

# Family Court's limited jurisdiction over trusts creates more cost for litigants

The Family Court's jurisdiction in relation to trusts is 'limited, piecemeal and uncertain'

## **Anthony Grant**

Many New Zealand families have arranged for their homes to be owned by trusts. When their relationships end, s 22 of the Property (Relationships) Act 1976 (PRA) requires that litigation concerning their property is to be filed in the Family Court. But the Family Court has only limited jurisdiction in relation to trusts.

When the Law Commission asked lawyers and trust professionals for their input into the legislation that became the Trusts Act 2019, it asked whether the Family Court should be given greater jurisdiction over trusts. The answer was generally No. I suspect this was because lawyers were concerned that the doctrines being used in the Family Court to get around trusts showed a willingness to change the law in ways that might be destabilising and unhelpful for the law in general.

With a lack of enthusiasm for the Family Court to have significant powers in connection with trusts, the commission arranged for there to be only one significant change – s 141 of the Trusts Act.

This section authorises litigants to consent to the Family Court having an enlarged jurisdiction over trusts and authorises the Family Court to make orders that it "considers necessary to protect or preserve any property or interest until the proceeding before the Family Court can be properly resolved" or "to give proper effect to any determination of the proceeding".

Beyond these two initiatives, it is not clear what jurisdiction Parliament may have given to the Family Court in connection with trusts.

Professor Nicola Peart has described the Family Court's jurisdiction in relation to trusts as "limited, piecemeal and uncertain". Her description is correct. The case of *Clayton v Barlow* [2021] NZFC 6332 is a good illustration of the Family Court's predicament. In that case, a family home was owned by a trust and the rest of a couple's assets were valued at less than the relationship debts so there was no relationship property of consequence to give to the parties. This meant the judge was powerless to make any meaningful orders in relation to either the home or any of the parties' assets.

For most families, the family home is their most significant asset and for many of them it is held in a trust. For litigants in relationship property disputes to be required to go to a court whose jurisdiction to make orders in respect of trusts is "limited, piecemeal and uncertain" is very unsatisfactory. An obvious consequence is that in many cases the litigation will need to be transferred to the High Court.

Following the theme of my last article, which concerned the inability of a large number of people to pay the costs of litigation, the outcome is that even more costs and delays are incurred by having to transfer litigation from the Family Court to the High Court.

This situation is not likely to be remedied in the near future. Parliament has yet to consider the Law Commission's proposals for changes to the PRA and the commission's proposals for the laws concerning what it calls "succession". Unless someone in the new government has a resolve to tackle these problems, and also has the necessary status to find time in Parliament's schedule to take charge of the process, it may be years before this unsatisfactory state of affairs is fixed. ■

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