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Family violence victims can fast-track claims to rewrite trusts

PREMIUM

OPINION



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A significant trust development passed into law without publicity last year. It concerned the court's power to modify a trust under s 182 of the Family Proceedings Act, a section that allows a court to rewrite a trust in any way it likes.

The section has two significant problems.

- It applies to marriages and civil unions but not to de facto relationships and is inherently unfair in its selectivity; and
- It can be invoked only after a couple's marriage or civil union has been dissolved.

This means that a couple who have separated are unable to invoke s 182 until two years have passed since the date of their separation.

Often the couple will live in a trust-owned house, with the consequence that the division of property associated with them will involve a delay of two years.

That situation was changed with the enactment of the Family Proceedings (Dissolution of Marriage or Civil

Union for Family Violence) Amendment Act 2024.

Section 39A of this Act provides in simple terms that a person who is the subject of a protection order under the Family Violence Act 2018 can apply for their marriage or civil union to be dissolved immediately. They don't have to wait for two years to pass.

Although the purpose of the Act is to enable a person with a violent spouse to dissolve their marriage without delay, the Act has the incidental benefit of allowing the partner to make a claim under s 182 immediately.

This benefit may have been unintentional, but it is nevertheless welcome. No one should be required to be locked by law into a violent relationship.

The Law Commission has recommended that s 182 should be abolished, particularly on the grounds that it is confined to marriages and civil unions but doesn't apply de facto unions.

Even so, the recent developments which allow for the acceleration of both the dissolution of marriages and claims under s 182 in circumstances where one party is violent to the other is welcome and should be perpetuated in any replacement legislation.

Barrister Anthony Grant is an adviser and litigator on the laws concerning trusts and estates. He is a member of The Law Association's Trust Law Committee