A new problem for executors and a new risk for trusts

By Anthony Grant, Trusts & Estates Litigator

Section 182 of the *Family Proceedings Act 1980* gives judges the power to re-write "ante-nuptial" and "post-nuptial" settlements. For practical purposes, these are trusts that were formed by or for parties to a marriage at a time when they were married or their marriage to each other was contemplated.

Anthony Grant

Section 182 is a powerful section. It derives from an 1857 statute in England and was hardly known here until the case of *Chrystall v Chrystall* [1993] NZFLR 772, which brought the section out of obscurity into the light.

In *Thakurdas v Wadsworth & Another* [2018] NZHC 1106, Justice Hinton has expanded the reach of section 182.

Up until now, it was thought that section 182 could only be invoked by a spouse who is alive. Justice Hinton says the section can be invoked after the spouse's death by his/her executors.

Her Honour's decision is couched with some qualifications. She says:

"It is clear ... that, following a dissolution, a spouse can bring a s182 claim for the benefit of a child ... It makes little sense ... for the spouse's personal representatives not to be able to do the same ..." (at para [68])

"... [I]t may be, particularly if children do not stand to benefit, or if the provisions of a will are entirely in favour of third parties, that an application by executors fails. However, that should not be a reason for a general rule declining standing to executors of a deceased spouse." (at para [76])

Justice Hinton also said (at para [76]): "The cases will be few where a spouse dies and proceedings are still in reasonable time."

The term "a reasonable time" comes from section 182 itself. The section provides that claims are to be made "within a reasonable time" after the dissolution of a marriage or civil union. The term "reasonable time" has been interpreted generously. A delay of three and a half years was allowed in one case and, in analogous legislation, a delay of ten years has been approved (see *Fisher on Matrimonial and Relationship Property*, paragraph 6.7, fn 3). The prospect that the administration of an estate might be suspended for three and a half years – let alone ten years – is plainly ridiculous.

What are the implications of this decision?

The most obvious implication is that administrators and executors won't know when they can safely distribute an estate.

Parliament has enacted three statutes which allow claims to be made after a person's death and each statute imposes time limits for making claims, to allow for the orderly distribution of an estate's assets.

The three statutes are the *Family Protection Act 1955*, the *Law Reform (Testamentary Promises) Act 1949*, and the *Property (Relationships) Act 1976*. In general, the first two require claims to be made within 12 months after probate has been granted, and the third has a six month time limit for notifying an election to make a claim.

Parliament has in all three instances recognised the need for time limits to be imposed upon claimants, so that estates can be administered within a reasonable time after a person's death.

But Justice Hinton's innovation has no specified time limit.

If executors want to know whether it is safe to distribute an estate, they may feel obliged to make enquiries of a dead spouse's executors, but such an enquiry may provoke a claim that would not otherwise be made. The executors may have no idea that they are entitled to bring proceedings on a dead person's behalf and, on being informed of the right, they will realise that they have leverage to extort a benefit from the estate.

Most executors would prefer to remain silent and do nothing, but this is unfair for the people who are entitled to bequests and other entitlements under the dead spouse's will.

Section 182 is a relic of the past, which could only be invoked in respect of couples who were married. Although the section has been expanded to cover couples who are parties to civil unions, it does not apply to couples who live in de facto unions.

We live in an era where there is general agreement that couples in a de facto relationship are to be treated in the same way financially as people who are married or who are parties to a civil union.

To expand the law for married couples (as the *Thakurdas* case does) but not for de facto unions is to prejudice couples in de facto unions in a way that Parliament these days would never allow.

This is an area where the Government is currently preparing draft legislation. The people who are drafting the new Trusts Bill should consider how section 182's equivalent provision in England has been interpreted. *Lewin* says that "property adjustment orders cannot be made after the death of the partners to the marriage" (page 380, fn 225), and Thomas & Hudson in *The Law of Trusts, 2nd Edition* say much the same (see paragraph 52.20, fn 68).

The current New Zealand interpretation creates uncertainty and risks for executors, lengthy delays in the distribution of bequests to beneficiaries, and prejudicial unfairness for co-habitees – a cocktail of consequences that is comprehensively unacceptable.