Family trusts - Time for reconsideration?

Maureen Southwick*

The protective legislation which frequently results in assets held within a family trust being removed from the ambit of a matrimonial property claim needs legislative amendment and judicial reconsideration in order to prevent potential inequity of division. Recent judicial interpretation may give some hope. However legislative change would more adequately address a very real problem.

In investigating the ability to reach property within a family trust, the New Zealand position still requires that consideration must be given to various sections of the Matrimonial Property Act 1976, the Trustee Act 1956 and to section 182 of the Family Proceedings Act 1980. An essential improvement in clarification and uniformity would result from an amalgamation of the various provisions under the one Act (most appropriately the Matrimonial Property Act).

A number of anomalies exist while the present legislative guidelines remain. For example the provisions of section 182 of the Family Proceedings Act are only available after the making of a dissolution order, presumption of death declaration or a declaration of a void marriage. Further difficulties arise from the fact that the High Court retains sole jurisdiction to consider applications pursuant to the Trustee Act 1956. Such an application may well essentially be a matrimonial property application and the manner in which the issue is forced to proceed under the Trustee Act may be entirely inappropriate.

There is no doubt that the family trust device, for the long or even short term advantage of one party, is largely a male dominated and male advantaging activity As such, it adds fuel to the fire of those who maintain male priority in the provisions of the Matrimonial Property Act and the Family Proceedings Act.

Nevertheless the question can fairly be asked - is existing legislation, piecemeal though it might be, explored enough in the attempt to break the armour of the family trust?

In particular section 182 of the Family Proceedings Act (while having its time limitations and a requirement that a settlement must have been made on the parties) may be a more useful device than appears at first blush. That usefulness was illustrated in the decision of *Chrystall* v *Chrystall,*[1] a decision of his Honour Judge Inglis QC. This was a case involving a family trust set up six years prior to separation to ensure that a

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* Barrister and Solicitor of the High Court of New Zealand.

1 [1993] NZFLR 772.

farm stayed within the family. The wife was included as a discretionary beneficiary as to housing and income only. After a marriage of 22 years during which it was acknowledged she had made significant contributions to the marriage partnership both generally and with respect to the farming enterprise, the wife stood to receive a small cash sum, not included in the family trust, whilst income and capital held in the trust vested in the husband.

For the provisions of section 182 to apply, the court was required and did find that a "post nuptial settlement on the parties" existed and that the settlement was designed not with a view to its impact on the husband alone but with a view to preserving a family asset. It was further held that in exercising the court's discretion under section 182 and in particular subsection (3) the court should contemplate "how the settlor might have proposed to formulate the settlement... if aware of the likelihood of the circumstances which arose".[2] His Honour found that it was a major purpose of section 182 to enable the court to resort to trust assets, or to modify the trust deed in response to the changed circumstances of an unforeseen divorce, so that one party cannot benefit from the settlement unfairly at the expense of the other. It is of interest to note that a further factor taken into account was the limitation on spousal support following dissolution.

The result of his Honour's consideration of the circumstances before him was an order that the trust should purchase and maintain a home for the use of the wife in addition to making a payment of a capital sum to her.

Whilst it has been said that this decision "shook the farming community" it nevertheless indicates a shift towards greater equity in circumstances which demanded such an approach. Nevertheless it needs to be said that the provisions of section 182 continue to present a number of limiting criteria.

A glance at the Australian approach indicates that the courts in that country have taken a quantum leap in their attempt to do justice between the parties by elevating a party's benefits gained from a trust beyond a "financial resource" (a concept recognised by their legislation) towards the category of actual property of that spouse. In the case of *Ashton* v *Ashton,*[3] the Full Court held that the trust under consideration was no more than the husband's "alter ego" and it was further said that "in a family situation such as the one here, this Court is not bound by formalities designed to obtain advantages and protection for the husband who stands in reality in the position of the owner".[4]

Areas of reform are not difficult to envisage. During at least the last six years such reform has been suggested, urged, but apparently rejected. Among the ideas mooted those emerging most often have been:

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2 Above n 1, 788.
3 (1986) FLC 91-777 at p 75,648.
4 Above n 3, at p 75,653.

(a) The adoption of the concept of financial resource derived from legal or de facto control of a trust being brought into the division.

(b) Adoption of the Canadian "claw back" concept.

(c) Legislative amendment providing that it is sufficient to show that the device of the trust has **in fact** defeated or diminished a right or claim - that is, deleting the present necessity to prove an **intention** to defeat.

Whilst the concept of financial resource remains unavailable and portions of our legislation are unchanged, the New Zealand courts may struggle to do justice in an area spotlit by those asking the question - is their truly equity after separation? In considering areas of reform, objections are raised in some circles as to what is seen as a potential return to a discretionary approach to property division. Reality however may be that such an approach cannot be avoided in an increasingly sophisticated financial society wherein as one device eventually proves unworkable another emerges.