Cradle to Grave
The Interface Between Property and Family Law

THE BUNDLE OF RIGHTS DOCTRINE – WHAT IS THE LAW?

by **Anthony Grant**

CONTENTS

THE DOCTRINE

I begin this paper by referring to the origins of the "Bundle of Rights" doctrine and to its meaning.

The doctrine has not been defined by the Courts. In general, it teaches that a person may have various "rights" or "interests" in a Trust that can be classified as "relationship property" for the purposes of the Property (Relationships) Act. The "doctrine" has great significance since the aspects of the Trusts that can be classified as "relationship property" are currently found in most family Trusts. The possessor of the rights is then treated as owning assets, the value of which will equate to the value of the assets of the Trust that they control. In this way, the intention to establish a Trust may be completely defeated.

In its latest guise, the doctrine has been extended so as to convert the assets within a Trust into relationship property. Among the far-reaching consequences of this development – if it is legally correct - is the prospect that many records relating to the ownership of land will be inaccurate.

THE CASES

B v M

It has been said that the first case in which the doctrine appeared was *B v M* [2005] NZFLR 730, a decision which Allan J decided at first instance. It was argued before him that the definition of the term "property" in the PRA was:

> *"broad enough to cover the interests of the parties both as discretionary beneficiaries under [two] Trusts and as final beneficiaries."*[1]

Allan J held that

> *"the definition of the term 'property' in s 2 of the PRA is sufficiently wide to cover the rights and interests of a spouse as a beneficiary under a discretionary Trust. The difficulty lies in the valuation of that interest."*[2]

He concluded this part of his Judgment by saying that it was:

> *"arguable that [the parties'] rights and interests as discretionary beneficiaries may fall within the definition of the term 'property' in the Act but it is not necessary to decide that point for present purposes. There is no evidence of the value of those interests, nor of the interests of the parties as final beneficiaries. There is no warrant for simply treating the assets of the Trusts as those of the parties and dividing it between the parties."*[3]

This was a conventional and uncontroversial analysis of the significance of a discretionary beneficiary's interest in a Trust.

1 Para 96.

2 Para 98.

3 Para 107.

The case appears to have been argued differently in the Court of Appeal. It was here that I believe the term "Bundle of Rights" was used for the first time. Robertson J said:

> *"The second substantive issue raised was the valuation of a bundle of rights which each of these parties had in the mirror trusts, which owned what had been the matrimonial home and which had continued to be the family residence after ownership was acquired by the two trusts."*[4]

He continued:

> *"Allan J concluded that the interests in the trusts could be relationship property, but he made no orders in respect of them because there was no evidence from which it was possible to assess and determine the value of the interests."*[5]

This description of what Allan J had said is hardly accurate. He had merely said that the interests of the parties "*as discretionary beneficiaries*" might fall within the definition of "property" for the purposes of the PRA. He did not refer to any other "rights or interests" that the parties might have had in the Trusts and whether they could be classified as relationship property.

Robertson J concluded the section of his Judgment in which he spoke about the Bundle of Rights[6] with the statement:

> *"There are interests in the trusts which the parties have ample opportunity to deal with to their mutual benefit under the general law"* [my emphasis]

The reference in this sentence to *"the general law"* was presumably intended to refer to legal regimes beyond the PRA - such as the Trustee Act and perhaps some principles of Equity. I take the passage to mean that Robertson J believed that there are some causes of action outside the PRA that will enable the "rights" or "interests" of a person in a Trust to be treated as if they are "relationship property". What they are was left unspecified.

The Court of Appeal's reference in this Judgment to the term "Bundle of Rights" was unhelpfully vague. No attempt was made to define the term; no attempt was made to show the kind of value that should be given to the so-called "rights"; there was no statement as to how the so-called "rights" were properly classified as "property" either for the purposes of the Trustee Act or the PRA; and the statement that the "*interests in the trusts*" could be dealt with "*under the general law*" was unhelpful in the lack of identification of the legal regime(s) that were alluded to and the way in which those regimes will apparently achieve outcomes that are similar to the treatment of Trust rights and interests as relationship property.

Few, if any, doctrines of such importance as the Bundle of Rights doctrine have been created with such a lack of jurisprudential debate and explanation.

Walker v Walker

The next case in which the term was mentioned was *Walker v Walker.* This was another decision of the Court of Appeal.[7] It was primarily concerned with the value of a debt that a Trust owed to a husband, the face value of which was $2.27m.

---

4 *M v B* [2006] 3 NZLR 660, para 112.

5 Para 116.

6 Paras 112-120.

7 [2007] NZFLR 772

Chambers J said:

> *"We agree the fact the debt is a private debt can lead to complications in valuation. For instance, if a debt owed by a Family Trust cannot be paid or can be paid only in part, the devaluation of the debt may be compensated for, at least in part, by an increase in value of one party's or both parties' interests in the Trust – whether his, her or their interests as settlor, trustee, appointor, or beneficiary, which interests may be relationship property."*[8]

He then referred to a concession that counsel for the wife had made to the effect that various aspects of the Trust were relationship property:

> "*Further, the wife seems to have conceded that certain other assets, which were relationship property and which are related to the debt, were to become the husband's property. Those other assets were:*
>
> *(a) The directorship of the Trustee Company;*
>
> *(b) The shares of the Trustee Company;*
>
> *(c) The power to appoint and remove directors of the Trustee Company;*
>
> *(d) The power to appoint and remove Trustees of the Trust;*
>
> *(e) The parties' discretionary interests under the Trust.*"

Chambers J treated this concession as having been properly made. He said:

> *"Indeed, those items of property appear never to have been valued. Those five items of property, plus the debt, formed a very valuable package, as together they confer control of the Company …. Had the wife put ownership of the package in issue and offered $2.275m for it … the husband would have had to match the offer. Indeed, on the evidence, she could have sensibly offered more than $2.275m for the package as the Company had by date of hearing restored its profitability and control of the package gave control of the Company."*[9]

Harrison v Harrison

The Bundle of Rights doctrine was expanded a little in the Court of Appeal's decision of *Harrison v Harrison.*[10] A husband and wife were the joint settlors of a Family Trust. The Trustee was a Company that had issued three shares: one to the husband, one to the wife and one to the couple's lawyer. Following the separation, the lawyer trustee decided to act for the husband alone. Robertson J spoke of the parties' relationship property:

> *"The position therefore was that, in law, the assets owned by Mr and Mrs Harrison which may be relationship property were the two debts owing back to them by [the Trust], household furniture and effects, and the shares they each held in [the Trust Company]. There was also a bundle of rights associated with their positions as discretionary beneficiaries under [the Trust], and as the joint holders of the powers of appointment of [the Trust's] Trustees …"*[11]

---

8 Para 38

9 Para 49

10 [2009] NZFLR 687, William Young P, Hammond and Robertson JJ

11 Para 10

Later in the Judgment, Robertson J said this:

> *"Leaving aside the rights which Mr and Mrs Harrison have as beneficiaries under the Trust[12] and their power to appoint the Trustees, those debts are virtually the only items of relationship property presently available for distribution between them …"*[13] [my emphasis]

In this passage, Robertson J appears to say two things First that the status of Mr and Mrs Harrison as discretionary beneficiaries was itself an item of relationship property for the purposes of the PRA, and second that their position as "*joint holders of the power of appointment*" of Trustees was relationship property for the purposes of the PRA.

Dealing with the first item – the status of a spouse as a discretionary beneficiary - a five Judge Court of Appeal in *Nation v Nation*[14] had said that

> *"The conventional view is that a discretionary beneficiary has no legal or equitable interest in the assets of the Trust until the Trustees have exercised their discretion in favour of the particular beneficiary …"*[15]

Although Robertson J's decision appears to differ from the Court of Appeal's statement in *Nation* it does not conflict with what was said in that case. The Court in *Nation* said that a discretionary beneficiary has no *"interest … in the assets of the Trust"* whereas Robertson J was saying something different, namely that a person's *"status as a discretionary beneficiary"* is relationship property. He did not say that the status as a discretionary beneficiary created an interest in the property owned by a Trust. The decision in *Nation* is of interest though, for another reason. The term "property" in the Trustee Act is defined as including *"any other right or interest"* – a similar definition to the one in the PRA. If the definition in the PRA is to be interpreted as it has been in *B v M, Walker* and *Harrison* does this not conflict with the way in which "property" is defined in the Trustee Act? How can the same right or interest be the property of spouses for the purposes of the PRA and simultaneously be the property of the Trustees for the purposes of the Trustee Act?

What then of the other "right" that Robertson J said was to be treated as relationship property: the joint power to appoint Trustees? In practice this "right" was of no practical benefit to either party. As Trustees they had to act unanimously but they would not have done this as their relationship had ended and they were at loggerheads with each other. In such circumstances I consider that if the Bundle of Rights is to be accepted as a legitimate doctrine the "right" had no value since neither party could extract any value from it.

Robertson v Robertson

The most recent case that deals with the Bundle of Rights can easily be assessed as the most problematic. It is *Robertson v Robertson*[16] a decision of Judge Burns of the Family Court in Auckland. In this case a husband and wife established two mirror Trusts. They were both Trustees of the two Trusts. At the time the Trusts were established the Trustees entered into a Deed of Partnership for an initial term of 10 years. The two Trusts co-owned the house in which the family lived; a holiday house; the business in which the husband worked; and some investments.

---

12 They, and their named children, were recorded in the Trust as its "primary beneficiaries": para 8 of the Judgment

13 Para 25

14 [2005] 3 NZLR 46, McGrath, Glazebrook, Hammond, William Young & O'Regan JJ

15 Para 74

16 (2009) Family Court, Auckland, FAM 2009-004-001627 / 1628, 19.11.09, Judge DA Burns

The wife sought an occupation order of the Trust-owned home in which they lived. Judge Burns held that such an order could only be made if the property could be categorised as relationship property and he held that, by use of the Bundle of Rights doctrine, the Trust-owned house had sufficient relationship property "interests" in it for it to be categorised as relationship property. I find this part of the decision difficult to follow. The Judge spoke of the rights of the parties as giving rise to "interests" in the property of the Trust and by this terminology it is clear that he meant "relationship property" interests. At what point does a relationship property "interest" in Trust property convert that property into relationship property? The Court gave no guidance on this topic of fundamental importance to property rights.

The Judge said:

> *"There has to be a [relationship] property interest in the dwellinghouse owned by one or both parties to provide jurisdiction to the Court to make an [occupation] order.*[17]
>
> *I accept … that s.27 [which authorises the Court to make an occupation order] only applies to relationship property, and only a right to immediate physical and personal possession."*[18]
>
> …
>
> *"I find that the property interest that one or both spouses must have in order to enable an occupation order to be made under s.27 must therefore be relationship property and not the separate property of one of the parties."*[19]

Judge Burns went on to ask himself:

> *"What types of interest in a Trust (if any) can qualify as 'relationship property' to give jurisdiction to make an occupation order?"*[20]

This was his answer.

> *"… There is a spectrum of interests within different Trusts. Those interests have been defined as variously rights, powers and property. At one end of the continuum is a mere expectancy which does not provide a property interest. At the other end of the range are a bundle of rights that can be properly identified as relationship property."*[21]

He proceeded to refer to eight factors. He didn't describe them as "*relationship property*" as such but it is implicit in his Judgment that he regarded them as relationship property. These are the eight items of "property" that he said were relationship property.

(1) "*A resolution passed by the Trustees providing for the parties to have the right to occupy the property*".

This was a reference to a resolution that the two sets of Trustees had signed at the outset of their partnership, in which they authorised themselves and their children as beneficiaries to occupy the house that was being used as their family home. That property had subsequently been sold and the parties lived in another dwelling owned

17 Para 43

18 Para 43

19 Para 45

20 Para 46

21 Para 60

by the two Trusts. There had been no similar resolution authorising them to occupy the replacement property but the Judge said that in his view the original resolution "*has been assigned to the new property*".[22]

(2) "*A distribution by the Trustees to the parties thus converting the discretionary interest at the time of distribution to a property interest."*

I cannot discern from the Judgment what this is intended to refer to.

(3) *"The formation of a partnership between the two Trusts and payments made through that partnership."*

(4) *"The effective control held by each party in their respective Trusts by virtue of the power of appointment each holds."*

(5) *"The fact that each are beneficiaries of each other's Trusts along with the children in each case.*"

In this context, the wife and the children were the final beneficiaries of one Trust and the husband and the children were the final beneficiaries of the other. They were described as the "*primary beneficiaries*". There were "*five secondary beneficiaries"*.

I believe I am correct in saying that the Judgment does not state whether the interests of the spouses and children were fixed or discretionary and I assume that they were simply discretionary.

(6) *"The decision made by the Trustees following the first separation to allow the wife to continue in exclusive occupation with the children, thus providing her with a right to occupy."*

(7) *"The ownership structure set out in the flowchart for the Robertson Family Trust Partnership which clearly have [sic] passed decision-making from the two respective mirror Trusts to the Partnership where the husband and wife have exercised decision-making not only in their capacity as trustees, but in their capacity as husband and wife in relation to the various interests including a company and other commercial entities."*[23]

The significance of these factors is better revealed by some elaboration.

(a) If Trustees pass a resolution authorising a beneficiary to occupy a Trust-owned property, that historic authorisation may – or will – cause the Trust property to become relationship property.

(b) If Trustees agree to work together as partners in managing co-owned Trust assets, the creation of the partnership is liable to convert – or will convert - the underlying asset into relationship property.

(c) If a person has "*effective control"* of a Trust via powers of appointment, the Trust assets may be converted – or will be converted - into relationship property.

(d) If a person is a discretionary beneficiary of a Trust, that right may – or will - create a relationship property interest in the assets of the Trust.

---

22 Para 61

23 Para 61

(e) An historic resolution to allow a beneficiary to occupy a home may – or will – give rise to a relationship property interest for that person in the asset of the Trust.

(f) If Trustees, who happen to be husband and wife, agree to co-operate in the management of assets that they own as Trustees the assets may – or will – be converted into relationship property.

I use the words "or will" in relation to each of the propositions because in accordance with Judge Burns' decision, there would seem to be an inevitability about the consequence.

Whereas the Court of Appeal in *B v M*, *Walker* and *Harrison* had classified Trust powers and interests as relationship property, but preserved the status of Trust assets as Trust property (being property that does not have the status of either relationship property or separate property) this case goes much further and classifies the Trust assets themselves as relationship property.

If this case represents the law it is truly revolutionary. Almost all Family Trusts that contain any property that was once properly classified as relationship property will have ceased to fulfil any useful function; the trustees will no longer be the legal owners of the Trust assets and the assets themselves will have been converted into relationship property.

Not only will the Trust assets have the status of relationship property but they will presumably be property that can be intercepted by creditors. In this way Trusts created by spouses for creditor protection are liable to be defeated by this interpretation of the Act.

If the *Robertson* decision is correct, it would seem that the legal ownership of Trust assets in a typical New Zealand discretionary Trust will almost invariably be taken from Trustees and be converted into the relationship property of spouses who are associated with a particular Trust.

THE RATIONALE FOR THE BUNDLE OF RIGHTS DOCTRINE

Judge Burns did a useful thing. He spoke about the rationale of the Bundle of Rights doctrine.

> *"The Family Court does get concerned in those circumstances where relationship property is settled on a Trust and one party seeks to use the property as a device in order to try and convert that relationship property into separate property or to retain control. There are specific remedies under the Act, but the Court will be alert to ensuring that no injustice occurs in those circumstances where the property settled was relationship property prior to being settled on a Trust."*[24]

The following words from the last sentence of the quotation seem to encapsulate his reasoning:

> *"… the Court will be alert to ensuring that no injustice occurs … where the property settled was relationship property prior to being settled on a Trust."*

Although that may sound a laudable initiative, there is a good case to be made that it is contrary to the intentions of Parliament. To assist in identifying Parliament's intentions in this regard I shall refer to three Parliamentary materials.

[24] Paras 63

When the changes to the MPA were being discussed, the Ministry of Justice produced a Report of the Working Group on Matrimonial Property and Family Protection[25] which recommended the enactment of changes to the legislation that would empower the Court to make orders to redistribute Trust capital. But Parliament rejected this recommendation. It was not willing for the Courts to have powers of the type that are available under the Bundle of Rights doctrine.

The rejection by Parliament of a judicial power to reorder Trust assets to be made over to a spouse can also be seen from the second and third materials:

(a) The Matrimonial Property Amendment Bill 1998 No. 109-2; and

(b) The Matrimonial Property Amendment Bill and Supplementary Order Paper No. 25, as reported from the Justice and Electoral Committee.

The first of these documents had an explanatory note that said:

> *"Clause 47 of the Bill inserts new Sections 44A to 44F into the 1976 Act, which empower the Court to order compensation for matrimonial property disposed of to a Trust or Company. These new sections provide compensatory measures where matrimonial property is transferred to a Trust which has the effect of defeating a spouse's interests even though at the time of the transfer there was no intention to defeat those interests.* ***The sections do not give the Court the power to order that the capital of the Trust be distributed to the affected spouse. This acknowledges that Trusts are created for legitimate reasons and should be permitted to fulfil that purpose****, where there was no intention to defeat the spouse's claim at the time the Trust was established. Bona fide third party interests are protected ….*
>
> *… The Law Society argued that the new provisions do not go far enough and may be easily circumvented.*
>
> *The Law Society also submitted that the Court should have power to hear claims from a spouse who has made contributions to a family Trust owning property from outside the marriage partnership. However, assets not able to be classified as matrimonial property at any stage of the marriage are not in the same category as the dispositions caught by ss.44A – 44F. Where the claimant spouse has paid for improvements to a home which is not owned by either spouse but by a family Trust which is a strict legal entity, the spouse may need to look to general law claims to address any entitlements."*

The second of the above Papers said this:

> *"****Submitters also comment on the need for greater powers for a Court to look behind Trusts … or to vest Trust capital in one partner****.*
>
> *It is only when a marriage or de facto relationship ends that the equal sharing regime comes into play. Requiring the parties to have independent legal advice before relationship property is transferred into the Trust would be contrary to the deferred sharing regime and would impose extra legal costs on the parties. In addition it would not prevent one party from transferring property that is owned solely by that party.* ***Therefore we do not recommend any changes in regard to this submission.***

[25] (1998) pp. 28 - 31

> *We also note the proposed new Sections 44A – 44F … give the Court greater powers with respect to the transfer of relationship property to a Trust or Company.* ***The proposed new Section 44C provides compensatory measures where relationship property is transferred to a Trust and the transfer has the effect of defeating a partner's rights, even though at the time of the transfer there was no intention to defeat those rights****."*

Judge Burns is the only Judge who has expressed a rationale for the Bundle of Rights doctrine. As can be seen from the three Parliamentary materials to which I have referred, they contain compelling evidence that Parliament expressly refused to include the kind of powers in the legislation that the Bundle of Rights doctrine is designed to create.

The fact that it took about 30 years between the enactment of the term "rights or interests" to be interpreted in the way the Courts have done with the Bundle of Rights doctrine is also compelling evidence that none of the people who were involved with the framing of the legislation ever contemplated that the words were to be given the meaning that the Courts give them in accordance with the Bundle of Rights doctrine.

ARE THE VARIOUS "RIGHTS" IN A TRUST "PROPERTY"?

This is an old debate. The answer used to be clear – "powers" are not "property" as the term "property" is generally understood. In the leading case of *Re Armstrong*[26] Fry LJ said:

> *"We all know that, when the Statute of Uses enable persons to declare uses, conveyancers availed themselves of it, and were in the habit of reserving powers to alter the uses declared by conveyances or settlements of land. But powers remained just as they were before the Act – they were not property, they were merely an individual capacity to do something.*
>
> *Again, when the equitable doctrine of Trusts was reconstituted after the passing of the Statute of Uses, the Courts of Equity recognised the capacity of certain persons to declare trusts by deed or will, and thus to mould or modify the existing trusts of property. This capacity, however, was only a power to do something; it might result in property, but it was not property at all. These are powers of the same kind as that with which we are dealing – powers to modify either existing legal uses or existing equitable trusts. I repeat that such powers are no more property than a power to do any act which an individual may do."*

The reason why the Courts did not regard powers of appointment as property was because they were merely the capacity to determine interests which derive from the donor of the power and not the donee.[27] In Dr Congreve's words:

> *"The consistent refusal of the Courts to characterise powers of appointment as proprietary interests[28] reflects the view that powers are merely a form of contingent event. If a proprietary interest is defined as a right in or relating to property, a power or capacity to alter legal relations with respect to property might be regarded as carrying a property interest. However, the Courts have always regarded the donee of a power of appointment as merely a conduit for the conveyance of the donor. A*

---

26 (1886) 17 QBD 521, 531 (CA)

27 I wish to acknowledge the assistance of Dr RL Congreve for making his doctoral thesis on "*The Nature and Extent of Trustees' Powers of Appointment, Selection and Disposition*" available to me. This proposition is taken from paragraph 2-07 of his Thesis.

28 See generally Farwell*, A Concise Treatise on Powers* (3rd Edition, 1916); Simes & Smith, *The Law of Future Interests* (2nd Edition, 1956, p. 392); *Tremayne v Rashleigh* (1908) 1 Ch. 681; *Townshend v Harrowby* (1857) 27 LJ (Ch) 553.

> *donee of a power has no more than the capacity to act, to appoint or not to appoint, and the effect of the appointment derives from the instrument creating the power."*[29]

Powers of appointment may not have the same characteristics as some other powers. For example, in *Barford v Street*[30] real and personal property was left by the testator on trust for a woman for life and on her death as she should appoint by Deed or Will. Sir William Grant MR said:

> *"An Estate for life with an unqualified power of appointing the inheritance comprehends everything …. By her interests she can convey her life estate: by this unlimited power she can appoint the inheritance. The whole equitable fee is thus subject to her present disposition."*[31]

In this way, an *unqualified* power over property was held to be the equivalent of an estate in the property. In *Barford v Street* the donee's life interest, coupled with an unqualified power, was held to give complete ownership. In this type of case, uncontrolled powers were construed as being "property".

In a second type of case, the property subject to the power was clearly taken on trust, and consequently there was no question of the donee taking the property beneficially.

In more modern times it has been held[32] that a power of revocation is not an item of "*property*". The question for consideration in that case was whether a power to revoke a Trust was available to a judgment creditor. The definition of "*property*" in the relevant statute says that "'*property' includes … [any] other right or interest …*"

This case has close parallels to the PRA as the definition of "*property*" in the PRA also includes a reference to "*any … right or interest*".[33]

The Court of Appeal in England has considered whether a general power of appointment was "*property*" for the purposes of s.272 of the Inheritance Tax Act 1984 (UK). That Act defined "*property*" as including "*rights and interests of any description*". It was held that in the "*legislative context*" in which that definition appeared, the words were intended to include a general power of appointment: see *Melville v Inland Revenue.*[34]

THE JUDICIAL PRESUMPTION OF TRUST MANIPULABILITY

The Bundle of Rights doctrine appears to be based on the presumption that a person who possesses the kind of rights and interests to which the Courts have referred will be able to take personal control and enjoyment of Trust assets.

If the Bundle of Rights doctrine is based on the theory that a spouse with powers in relation to a Trust can take its assets, is that theory correct?

---

29 Dr Congreve's Doctoral Thesis, para 2.07 – see footnote 27 above.

30 (1809) 16 Ves. Jun. 135 and see the other cases cited in Note 2, 2 Ves. Jun. 594

31 Ibid, p. 139

32 By Smellie CJ in *TMSF v Merrill Lynch Bank & Trust (Company) Cayman Limited,* Grand Court of the Cayman Islands, 26.6.09 and [appeal citation], copies of which on my website: see www.anthonygrant.com page "Trusts" Articles published in New Zealand Lawyer article entitled "*Trusts – the Bundle of Rights – Is it Good Law*?

33 See s.2 of the Act

34 [2001] EWCA Civ 1247

In this context I wish to refer to some factors that point away from that conclusion. They are not put forward as a comprehensive set of factors for this purpose – but merely ones that illustrate how the presumption may not be correct.

Is a Trustee entitled to vote in favour of personal gain?

It has been said that there is an "inflexible rule" that a fiduciary is not allowed to put himself or herself in a position where duty and interests conflict.[35]

Does this mean that a Trustee, who is also a discretionary beneficiary, must abstain from voting in favour of a distribution to himself/herself?

This is a question of fundamental importance in this area of the law and the answer is strangely uncertain. *Waters' Law of Trusts in Canada*[36] says that:

> *"… once the Court has found a conflict of interest and duty, the question is asked as to whether consent to that activity was given. Where it is alleged that the activity was authorised at the time of appointment, this will involve the construction of the instrument appointing the fiduciary …"*.

Ford & Lee's *"Principles of the Law of Trusts* says that:

> *"Some Trust Deeds enable the Trustees to appoint the Trust Fund to themselves. It is hard to see how these Trustees can owe any fiduciary duties to other possible beneficiaries under the Trust; and it is submitted that their duty not to enter into a position of conflict of duty and interest is impliedly remitted. A provision of this kind may be expected in a Trust instrument where the Trustees have provided funds to the Trust additional to a nominal sum provided at its creation and wish to retain control of them …".*[37]

It is not clear to me whether the author of this passage – Professor Lee – is writing of a typical New Zealand discretionary Trust where a Trustee is also a discretionary beneficiary or whether he is referring to a Trust where the right of the Trustee to appoint to himself is set out with greater clarity.

Finn[38] says that:

> *"…A Trustee … does not lose his fiduciary status simply because he has either in that capacity or as a beneficiary an express right to the partial enjoyment of the Trust property. But these cases apart, where a person has been given possession or control of another's property and has been given a right to use that property in a particular way for his own benefit, it is impossible in the present state of the law to make any confident assertion as to when he will or will not be held to be in a fiduciary position"*.

---

35 Lord Herchell in *Bray v Ford* [1896] AC 44.

36 3rd Ed., 2005, page 887.

37 Para. 9.21090.

38 *Fiduciary obligations,* 1977, para 204.

In more recent writings[39] Justice Finn attempted to give a description of a fiduciary. This was it:

> *"A person will be a fiduciary in his relationship with another when and in so far as the other is entitled to expect that he or she will act in that other's interests … to the exclusion of his or her own several interests."*

In accordance with that definition, a wife who is not a Trustee may be entitled to expect that her husband who is a Trustee will act in their joint interests and in the interests of the other beneficiaries and not in his own self interest.

Sir Ivor Richardson and Dr R L Congreve in their book *Law of Estate and Gift Duty*[40] appear to have assumed this, saying that a Trustee with a power to make an appointment was, in their words *"limited by his fiduciary duties from exercising his authority to appoint in his own favour."*

This is a subject of unfortunate uncertainty and I do not propose to say more about it in this Paper except to conclude with the observation that in a typical family Trust, if only one of the spouses is a Trustee, and if all the members of the family are discretionary beneficiaries, the Trustee spouse would appear to owe duties to all of the beneficiaries and a decision to make an appointment in favour of himself may be prohibited by fiduciary restraints.

The Unanimity rule

It is a fundamental principle of the law of trusts that, unless a settlor has made a direction to the contrary, trustees must act unanimously. Although some Trusts are worded so as to authorise Trustees to make decisions by a majority, it is much more common for there to be a requirement of unanimity.

In circumstances where both spouses are Trustees of the same Trust, it is common, following their separation, for them to be incapable of reaching agreement about the destiny of Trust assets and income. The presumption that a "right or interest" can convert Trust property into that person's own property, is likely to be unsound if it assumes that estranged spouses can agree on the distribution of Trust assets to either one or both of them.

Is a power of appointment a fiduciary power?

The Bundle of Rights doctrine appears to presume that a person with a power to appoint and remove Trustees can do so selfishly. Is this correct? The Hon Justice David Hayton said in a recent speech that:

> *"the exercise of key powers (eg to appoint new Trustees) is strongly presumed to be fully fiduciary, ie it cannot be exercised selfishly."*[41]

In *PE & AJM v PE & ICJ PO.*[42] Christiansen AJ made a statement to a contrary effect. He said that:

> *"Old cases such as in Re Skeats' Settlement (1889) … which indicated that the exercise of a power of appointment of new Trustees could not be exercised for a person's own benefit are no longer relevant in the current age.:*[43]

---

39 In a Paper delivered to the 13th Commonwealth Law Conference, 2003, Melbourne.

40 Butterworths, 5th Edition, 1978, para 2/121.

41 *"The Hayton Review of Current Trust Law Issues"*, 23 June 2008, Transcontinental Trusts Conference, Geneva.

42 (2004) High Court Christchurch CIV 2004-409-1368 – 29.10.04

It is worth noting that in *Charman v Charman*[44] the lawyers who acted for both the husband and wife – and they were senior advocates in England who are knowledgeable in this area of the law – accepted that *Re Skeats'* settlement is still good law, and the English Court of Appeal did not disagree with them. The better analysis would therefore appear to be that a power to appoint a Trustee is a fiduciary power and it cannot be invoked selfishly.

The specific provisions in a Trust Deed

The statements about the Bundle of Rights in both *Walker* and *Harrison* appear to have been made without detailed consideration being given to specific terms of the Trust Deeds in those cases. The ability of settlors to fashion Trusts in individual ways must be taken into account when considering whether a "power" should be interpreted as an item of "relationship property" for the PRA. Trust Deeds can describe whether a power is intended to be a fiduciary power or not. They can characterise the consequences that are to be associated with the exercise of a power. For this reason, the statements that were made about the "Bundle of Rights" in *Walker* and *Harrison* should be treated with caution since they are expressed as universal principles when the specific terms of a Trust Deed may give rise to a different analysis.

Other arguments

There are other aspects of the so-called *"rights and interests"* that may, on analysis, show that they cannot be exercised selfishly. This is a large topic and the points that I have made are intended to illustrate some of the problems that exist with an assumption that a person who possesses various Trust rights and powers can lawfully use them to appropriate Trust assets.

CONCLUSION

Good law is developed by a process of rigorous challenge and debate. The Bundle of Rights doctrine has not been subjected to this process and until this happens, it is not clear how the doctrine will emerge and whether its teachings will remain as they are today.

---

43 Paras 38-42

44 [2007] EWHC CIV-503, CA, 24.5.07.