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STRIKING A BALANCE BETWEEN TESTAMENTARY FREEDOM AND EFFECTIVE FAMILY PROTECTION:

ADDRESSING THE USE OF TRUSTS IN THE CONTEXT OF SUCCESSION

LAWS521 Research Essay

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I Introduction

With the recent work of the Law Commission, succession law has come to the forefront of legal discussion in New Zealand. Succession law refers to the body of law that determines how our property is distributed upon our death. New Zealand succession law attempts to balance two fundamentally inconsistent policy concerns. On one hand, we have the property rights of the deceased, the freedom they should have to determine how their property is distributed upon death. On the other hand, we have the rights of family members to receive a share of the deceased's property. Succession law in New Zealand attempts to strike a middle ground, allowing the deceased to exercise testamentary freedom but subject to specific statutory exceptions. In response to these statutory limitations on testamentary freedom, trusts have emerged as an effective way of realising absolute testamentary freedom. The Law Commission has recently considered the subversive role of trusts in succession law, proposing limited clawback mechanisms. However, trusts also play an essential role in facilitating property arrangements that continue beyond death and that are not otherwise possible. While condemning the use of trusts to avoid succession law, it must also be recognised that trusts can play a beneficial role in structuring arrangements beyond death. Clawback mechanisms must be carefully structured to realise this tension.

This paper seeks to propose an ideal model of anti-avoidance mechanisms for succession law. Section II will provide a brief introduction to succession law in New Zealand, with section III looking at the development of family protection laws and the issues created. Section IV looks at how discretionary trusts are abused in the context of succession, section V then attempts to justify the trust as an autonomy enhancing device. Section VI examines the policy considerations that different jurisdictions have grappled with when introducing anti-avoidance provisions for succession law, providing the background by which anti-avoidance in New Zealand succession law must be assessed. Section VII will criticise the current anti-avoidance mechanisms proposed by the Law Commission, making suggestions as to how these could better fit within the policy concerns discussed. Section VIII will then assess the notional estate approach taken in some jurisdictions, concluding that it is not a suitable fit for New Zealand succession law. Section IX will look at how settlor control has been considered in other contexts, recommending a focus on effective control as a potential solution for succession law. Finally, section X will finish with some concluding comments.

II Succession Law in New Zealand

A What Happens When We Die?

Succession law refers to the body of law that determines how our property is distributed upon our death.[1] Succession law has traditionally taken one of two approaches. Civil law jurisdictions commonly take a forced heirship approach, where the deceased's property will be allocated as per the entitlements deemed appropriate by the law.[2] Common law jurisdictions take a proprietary focus, allowing the deceased the freedom to determine how their property is distributed upon their death.[3] Inheriting the laws of the United Kingdom, New Zealand succession law began with this proprietary focus.[4] Modern succession law in New Zealand represents a middle ground between the two. This has been described as a discretionary form of forced heirship, allowing the deceased to distribute their property as they wish but subject to discretionary powers bestowed upon the Courts.[5]

Succession law in New Zealand therefore attempts to strike a balance between the competing policy objectives of protecting testamentary freedom, while ensuring deserving people are not deprived of a distribution from the estate.[6] Upon death, the property of the deceased is distributed as per the terms of their will.[7] This is testamentary freedom in action, the deceased has the freedom to elect what happens with their property after they die.[8]

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[1] Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of Succession Law: Rights to a person's property on death* (NZLC R145, 2021) at [2.4].

[2] See generally Reinhard Zimmerman "Mandatory Family Protection in the Civilian Tradition" in Kenneth G C Reid, Marius J de Waal and Reinhard Zimmerman (eds) *Comparative Succession Law: Volume III: Mandatory Family Protection* (Oxford University Press, New York, 2020) 648.

[3] See generally Kenneth G C Reid "Mandatory Family Protection in the Common Law Tradition" in Kenneth G C Reid, Marius J de Waal and Reinhard Zimmerman (eds) *Comparative Succession Law: Volume III: Mandatory Family Protection* (Oxford University Press, New York, 2020) 707.

[4] English Laws Act 1858, s 1.

[5] Nicola Peart "Forced Heirship in New Zealand?" (1996) 2 BFLJ 97 at 98.

[6] Law Commission, above n 1, at [8.56].

[7] Wills Act 2007, s 1(b).

[8] Law Commission, above n 1, at [2.7].

In an attempt to balance testamentary freedom with the obligations the deceased owes to certain parties, the law provides for different remedies allowing claims against the estate.[9] The Family Protection Act 1955 (FPA) allows family members to challenge the deceased's testamentary freedom where through the terms of their will or as a result of their intestacy, the deceased has not provided for the proper maintenance and support of the claimant.[10] The Law Reform (Testamentary Promises) Act 1949 provides a remedy for those who receive no provision from the estate, but were promised a distribution from the estate in return for services provided to the deceased.[11] The Property Relationships Act 1976 (PRA) ensures a surviving partner is not in a worse position than if the relationship had been ended by separation rather than death. It allows the surviving partner to claim their relationship property entitlement instead of their share of the estate as provided for via will or the intestacy rules.[12] All these remedies allow the aggrieved party to force a distribution from the estate, impinging on the deceased's testamentary freedom. The focus of this paper will be on the relationship between trusts and the application of the FPA.

B The Relevance of Trusts as a Will-Substitute

It appears as if succession law is well balanced, with different remedies preventing the exercise of absolute testamentary freedom. However, various will-substitutes allow people to distribute property as they wish during their lifetime by taking the property out of the estate. This negates the risk of an aggrieved party making a claim against that property.[13] The unconstrained ability to structure your affairs such that property falls with or within the estate at your option indicates that the scales are tipped in favour of testamentary freedom.[14]

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[9] Law Commission, above n 1, at [2.8].

[10] Sections 3 and 4.

[11] Section 3.

[12] Section 61; and Administration Act 1969, s 77.

[13] Nicola Peart and Prue Vines "Will-Substitutes in New Zealand and Australia" in Alexandra Braun and Anne Röthel (eds) *Passing Wealth on Death: Will Substitutes in Comparative Perspective* (Hart Publishing, Oxford, 2016) 107 at 108; and Law Commission, above n 1, at [8.17].

[14] Law Commission, above n 1, at [2.7].

Particularly relevant to this paper is the use of trusts. In New Zealand, it is perfectly legal to transfer property into a discretionary trust such that it is safe from any claims against the estate.[15] Trust property is no longer part of the estate, so an aggrieved party will fail to use the remedies available to them.[16] Trusts are an effective method of upholding the deceased's testamentary freedom, as it ensures property passes into the hands of those the deceased intends.[17]

New Zealand succession law currently has no explicit anti-avoidance mechanism which prevents the avoidance of claims against the estate.[18] General trust-busting remedies are available at common law.[19] However, these are limited in scope and the law is unsettled.[20] An indirect method of clawback exists through the PRA,[21] but this is very complex and is not an appropriate response to the avoidance of succession law.[22] Neither of the current options effectively address the use of trusts to avoid succession law.

III Family Protection

The focus of this paper will be on claims under the FPA. The terms "succession law", "claims against the estate" and "family protection" will be used interchangeably. This section will set out the history of the FPA, concluding that its broad application has provided an incentive for trust use as a device to avoid succession law. The recent proposals of the Law Commission will then be examined, concluding that the argument for anti-avoidance mechanisms is more persuasive when

[15] Peart and Vines, above n 13, at 108.

[16] Law Commission, above n 1, at [8.8].

[17] Nicola Peart "New Zealand's Succession Law: Subverting Reasonable Expectations" (2008) 37 CLWR 356 at 379.

[18] Peart and Vines, above n 13, at 114.

[19] See for example *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551; *Official Assignee v Wilson* [2007] 3 NZLR 45 (CA); *Murrell v Hamilton* [2014] NZCA 377; and *D and E Ltd v A, B and C* [2022] NZCA 430.

[20] Law Commission, above n 1, at [8.67(b)].

[21] Section 88(2).

[22] Law Commission, above n 1, at [8.18].

coupled with a refinement of family protection laws in New Zealand. This section does not seek to set out any substantive recommendations to the reform of the FPA, but merely seeks to show how the scope of the FPA is inextricably linked to the issue of avoidance in New Zealand.

A A Brief History of Family Protection in New Zealand

In 1900, New Zealand became the first common law jurisdiction to move away from a strict proprietary focus and towards a discretionary form of forced heirship. This was in response to the ease with which a strict proprietary focus enabled the deceased to completely ignore the claims of their dependents.[23] The Testator's Family Maintenance Act 1900 allowed the Court to grant the deceased's wife and children a greater distribution from the estate, where the deceased failed to make adequate provision for their proper maintenance and support.[24] The focus was on the claimant's economic position, the Courts originally taking a narrow interpretation so that it corresponded with existing obligations that applied during the lifetime of the deceased.[25]

Courts have repeatedly emphasised the need for family protection laws to reflect the expectations of society. McCarthy P has said "the Family Protection Act is a living piece of legislation and our application of it must be governed by the climate of the time".[26] This has led to the FPA in its current form, which permits claims from a much broader range of claimants.[27] Although the scope of the FPA has been expanded to reflect changes in societal views, the test for recovery has remained unaltered.[28] However, case law has stretched the application of the FPA far beyond its

[23] Rosalind Atherton "New Zealand's Testator's Family Maintenance Act of 1900 – The Stouts, the Women's Movement and Political Compromise" (1990) 7 Otago LR 202 at 216.

[24] Section 2.

[25] See *Re Rush* (1901) 20 NZLR 249 (SC) at 253; and Destitute Persons Act 1894.

[26] *Re Wilson (deceased)* [1973] 2 NZLR 359 (CA) at 362.

[27] Section 3.

[28] Compare Testator's Family Maintenance Act 1900, s 2; and Family Protection Act 1955, s 4.

original intentions. The Court's assessment has moved from an economic to an ethical inquiry,[29] the Court assessing:[30]

> … whether, objectively considered, there has been a breach of a moral duty judged by the standards of a wise and just will-maker who is fully aware of all the relevant circumstances.

This has led to the possibility of support claims, where claimants with no financial need make a claim for provision from the estate in recognition of their belonging to the family.[31] Importantly, this has led to a majority of FPA claims being made by adult children who are financially independent.[32]

B Criticisms of the FPA

The FPA as originally enacted was meant to offset the injustices of absolute testamentary freedom. However, the FPA in its current state goes too far and represents a significant incursion into the property rights of the deceased.[33] Many commentators have described how a test based on a "moral duty" provides too vague a description of the policy goals of the FPA. The moral way of distributing the estate is ultimately a subjective assessment, judges are effectively able to substitute their opinion of what is fair in place of the deceased's.[34] The lack of a clear policy objective has led to the FPA being referenced as "a leading example of legislation giving the court discretion to order virtually anything it likes".[35] This unlimited discretion and the resulting unpredictability not

[29] Bill Patterson *Law of Family Protection and Testamentary Promises* (5th ed, LexisNexis, Wellington, 2021) at 21–23.

[30] Law Commission, above n 1, at [5.6]; referring to *Little v Angus* [1981] 1 NZLR 126 (CA) at 127.

[31] *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at [52].

[32] Law Commission, above n 1, at [5.11].

[33] Peart, above n 17, at 364.

[34] John Caldwell "Family protection claims by adult children: what is going on?" (2008) 6 NZFLJ 4 at 4.

[35] Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 704.

only severely undermines testamentary freedom, but has also led commentators to condemn the FPA on the basis that it undermines the rule of law.[36]

The current status of the FPA seems to be inconsistent with the views of modern society. Recently, William Porter has provided an insightful summary of surveys taken on public perceptions of obligations upon death.[37] His findings show "general public support for testamentary freedom".[38] He notes that the ease with which the deceased's testamentary freedom can be set aside appears to be a development of public concern, especially in relation to adult children who are financially independent. However, he does note public acceptance that some circumstances are deserving of the ability to force a distribution from the estate. Porter notes that "Despite the change in societal views, and the judicial recognition that the FPA ought to be interpreted so as to reflect those views, the expansive judicial approach continues."[39] Trusts have therefore emerged as a device to bring succession law in line with the reality of public opinion.

The relationship between the FPA and trusts poses a multi-pronged issue of real concern. Trusts have emerged as a method to avoid the application of overreaching family protection laws and to give primacy to testamentary freedom.[40] However, the use of trusts goes too far when it avoids the application of the FPA altogether. As noted by Porter, research shows that although generally in favour of testamentary freedom, "there remains strong community support for being able to challenge wills in more targeted circumstances".[41] Law reform is needed to bring the application of the FPA back in line with societal expectations, by addressing the dual issue posed by the application of the FPA and the use of trusts. Anti-avoidance mechanisms are needed to prevent the avoidance of the FPA, but only if the broad application of the FPA is addressed. This issue is aptly summarised by Porter, who says:[42]

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[36] William Porter "Bad law makes hard cases - the case for repealing or amending the Family Protection Act 1955" (2021) 10 NZFLJ 101 at 104.

[37] At 103.

[38] At 103.

[39] At 104.

[40] Peart, above n 17, at 379.

[41] At 106.

[42] At 105.

> To introduce anti-avoidance measures would be to double-down on a bad law … if the scope of the FPA was significantly reduced, and its policy underpinnings clarified, the introduction of anti-avoidance measures would become more compelling.

C The Law Commission's Proposals

At the end of 2021, the Law Commission published its final report on its view into succession law.[43] As part of its recommendations, the Law Commission recommended the enactment of the Inheritance (Claims Against Estates) Act (the 'ICAE'). This Act compiles all the different mechanisms through which a claim can be made against an estate. These claims currently exist in different statutes and the new Act is intended to make the law more accessible.[44]

Responding to the issues outlined above, the Law Commission has proposed to refine the basis on which awards will be made under the FPA.[45] The proposals refine the basis on which a claim can be made, limiting the range of claimants and making economic considerations central to the Court's decisions. Furthermore, the Law Commission has refined the direction given to the Courts such that they have less discretion when granting awards.

An analysis of these proposals is outside the scope of this paper. Relevant to this paper, is the argument that refining the FPA in response to the aforementioned concerns makes anti-avoidance mechanisms a necessary development in succession law. Limiting the FPA to claimants in financial need is a justified limitation on testamentary freedom. Trusts should not be permitted to avoid these obligations and undermine the effectiveness of these proposed laws. Addressing this issue will be the focal point of this paper.

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[43] Law Commission, above n 1.

[44] At [2.131]-[2.133].

[45] Law Commission, above n 1, at [5.92]-[5.175].

IV Abusing the Discretionary Trust in the Context of Succession

In discussing the Trusts Act 2019, McLay has described how the interaction between trusts and issues of public policy should be left to non-trust law rather than trust law itself.[46] Accordingly, the misuse of discretionary trusts has been well-documented and addressed by legislative intervention in the contexts of insolvency, taxation and relationship property.[47] This paper argues that succession law is equally deserving of discussion. Upon death, the subversive feature of discretionary trusts allows the settlor to easily avoid the obligations imposed on them by family protection laws. While alive however, the trend of excessive settlor control allows the settlor to continue benefiting from the property as if the property is not held in a trust. These abusive features of the trust appear to undermine the operation of succession law and warrant legislative response in the form of anti-avoidance mechanisms. This section describes how trusts which subvert the law or allow the settlor to retain excessive control are not normatively justified. Accordingly, these abusive features will be discussed later in this paper as separate triggers for the operation of clawback mechanisms.

A Subverting Succession Law

The trust is renowned for its ability to avoid the liabilities attached to ownership.[48] Tax avoidance and asset protection have become core elements of trust practice and offshore trust regimes legislate to facilitate this subversive feature.[49] Some claim that the subversive feature of the trust is its main justification, the trust allowing owners to avoid the injustices of liabilities imposed on property owners.[50]

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[46] Geoff McLay "How to read New Zealand's new Trusts Act 2019" (2020) 13 J Eq 325 at 328.

[47] Property (Relationships) Act 1976, ss 44 and 44C; Property Law Act 2007, ss 345-350; Income Tax Act 2007, s BG 1; see also Nicola Peart "Intervention to Prevent the Abuse of Trust Structures" (2010) 3 NZ L Rev 567; and Law Commission *Some Issues with the Use of Trusts in New Zealand: Review of the Law of Trusts: Second Issues Pap*er (NZLC IP20, 2010).

[48] Austin W Scott "The Trust as an Instrument of Law Reform" (1922) 31 Yale LJ 457 at 458.

[49] Andres Knobel *Trusts: Weapons of Mass Injustice?* (Tax Justice Network, 13 February 2017) at 9 and 11.

[50] See for example Brooke Harrington *Capital Without Borders: Wealth Managers and the One Percent* (Harvard University Press, Cambridge (Mass), 2016) at 150.

The discretionary trust has developed as an effective mechanism in avoiding the liabilities of ownership. The discretionary trust is a powerful tool to subvert the law, as it allows trust assets to be "ownerless" and thus no liability can attach to them.[51] The settlor divests themselves of legal and beneficial ownership by transferring the property to be held on trust, granting the trustee legal ownership and wide discretion as to how the trust property is dealt with. This discretion means that individual discretionary beneficiaries have no proprietary interest in the trust property, but only a hope or expectancy of benefiting from the trustee's discretion.[52] No individual can be pointed to as having beneficial ownership of the trust property. The property is therefore in an ownerless state, meaning the liabilities of ownership cannot attach to it.

Bennett and Hofri-Winogradow rightly suggest that although subversion appears to be a core feature of the trust, there exists no normative justification for the use of trusts to subvert the law.[53] Claims that subversion is justified due to the injustice of ownership liabilities are normatively incoherent, as it asks the law to both provide for ownership liabilities and for a mechanism to avoid those liabilities.[54] Non-trust law is itself justified on the basis of conscious policy decisions from the legislature. Using the trust principally to avoid laws that are normatively justified therefore raises questions of legitimacy.[55]

Legislative response targeting the subversive use of trusts reinforces the suggestion that no normative justification for subverting the law exists. In many jurisdictions, anti-avoidance mechanisms prevent trusts from subverting the operation of the law in the context of tax

[51] Mark Bennett "The illusory trust doctrine: formal or substantive?" (2020) 51 VUWLR 193 at 204.

[52] *Hunt v Muollo* [2003] 2 NZLR 322 (CA); and Alastair Hudson *Equity and Trusts* (9th ed, Taylor & Francis Group, London, 2016) at 38.

[53] See Mark Bennett and Adam Hofri-Winogradow "The Use of Trusts to Subvert the Law: An Analysis and Critique" (2021) 41 OJLS 692.

[54] Bennett and Hofri-Winogradow, above n 53, at 713.

[55] Pey Woan Lee "Remedying the abuse of organisational forms: Trusts and companies considered" (2019) 13 J Eq 211 at 211; Bennett and Hofri-Winogradow, above n 53, at 713.

avoidance,[56] relationship property[57] and insolvency.[58] This represents a policy decision from the legislature that the justification for allowing trusts to subvert the law is outweighed by the social benefit those laws seek to provide.[59]

Succession law is the outlier, in that the legislature has not yet responded to the subversive feature of trusts in this context.[60] Regardless, the author suggests that anti-avoidance mechanisms are required to prevent the avoidance of succession law. Trusts allow settlors to avoid claims against their estate by transferring their property into a trust during their lifetime. As the property is no longer owned by the settlor, when the settlor dies claimants are unable to make a claim as insufficient property remains in the estate.[61] Family protection laws justify a restriction of property rights by protecting the interests of those who are dependent on the deceased at the time of death.[62] Little justification exists for allowing the trust to be used to avoid the application of these laws.

B Excessive Settlor Control

A recent trend in trust law has seen the rise of excessive control retained by the settlor. This has been motivated by the settlor's desire to retain some influence over how the trust property is administered.[63] In response to the demands of settlors, it is becoming increasingly common for trust practitioners to reserve powers to the settlor that allow them to influence the administration

[56] Income Tax Act 2007, s BG 1; and Income Tax (Trading and Other Income) Act 2005 (UK), s 624.

[57] Property (Relationships) Act 1976, ss 44 and 44C; Matrimonial Causes Act 1973 (UK), s 25(2)(a); and Family Law Act 1975 (Cth), s 75(2)(b).

[58] Property Law Act 2007, ss 345-350; Insolvency Act 1986 (UK), s 423; and Bankruptcy Act 1966 (Cth), s 121.

[59] Bennett and Hofri-Winogradow; above n 53, at 715 and 717.

[60] The legislature has even ignored past anti-avoidance proposals, see Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at 127-135.

[61] Peart and Vines, above n 13, at 114.

[62] Law Commission, above n 1, at [5.92]-[5.100]; [5.135]-[5.145]; and [5.147]-[5.150].

[63] Mark Bennett "Competing Views on Illusory Trusts: the Clayton v Clayton litigation in its wider context" (2017) 11 J Eq 48 at 55-56.

of the trust.[64] In extreme cases, the settlor retains such extensive powers that the control they retain over the trust property is "tantamount to ownership".[65] Courts have grappled with the implications of such control, considering whether a valid trust has been created in such circumstances.[66]

Influence over how the trust is administered is not a development of concern.[67] However, when combined with the subversion attribute inherent to the trust, excessive control is a concerning development in the law of trusts. Settlors are able to abuse the trust to avoid the liabilities of property ownership while still retaining the benefit of the property. A settlor can formally remove property from their ownership, shielding the property from liabilities attached to ownership. However, the settlor may also reserve powers which functionally allow them to control the management of the property as if the trust did not exist.[68] As described by Webb, "the blatant cherry-picking of trust advantages introduces artificiality and undermines the institution as a whole".[69]

In the context of succession, settlor control makes a mockery of family protection laws. It is possible for a settlor to transfer property into a trust in order to mitigate the risk of estate claims, while retaining such powers that they are still benefiting from the property in the same way as they were before the trust.[70] A settlor can retain the power to distribute trust property to themselves, in which case that property once again becomes part of the estate. But before those powers are exercised, the property remains outside the estate and will be safe from estate claims in the event of the settlor's death.[71] While alive, trust assets are treated as if they are still owned by the settlor.

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[64] Jessica Palmer "Controlling the Trust" (2011) 12 Otago LR 473 at 478; and Chris Duncan and Henry Brandts-Giesen "The potential vulnerability of reserved powers trusts" (2021) 27 T & T 194 at 194.

[65] *Webb v Webb* [2020] UKPC 22 at [89].

[66] See generally *Clayton v Clayton [Vaughan Road Property Trust]*, above n 19; *Webb v Webb*, above n 65; and *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch).

[67] Donovan Waters "Trusts: Settlor Reserved Powers" [2006] 25 Est Tr and Pensions J 234 at 234.

[68] Bennett and Hofri-Winogradow, above n 53, at 699.

[69] James Webb "An Ever-reducing Core? Challenging the Legal Validity of Offshore Trusts" (2015) 21 T & T 476 at 477.

[70] Peart and Vines, above n 13, at 108.

[71] Peart and Vines, above n 13, at 115.

However, upon death the trust assets are protected from estate claims regardless of the control the settlor could exercise during their life. All the benefits of ownership are retained while the liabilities are avoided.[72]

The relevance of settlor control will be explored in sections VIII and IX, where it will be suggested as an additional trigger for the operation of clawback provisions.

V Justifying the Trust's Place Within Succession

As discussed above, the flexibility inherent to the trust concept has permitted opportunistic settlors to abuse the trust for their own benefit and to the detriment of others. This section assesses possible justifications for the role the trust plays in succession, concluding that its autonomy-enhancing function provides real benefit in allowing highly individualised property arrangements which continue beyond the death of the owner. More importantly, this justification condemns the abuses described above. Effective law reform should therefore be directed at the abusive features, while still permitting the trust to operate in a manner in which it is justified.

A The Trust's Key Autonomy Enhancing Function

Many trust theorists have attempted to provide a normative justification for the trust.[73] However, these are of general application and do not hold true in all contexts. For example, Hansmann and Kraakman focus on the economic benefits flowing from the trust's role in facilitating affirmative asset partitioning.[74] This argument has little significance in the context of succession, where the trust is used as a passive asset holding device and attracts none of the economic benefits relied

[72] Peart, above n 47, at 568.

[73] See Bennett and Hofri-Winogradow, above n 53, at 703-708.

[74] Henry Hansmann and Reinier Kraakman "The Essential Role of Organisational Law" (2000) 110 Yale LJ 387 at 395 and 403.

upon to justify the trust through an economic lens.[75] For the law to preserve the trust's role in succession, it must be justified in a way that applies specifically to that context.

The most convincing justification for trusts in succession law is found in the trust's autonomy enhancing function. Dagan argues that in a truly liberal society, property law must seek to promote people's individual autonomy.[76] Owners should be afforded the widest degree of autonomy possible, including the ability to make complex arrangements determining how the property is to be handled after their death.[77]

The range of structures recognised as "property" under the common law is a closed list.[78] Thus, property law fails to truly provide for the autonomy of owners. According to Dagan and Samet, a liberal property law requires an open-ended residual category comprising those arrangements that do not fit within the closed list of property rights:[79]

> Such a category would allow autonomous individuals to reject the state's favoured frameworks and decide for themselves how to arrange their interpersonal relationships, while taking into account the interests of third parties.

The inherent flexibility of the trust permits complex, highly customisable ownership arrangements in ways not possible through the common law.[80] It allows people to realise their autonomy in property ownership, as the settlor is bound "only by the limits of her creativity".[81] The trust permits

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[75] Ming-Wai Lau *The Economic Structure of Trusts: Towards a Property-based Approach* (Oxford University Press, New York, 2011) at 74-75; Lee, above n 55, at 216; and New Zealand Trustee Services "Types of Trusts" <www.nztrustees.co.nz/>.

[76] Hanoch Dagan *A Liberal Theory of Property* (Cambridge University Press, New York, 2021) at 35-40.

[77] See Simon Gardner *An Introduction to the Law of Trusts* (3rd ed, Oxford University Press, New York, 2011) at 31.

[78] See Thomas Gibbons "Management rights and property" [2013] NZLJ 44 at 44.

[79] Hanoch Dagan and Irit Samet "Express Trust: The Dark Horse of the Liberal Property Regime" in Simone Degeling (eds) *Philosophical Foundations of the Law of Trusts* (2022) (forthcoming) at 7.

[80] See Lau, above n 75, at 137.

[81] Dagan and Samet, above n 79, at 29.

owners to structure their arrangements in a way that recognises the unique circumstances facing each individual. Dagan and Samet suggest that the trust represents the best existing option for filling this role of a residual category of property types. The "almost infinitive flexibility" of the trust effectively permits owners to structure their arrangements outside of the closed list prescribed by the law.[82] In this sense, Dagan and Samet label the trust as the "dark horse" of liberal property.[83]

This stands as the main justification for trusts in the context of succession law. Knobel provides a good example of how a trust can be used in succession:[84]

> … a parent may know that his reckless, spendthrift daughter would likely blow her inheritance in Las Vegas in a week. The parent can instead put her inheritance into a trust, which will give her a steady stream of income for years after her parents' death. No matter how hard she tries, she will not be able to get hold of the trust assets (principal) beyond that income doled out by the trustee.

Such an arrangement sits outside the class of property arrangements available under the common law. Due to the flexibility permitted through a trust, the settlor is able to structure their affairs in a unique way and to achieve their desired goals for their property and family beyond death. Knobel describes the above example as "socially useful".[85] The autonomy provided by the trust justifies its role in succession, as it provides for the ability to create socially useful and highly personalised property arrangements that continue beyond death.

Some proponents of the autonomy theory argue that although the trust is justified for its autonomy enhancing capabilities, this does not extend to trusts used to avoid the application of the law.[86] Subversion of the law is condemned for the same reasons that justify the use of the trust. Drawing from concepts of distributive justice, a liberal society must consider the autonomy of property

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[82] At 24.

[83] At 24.

[84] At 20.

[85] At 9.

[86] See generally Dagan and Samet, above n 79; Bennett and Hofri-Winogradow, above n 53, at 710-712.

owners as well as non-owners.[87] It would be unjust to confer autonomy enhancing rights only on those who own property. Dagan and Samet argue that:[88]

> … the legitimacy of the property rights of the well-off relies on and indeed depends on their contribution to a viable background regime that guarantees everyone the material, social and intellectual preconditions of self-determination.

In other words, a truly liberal property law bestows autonomy on property owners in return for their contributions to a system which ensures all people are able to exercise autonomy. The trust is justified in that it provides for this autonomy in property ownership. But using the trust to subvert the law is ultra vires, as it allows owners to avoid contributing to the very regime that lends legitimacy to their property rights.[89] Similarly, Bennett and Hofri-Winogradow argue that:[90]

> The autonomy an owner enjoys as a result of having rights to property is always granted subject to the duties and liabilities the law imposes. The protection and the liabilities are parts of the same system. One cannot, and indeed should not, have one without the other.

D and E Ltd v A, B and C (*D v A*) exemplifies how trusts used to subvert succession law have no place in a liberal property regime.[91] In *D v A*, the deceased had verbally, physically and sexually abused his children when they were young and this led to various disadvantages continuing into their adult years.[92] Shortly before death, the deceased transferred all his property into a trust with the deliberate and sole intention of denying his children any claim against his estate.[93] The autonomy theory condemns the deceased's use of a trust to subvert the operation of the FPA. As described above, the legitimacy of the deceased's property rights relies on his acknowledgement of liabilities which the law has deemed appropriate to attach to the ownership of property. Through

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[87] Dagan and Samet, above n 79, at 13-14.

[88] At 48.

[89] Dagan and Samet, above n 79, at 8.

[90] At 712.

[91] *D and E Ltd v A, B and C*, above n 19.

[92] At [10-[44].

[93] At [48]-[52].

the FPA, the deceased has an obligation to use his property to provide for certain family members. Using a trust to subvert his children's entitlement under the FPA is outside the scope of what is justified under the autonomy theory and is therefore an illegitimate exercise of the deceased's property rights. Clawback provisions which unwind arrangements which are not justified by the autonomy theory complement the property rights which the autonomy theory also lends legitimacy to.

B A Solution for Succession Law

The recent Law Commission inquiry has brought succession law to the forefront of legal discussion in New Zealand. In the context of succession, trusts are normatively justified based on their autonomy enhancing function. However, this justification does not extend to exploitative uses of the trust. The law should not provide for activities with no normative justification. The author suggests that the ideal route for succession law is to follow the intermediate solution supported by Bennett and Hofri-Winogradow.[94] Anti-avoidance mechanisms should target the abusive features of the trust, while preserving the flexibility which allows the trust to carry out its autonomy enhancing function. As described by Knobel, the ideal approach is "throwing out the unhealthy bathwater without also jettisoning the healthy baby".[95]

Respecting the autonomy-enhancing function of the trust will inevitably lead to incidental subversion of the law.[96] However, if property is transferred to a trust only to take advantage of the subversive feature and deny a deserving child from their entitlement, such an arrangement should not be permitted. This argument only gains momentum where the settlor reserves such powers that they are effectively able to still benefit from the property.

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[94] At 713-714.

[95] At 5.

[96] Bennett and Hofri-Winogradow, above n 53, at 714.

The Law Commission has indicated that its reforms must respect the way the "deceased has structured their property affairs".[97] Kelly argues that such an objective can only be achieved by allowing succession law to proceed without the addition of anti-avoidance.[98] However, this argument ignores the additional policy objective of "promoting positive outcomes for families and whānau".[99] The solution alluded to provides a just middle ground where the property rights of owners are respected, including the right to structure arrangements through a trust that will continue after death, while also preventing them from avoiding the obligations of ownership by exploiting the subversive feature of the trust.

VI Policy Considerations in Other Jurisdictions

A discussion of overseas approaches to succession law is useful as it highlights the differing policy arguments to consider when assessing anti-avoidance in succession law. Clear trends of discussion can be observed across all these jurisdictions, with law reform bodies either preferring effective family protection laws or protecting proprietary interests. This reflects the discussion above, with a balance to be struck between allowing justified trust use and ensuring effective application of the FPA. This section will consider overseas jurisdictions in two categories, those that have preferred testamentary freedom and those in favour of effective family protection laws.

A In Favour of Effective Family Protection

A common argument is that the various remedies available represent a conscious policy decision that certain classes of people deserve the ability to claim against the estate. The ease with which a trust can be used to avoid such claims undermines the effectiveness of such remedies.[100] This

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[97] Law Commission *Review of Succession Law: Rights to a person's property on death | He arotake i te āheinga ki ngā rawa a te tangata ka mate ana* (NZLC IP46, 2021), at [1.25]-[1.26].

[98] Peter Kelly "Reforming family law without compromising trust integrity: Recognising wealth held in trust when reallocating family property on death or separation" (LLB(Hons) Research Paper, Victoria University of Wellington, 2021) at 42-43.

[99] Law Commission, above n 97, at [1.22].

[100] Law Commission, above n 1, at [8.59].

argument is especially strong in regard to family protection claims, where trusts can be used to disinherit deserving family members who are then left with no remedy. Clawback provisions allow these remedies to operate as intended, constraining absolute testamentary freedom.[101]

It is also argued that without anti-avoidance, succession law is arbitrary and creates inequalities in the way it operates. Those with wealth are able to engage resourceful lawyers to structure their affairs in a way that protects their assets from estate claims and ensures their wealth is distributed as they intend. However, those who are unable to afford this are left open to estate claims and may find their property does not end up in the hands of who they intended.[102] It is therefore easier for the wealthy to protect their estates from claims. This is illogical, as Courts will be more likely to award a claim against larger estates. A response to this is that those who can afford good lawyers will be able to find ways around the clawback provisions anyway.[103] On this argument, testamentary freedom will always be more accessible to those with wealth.

A desire to ensure the effectiveness of family protection laws has resulted in the introduction of clawback provisions in several jurisdictions. In the United Kingdom, the Court is able to access property disposed of within six years of death with the intention of defeating a family provision claim and where full valuable consideration was not provided.[104] In designing these provisions, the Law Commission noted the interference with testamentary freedom and the uncertainty created for third parties.[105] However, ensuring the effectiveness of laws designed to protect dependents was of greater importance.

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[101] National Committee for Uniform Succession Laws *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP28, 1997) at 93.

[102] Tasmania Law Reform Institute *Should Tasmania Introduce Notional Estate Laws* (Final Report No 27, 2019) at [5.6.26]-[5.6.32].

[103] Scottish Law Commission *Report on Succession* (Scot Law Com No 215, 2009) at [1.20]; and South Australian Law Reform Institute *Distinguishing between the Deserving and the Undeserving: Family Provision Laws in South Australia* (Report 9, 2017) at [8.3.4].

[104] Inheritance (Provision for Family and Dependants) Act 1975 (UK), s 10.

[105] Law Commission (England & Wales) *Family Law Second Report on Family Property: Family Provision on Death* (Law Com No 61, July 1974) at [191].

Clawback mechanisms have also been introduced in New South Wales to ensure the effectiveness of family protection laws.[106] While recognising the tough balancing act between competing policy objectives, the New South Wales Law Review Commission concluded that without anti-avoidance mechanisms the law would be ineffective and arbitrary in its application.[107] New South Wales follows a comprehensive approach to anti-avoidance, referred to as the notional estate.[108] The Court can claw back assets that were subject to a relevant property transaction, meaning that the deceased makes an act or omission that results in the property being held by another person or subject to a trust, where full valuable consideration was not provided.[109] A failure to exercise a power of appointment or revocation are listed as examples of relevant property transactions.[110] The notional estate can only include transactions that took place within the three years before the deceased's death.[111] Where the transaction took place within three years of death, the Court must be satisfied that the transaction was entered into with the intention of defeating or limiting a claim. Where the transaction took place within one year of death, the intention of the deceased is irrelevant.

B Primacy Given to Property Rights

The fundamental argument against clawback provisions follows the autonomy theory outlined above. Property rights allow people to deal with their property as they wish during their lifetime.[112] Having rights in property includes the ability to decide who inherits property upon your death, or testamentary freedom.[113] Peart has described how the range of remedies available already acts as a significant infringement on property rights and by extension testamentary freedom.[114] If parties

[106] Succession Act 2006 (NSW), s 63(5).

[107] New South Wales Law Review Commission *Testator's Family Maintenance and Guardianship of Infants Act 1916* (Report No 28, 1977) at [2.22.3].

[108] Section 63(5).

[109] Section 75.

[110] Section 76(2).

[111] Section 80.

[112] Law Commission, above n 1, at [2.4].

[113] *Banks v Goodfellow* (1870) LR 5 QB 549 at 564.

[114] Peart, above n 17, at 357.

want to avoid estate claims by transferring property outside of the estate and relinquishing beneficial ownership, then it is fair that they are able to do so.[115] Trusts are commonly used to fulfil this purpose.[116] This is not a mechanism to disinherit family members, but a way of protecting the interests of those who the owner wants to inherit the property.[117] Using a trust will enable the owner to control who inherits property and in what circumstances. Clawback provisions infringe property rights, setting aside carefully planned, well-intentioned financial arrangements. People should be free to structure their affairs during their life without the risk that this is set aside after their death.

A primary issue in phrasing clawback provisions is the risk that they will be structured too broadly and will lead to greater uncertainty.[118] It is the owner of the property who is in the best position to assess the competing claims against their property.[119] The decision to disinherit a family member will be reached based on the merits of competing claims to the property. An owner of property should be able to rely on the certainty of arrangements they have made during their lifetime, knowing that when they die their assets will end up in the hands of those they intend them to be.[120] Clawback provisions would reduce this certainty, leaving the owner of property unsure that their arrangements will survive. Additionally, innocent beneficiaries of a family trust will be unable to rely on the provisions made for them by the settlor if claimants are able to easily clawback trust assets.[121]

These concerns have led many jurisdictions to reject clawback provisions. For example, the National Committee for Uniform Succession Laws has proposed that all states in Australia follow

[115] Victorian Law Reform Commission *Succession Laws* (Report, 2013) at [6.179].

[116] Peart and Vines, above n 13, at 127-128.

[117] Peart and Vines, above n 13, at 114.

[118] Tasmania Law Reform Institute, above n 102, at [5.5.21].

[119] Tasmania Law Reform Institute, above n 102, at [5.5.18]-[5.5.19].

[120] Peart, above n 17, at 356-357.

[121] Tasmania Law Reform Institute, above n 102, at [5.5.52].

the New South Wales model.[122] However, this has been unanimously rejected on the grounds that the notional estate represents too great an infringement on property rights.[123]

Concerns over property rights have also prevented the success of uniform family protection laws in Canada.[124] Relevantly, the Uniform Law Conference of Canada suggested giving the Court the power to treat trust property as part of the estate where the deceased retained a power to revoke the trust or consume, invoke or dispose of the trust property.[125] Most provinces have rejected the Uniform Act on the basis of its intrusion on testamentary freedom and commercial certainty.[126] It is interesting to note that while a notional estate approach was rejected in British Columbia, a more limited clawback mechanism targeting property disposed of with the intention to defeat a claim has been suggested.[127] This approach was proposed on the basis that it protected testamentary freedom and certainty, while preventing deserving claimants from being deliberately denied a claim.[128]

C Conclusions

The above analysis shows how any proposed law reform must balance the conflicting policy objectives of testamentary freedom and effective family protection. The trend appears to be that clawback mechanisms are only warranted when they target property disposed of with the intent to defeat a claim. It can be implied from overseas that such an approach strikes an appropriate balance between testamentary freedom and protecting family protection laws. Where more expansive models have been introduced, they have been widely condemned.

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[122] National Committee for Uniform Succession Laws, above n 101, at 93-94.

[123] Victorian Law Reform Commission, above n 115, at [6.178]-[6.180] and [6.186]; Tasmania Law Reform Institute, above n 102, at [5.9.8] and [5.9.12]; and South Australian Law Reform Institute, above n 103, at [8.4.1].

[124] Uniform Dependants' Relief Act 1974 (Canada).

[125] Section 20(1).

[126] See for example Law Reform Commission of British Columbia *Report on Statutory Succession Rights* (LRC 70, 1983) at 95-97.

[127] British Columbia Law Institute *Wills, Estates and Succession: A Modern Legal Framework* (BCLI Report No 45, June 2006) at 202-203.

[128] At 203 and 205.

It is relevant to note that some jurisdictions have found clawback provisions to be a disproportionate response to the general lack of evidence that avoidance behaviour is an issue.[129] This is not the case in New Zealand, where the Law Commission has concluded that anti-avoidance mechanisms are justified by the current trend of avoidance.[130] The comparatively high use of discretionary trusts in New Zealand provides a likely reason for this,[131] with commentators noting the common use of trusts as a will-substitute to avoid the overreaching application of the FPA.[132] This author suggests that this provides an additional argument in favour of anti-avoidance mechanisms that was not as pertinent in other countries' consideration of anti-avoidance. Therefore, there is an argument to be made that more expansive models which have been rejected in other jurisdictions may have a place in New Zealand succession law.

VII A Critique of the Law Commission's Succession Law Proposals

As part of its suggestions for succession law, the Law Commission proposed the ICAE contain clawback provisions to address the scenario where insufficient property remains in the estate to satisfy a claim against the estate.[133] Public submissions indicated that will-substitutes such as trusts are being used to avoid claims against the estate, allowing the deceased to avoid their family protection obligations.[134] The Law Commission noted that the current anti-avoidance mechanisms applicable to succession law were "complex and burdensome" and in need of reform.[135] The law in some of these areas is unsettled and the Law Commission argues that express anti-avoidance

[129] See for example Victorian Law Reform Commission, above n 115, at [6.175] and [6.186].

[130] Law Commission, above n 1, at [8.17].

[131] Law Commission, above n 47, at [2.1]-[2.7].

[132] Peart and Vines, above n 13, at 114 and 128; Peart, above n 17, at 379; Porter, above n 36, at 105; and Jeremy Johnson and James Anson-Holland "Creation of Trusts" in James Anson-Holland and Others *Law of Trusts (NZ)* (online ed, LexisNexis NZ) at [2.1.5].

[133] At [8.7].

[134] At [8.17]; and Peart, above n 17, at 379.

[135] At [8.18]-[8.19].

mechanisms will provide greater certainty.[136] Paul and Day note that "Statutory anti-avoidance mechanisms should limit the court's recourse to alternative remedies."[137]

In response to this, the Law Commission has proposed a "limited clawback approach".[138] As described above, clawback provisions must balance the conflicting interests of testamentary freedom and family protection. The current proposals do not strike an appropriate balance and are in need of fine-tuning before they represent a desirable remedy to abusive trust structures.

A Intention to Defeat: Too Broad a Trigger for Liability?

In line with other jurisdictions, the Law Commission proposes that the Court have the power to recover property that was disposed of with the intent to defeat a claim under the ICAE.[139] Similar provisions have been viewed as balancing the competing policy objectives of testamentary freedom and effective family protection.[140] However, this is not the case in the context of New Zealand.

This clawback provision is modelled on similar provisions in the contexts of relationship property and insolvency.[141] In *Regal Castings v Lightbody*, the Supreme Court interpreted "intention to defeat a claim" to mean knowledge that the transaction will have the effect of defeating a claim.[142] This takes an objective view of intention, inferring intention to defeat a claim from the knowledge of a transaction's defeating effect.[143] This case was decided in the context of insolvency and has

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[136] At [8.67(b)].

[137] Susan Paul and John-Luke Day "Te Aka Matua o te Ture | Law Commission, on the Law Commission's recommendations for reform" (2022) NZLJ 21 at 32.

[138] At [8.32] and [8.59].

[139] At [8.59].

[140] British Columbia Law Institute, above n 127, at 202-203.

[141] Property (Relationships) Act 1976, s 44; and Property Law Act 2007, ss 344-350.

[142] *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 at [53]-[56].

[143] See Law Reform Commission of Western Australia *Joint Tenancy and Tenancy in Common* (Project No 78, Report, November 1994) at [4.24]; and Joshua George Oliver "Separation and separate legal entities: a case for reforming the Property (Relationships) Act 1978" (2022) 10 NZFLJ 191 at 196.

since been applied to the relationship property regime.[144] In the context of succession however, this test seems to cast the net too wide. It can be argued that an obvious consequence of transferring property out of the estate, is that less property will remain in the estate to satisfy the claims of aggrieved family members. Whenever property is transferred out of the estate such that little or no property remains, the deceased will know of the defeating effect this has on a claimant, therefore satisfying "intention to defeat" and triggering the operation of the clawback provisions.[145]

It can be argued that knowledge of a defeating effect is deservingly treated as an "intention to defeat". However, the author argues that there is a distinction between using a trust to intentionally prevent the possibility of estate claims and genuinely engaging in estate planning with the knowledge that this will have an incidental subversive effect. This distinction has been recognised by Patterson:[146]

> While some intend that assets be transferred to a family trust so as to defeat a claim … others use the trust as a proxy for their will and give extensive instructions to trustees as to how the trust should operate after their death.

Although it can be argued that such a distinction is minimal, a similar distinction has been drawn in the context of the Land Transfer Act 2017:[147]

> … where the boundary lies between honestly taking a registered interest, knowing of an inconsistent unregistered interest, and dishonestly taking a registered interest to the prejudice of an unregistered interest can often be "a matter of degree, even slight degree".

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[144] *Potter v Horsfall* [2016] NZCA 514, [2016] NZFLR 974 at [41].

[145] Morris Legal "IP46 Submission 195 Morris Legal" (10 June 2021) Law Commission <www.lawcom.govt.nz/> at [9.4]; and Kelly, above n 98, at 41.

[146] Patterson, above n 29, at 90.

[147] *North Shore Aero Club Inc v Black River Trustees Ltd* [2020] NZHC 3070 at [35].

This distinction is necessary to ensure that good faith parties are able to rely on their property rights.[148] Treating mere knowledge as sufficient to unwind transactions significantly undermines the ability of people to deal with property as they wish. The Law Commission's proposal fails to recognise this distinction, catching property disposed of for a clear subversive purpose as well as property disposed of as part of genuine estate planning. The current proposals therefore represent an unjustified infringement on the property rights of the deceased and will undermine the autonomy enhancing feature of the trust.

The threshold of "intention to defeat" is further lowered when one considers that entitlement under the ICAE will not be quantifiable at the time the settlor transfers property to a trust. Entitlement under the ICAE will be based on the discretion of the Court and will be highly dependent on the facts of an individual case, including what has happened since the transfer of property.[149] In comparison, entitlement under the PRA and Property Law Act 2007 (PLA) are quantifiable, relating to a share of relationship property or a debt owed respectively.[150] Under the PRA and PLA, clawback provisions are triggered where the settlor had knowledge of the defeating effect on a quantifiable claim. This is a higher threshold than under the ICAE, where the clawback provisions will be triggered where the settlor knows the disposition of property will have a defeating effect, regardless of the value of that claim.[151] Again, this arguably applies to any disposition of property.

The Law Commission has described the current proposal as a "limited clawback approach".[152] However, it is likely to have a far more expansive application than intended. If the Law Commission thinks a "limited clawback approach" is appropriate, further refinement is needed before this is achieved.

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[148] Neil Campbell and Rod Thomas "The Fraud Test and 'Manifest Injustice' under the New Land Transfer Act" (31 August 2018) Social Science Research Network <www.ssrn.com> at 13.

[149] Law Commission, above n 1, at [5.102]-[5.108]; [5.135]-[5.145]; [5.154]-[5.156]; and [5.169]-[5.171].

[150] Property (Relationships) Act 1976, pt 4; and Property Law Act 2007, s345(1)(a).

[151] TGT Legal "IP46 Submission 197 TGT Legal" (11 June 2021) Law Commission <www.lawcom.govt.nz/> at [54.2(c)]; and Law Commission, above n 1, at [8.61].

[152] Law Commission, above n 1, at [8.32].

B Defences: Ineffective and Inefficient

The Law Commission proposes two defences that prevent a Court from making an order even where the "intention to defeat" test has been met. Firstly, the Court is unable to make an order over property purchased for valuable consideration by a good faith purchaser.[153] Such a defence is well established but has little relevance in this context,[154] where it is common to transfer property to a trust via a gift.[155]

The second defence states that where valuable consideration has not been provided but the property was received in good faith, the Court must exercise its discretion to determine whether it is unjust to make an order.[156] This defence is more relevant in the context of trusts. However, the following issues are concerning.

1 Receiving property in good faith

The application of the second defence relies on the recipient of the property receiving it in good faith. In the context of a trust, the recipient of the property will be the trustee. In order to retain some degree of control over the trust assets, it is very common for a settlor to make themselves a trustee of their family trust.[157] Where the settlor disposed of the property with the "intention to defeat", an argument that the recipient received the property in good faith will never be successful where the settlor is also a trustee. Even where other trustees were completely innocent they will

[153] At [8.68].

[154] Property (Relationships) Act 1976, s 44(2); and Property Law Act 2007, s 349(1); and see generally Dagan and Samet, above n 79, at 39.

[155] Peart and Vines, above n 13, at 116.

[156] At [8.70].

[157] Hudson, above n 52, at 74; and Henry Brandts-Giesen and Sarah Kelly "Rethinking traditional asset planning in New Zealand" [2018] NZLJ 263 at 263.

be imputed with the settlor's intention, meaning the settlor will not be able to avoid the application of this provision by claiming the other trustees received the property in good faith.[158]

In the rare circumstances that a settlor is not also a trustee, it is unlikely that an independent trustee will be able to rely on this defence of good faith receipt. Where the intention of the settlor is to defeat a claim against the estate, it is likely that an independent trustee would be aware of this intention, preventing the application of the defence of good faith. *Kain v Hutton* has described how a trustee must understand the wishes of the settlor.[159] Additionally, the Trusts Act 2019 describes how a trust should be administered in a way consistent with its terms and objectives and Anthony Grant suggests that a settlor's intention is relevant to this.[160]

The Law Commission has recognised the possibility that the "intention to defeat" test may be too broad, justifying this on the basis that "the recipient of property may be able to rely on the defences".[161] This indicates that insufficient consideration has been given to how trusts will be impacted by these proposals. The wide scope of "intention to defeat", coupled with the low chances of a successful defence, makes it likely that a large number of family trusts will be unfairly caught by the clawback provisions.

2 Broad discretionary powers

Even assuming the trustee has received the property in good faith, the discretion given to judges is too broad and risks providing for uncertain and inefficient administration of estates. Where the property was received in good faith, the Court will claw back trust assets unless it is unjust to do

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[158] Tāneora Fraser and John-Luke Day "What property should be available to satisfy family members' claims against an estate?" (2022) 10 NZFLJ 173 at 176; and *Regal Castings Ltd v Lightbody,* above n 142, at [70].

[159] *Kain v Public Trust* [2021] NZCA 685 at [136].

[160] Anthony Grant "The thorny issue of a settlor's intentions" (4 February 2022) <http://anthonygrant.com/trusts>; referring to section 4(a).

[161] At [8.61].

so.[162] This bestows a level of discretion that exceeds that given under the equivalent provisions under the PRA[163] and PLA.[164]

Beyond charitable gifts,[165] the Law Commission provides no explanation as to what scenarios will be "unjust". The assessment of whether an order is unjust will be heavily contextual and will likely lead to prolonged disputes. Whether something is unjust is primarily a value judgement, meaning different judges may come to different conclusions on the same facts. In comparison, s44(4) of the PRA provides the Court with a much clearer view of where it would be unjust to claw back trust assets. Under s44(4), the Court must exercise its discretion to consider whether making an order would be unjust, due to the reliance the recipient has placed on their interest in the trust property. Under the ICAE there is scope to take into consideration more factors than the recipient's reliance. For example, it is not clear whether a Court could consider the interests of discretionary beneficiaries who have nothing more than an expectation they will benefit from the trust.

The Law Commission states that this broad wording is intended to recognise the diverse range of circumstances that the Courts may come across.[166] Although this objective is warranted, the author suggests that further refinement is needed to avoid prolonged disputes that will lengthen the administration of the estate. The Law Commission describes "promoting efficient estate administration and dispute resolution" as one of the objectives of reform:[167]

> For those who wish to claim against an estate or defend a claim, the law should enable them to understand their rights and to determine the strength of such a claim … Parties should be able to settle disputes without the need for defended court proceedings

[162] Law Commission, above n 1, at [8.68] and [8.70].

[163] Section 44(4).

[164] Section 349.

[165] At [8.71].

[166] At [8.70].

[167] At [2.147]-[2.150].

With the current discretion given to judges, this objective is unlikely to be successful. Anti-avoidance mechanisms should be easily applicable and provide a clear framework for the Courts to follow. Similar criticisms were made in regard to the broad discretion permitted under the FPA. It would be illogical to amend the wide discretion under the FPA yet provide for a similarly broad level of discretion in regard to clawback provisions operating under the same regime.

C Suggestions for Reform

The above discussion sets out why the differences between trusts and other transactions make a general clawback provision inappropriate. Therefore, the best way forward for succession law is to include a specific clawback provision for trusts. This section sets out how the proposals of the Law Commission can be refined to uphold the autonomy enhancing feature of the trust.

1 Taking a subjective focus

In line with other jurisdictions,[168] the author suggests that an objective focus is too broad and undermines property rights. The author suggests that a subjective assessment is more appropriate, focusing on the fraudulent intentions of the deceased. Such a provision could be worded as follows.

> (1) Where there is insufficient property in an estate to meet all entitlements and awards under this Act, the Court has the power to recover property the deceased has settled on trust where:
>
> (a) The deceased fraudulently disposed of that property with the intention to defeat an entitlement or claim under the Act.

Fraud under this provision is intended to correspond with the understanding of fraud under the Land Transfer Act 2017 (LTA fraud).[169] The essence of LTA fraud has been described as

[168] Law Reform Commission of Western Australia, above n 143, at [4.24].

[169] Section 6.

"intentional dishonesty",[170] "moral turpitude"[171] or "a wilful and conscious disregard and violation of the rights of other persons".[172] The author suggests that such a standard will catch cases like *D v A*, where the trust was created to "prevent any of his family [from] chasing his assets".[173] Such a case undoubtedly satisfies the threshold of "intentional dishonesty", meaning the deceased is prevented from using the trust to subvert succession law.

The concept of LTA fraud will also protect the autonomy enhancing function of the trust. LTA fraud will not be established by mere knowledge of the defeating effect of a transfer, some element of dishonesty is required.[174] Applying such a concept to this context recognises that when permitting trusts to operate there will always be some incidental subversion of the law.[175] In order to allow trusts to carry out their autonomy enhancing function, it is essential that knowledge of the incidental subversive effect does not undermine genuine estate planning. The proposed provision therefore effectively distinguishes trusts used to subvert succession law from estate planning with an incidental subversive effect. For example, a settlor may transfer all his assets to a trust with the direction that upon his death, the trust assets be used to fund various research and charitable ventures.[176] The settlor knows that such a transaction will have the effect of preventing his children from making a claim against his estate, but the author suggests that the "moral turpitude" required to trigger the clawback provisions is not present in this scenario. The settlor is using a trust in good faith to direct how his property is to be used after his death, not to dishonestly deprive his children from making an estate claim.

As noted in other jurisdictions,[177] a subjective test will be harder to satisfy and therefore easily circumvented. This is an unfortunate but necessary consequence of ensuring such clawback

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[170] *North Shore Aero Club Inc v Black River Trustees Ltd*, above n 147, at [32].

[171] *Bahr v Nicolay (No 2)* [1988] 164 CLR 604 at 614.

[172] *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1923] NZLR 1137 (CA) at 1173.

[173] At [48].

[174] See Section 6(2)(b); and *North Shore Aero Club Inc v Black River Trustees Ltd*, above n 147, at [34]-[35].

[175] Bennett and Hofri-Winogradow, above n 53, at 714.

[176] This example is loosely based on the facts of *Carson v Lane* [2019] NZHC 3259 at [12].

[177] Victorian Law Reform Commission, above n 115 at [6.183]; and Law Reform Commission of Western Australia, above n 143 at [4.9] and [4.24].

provisions do not operate too broadly as to undermine the beneficial uses of trusts. In sections VIII and IX, further methods of clawback will be discussed which attempt to offset the negative consequences of having a higher threshold.

2 The court's discretion

The Court must be awarded the discretion to decline to access trust assets in circumstances where it would be unjust. The Law Commission has expressed concern at the wide discretion the concept of "moral duty" awards Courts under the FPA.[178] The author suggests that these concerns are equally valid when allowing Courts to exercise their discretion under the vague concept of injustice. The Courts must be directed as to what factors are relevant in determining whether accessing trust assets would be unjust.

Examples of such relevant considerations could include interested parties altering their position in reliance on the arrangement, the interests of only disturbing property arrangements to the minimum extent possible, the interests of other discretionary beneficiaries in the trust not being disturbed and any other purposes the deceased had in mind when providing for these arrangements.

These suggestions are not intended to point out all factors relevant to a Court's assessment. What it shows is that providing guidance for the Court's exercise of discretion is preferable to allowing the Court to exercise its discretion based on vague concepts such as injustice.

VIII An Assessment of the Notional Estate

The previous section proposed a limited clawback mechanism targeting intentional subversion of succession law. This section will describe why further clawback mechanisms that look beyond intentional subversion should exist alongside the proposals made in the previous section. The notional estate will be discussed as a potential option, ultimately concluding that such an approach is not a desirable option for New Zealand succession law.

[178] At [5.28]-[5.29].

A The Need for a More Expansive Approach

A number of factors discussed in this paper have indicated the need for further clawback mechanisms which take a broader focus than subversive intention. Firstly, the clawback mechanism proposed in section VII requires a high threshold in order to avoid unravelling the beneficial uses of trusts. More expansive options of clawback mechanisms will offset the negative consequences of such a threshold by enlarging the potential pool of assets available to claimants, therefore making claims against the estate more effective. Section IV identified excessive settlor control as an abusive feature of the trust that deserves to be targeted by clawback mechanisms. Such control can be the focus of a more expansive approach. Whereas mechanisms in other jurisdictions which target the deceased "dominion and control" have been mainly rejected in favour of protecting property rights,[179] section VI suggested that more expansive clawback mechanisms may be an appropriate response to New Zealand's comparatively widespread use of trusts. Further clawback mechanisms must balance the property rights of the deceased with the need for a more expansive approach.

B Rejecting the Notional Estate

In its Issues Paper, the Law Commission suggested a "comprehensive clawback mechanism" based on the notional estate approach used in some jurisdictions.[180] The approach targets the deceased's control over property not within their ownership, treating such property as within the estate on the basis that the property would have been part of the estate if the deceased had exercised their control before death. In the context of trusts, the notional estate targets the deceased powers of appointment and revocation. If such powers had been exercised, the trust property would have been returned to the deceased ownership and would be distributed upon their death as part of the

[179] See for example Victorian Law Reform Commission, above n 115, at [6.178]-[6.180] and [6.186]; Tasmania Law Reform Institute, above n 102, at [5.9.8] and [5.9.12]; and South Australian Law Reform Institute, above n 103, at [8.4.1]; see also Allison Tait "Trusting Marriage" (2019) 10 UC Irvine L Rev 199 at 219.

[180] At [9.45].

estate.[181] Where such powers exist, the Court is able to order the transfer of trust property or a sum of equivalent value to the estate.[182] Such a suggestion was widely condemned by public submissions and was not continued across into the Law Commission's final proposals.[183] Although the notional estate addresses the need for more expansive clawback mechanisms, the following discussion will indicate why it does not represent a desirable option.

1 A significant incursion on property rights

Under the notional estate, the mere existence of trust powers triggers the application of clawback provisions. This effectively targets omissions to act, whereas the intentional subversion clawback provisions target "positive asset stripping undertaken with the intention of defeating claims".[184] The policy rationale for this appears to be that once the settlor is aware they are approaching death, they are obliged to exercise their trust powers so that the trust property becomes part of their estate and will be distributed upon their death. If they do not exercise their powers, the notional estate applies to achieve the same result.[185] However, people should be free to structure their affairs such that property passes out of their estate.[186] Without evidence that the deceased has engaged in positive acts to abuse the trust, trust property should not be accessible on the basis that the deceased omitted to distribute trust assets to themselves before death.[187]

This argument is strengthened when one considers that settlor control is only unjustified when it is combined with the subversive feature of the trust to "cherry pick" trust advantages.[188] Clawback provisions should therefore target those who engage in positive acts to abuse the trust in this way. The notional estate will target trust property without evidence of such positive actions, merely

[181] Law Commission, above n 97, at [9.46].

[182] Law Commission, above n 97, at [9.47].

[183] At [8.77].

[184] Tasmania Law Reform Institute, above n 103, at [5.7.9].

[185] See Law Reform Commission of Western Australia, above n 143, at [4.25].

[186] Law Commission, above n 97, at [1.7].

[187] Tasmania Law Reform Institute, above n 103, at [5.7.9].

[188] Webb, above n 69, at 477.

focusing on the existence of trust powers. Property can be accessed even where the trust powers were not exercised during the deceased's lifetime, or without evidence that such powers were retained with the intention that they be used to exercise control over trust property. This appears to take an objective approach to settlor control, treating the existence of trust powers as evidence of an intention to exploit the features of the trust. Such an approach is inappropriate in the context of succession. Without evidence that the deceased had the intention of using these powers, it would be unjust to unwind arrangements on the basis that the deceased had the ability to control trust property but did not. As the settlor is dead, they cannot provide evidence as to their reason for retaining those powers.[189] Reserving such powers is a common trend in trust practice and it is plausible that the deceased could have held these powers without understanding the significance of them.[190] To access trust property on the mere existence of trust powers represents an unjustified incursion on property rights, unravelling arrangements the deceased made during their lifetime.

Additionally, providing for a list of trust powers that trigger clawback on the basis that they exist will undermine the flexibility which is inherent to the trust's autonomy enhancing function.[191] A settlor cannot include such powers in the trust deed, without making the trust assets available to satisfy estate claims. In the context of succession, a better approach is to provide for a general standard which will trigger the application of clawback provisions.[192] Settlors will be free to structure a trust as they like, with the knowledge that they will trigger liability if they pass over a specified standard. Directing settlors as to what will trigger liability and allowing them to act accordingly is a more desirable option than denying them the ability to include certain powers.

[189] See generally South Australian Law Reform Institute, above n 103, at [8.3.3].

[190] See Duncan and Brandts-Giesen, above n 64, at 194 and 199-200; Brandts-Giesen and Kelly, above n 151, at 263-264; and Henry Brandts-Giesen and Jeremy Bell-Connell "The nature, duties, and powers of third party power holders under trusts" [2022] NZLJ 207 at 209.

[191] Bennett and Hofri-Winogradow, above n 53, at 713; and Peart, above n 47, at 584.

[192] See Bennett and Hofri-Winogradow, above n 53, at 717-718.

2 An ineffective remedy for settlor control

The notional estate fails to properly address the multitude of ways by which a settlor can retain control of trust property. The notional estate approach explicitly refers to powers of appointment and revocation on the basis that trust property would have become part of the estate if the deceased had exercised those powers.[193] However, this approach is inadequate as a clawback mechanism targeting settlor control. The inherent flexibility of the trust means that resourceful trust practitioners will easily find new ways to structure the trust in a way that allows the settlor to retain control.[194] Knobel has indicated the difficulties associated with providing for a closed list of condemned trust features, noting "these would need to be updated regularly to keep pace with harmful innovations in trust laws".[195] Similarly, Tait has criticised a notional estate approach on the basis that "problems arise when the asset is not listed".[196] For example, in *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* the settlor retained powers to veto trustee decisions and remove and appoint trustees without cause.[197] Such powers would not be caught by the notional estate but allow the settlor to "retain his beneficial ownership of the assets".[198]

IX Effective Control: An Appropriate Solution?

Although an approach modelled on the notional estate is not a suitable option for New Zealand succession law, this does not mean that the argument in favour of further clawback mechanism should be ignored. By examining how settlor control is addressed in other contexts, this section will describe how a focus on effective control is a desirable approach for succession law. Such a provision introduces a more expansive clawback mechanism which responds to the shortcomings of the notional estate.

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[193] Law Commission, above n 97, at [9.45(d) and (e)]-[9.46].

[194] See for example Duncan and Brandts-Giesen, above n 64, at 199-200; and Brandts-Giesen and Bell-Connell, above n 183, at 210-211.

[195] At 48.

[196] At 218.

[197] *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev,* above n 66, at Clauses 4.5, 6.3 and 6.1.

[198] At [278].

A Legislative Responses to Settlor Control

1 New Zealand

Settlor control is a relevant consideration in a number of statutory contexts in New Zealand. For tax avoidance purposes,[199] Courts have looked at the continued benefit derived from the trust income.[200] Such continued benefit leads to a conclusion that a trust has tax avoidance as its purpose or effect, leading to a conclusion that the trust is a tax avoidance arrangement.[201] Settlor control over the trust property would be a relevant consideration in such an assessment and a strong indication that the trust was a tax avoidance arrangement.

An applicant's interest in a trust and any potential benefit from that trust are relevant considerations in the context of assessing eligibility for legal aid.[202] This involves assessing the degree of settlor control, having regard to the trust deed, trust powers and history of trust transactions. Additionally, settlor control is a relevant consideration for the purpose of recovering criminal proceeds.[203] Where criminal proceeds have been disposed of to a trust yet effective control was retained by the settlor, the Court is able to treat the settlor as retaining an interest in that property.[204]

Furthermore, the Law Commission recently considered whether to expand the definition of property under the PRA.[205] It suggested including "any interest under a trust through which it is both likely and permissible that the partner will receive a distribution of the trust property".[206] Settlor control would undoubtedly be a relevant consideration in assessing whether such an interest

[199] Income Tax Act 2007, s BG 1.

[200] *Penny v Commissioner of Inland Revenue* [2011] NZSC 95, [2012] NZLR 433 at [35].

[201] Section YA 1.

[202] Legal Services Regulations 2011, s 8(4).

[203] Criminal Proceeds (Recovery) Act 2009.

[204] Section 58; and see for example *Commissioner of Police v Filer* [2013] NZHC 3111 at [43].

[205] Law Commission *Dividing relationship property – time for change? | Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [22.11].

[206] At [22.11].

existed. However, this option for reform was not preferred in the final proposals of the Law Commission.[207]

2 Australia

For the purpose of determining spousal payments, settlor control is a relevant consideration when assessing a partner's financial resources.[208] An interest in a trust will form part of a partner's financial resources if the partner has "a reasonable expectation that the trustee's discretion will be exercised in his or her favour".[209] Settlor control is clearly a relevant factor in such an assessment.

3 United Kingdom

Similarly to the Australian approach, a Court can consider settlor control when assessing a partner's financial resources for the purpose of making a spousal payment.[210] When assessing whether an interest in a trust is a financial resource, Courts must consider whether the trustee would be likely to advance trust property to the settlor if they were to ask.[211] Settlor control would be strong evidence of this test being satisfied.

For taxation purposes, trust income will be attributed to the settlor where they retain an interest in the trust property.[212] The settlor will have a retained interest in the trust property where circumstances exist in which the trust property is, will or may become payable to the settlor.[213] Settlor control over the trust property is an example of such circumstances.

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[207] Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [11.68].

[208] Family Law Act 1975 (Cth), s 75(2)(b).

[209] *Hall v Hall* [2016] HCA 23, (2016) 332 ALR 1 at [54].

[210] Matrimonial Causes Act 1973 (UK), s 25(2)(a).

[211] *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246 at [48]-[49].

[212] Income Tax (Trading and Other Income) Act 2005 (UK), s 624.

[213] Section 625.

B Effective Control as a Response for New Zealand Succession Law?

Wall describes how legislatures will extend non-trust law beyond formal understandings of property, targeting functional understandings of ownership.[214] The above discussion exemplifies this, showing how excessive settlor control has been addressed in other statutory contexts. These provisions operate to deny the settlor "from asserting that they have no property, when in reality they can access property as and when they choose to do so".[215] Such provisions do not permit a Court to claw back trust assets and widen the pool of assets available to claimants, yet the Law Commission has indicated that a clawback provision targeting settlor control is possible.[216] The drafting of any similar provisions for succession law must therefore consider the concerns raised by the Law Commission that prevented them from introducing such a provision in the context of relationship property.[217]

A functional understanding of property similar to those outlined above would seem to be a suitable basis for further clawback mechanisms for succession law. The author sees no difference between obligations upon death and obligations during the deceased's lifetime. If the exercise of control over trust assets would attract liability while alive, succession law is deserving of similar treatment. Alternatively, Kelly has suggested that succession law must adhere to a formal understanding of property as the settlor has died and can no longer exercise control over trust property.[218] However, such an argument would lead to the undesirable result where a settlor is effectively able to decide if their property is subject to succession law. By putting property in a trust, the settlor is able to shield property from claims against the estate while continuing to exercise control during their lifetime as if they retained ownership.[219] In order to prevent this injustice, a functional understanding of property appears to be an appropriate option for further clawback mechanisms.

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[214] Jesse Wall "The Functional-Formal Impasse in (Trust) Property" (2018) 14 Int JLC 437 at 451.

[215] Peart, above n 47, at 584-585.

[216] Law Commission, above n 198, at [22.11] and [22.14].

[217] At [22.20]-[22.22].

[218] At 42-43.

[219] Peart and Vines, above n 13, at 115.

Barkley has discussed the deceased ability to control trust assets as a possible clawback mechanism for succession law. Although not his preferred option, he suggests that:[220]

> … if a person dies with the practical power to obtain trust assets for their own benefit without effective recourse by other beneficiaries, then those assets should be available to satisfy estate claims.

If modified to reflect the shortcomings of the notional estate, this proposal represents a desirable option for succession law. Such a proposal could be worded as follows, building on the previous proposals outlined in section VII:[221]

(1) Where there is insufficient property in an estate to meet all entitlements and awards under this Act, the Court has the power to recover property the deceased has settled on trust where:
   (a) The deceased fraudulently disposed of that property with the intention to defeat an entitlement or claim under the Act; or
   (b) The deceased died with the ability to exercise effective control over the trust property; and
      (i) The deceased exercised effective control over that property during their lifetime; or
      (ii) The deceased retained the ability to exercise effective control with the intention of using that ability to control the trust property during their lifetime.

Where this provision applies, the Court is able to treat that property as part of the estate. To satisfy an ICAE claim, the Court has the power to order the transfer of trust property or a sum of equivalent value to the estate.[222]

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[220] Tobias Barkley "IP46 Submission 171 Tobias Barkley" Law Commission <www.lawcom.govt.nz/> at 6.

[221] For clarification, the proposals relevant to this section are outlined at s 1(b).

[222] This mirrors the suggestions of the Law Commission, above n 97, at [9.40] and [9.47].

C Explaining the Proposed Provision

The proposed provision has been drafted such that it responds to the shortcomings of the notional estate, while still providing for a more expansive method of accessing trust assets. Firstly, a general standard such as effective control addresses several shortcomings of the notional estate. By turning the focus from the existence of trust powers to the reality of effective control, resourceful lawyers have less scope to draft trust deeds in such a way that circumvents the proposed law.[223] Furthermore, the essential autonomy enhancing aspect of the trust is better served by setting out a standard by which the settlor is able to respond to.[224] Under the proposed provision, the settlor is free to structure a trust as they wish, in the knowledge that if they retain effective control the trust property may be subject to estate claims.

The actual exercise of effective control over trust property has been selected as this targets the explicit "cherry-picking of trust advantages".[225] The proposed provision also targets effective control which was never exercised before the death of the settlor, yet which was explicitly retained for such a purpose. It would be arbitrary if two trusts are both set up with the intention that the settlor retains effective control, yet by chance one settlor dies before actually exercising such control and the trust is therefore able to avoid the clawback provisions. Both are positive actions done to abuse the trust and accessing trust property in such circumstances is a justified infringement on property rights.[226] Such trusts are deservedly treated differently from those where the settlor had no intention of retaining effective control, yet due to the drafting of the trust deed has such an option. To ensure that such trusts are not caught by clawback mechanisms, the proposed provision targets positive actions with the express intention of abusing the features of the trust. Without proof the settlor is intending to "cherry-pick" trust advantages, they should be allowed to rely on the arrangements they have intended to create.

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[223] See Tait, above n 172, at 218-219.

[224] See Bennett and Hofri-Winogradow, above n 53, at 717-718.

[225] Webb, above n 69, at 477.

[226] See Wall, above n 207, at 451-452; and Bennett and Hofri-Winogradow, above n 53, at 701-703.

This standard will inevitably miss cases where the settlor's intention to retain effective control is hidden.[227] However, the settlor knows they cannot exercise control without permitting the Court to access trust property upon their death. The risk of liability will incentivise settlors to refrain from exercising effective control and "cherry picking" trust advantages. This will "likely lead to the use of trusts in ways that actually alter the substance of the settlor's ownership of property".[228] Although the Court is unable to access trust property in such circumstances, this is an acceptable trade-off as settlors are less likely to exploit the features of the trust.

The proposed provision responds to the Law Commission's main reason for rejecting a similar provision in the context of relationship property.[229] Their proposed test,[230] as well as the financial resources test used in other jurisdictions,[231] focuses on the likelihood of a partner continuing to benefit from the property in such a way that undermines the purpose of the legislative scheme.[232] The Law Commission was concerned with the evidential complexity that comes with the "need to inquire into many matters to consider the likelihood that a partner would receive a distribution of trust property", as well as the difficulty of valuing interests where such a valuation is based on a prediction as to how the trust will be administered.[233] The proposed provision simplifies the Courts assessment by only focusing on actual control exercised during the deceased lifetime, or evidence that such control was retained to abuse the features of the trust. Where such control or intention is present, the Court is able to treat the trust property as part of the estate and use it to satisfy estate claims. This simplification is possible due to the clear differences between the division of property on separation and death. In the context of separation, the interest provides the settlor with a valuable asset that frustrates the equal distribution of relationship property.[234] Assessing the likelihood of future benefit is necessary to achieve the purpose of providing for a just division of

[227] See the concerns of the Law Commission, above n 198, at [22.20].

[228] Bennett and Hofri-Winogradow, above n 53, at 718.

[229] Law Commission, above n 200, at [11.68].

[230] Law Commission, above n 198, at [22.11].

[231] Family Law Act 1975 (Cth), s 75(2)(b); and Matrimonial Causes Act 1973 (UK), s 25(2)(a).

[232] Law Commission, above n 198, at [22.19].

[233] At [22.22].

[234] Diana Bryant "Heterodox is the new orthodox - discretionary trusts and family law: a general comparison" (2014) 20 T & T 654 at 669.

relationship property.[235] In the context of succession, the Court's focus should be whether the deceased abused the trust during their lifetime. Valuing any interest by assessing the likely benefit from the trust is a futile exercise, as the deceased is unable to exercise control over the trust after their death.[236] The potential to abuse the trust by continuing to benefit is not a relevant concern, allowing the Court to engage in a simple assessment of the deceased's actions during their lifetime.

D Summary

Combined with the limited clawback mechanism proposed above, this solution represents an effective remedy to prevent the abuse of trusts in the context of succession. Where property is fraudulently settled on trust to defeat a claim against the estate, the Court will be able to access trust property for the purposes of satisfying an estate claim. Where property has been settled on trust without such fraudulent intention, the Court is still able to access the property if the deceased continued to exercise control over the trust assets. Such a solution strikes an acceptable balance between providing for effective family protection laws and upholding the testamentary freedom of the deceased.

X Conclusion

The relationship between trusts and succession law is complex, as the inherent flexibility of the trust has led to its emergence as a device of both social benefit and abuse. The trust plays a key role in facilitating the ability of property owners to make unique arrangements that continue beyond their death. The trust has also emerged as a popular device to avoid the application of the FPA and deny deserving family members from making a claim against the estate. No normative justification exists for subversive trust use, this argument only gaining momentum when one considers the Law Commission's current attempts to move the FPA back in line with societal

[235] Rachael Yong "Time for a Change? The Law Commission's Review of the Property (Relationships) Act 1976 and its Recommendations on Trusts (2020) 26 Auckland U L Rev 263 at 274; *Clayton v Clayton [Vaughan Road Property Trust]*, above n 20, at [79]; and Law Commission, above n 200, at [11.15]-[11.17].

[236] Kelly, above n 98, at 42.

expectations. The interplay between trusts and succession law is therefore an issue of relevance for New Zealand. The subversive use of trusts to avoid succession law must be prevented, while the beneficial role the trust plays in the context of succession must not be undermined.

This paper has sought to provide an answer to this issue, proposing an ideal solution that balances the conflicting concerns of succession law. The proposals have been carefully drafted to target abusive trust structures, while still permitting the trust to continue as a device for estate planning. Family protection laws allow family members to claim against the estate in appropriate circumstances. The proposed clawback mechanisms would ensure that such laws are not undermined by the use of trusts in New Zealand, while still allowing the use of trusts as a common device in estate planning. This represents a desirable shift in succession law, where the unconstrained use of trusts has pointed New Zealand towards absolute testamentary freedom.

XI Word Count

The text of this paper (excluding cover page, table of contents, footnotes, and bibliography) comprises approximately 12,096 words.

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