TRUST/PROPERTY/FAMILY LAW

The *Preston* case: why section 182 must go

The Supreme Court has said the second wife can take the pre-relationship assets that have been settled on a trust

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Section 182 of the Family Proceedings Act allows a court to make any changes it wants to a 'nuptial settlement'.

The term was intended to refer to marriage settlements of the type made in the 1860s. Settlements were generally made on, or shortly before, a marriage and the beneficiaries were usually the wife or the husband and the children who would be born to them. Settlements for the benefit of a wife were needed because wives were not allowed to own property.

Since then, the term 'nuptial settlement' has been comprehensively distorted. It now applies to trusts of which one or other of the spouses was made a discretionary beneficiary at any stage during the marriage or in contemplation of a specific marriage.

Unlike the parties to a nuptial settlement made in the 1860s, a spouse who is a discretionary beneficiary of a contemporary New Zealand family trust has no certainty that he or she will ever receive a distribution from the trust.

In the Court of Appeal's recent decision in *Preston* it was held that a wife should not be able to use s 182 to obtain assets from a trust that her husband had established when he had not met her and with assets created before he met her.

The Supreme Court has reversed that decision: see *Preston v Preston* [2021] NZSC 154.

Bygone days

It is extraordinary that s 182 is still part of our law today. It derives from a New Zealand Act that was passed in 1867 which, in turn, echoed an English provision enacted a few years earlier.

In 1867, a married woman could not own property. This was because a husband and wife were deemed to be one person and the legal existence of the woman was 'suspended' during the marriage. A person who has no legal existence cannot own property.

To illustrate how archaic the law was at the time, a married woman who had been deserted was in a different position. In 1860, Parliament allowed a deserted wife to keep what she earned after her husband had deserted her but he was entitled to take any property she might have brought into the marriage.

Divorce was unobtainable prior to 1867. In that year, an Act made divorce attainable – in theory. But the Act was grossly unfair. A husband could divorce his wife on grounds of adultery but a wife could not divorce her husband for adultery unless she could additionally prove one of a number of events including incest, bigamy, rape (of someone else), sodomy, bestiality or cruelty (ie, brutal violence).

In 1867 it was not lawful for a man and woman to cohabit. For that reason, s 182 applies only to marriages and not to people who cohabit. Times have changed dramatically since then: cohabitation is common, along with polyamory, serial monogamy and serial cohabitation. But only marriages get the benefit of s 182.

The 19th century laws concerning marriage were riddled with hypocrisy. Although the law was substantially based on the theory that marriages would last forever, the extent to which the sanctity of marriage was ignored by husbands can be seen from the fact that in London alone in 1857 there were said to be 3,325 brothels and 9,409 prostitutes.

Dramatic change

Our law concerning matrimonial property changed dramatically with the enactment of the Matrimonial Property Act in 1976.

It declared there were two categories of property: matrimonial property and separate property. A spouse is entitled to own separate property whether it was earned prior to the marriage or received by gift or bequest during the marriage.

That is a fundamental principle of our law of relationship property. The Court of Appeal upheld that principle in the *Preston* case when it determined that assets a husband acquired prior to his relationship with his second wife and which he settled on a trust should not be taken by the second wife.

The Supreme Court has said the second wife can take the pre-relationship assets that have been settled on a trust.

Our law concerning spousal relationships also changed dramatically with the Property (Relationships) Act amendments in 2001. This gave cohabiting couples the same property rights as married couples. Section 182 contravenes this statutory entitlement by its exclusive focus on marriages.

Three fundamental criticisms can be made of s 182:

- It is a distortion of the 1867 legislation to say that a typical New Zealand 21st century discretionary trust is a 'nuptial settlement' as that term was understood to mean in 1867;
- Section 182 breaches Parliament's resolve that cohabitees should have the same property rights as married couples; and
- Contrary to the classification of separate property rights in the Property (Relationships) Act 1976, s 182 as interpreted by the Supreme Court gives a party to a marriage or civil union the ability to take the separate property assets the other party acquired before he or she ever met his/her spouse and settled them on a trust.

The Law Commission is to review the PRA and it will hopefully recommend the abolition of s 182 and its replacement by a more principled regime.

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