TRUST LAW

Sutton v Bell: keeping pre-relationship assets from a partner has just got harder

A disposition of property to a trust can be set aside if at the time of the settlement the man and his prospective partner had 'a clear and present intention to become parties to a de facto relationship'

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When a person (typically a man) with assets from what I will call "relationship one" wants to preserve them before entering into "relationship two", it is common for him to settle the assets on a trust. If the settlement occurs before relationship two begins, it is commonly understood that the assets cannot be intercepted by the second spouse. (I will use the term "spouse" to refer to people who are married as well as to people in a *de facto* relationship .)

This is because the courts have accepted that it is fair for him to preserve the assets from relationship one since his second spouse had no role in creating them.

The law has now changed. The Supreme Court has held in *Sutton v Bell* [2023] NZSC 65 that if the assets from relationship one are settled on a trust when the man and his prospective partner have "a clear and present intention to become parties to a de facto relationship", the settlement can be set aside and the in-coming spouse can take as many of the assets from relationship one as were settled on the trust as a court will allow.

Although the test is expressed simply, it may be difficult to apply in many cases

The case in which the Supreme Court reached this outcome had unusual facts. A Family Court judge held that the couple had been in a *de facto* relationship for eight or nine months before the man's property was settled on a trust but a High Court judge, with some additional facts, disagreed. On the High Court judge's analysis, the property from relationship one was transferred to a trust a few days before relationship two began.

I will not lengthen this article with a fuller account of the facts of the case but will say in summary that readers may think the Supreme Court's decision was understandable on the unusual facts.

However, the bright-line test that existed before *Sutton v Bell* has now gone. To the court's credit, O'Regan J has tried to simplify the test the courts are to apply when deciding whether to set such trusts aside. The test is this:

> *"If [a] disposition of property is made in circumstances where the parties are in a romantic relationship and/or are living together but do not have a clear and present intention to become parties to a de facto relationship, then we do not consider that it would be right to infer an intention to defeat a claim or rights that may, or may not, arise in the future..." [69]*

The critical words in this formulation are that a disposition of property to a trust can be set aside if at the time of the settlement the man and his prospective partner had "a clear and present intention to become parties to a de facto relationship".

By contrast, if at the time of the settlement of the property on a trust, the parties are living together "in a romantic relationship" (for "romantic" read "sexual") but they do not have a "clear and present intention to become parties to a de facto relationship", the settlement cannot be set aside.

Although the test is expressed simply, it may be difficult to apply in many cases. In some cases, it will be easy to say the settlement of the property on a trust was made when the settlor had no intention "to become parties to a de facto relationship".

But there will be other cases where it is not clear if the relationship will be a de facto relationship or something less. The term "de facto" is so vague that lawyers will often struggle to know if a relationship can be categorised in that way and if lawyers struggle to give a clear answer to that question, the non-lawyer participants to the relationship will have no hope of being able to give a reliable assessment.

A person who wishes to avoid being caught in this trap may need to be ruthless and sever a pending relationship until sufficient time has passed that it can safely be predicted that there was no "clear and present intention" at the time of the settlement for the couple to "become parties to a de facto relationship". Alternatively, the person will need to arrange for a s 21 agreement to be entered into.

The notion that a person who merely intends to live with someone in a relationship which might not be a "de facto" relationship must nevertheless have a s 21 agreement is likely to lead to a change in social behaviour. Just as New Zealanders have generally got used to the need to negotiate a pre-nuptial agreement with a prospective spouse, so they will now need to get used to negotiating a "pre-nuptial" agreement with a person who might not be categorised by a court as a de facto partner. ■

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