, 2006).

P. E Joske *Matrimonial Causes and Marriage Law and Practice of Australia and New Zealand* (Butterworths, Australia and NZ, 1972).

Maurizio Lupoi and Simon Dix (trans) *Trusts a Comparative Study* (Cambridge University Press, Cambridge, 1997).

FW Maitland *Equity – a Course of Lectures* (1936, Cambridge University Press, Cambridge, 1936).

A.J Oakley *Trends in Contemporary Trust Law* (Clarendon Press, Oxford, 1996).

R C Pope *The Practice and Pitfalls of Trusts and Wills* (NZ Society of Accountants, Wellington, 1972).

N Richardson *Nevills Law of Trusts, Wills and Administration in NZ* (9<sup>th</sup> ed, Butterworth, Wellington, 2004).

Edwin Simpson and Miranda Stewart “Introduction: Sham Transactions” in Edwin Simpson and Miranda Stewart (eds) *Sham Transactions* (Oxford University Press, Oxford (UK), 2013).

A Underhill and DJ Hayton *Underhill & Hayton: The Law Relating to Trusts and Trustees* (15<sup>th</sup> ed, Butterworth, London, 1995).

James Wadham *Willoughbys Misplaced Trust* (2nd ed, Gostick Hall Publications, 2002).

Peter Zuvela *Equity and Trusts Flowcharts* (LBC Information Services, Sydney, 1996).

#### ***D Journal Articles***

Tobias Barkley “Clayton v Clayton: The Court of Appeal on the concepts of property and trusts” (2015) NZLJ 164.

Jeremy Bell Connell “Clayton v Clayton: Nipping the illusory trust in the bud” (2015) 7 NZLJ 261 at 262.

Jeremy Bell Connell, Wynn Williams “Clayton v Clayton: Trust Busting” (2015) NZLJ 288.

Matthew Conaglen “Sham Trusts” (2008) 67(1) C.L.J 176.

Thomas Gibbons “Alter Ego trusts” (2007) NZLJ 316.

Geoff McLay “The Law of Trusts” (2013) NZLJ 357.

BoHao (Steven) Li “There is no such thing as a sham trust” (2013) 44 VUWLR 115.

Jessica Palmer and Nicola Peart “Trust Principles Overlooked” (2011) NZLJ 423.

Nicky Richardson “The New Zealand Property (Relationships) Amendment Act 2001” (2002) IFL 86.

Jessica Palmer “Controlling the Trust” (2011) 12 Otago LR 473 at 474.

Jessica Palmer “Dealing with the emerging popularity of sham trusts (NZ)” (2007) 1 NZ L Rev 81.

Nicola Peart “Can your Trust be Trusted” (2009) 12 Otago LR 59.

Nicola Peart “Intervention to Prevent the Abuse of Trust Structures” (2010) 3 NZ L Rev 567 at 599.

Nicola Peart “The Property (Relationships) Amendment Act 2001: A Conceptual Change” (2009) 39(4) VUWLR 813 at 824.

Nicola Peart and Mark Henaghan and Greg Kelly “Trusts and Relationship property in NZ” (2011) 17 T.& T. 866.

### *E Parliamentary and government materials*

Matrimonial Property Amendment Bill and Supplementary Order Paper No 25 (explanatory note).

Matrimonial Property Amendment Bill (select committee report).

### *F Reports*

Law Commission *Review of the Law of Trusts: A Trusts Act for NZ* (NZLC R130, 2013).

Law Commission *Review of Trust Law in New Zealand: Introductory Issues Paper* (NZLC IP19, 2010).

Law Commission *Some Issues with the Law of Trusts in New Zealand: Review of the Law of Trusts Second Paper* (NZLC IP20, 2010).

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).

Law Commission *Law of Trusts: Preferred Approach Paper* (NZLC IP31, 2012).

The Family Law Section NZ Law Society “Submissions from Family Law Section of the NZ Law Society on the Matrimonial Property Amendment Bill and the De Facto Relationships (Property) Bill”.

Working Group on Matrimonial property and Family Protection “Report of the Working Group on Matrimonial Property and Family Protection”.

### ***G Dissertations***

Sean Conway “Whats mine is yours or is it? Accessing spousal trusts for the purposes of the Property (Relationships) Act 1976” (LLB (Hons), University of Otago, 2011).

### ***H Internet Resources***

Martin Hawes “Say hello to the trust-busting era” (3 May 2015) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>.

Ross Knight “Clayton v Clayton – the last chapter” (5 November 2015) New Zealand Law Society < [www.lawsociety.org.nz](http://www.lawsociety.org.nz) >.

Sam Sachdeva “How many NZ politicians are using trusts for their assets?” (4 April 2016) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>.

Donna Chisholm “Breaking Up: How Not to Go Broke” (1 July 2015) Women’s Weekly <[www.womensweekly.co.nz](http://www.womensweekly.co.nz) >.

Donna Chisholm “When the vow breaks” (1 July 2015) Women’s Weekly <[www.womensweekly.co.nz](http://www.womensweekly.co.nz) >.

Anthony Grant “Illusory Trusts” A new doctrine to invalidate trusts – Part 1” Anthony Grant Barrister <[www.anthonygrant.com](http://www.anthonygrant.com)>.

Anthony Grant “Illusory Trusts” A new doctrine to invalidate trusts – Part 2” Anthony Grant Barrister <[www.anthonygrant.com](http://www.anthonygrant.com)>.

Anthony Grant “Illusory Trusts” A new doctrine to invalidate trusts – Part 3” Anthony Grant Barrister <[www.anthonygrant.com](http://www.anthonygrant.com)>.

Anthony Grant “Illusory Trusts” A new doctrine to invalidate trusts – Part 4” Anthony Grant Barrister <[www.anthonygrant.com](http://www.anthonygrant.com)>.

Anthony Grant “The fate of family trusts following Clayton v Clayton” (27 May 2016) ADLS Independent Voice of Law <[www.adls.org.nz](http://www.adls.org.nz)>.

### *I Other resources*

Vanessa Bruton “Trusts can survive a relationship breakdown – myth or reality” (Paper presented to New Zealand Law Society Continuing Legal Education October 2013).

Vanessa Bruton and Isaac Hikaka “Trusts Conference” (paper presented to NZ Law Society Continuing Legal Education, June 2015).

David Burns and Margaret Casey “The PRA and Property – resolving disputes and resolving claims” (Paper presented to New Zealand Law Society Seminar, March 2005).

Anita Chan “NZLS Trusts and the PRA working together” (Paper presented to New Zealand Law Society Continuing Legal Education, August 2006).



Vivienne Crawsha “Section 21 – Contracting Out” ((Paper presented to New Zealand Law Society Continuing Legal Education, March 2012).

Geoff McLay “Trusts – Implication of the Law Commissions Report” (Paper presented to New Zealand Law Society Continuing Legal Education, September 2013).

Ministry of Justice *Relationship property a guide to the law* (Ministry of Justice, New Zealand, 2001).

Andrew Watkins and Simon Weil “Trusts for Property Lawyers” (paper presented to NZLS CLE seminar, November 2012) 1 at 97.

## *VIII Word Count*

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 7,745 words.