TRUST LAW

Court protects trust assets acquired before marriage

By Anthony Grant

The courts' most powerful tool for modifying a trust is s 182 of the Family Proceedings Act.

Its English equivalent is s 24(1)(c) of the Matrimonial Causes Act 1973. This section gives the courts freedom to modify "nuptial settlements" (in simple terms, "trusts that are created with a specific married couple in mind") in any way they want.

The section is old – the original formulation was enacted in 1859 – and is, by contemporary standards, archaic in that it applies to couples who were married or in civil unions but not to co-habitees. The Law Commission says the section should be repealed, in part because it doesn't apply to co-habitees.

Trust assets acquired before a relationship began should not be given to a spouse who made no contribution to their creation

It was the subject of a recent Court of Appeal decision in which the President of that Court gave it a refreshingly sensible interpretation: *Preston v Preston* [2020] NZCA 679. I mean no disrespect to Kós P when I describe his judgment as being "refreshingly sensible" and will explain why I use that term.

The *Preston* decision almost certainly reflects the broad consensus of trust professionals in New Zealand: that trust assets acquired before a relationship began should not be given to a spouse who made no contribution to their creation.

The courts in England have taken a completely different approach. Take, for example, a famous case involving an impecunious MP – *Browne v Browne* [1989] 1 FLR, 291. A wife who was the beneficiary of two trusts funded entirely with her mother's wealth was ordered to pay the husband £175,000.

For that to happen, the trustees would have had to make moneys available to her so she could, in turn, give it to him. When she resisted, the court ordered her to be imprisoned for contempt.

The case went to the Court of Appeal where, in a unanimous judgment to which the Master of the Rolls was a party, the High Court's decision was upheld.

The pathway the court took to achieve this objective was not s 24(1)(c) of the Matrimonial Causes Act, but the definition of matrimonial property which differs substantially from the definition of what in New Zealand is termed relationship property.

Contrast the *Browne* case with *Preston*. After Preston's first marriage ended, he established a trust, the primary purpose of which was to benefit his children.

Kós P said it was not appropriate for the court to make an order under s 182 in favour of the second wife as the original objects of the trust were the children of Preston's first marriage: "all the [trust] assets were acquired by Mr Preston well ahead of the relationship" with his second wife and the assets "were vested in the [trust] by Mr Preston before the de facto relationship with Mrs Preston began; and [the assets] were not contributed by... her." [27]

Further, the woman whom he would later meet and marry had made "no material or substantial contribution to sustaining [the trust] assets but had benefitted from them in a not insubstantial manner..."

The gulf between the English Court of Appeal and the New Zealand Court of Appeal – 'chasm' would be a better word – can be seen in Butler-Sloss LJ's statement in *Browne*:

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> *"It is a sad reflection if in these times of much vaunted equality of the sexes a husband should be seen to be acting in some way improperly if he exercises his right to claim a share of a wealthy wife's money in circumstances in which the law provides for him to be permitted... to make these sorts of applications."*

The difference between the *Preston* and *Browne* cases may stem from a differing attitude to marriage. The *Browne* case may reflect a fading belief that marriage is supposed to endure for life and if it is to be brought to an end prematurely, the court should assume that the poorer party – usually the wife – may deserve financial support for many years following separation.

By contrast, in New Zealand there is a prevailing belief these days that marriage should more appropriately be seen as a transaction. Wealth created when a couple is together is to be divided between them, but wealth created before the relationship begins and after it ends should not. Spousal maintenance should be of a short-term duration and should not endure for years.

There have been so many attacks on trusts by spouses in recent decades, often by innovative and unusual means, that it is refreshing to see a court uphold the integrity of a trust and not allow its assets to be taken by a spouse who had no role in the creation of the trust assets and who simply – and selfishly – wants to be a passive recipient of its wealth.

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Anthony is a speaker at the upcoming ADLS Cradle to Grave conference. For details, please click here