

WHAT HAPPENS TO TRUST OWNED PROPERTY WHEN YOU SEPARATE?

Although there is no central register or records of trusts in New Zealand, they are a popular way for many New Zealanders to deal with assets, often with little thought as to what happens when a separation occurs. The Property (Relationships) Act 1976 does permit claims for compensation when property has been disposed of to a trust in some situations but a statute which has received little judicial attention until recently is s182 Family Proceedings Act 1980. Under that section the Family Court has the power to vary the terms of a trust that has been created before a marriage or after a marriage (or civil union). The terms of the Trust can be varied for the benefit of the children, or the parties to a civil union or marriage or either of them. The application can only be made on, or a reasonable time after, a divorce (of a marriage or a civil union), which means that s182 only applies to couples who were married or in a civil union.

This aspect of the Family Proceedings Act 1980 has not been updated to follow other legislation which does not draw a distinction between property rights of married, civil union, de facto and same sex couples. This means de facto couples need to apply to the High Court to resolve trust matters under Trustee Act 1956, often a more complex and costly process.

Applications pursuant to s182 are becoming more prevalent as spouses search for ways to divide property held by a Trust. The focus of the Court's powers, and the use of s182 to facilitate property division has become the subject of increasing recent academic debate and the extent to which s182 of the Family Proceedings Act 1980 should be governed by the equal sharing regime of the Property (Relationships) Act 1976 is also undecided by the Court.

The current approach can be summarised as follows:

"In a nutshell, a Court should decide to exercise the s182 discretion with caution and only where, taking into account all relevant circumstances, it is necessary in the interest of fairness and justice to do so. Once the decision has been made to exercise the s182 powers however, the discretion is a broad one to be exercised in a manner which achieves a fair result, taking into account the total background. s182 is premised upon the tenets of fairness and justice".
(Ward v Ward)

It is important to note that s182 gives the Court the power to modify the trust deed; it does not allow the Court to direct the trustees how to act. Nor does it provide an automatic equal division of trust owned property, although in some recent cases there has been very close to an equal division.

The increasing trend towards the use of s182 of the Family Proceedings Act will have implications for asset protection and tax planning as well as the extent of property which can be divided after separation. This will also be particularly relevant where the bulk of the property at issue between the spouses is held by a trust and there is limited property that could be defined as relationship property.

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