+ *Trust law*

The fate of family trusts following *Clayton*

By Anthony Grant, Barrister, Radcliffe Chambers

The Supreme Court recently delivered two judgments in the *Clayton* litigation. One is confined to what I will call the "bundle of rights" and the other to the circumstances in which trusts can be modified by the use of section 182 of the *Family Proceedings Act 1980*.

This article is confined to the decision concerning section 182 – *Clayton v Clayton & Ors* [2015] NZSC 30.

Section 182 lay hidden in our law, virtually unknown to practitioners and politicians, when Parliament enacted the *Matrimonial Property Act* in 1976. And when the Act was modified in 2001, the politicians apparently knew nothing about it – or at least nothing of consequence about it.

The politicians who were responsible for enacting the *Matrimonial Property Act* and the revised version of it in 2001 refused to give the courts the power to modify trusts that the Supreme Court now says are, and always were, freely available via section 182.

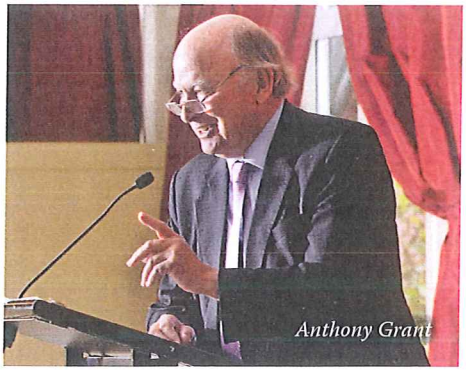
Section 182 empowers the Courts to modify "nuptial settlements".

A "nuptial settlement" is a "settlement" (and for this purpose a trust is a settlement) that was made on one or both of the parties to a marriage at a time when the marriage was either in contemplation or in existence.

The section was considered in detail by the Supreme Court in *Ward v Ward* [2010] 2 NZLR 31 where it was given what I will call a "conservative" interpretation.

That has gone. And much of it by a footnote! It's footnote 100, in which the Supreme Court says, in effect, that its decision a few years ago in *Ward* was wrong. Now, in paragraph 67 of the judgment that Glazebrook J delivered on behalf of four of the five members of the Court, she says that:

"Where ... a Trust is settled during marriage and contains or is sustained by assets accumulated by one or both of the spouses only during the marriage, it may well be that the discretion [to modify the Trust] will result in equal sharing ... ."



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Family Court judges have for years resisted the constraints that Parliament imposed on them concerning the extraction from family trusts of assets that would otherwise have been classified as relationship property. They have resorted to the notion of alter ego trusts, sham trusts, illusory trusts, constructive trusts, and the Walker version of the bundle of rights "doctrine". None of these other "doctrines" is now needed. If a couple is willing to wait for two years after they have separated, they can, following the dissolution of their marriage or civil union, invoke section 182 and expect to receive 50% of the assets of the trust.

This is a bombshell. It means that all trusts that have been created by spouses during a marriage with assets that were originally relationship property can be re-written by the courts with the likely outcome that the contents will be divided on a 50:50 basis.

Section 182 is ancient. It was enacted at a time when the law didn't recognise the legitimacy of people co-habiting. To do so was to "live in sin" and the law would not validate immoral arrangements. For that reason, the section still does not apply to co-habitees.

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For married couples and couples who have undergone civil unions, none of these other "doctrines" is now needed. If the couple is willing to wait for two years after they have separated, they can, following the dissolution of their marriage or civil union, invoke section 182 and, so it appears from paragraph 67 of the majority judgment, expect to receive 50% of the assets of the trust.

There are two riders to this. The first is that if there are children, the court may think it appropriate to arrange for some of the assets of the trust to be settled for the benefit of the children before dividing the remaining assets of the trust.

The second rider is that spouses who enter into pre-nuptial agreements or mid-nuptial agreements can avoid the *Clayton* outcome since section 182(6) provides that the court cannot modify trusts that are the subject of such agreements. That being said, the pre-nuptial agreement or mid-nuptial agreement must be sensibly structured. Mr Clayton's was so one-sided that even he considered that it could be ignored. LN

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