Time for a Change? The Law Commission's Review of the Property (Relationships) Act 1976 and its Recommendations on Trusts

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The Law Commission recently conducted a review of the Property (Relationships) Act 1976 (PRA), concluding that the Act "is no longer fit for purpose for 21st century New Zealand". It has been more than 40 years since the PRA was enacted. Since then, there have been significant demographic, social and economic changes in New Zealand. The PRA was intended to achieve a just division of property following separation, but trusts have undermined this aim by removing assets from the relationship property pool. This article analyses the Law Commission's recommendations concerning trusts and concludes that the recommendations strike an appropriate balance between preserving trusts and achieving a just division of property at the end of a relationship.

I INTRODUCTION

A lot can happen in 40 years. In that time, New Zealand has witnessed the All Blacks win three Rugby World Cups, experienced multiple financial crises and passed homosexual law reforms.[1] In 40 years, "New Zealand has undergone significant demographic, social and economic changes", which have in turn influenced social attitudes and norms.[2] The ways people form relationships and families, how these relationships function and what happens when a relationship ends have also changed significantly.[3] Currently, "fewer people are marrying and more people are in de facto relationships".[4] People tend to marry later in life,[5] and are more likely to

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1 See The Listener "The events that shaped New Zealand" (14 August 2019) NOTED <www.noted.co.nz>.

2 Law Commission *Relationships and Families in Contemporary New Zealand: He Hononga Tangata, He Hononga Whānau I Aotearoa O Nāianei* (NZLC SP22, 2017) [Law Commission (NZLC SP22)] at 9.

3 At 9–10.

4 At 14.

5 At 15.

enter relationships with existing assets.[6] Both partners are more likely to work, especially "couples with dependent children".[7]

The Property (Relationships) Act 1976 (PRA) has endured through all these changes. The PRA governs the division of relationship property upon separation,[8] but as it has been more than 40 years since its enactment, what people consider a just division has changed. The Law Commission believes "the PRA is no longer fit for purpose for 21st century New Zealand".[9] It commenced a review of the PRA in 2016 and tabled its recommendations in Parliament.[10] The Government decided not to give effect to any substantive recommendations.[11] Instead, it intends to consider them alongside the Law Commission's review of succession law.[12]

This article explores the Law Commission's recommendations on trusts. Part II introduces the principles and purposes of the PRA and explores how trusts currently undermine equal division. Parts III–VI look at ways to challenge a trust and discuss how current remedies under the PRA are unsatisfactory. As a result, courts have increasingly turned to s 182 of the Family Proceedings Act 1980 (FPA) and common law doctrines to provide remedies to affected partners. This has resulted in a piecemeal approach, which means the PRA has failed to be a comprehensive code. Parts VII–IX analyse the implications of the Law Commission's recommendations and discuss their advantages and disadvantages. Part X concludes that the Law Commission's recommendations strike an appropriate balance between achieving a just division and preserving trusts.

II PROPERTY (RELATIONSHIPS) ACT 1976

The PRA aims "to provide for a just division of the relationship property" following separation.[13] It is guided by the underlying principle that each

6 Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP44, 2018) [Law Commission (NZLC IP44)] at [2.15(e)].

7 Law Commission (NZLC SP22), above n 2, at 39.

8 Section 1M(c).

9 Law Commission *Review of the Property (Relationships) Act 1976: Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) [Law Commission (NZLC R143)] at [2.15].

10 Law Commission "Review of the Property (Relationships) Act 1976" <www.lawcom.govt.nz>.

11 Law Commission, above n 10.

12 Law Commission "Government response to the Law Commission report: Review of the Property (Relationships) Act 1976 – Te Arotake i te Property (Relationships) Act 1976" (27 November 2019) <www.lawcom.govt.nz>.

13 Property (Relationships) Act 1976 [PRA], s 1M(c).

partner contributes equally to the relationship, although in different ways.[14] Couples should share the "property fruits" at the end of their relationship.[15]

Purpose of a Trust

Trusts are used for a variety of reasons, such as asset planning or protection, tax advantages, and providing for children's maintenance and education.[16] Trusts gained popularity during the 1950s as a mechanism to avoid estate duty and high tax rates.[17] The advantages derived from trusts have significantly reduced following the abolishment of estate duty and readjustment of tax rates.[18]

In the relationship context, a number of legislative changes resulted in more trusts being used to protect assets from relationship partners.[18] Under the Matrimonial Property Act 1963, property was divided based on each spouse's contributions to the property, rather than his or her contribution to the marriage.[19] Marriage did not confer "any entitlement to share in each other's property",[20] so "equal division was not presumed and [therefore] seldom achieved".[21] However, following the enactment of the Matrimonial Property Act 1976 (MPA 1976), relationship property was subject to equal division following the dissolution of marriage.[22] This was "a radical change from the discretionary" nature of property division in the past.[23]

The Property (Relationships) Amendment Act 2001 renamed the MPA 1976 to the PRA.[24] It also expanded the MPA 1976's scope to include de facto and civil union partners, broadening the number of couples caught under the PRA.[25] This expanded scope reflects how society's perception of marriage has changed. Marriage "no longer holds the unique status it once did".[26] For these reasons, it is no surprise that trusts have become an increasingly attractive vehicle to protect property, not just from creditors, but also partners.

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14 Nicola Peart, Mark Henaghan and Greg Kelly "Trusts and relationship property in New Zealand" (2011) 17 Trust & Trustees 866 at 867.
15 At 867.
16 Law Commission *Some Issues with the Use of Trusts in New Zealand: Review of the Law of Trusts Second Issues Paper* (NZLC IP20, 2010) [Law Commission (NZLC IP20)] at [2.11]–[2.12].
17 At [2.9].
18 At [2.11].
19 Law Commission *Dividing relationship property – time for a change?: Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) [Law Commission (NZLC IP41) at [2.29].
20 Nicola Peart "The Tension Between Private Property and Relationship Property in Rural New Zealand" (2007) 11 Journal of South Pacific Law 4 at 6.
21 Nicola Peart "The Property (Relationships) Amendment Act 2001: A Conceptual Change" (2009) 39 VUWLR 813 at 816.
22 At 814.
23 At 816.
24 Property (Relationships) Amendment Act 2001, s 5.
25 Section 9.
26 Peart, above n 21, at 821.

Discretionary Trusts

Discretionary family trusts are the most common form of trust in New Zealand[27] — they can be established by one or both partners for the benefit of themselves and their children. Discretionary family trusts can thwart the policy objectives of the PRA by defeating a partner's claim or rights. This is because the PRA only applies to property that is beneficially owned by either or both partners.[28] When a partner disposes property into a trust, he or she alienates his or her ownership rights in that property. The trustee legally owns property and can distribute trust property as he or she sees fit. If a partner is a discretionary beneficiary, then he or she does not have a fixed or vested beneficial interest in any trust property.[29] The partner only has "a [mere] hope or expectation" the trustee will exercise discretion in the partner's favour.[30] A discretionary beneficiary has limited rights, at most:[31]

- to compel due administration of the trust;
- to hold trustees accountable; and
- to prevent trustees from acting irrationally, improperly or breaching their fiduciary obligations.

Given these limitations, trust property that would have been relationship property and subject to equal sharing is removed from the relationship property pool and moved outside the scope of the PRA.[32] Trusts can be structured to enable property owners to reap the benefits from their assets in a trust, all without losing control or enjoyment of their assets. This loophole has "prompted 'trust busting' [solutions in both] legislation and common law doctrines".[33]

Dynastic Trusts

A dynastic trust is a form of discretionary trust, usually settled by parents for the benefit of their children, grandchildren and other family members.[34] The purpose of a dynastic trust is often to preserve assets and pass them to future

27 SuperLife "Family Trusts" <www.superlife.co.nz>.
28 Section 2, definition of "owner".
29 Jessica Palmer and Nicola Peart "Trust principles overlooked" [2011] NZLJ 423 at 423.
30 At 423.
31 Frances Gush "The 'bundle of rights' — Unravelling trust principles?" (2012) 7 NZFLJ 157 at 157.
32 Nicola Peart "The Property (Relationships) Act 1976 and Trusts: Proposals for Reform" (2016) 47 VUWLR 443 at 443–444. Note that assets held by a spouse in his or her capacity as a trustee are outside the scope of ss 2 and 4B of the PRA as he or she does not have beneficial ownership, despite being the legal owner of the property. See Law Commission (NZLC IP41), above n 19, at [20.28].
33 Jeremy Johnson and James Anson-Holland "Trusts and Asset Planning: An Introduction" in Don Breaden (ed) *Law of Trusts* (online ed, LexisNexis) at [1.1].
34 Law Commission (NZLC IP41), above n 19, at [21.19].

generations without being susceptible to challenge from partners or creditors.[35] It is a "multi-generational ownership structure" used to retain wealth within a family.[36] Parents can settle dynastic trusts and include their child's future spouse as a discretionary beneficiary before they even contemplate marriage.[37] Any property a partner acquires in his or her capacity as a beneficiary is separate property because a third party settles the trust.[38]

III STATUTORY REMEDIES UNDER THE PRA

This Part explores the current avenues for redress under the PRA. Despite Parliament's efforts to achieve just divisions, the narrow scope of the trust-busting provisions enables partners to circumvent the PRA — giving rise to inequality.

Section 44 of the PRA

Section 44 empowers the court to make an order when any person has disposed property to defeat a partner's claim or right. This includes, but is not limited to, dispositions of separate or relationship property into a trust. For a disposition to be set aside, the partner disposing of property must have an intention to defeat the other partner's rights at the time of disposition. The test for intention is whether the partner knew or must have known that, by disposing of the property, he or she was exposing the other partner to a significantly enhanced risk of not obtaining his or her share of relationship property.[39] Courts can infer intention where the party knew of the consequences of the disposition.[40] Section 44 is limited because the intention threshold is high. It is difficult to prove intention in circumstances where both spouses agreed to dispose of their assets to a trust,[41] the trust is settled before the relationship began or a third party settles the trust.[42] If the requirements of s 44 are satisfied, the court may make orders to unwind the disposition and recover property, or order compensation.[43]

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35 Peter Eastgate and Penny Henderson "Section 182 FPA" [2012] NZLJ 32 at 35.
36 Jessica Palmer "What to Do About Trusts" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance* (Intersentia, Cambridge, 2017) 177 at 180.
37 Eastgate and Henderson, above n 35, at 35.
38 PRA, s 10.
39 *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 at [54].
40 Peart, Henaghan and Kelly, above n 14, at 869; and *Regal Castings Ltd*, above n 39, at [40].
41 See, for example, *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31 at [7] and [61].
42 Palmer, above n 36, at 194.
43 PRA, s 44(2)(b).

Section 44C of the PRA

In 1988, the Government Working Group identified that a significant amount of relationship property was being disposed to trusts, undermining the rights and entitlements of one partner under the PRA.[44] To redress this inequality and overcome s 44's limitations, Parliament, on the Government Working Group's recommendation, introduced s 44C.[45] Section 44C empowers the court to make orders where one or both partners dispose of relationship property to a trust during or after the beginning of marriage, civil union or de facto relationship (qualifying relationship). To come under s 44C, the disposition must have "the effect of defeating the claim or rights of one" partner and must not be of a kind to which s 44 applies.[46] This makes the requirements of s 44C easier to satisfy because intention is not required.

However, s 44C's scope is limited and does not prevent trusts being used to circumvent the PRA. Section 44C will not operate if separate property was disposed before a qualifying relationship. Partners can avoid ss 9A and 17 of the PRA, which provide that "separate property becomes relationship property" if it was sustained or enhanced by the application of relationship property or the actions of either or both partners. Partners can dispose of separate property to a trust before it becomes relationship property, thereby reducing the relationship property pool. Similarly, the family home is relationship property whenever acquired.[47] A house that is separate property can be disposed to a trust before a qualifying relationship to circumvent s 8(1)(a) of the PRA, even though the partners then use it as the family home.[48] It is not difficult to circumvent s 44C with careful planning.[49]

Compensation

If the requirements of s 44C are met, the court may order a payment of money, transfer of property (separate or relationship) or order a trustee to pay the affected partner trust income.[50] The court's inability to order a remedy from trust capital is a significant limitation. If there is insufficient relationship or separate property, or if the trust produces insufficient income, the affected partner may receive no compensation, despite meeting the s 44C threshold.[51] The court cannot dismantle or set aside a trust, nor can it "order

44 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 28–31; and Peart, above n 21, at 826.
45 Peart, Henaghan and Kelly, above n 14, at 870.
46 PRA, ss 44C(1)(b)–44C(1)(c).
47 Section 8(1)(a).
48 Jo Hosking *Law of Trusts (NZ)* (online ed, Lexis Nexis) at [9.9].
49 Nicola Peart "Intervention to Prevent the Abuse of Trust Structures" [2010] NZ L Rev 567 at 588.
50 PRA, s 44C(2).
51 See *Ward*, above n 41, at 35.

the trustees to invest the capital in income producing assets".[52] The repeal of gift duty is likely to further reduce the effectiveness of s 44C by allowing partners to alienate property "in one transaction leaving no assets outside the trust" from which the court could order compensation.[53]

The PRA prioritises the preservation of trusts and beneficiaries' interests over a partner's right to trust property by only interfering with trusts in narrow circumstances.[54] This has resulted in the PRA failing to achieve a just division following separation. It provides inadequate protection to the legitimate rights and interests of spouses, creating a need to turn to other avenues for redress.[55]

IV FAMILY PROCEEDINGS ACT 1980

The PRA's inadequacy has increasingly led courts to turn to s 182 of the FPA, which has an origin and purpose distinct from the PRA.[56] Section 182 enables the court to vary the terms of ante-nuptial and post-nuptial settlements, including trusts.[57] The premise of nuptial settlements is continuing marriage, but "Parliament recognised that injustices could arise" when this premise no longer holds.[58] Parliament intended s 182 to operate when the parties' expectations during settlement have been defeated.[59] This prevents spouses "from benefiting unfairly from the settlement" at the other spouse's expense.[60]

Section 182 of the FPA and Dynastic Trusts

Section 182 of the FPA involves a two-stage process: first, to determine whether the trust settlement has a clear connection with marriage to constitute a nuptial settlement; and second, to assess whether and how the court should exercise its discretion.[61] Trust settlements established during a marriage will have "the necessary connection to the marriage".[62] Dynastic trusts established before an existing marriage with a substantial number of other beneficiaries may lack the requisite nuptial character.[63] The Court of

52 Stephanie Ambler "Where there's a wrong, there's a remedy — or is there with trusts?" (2007) 5 NZFLJ 311 at 313.
53 Peart, Henaghan and Kelly, above n 14, at 867.
54 Law Commission (NZLC IP41), above n 19, at [21.1].
55 Law Commission (NZLC R143), above n 9, at [11.16]–[11.17].
56 At [11.108]; and Eastgate and Henderson, above n 35, at 32–33.
57 Law Commission *Review of the Law of Trusts* (NZLC R130, 2013) at [19.35].
58 *Ward*, above n 41, at [15].
59 At [27].
60 At [20].
61 *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189 at [27].
62 At [36].
63 *Kidd v Van den Brink* [2010] NZCA 169 at [8] and [17].

Appeal in *Kidd v Van den Brink* suggested s 182 can be used to access dynastic trust property even if it was settled before the parties met.[64] What matters is whether the subsequent dispositions to the trust have a connection to the marriage.[65]

In *Clayton v Clayton*, the Supreme Court stated in obiter that dynastic trusts have the necessary connection with marriage once a marriage has taken place.[66] Even if this is not the case, "each disposition of property to … a trust after marriage could constitute a post nuptial settlement".[67] Furthermore, the existence of beneficiaries would not be fatal to a finding of a nuptial settlement.[68] Having children from a marriage as beneficiaries may be "a strong indication of a nuptial trust".[69]

The decisions in *Kidd* and *Clayton* suggest that, in the context of a dynastic trust settled before a qualifying relationship, s 182 of the FPA may award a remedy even though the PRA does not. This reflects the wide ambit of s 182 and the potential to undermine the PRA. However, the application of s 182 to trust property is narrowly confined to certain trust assets, rather than the whole trust, and limited to the partner's reasonable entitlements to that property.[70]

The Effect of s 182 in Light of the PRA

The trustees in *Clayton* argued ss 44 and 44C are Parliament's chosen remedies for dealing with trusts following separation.[71] Since s 44C specifically does not allow orders to affect trust capital, s 182 should be read down by reference to that provision.[72] The Court held that Parliament consciously left s 182 untouched when it introduced s 44C.[73] Furthermore, when Parliament amended s 182 to include civil unions, it did not attempt to limit the scope of s 182 by reference to s 44C.[74] As the origins and purpose of the FPA and PRA are entirely different, there is no reason to read down s 182.[75]

Although courts have tried to read s 182 consistently with the PRA, the two sit uncomfortably together.[76] Parliament intended the PRA to be a

64 At [13] and [16].
65 At [16].
66 *Clayton (Claymark Trust)*, above n 61, at [36].
67 At [36].
68 At [37].
69 At [37].
70 Rachel Riddle "Turning Family Homes Into Castles: Testing the fortress of 'dynastic' trusts against relationship property rights in New Zealand" (LLB(Hons) Dissertation, University of Otago, 2012) at 23.
71 *Clayton (Claymark Trust)*, above n 61, at [61].
72 At [61].
73 At [62].
74 At [62].
75 At [63].
76 Law Commission (NZLC IP44), above n 6, at [6.28].

comprehensive code governing property division when a relationship ends.[77] However, it cannot do so when s 182 has the overlapping function of adjusting property rights on separation.[78] Section 182 is "part of the family property toolkit for accessing" trusts after separation.[79] This is problematic because different principles underpin s 182 and the PRA.[80] Unlike the PRA, s 182 has no presumption of equal sharing. Instead, the courts will compare the applicant spouse's current position after dissolution to his or her position under the settlement, assuming a continuing marriage.[81] This comparison gives the court more extensive powers to deal with trust property under s 182.[82]

The court also has jurisdiction under s 182 to make an order from trust capital.[83] It does not have this power under the PRA because Parliament expressly rejected it.[84] If Parliament intended the PRA to be a code, then s 182 provides an alternative route that defeats the intended limits of the PRA.[85]

Only married couples or those in a civil union can use s 182. Therefore, de facto couples face inequality by not having access to trust capital under that section. This undermines the PRA, which sought to remove this inequality by including de facto relationships in the 2001 amendments.[86]

An order under s 182 can only be made after the court has made a dissolution order.[87] In contrast, the court can make an order under the PRA after separation but before a formal dissolution.[88] Therefore, a partner can apply under the PRA before he or she can apply under s 182.[89]

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77 PRA, s 4.
78 Law Commission (NZLC IP44), above n 6, at [6.26].
79 Sean Conway "What's Mine is Yours, or Is It?: Accessing Spousal Trusts for the Purposes of the Property (Relationships) Act 1976" (LLB(Hons) Dissertation, University of Otago, 2011) at 19.
80 Law Commission (NZLC IP44), above n 6, at [6.26].
81 *Clayton (Claymark Trust)*, above n 61, at [53].
82 Law Commission (NZLC IP44), above n 6, at [6.26]. See also *Clayton (Claymark Trust)*, above n 61, at [48] and [83]. The Court would have split the Claymark trust equally under s 182, which it could not do under the PRA.
83 Conway, above n 79, at 18.
84 Matrimonial Property Amendment Bill 1998 (109–2) (select committee report) at xii.
85 The courts' interpretation of "property" and "bundle of rights" also has the same effect of defeating the intended limits of the PRA. See the discussion at Part VI of this article.
86 Property (Relationships) Amendment Act, s 9.
87 Law Commission (NZLC IP44), above n 6, at [6.26]. A dissolution order can only be made two years after separation. See Family Proceedings Act 1980, ss 182(1), 37 and 39(3).
88 At [6.26]; and PRA, s 25(2)(a).
89 Law Commission (NZLC R143), above n 9, at [11.26].

V TRUSTS ACT 2019

The Trusts Act 2019 comes into force in 2021, replacing the current Trustee Act 1956. It seeks to modernise and clarify existing trust law. It will impose mandatory duties, which trustees must perform and cannot exclude.[90] For example, trustees must provide beneficiaries with basic trust information.[91] The Trusts Act also imposes default duties, which trustees can exclude.[92] Codifying these duties strengthens beneficiaries' ability to hold trustees to account. Partners who are beneficiaries can apply to the court to review a trustee's decision, and make orders to remove or replace the trustee.[93] Courts can use this review mechanism when a bitter separation "has affected the administration of the trust".[94]

VI REMEDIES AT COMMON LAW

Sham Trusts

An express trust requires three certainties: certainty of intention, certainty of subject matter and certainty of objects.[95] When the settlor intended a trust "to be a mere facade behind which [other] activities might be carried on",[96] the trust "does not evidence the true common intention of the parties" and therefore lacks certainty of intention.[97] This is a sham trust. The trust deed has no effect, so it is as if the trust was never created. There is "a high threshold for finding a sham [trust, so] … the sham doctrine offers little hope of success" for partners seeking a share of trust assets.[98]

Illusory Trusts

An illusory trust occurs where the settlor intends to create a trust but has reserved such extensive powers that, in reality, he or she did not intend to part control with the property.[99] The assets remain under the settlor's control

90 Trusts Act 2019, ss 23–27.
91 Section 51.
92 Section 28.
93 Sections 114 and 126.
94 Law Commission (NZLC IP41), above n 19, at [20.62].
95 Greg Kelly and Chris Kelly *Garrow and Kelly Law of Trusts and Trustees* (7th ed, LexisNexis, Wellington, 2013) at 53.
96 *Scott v Commissioner of Taxation of the Commonwealth (No 2)* (1966) 40 ALJR 265 (HCA) at 279.
97 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289 at [33].
98 Peart, Henaghan and Kelly, above n 14, at 874.
99 *Clayton v Clayton* [2013] NZHC 301, [2013] 3 NZLR 236 [*Clayton* (HC)] at [90]–[91].

for his or her benefit — he or she never intended to benefit the beneficiaries.[100] A finding of an illusory trust means no valid trust was created,[101] so the property vests personally with the settlor and becomes subject to the PRA.

In *Clayton*, although the Vaughan Road Property Trust was not a sham trust, it was an illusory trust.[102] The terms of the trust deed reserved extensive powers to Mr Clayton. He could add or remove trustees and beneficiaries, had unfettered powers to distribute trust income and capital of the trust to himself.[103] He also could wind up the trust at any time. Mr Clayton could exercise this power in his self-interest to the exclusion of other beneficiaries. In effect, he retained all powers of ownership and could deal with the trust property as if the trust was never created.[104] The Supreme Court stated "the term 'illusory trust' [was not] helpful", and did not determine the issue.[105] However, the Court held that finding there is no sham trust does not preclude the finding of an illusory trust. The settlor may have the subjective intention to create a trust but failed in his or her attempt, so no valid trust comes into existence.[106]

Bundle of Rights

1 Power as Property

Frustrated with the PRA's limited ability to deal with discretionary trusts, courts have used the "bundle of rights" doctrine.[107] The doctrine refers to a combination of different interests, powers and rights that constitute property under the PRA, including relationship property.[108] The bundle of rights doctrine captures intangible rights that do not fit within traditional conceptions of property.[109]

Powers of appointment and discretionary interests constitute *property* that has some value attached.[110] This does not mean the trust property itself is relationship property.[111] The spouse is treated as the owner of the powers, not the owner of trust property. However, courts have held the

100 Ross Holmes "Part II — Sham Trusts" in Don Breaden (ed) *Law of Trusts* (online ed, LexisNexis) at [A.12].
101 *Clayton v Clayton* [2016] NZSC 29, [2016] 1 NZLR 551 [*Vaughan Road Property Trust*] at [123].
102 *Clayton* (HC), above n 99, at [90].
103 At [90]; and *Clayton (Claymark Trust)*, above n 61, at [118].
104 *Clayton* (HC), above n 99, at [90].
105 *Vaughan Road Property Trust*, above n 101, at [129].
106 At [123].
107 Law Commission (NZLC IP20), above n 16, at [4.35].
108 Section 2 defines "owner" as a "beneficial owner of property" and the definition of "property" includes "any other right or interest".
109 Gush, above n 31, at 157.
110 Law Commission (NZLC IP41), above n 19, at [20.36]–[20.37]; and *Vaughan Road Property Trust*, above n 101, at [69]–[70].
111 See *LR v JR (A bankrupt)* [2011] NZFLR 797 (FC) at [59].

powers carry the same value as the trust property.[112] In *Clayton*, the Supreme Court held the combination of Mr Clayton's powers and entitlements under the trust amounted to a general power of appointment, tantamount to ownership.[113] The nature of the powers gave Mr Clayton a wide and unfettered ability to act in his own interest (as he was trustee and beneficiary), with no accountability to other beneficiaries.[114] Therefore, the power was property, capable of being relationship property and subject to equal division.

The *Clayton* decision produces some unsatisfactory results.[115] First, Mrs Clayton was entitled to half of the trust assets, but the other half was not Mr Clayton's relationship property because it remained trust property for the benefit of the beneficiaries.[116] Secondly, the couple's children, who were beneficiaries, did not have any enforceable rights against Mrs Clayton's half share of the trust property.[117] The decision also opens the possibility for a partner to claim half the trust assets settled by the other partner's parents if the other spouse has exclusive powers to appoint and remove beneficiaries and significant control tantamount to ownership.[118] This decision reflects how the courts have gone to great lengths to provide partners with a remedy. However, it goes against legislative policy that prioritised trusts over relationship property claims — Parliament expressly legislated "against giving the courts the power to make orders against the trust capital".[119] On the other hand, such an approach is arguably necessary to give effect to the PRA's goal to provide a just division.

Constructive Trusts upon an Express Trust

An order of constructive trust over assets held in an express trust requires the trustee to hold the portion of the value of the trust property, attributable to the non-owning partner's contributions, on constructive trust in favour of the non-owning partner.[120] For a successful claim, the claimant partner must show he or she made a contribution to the trust property and that both parties had a reasonable expectation the claimant will have a share in the property.[121] Courts have been more willing to impose a constructive trust where a partner has treated the trust assets as his or her own — in other words, where the trust is the partner's "alter ego".[122]

112 *Vaughan Road Property Trust*, above n 101, at [99].
113 At [22] and [68].
114 *Clayton (Claymark Trust)*, above n 61, at [62].
115 Anthony Grant "Has the bundle of rights been reborn?" (2015) 866 LawTalk 32.
116 Grant, above n 115.
117 Grant, above n 115.
118 Grant, above n 115.
119 Jessica Palmer and Nicola Peart "Clayton v Clayton: a step too far?" (2015) 8 NZFLJ 114 at 118.
120 Law Commission (NZLC IP41), above n 19, at [20.68].
121 *Lankow v Rose* [1995] 1 NZLR 277 (CA) at 294.
122 See, for example, *Prime v Hardie* [2003] NZFLR 481 (HC) at [30].

1 Compensation

Courts base an award for a constructive trust claim on the claimant's contribution to the trust property, rather than a presumption of equal sharing.[123] Both direct and indirect contributions to the property will be relevant.[124] However, the court has often struggled to give weight to non-financial contributions.[125] In *Vervoort v Forrest*, Ms Vervoort decorated, maintained and helped refurbish the trust property.[126] The Court of Appeal held that her contributions were cosmetic in nature and did not contribute significantly to the value of the asset.[127] This decision reflects how an award under a constructive trust claim may be lower than one under the PRA and may not reflect a just division.

Before 2001, constructive trust claims were a common method used by de facto couples because de facto couples were not included in the PRA.[128] Despite being included now, de facto couples still resort to constructive trust claims, reflecting the inadequacy of the PRA when assets are placed in trusts.[129] Furthermore, it is questionable whether claims of constructive trust should be brought alongside PRA claims at all. Parliament intended the PRA to be a code and expected it to apply "instead of the rules and presumptions of common law and equity".[130]

As can be seen, the law is in disarray. The unsatisfactory PRA regime led the courts to bend over backwards to achieve a just result upon separation. Nicola Peart commented that "[t]he Courts were more proactive than Parliament … [and] had long ago recognised the need to respond to society's changing values".[131] This has resulted in a piecemeal approach that undermines the goal to make the PRA a code governing property division upon separation. It has also reduced the effectiveness of trusts, particularly where the settlor partner retains significant control. The Law Commission stated "that the [current] protection given to trusts over the rights of partners … [is] problematic".[132]

123 Law Commission (NZLC IP41), above n 19, at [21.57].
124 *Vervoort v Forrest* [2016] NZCA 375, [2016] 3 NZLR 807 at [46]–[47].
125 Mark Henaghan and Nicola Peart "Relationship Property Appeals in the New Zealand Court of Appeal 1958-2008: The Elusiveness of Equality" in Rick Bigwood (ed) *The Permanent New Zealand Court of Appeal* (Hart Publishing, Oxford, 2009) 99 at 101.
126 *Vervoort*, above n 124, at [8].
127 At [75].
128 Law Commission (NZLC IP41), above n 19, at [20.68].
129 Law Commission (NZLC IP44), above n 6, at [6.13(d)].
130 PRA, s 4 as cited in Conway, above n 79, at 5.
131 Peart, above n 21, at 820.
132 Law Commission (NZLC IP44), above n 6, at [6.30].

VII THE LAW COMMISSION'S PROPOSALS

The Law Commission reviewed the PRA for three years.[133] On 16 October 2017, it published an Issues Paper seeking public feedback on a wide range of issues, including whether the PRA was "still achieving a just division of property at the end of a relationship".[134] On 1 November 2018, the Law Commission published a Preferred Approach Paper discussing "a package of reforms" to the PRA and outlined its preferred approach.[135] Following public submissions, it published a final review with 140 recommendations for reform, which was tabled in Parliament on 23 July 2019.[136] This Part will only discuss the recommendations made concerning trusts. The Law Commission recommends broadening s 44C of the PRA to provide a comprehensive remedy and repealing s 182 of the FPA.[137]

Amending s 44C of the PRA

The Law Commission proposes s 44C should enable the court to make orders in three broad situations:[138]

> (a) Where either or both partners have disposed of property to a trust at a time when the qualifying relationship was reasonably contemplated or since the qualifying relationship began and that disposition has had the effect of defeating the claim or rights of either or both of the partners under any other provision of the PRA.
> (b) Where trust property has been sustained by the application of relationship property or the actions of either or both partners.
> (c) Where any increase in the value of the trust property, or any income or gains derived from the trust property, is attributable to the application of the relationship property or the actions of either or both partners.

1 Dispositions That Defeat the Entitlements of Either or Both Partners

For s 44C to apply, the disposition must have the effect of defeating the rights of *one* of the partners.[139] If the disposition defeats the rights of both

133 Law Commission "Review of the Property (Relationships) Act 1976" (24 May 2016) <www.lawcom.govt.nz>.
134 Law Commission (NZLC IP41), above n 19, at 1.
135 Law Commission (NZLC IP44), above n 6, at [1.10]–[1.11].
136 Law Commission (NZLC R143), above n 9, at [1.15].
137 Law Commission (NZLC IP44), above n 6, at [6.47].
138 Law Commission (NZLC R143), above n 9, at [11.54].

parties equally, the courts cannot order compensation.[140] The Law Commission proposes s 44C should also apply when the disposition has defeated *both* partners' rights.[141] This proposal would lower the threshold for partners to bring a s 44C claim.

The Law Commission's proposal would prevent partners from arguing s 44C does not apply because both parties are equally affected by the disposition. This is especially the case where both partners are discretionary beneficiaries. In *RWR v AJR*, for example, both partners were discretionary beneficiaries of the trust.[142] The husband argued s 44C did not apply because he was "no better off" than his wife and he was equally as vulnerable to the trustee's decision.[143] The Family Court decision, which was upheld by the High Court, rejected this argument because the husband retained control over the trust.[144] The husband was the sole shareholder and director of a company that was the corporate trustee of the trust.[145] This decision reflects the robust approach the courts have taken to overcome the limitations of s 44C. The Law Commission's proposal is beneficial when the level of control is not extensive or when the partner hides his or her real interest in a trust.[146]

The Law Commission believes disputes over whether one partner is more disadvantaged than the other are unnecessary, given the court has the discretion to adjust compensation to ensure it reaches a just outcome.[147] However, the proposal's ability to reduce these disputes is questionable. Under the Law Commission's proposed cl 44C, the court must consider the extent to which a partner's rights have been defeated when considering whether it is just to award compensation.[148] The proposal merely shifts the extent of disadvantage inquiry from the initial threshold question of whether cl 44C applies to the compensation stage. The Law Commission also believes determining whether a partner has retained effective control of the trust is a complex inquiry.[149] However, the proposal's ability to reduce this complexity is also questionable. To determine the extent of disadvantage suffered by a partner, the court will inevitably have to inquire into whether the other partner has concealed his or her interest (for example, through

139 PRA, s 44C(1)(b).
140 Nicola Peart "Section 44C of the Property (Relationships) Act 1976: conflicting interpretations" (2003) 4 BFLJ 199 at 200.
141 Law Commission (NZLC R143), above n 9, at [11.81].
142 *RWR v AJR* [2010] NZFLR 82 (HC) at [5].
143 At [14].
144 *AJR v RWR* FC Hamilton FAM-2004-019-1345, 31 October 2008 at [48]–[53] as cited in *RWR v AJR*, above n 142, at [14]. The High Court upheld the Family Court's decision at [34].
145 *AJR v RWR*, above n 144, at [48].
146 Law Commission (NZLC R143), above n 9, at [11.81].
147 At [11.81].
148 See Appendix 3 for the Law Commission's "Draft amended s 44C": Law Commission (NZLC R143), above n 9, at 503.
149 At [11.81].

control) in a trust, as that may indicate whether he or she is likely to exercise that control to benefit themselves.[150]

The Law Commission's reasons for their proposal are not convincing. The point of s 44C is to remedy the inequality in property rights arising from a disposition. If both partners are equally affected by the disposition, there is no inequality to remedy, as neither partner has an advantage over the other and no rights are defeated.[151]

2 Dispositions of All Property

The Law Commission proposes cl 44C should cover dispositions of *all* property, including separate property — not just dispositions of relationship property.[152] This proposal provides a remedy in cases like *Genc v Genc*, where separate property (for example, inheritance) is disposed to a trust and the trust uses the money to purchase property such as the family home.[153] If the partner acquired the family home under their own name, rather than through the trust, it would have become relationship property under s 8.[154] Therefore, the disposition defeats the other partner's claim to an equal share in the home.[155] Extending s 44C to cover dispositions of all property aligns with another Law Commission proposal that "separate property can become relationship property if it is used to acquire property for the common use or common benefit of the partners".[156]

The Law Commission proposes the family home will be separate property if it was acquired before the relationship was contemplated or acquired as a gift or inheritance.[157] Under its proposal, only the increase in the value of the family home during the relationship will be relationship property.[158] If a trust acquires the family home, cl 44C would apply, as the claimant partner's right to a share in the increase in value would have been defeated.

A potential concern of this proposal is the lack of a requirement for an intention to defeat a partner's claim. Currently, dispositions of separate property are accessed through s 44, which requires a high threshold for proving intention. Under the Law Commission's proposal, cl 44C would be triggered in situations where a partner disposes separate property for genuine reasons with no intention to defeat his or her partner's claim. However, since

150 Hosking, above n 48, at [9.9].
151 Peart, above n 140, at 200.
152 Law Commission (NZLC IP44), above n 6, at [6.63].
153 *Genc v Genc* [2006] NZFLR 1119 (HC) at [73]–[75].
154 PRA, s 8(1)(a).
155 Law Commission (NZLC R143), above n 9, at [11.74]; and *Genc*, above n 153, at [75].
156 Law Commission (NZLC R143), above n 9, at [11.75].
157 At [11.75].
158 Law Commission (NZLC IP44), above n 6, at [6.79], [6.69] and [6.64].

intention is a significant hurdle to overcome in s 44, it is not appropriate to import it into cl 44C.

Overall, this proposal is a welcome change, as it minimises the ability of a partner to circumvent s 44C where separate property would have become relationship property. It shifts the focus to whether the disposition has the effect of defeating a partner's claim, which is a more appropriate inquiry.

3 Dispositions Made in Contemplation of Entering a Qualifying Relationship

Currently, s 44C only applies to dispositions made since the qualifying relationship began.[159] The Law Commission proposes to extend s 44C to dispositions made when the partners "reasonably contemplated" a qualifying relationship.[160] This includes the dating period but does not include dispositions made before the partners had met.[161]

(a) Uncertainty in "Reasonably Contemplated"

The court must determine whether the disposition occurred before or after the partners reasonably contemplated the relationship. A disposition that occurs before would be safe from the proposed cl 44C. The disadvantage of this proposal is that it is difficult to determine when the partners reasonably contemplated a qualifying relationship and will result in increased litigation. Determining when a qualifying relationship begins is already difficult because the law considers a de facto relationship before the marriage as being part of the relationship.[162] The current definition of a de facto relationship is extensive and not clear cut, requiring an assessment of the circumstances of the relationship.[163] Couples are more likely to "[drift] … into a qualifying [de facto] relationship without appreciating the property consequences" provided in the PRA.[164] Couples may not realise the equal sharing regime applies sooner than they expect. Adding an inquiry about whether the partners reasonably contemplated the qualifying relationship will create additional uncertainty for property owners about whether their disposition is safely outside the PRA's reach. Clause 44C provides a short window for the owning partner to dispose of assets to a trust safely. Given the uncertain nature of "reasonably contemplated", a disposition is only safe if the asset is disposed before the couple had met (subject to cl 44(1)(b)–

159 PRA, s 44C(1)(a).
160 Law Commission (NZLC R143), above n 9, at [11.77].
161 At [11.77].
162 PRA, s 2B–2BAA.
163 Section 2D.
164 Law Commission (NZLC IP44), above n 6, at [2.15].

44(1)(c)) or if they contract out of cl 44C.[165] Any dispositions while the partners are dating may be vulnerable to cl 44C. Professor Mark Henaghan argues:[166]

> … it is necessary in family law to provide as much certainty as possible in legislation, specifying the consequences of and remedies available on separation or dissolution so that those concerned can know where they stand.

The Law Commission suggests "reasonably contemplated" includes the dating period.[167] As there are various levels of commitment in dating, there needs to be a definition of dating or factors that indicate what type of dating is covered by cl 44C. Furthermore, there would be issues if one partner reasonably contemplated the qualifying relationship but the other did not.[168]

On the other hand, increased uncertainty and litigation may be an unavoidable consequence of catching dispositions that interfere with the policy objectives of the PRA.[169] Given the diversity of relationships and the tendency for people to engage in strategic behaviour, s 44C's broad language gives the court greater discretion to do justice according to the facts of each case.

Some submissions proposed to adopt a fixed two-year period before the qualifying relationship begins.[170] The Law Commission believes limiting s 44C to a fixed period before or during the relationship is undesirable because this incentivises strategic behaviour.[171] A partner may dispose of assets into a trust and then delay cohabitating to avoid the application of s 44C.[172] This argument is naïve. People will engage in strategic behaviour regardless.

(b) Aligning with s 44?

An advantage of the Law Commission's proposal is that it captures situations of strategic behaviour.[173] One example would be where a couple contemplates moving in together and, just before moving in, the owning partner disposes of his or her assets to a trust to defeat the other partner's future claims under the PRA. This seems to align cl 44C with s 44

165 Law Commission (NZLC R143), above n 9, at [11.77] and [11.79].
166 Mark Henaghan "New Zealand Family Law in the 21st Century by B D Inglis" (2009) 12 Otago LR 201 at 202 as cited in Conway, above n 79, at 48.
167 Law Commission (NZLC R143), above n 9, at [11.77].
168 Nicola Peart "Submission to the Law Commission's Issues Paper 44 on the Review of the Property (Relationships) Act 1976" at [4.2.1].
169 Telephone call with Jessica Palmer, Dean of Law University of Otago (Helen McQueen, Law Commission) file note provided by Law Commission.
170 Law Commission (NZLC R143), above n 9, at [11.78].
171 At [11.78].
172 At [11.78].
173 At [11.78].

concerning the intention requirement — capturing situations where a partner has the intention to defeat his or her partner's claim. However, cl 44C is much broader and potentially harsher than the requirement of intention in s 44.

Many couples identified that they are in a committed relationship with someone who lives in a different household, known as "living apart together relationships" (LATs).[174] LATs may be an indication that partners who live apart together are unable or not ready to cohabitate. However, many young adults claimed that, for them, LAT was "a state of transition and [they] intended to live together in future".[175] Clause 44C creates the potential for assets purchased during a LAT relationship (that is not yet a qualifying de facto relationship) to be vulnerable to a claim if the disposition of property occurs after the parties contemplate entering a de facto relationship.

The point of the three-year qualifying period for a de facto relationship is to prevent the "retrospective imposition of property sharing obligations on unsuspecting partners".[176] It allows partners to recognise their relationship is changing before deciding whether to accept the property sharing obligations under the PRA or to contract out. Clause 44C undermines this because it imposes sharing obligations retrospectively before the qualifying relationship was in existence. In the present author's opinion, when partners contemplate entering a qualifying relationship, they should have the opportunity, and potentially the last chance, to consider asset protection measures. Since the other party has not yet accrued any rights under the PRA, no rights or claims will be defeated. A trust may be the only way an individual can protect his or her assets if the other partner does not agree to sign a prenuptial agreement.[177]

Overall, cl 44C prevents a partner from protecting his or her assets by using a trust to prevent future claims once the couple reasonably contemplated a qualifying relationship. Clause 44C should not apply when couples reasonably contemplated a relationship, for determining when that reasonable contemplation occurred creates uncertainties. Individuals should have the opportunity to protect their assets before their partners accrue any rights under the PRA. The current period covering dispositions during the relationship better balances both partners' rights.

174 Law Commission (NZLC SP22), above n 2, at 20–21.
175 At 21.
176 Law Commissions (NZLC IP44), above n 6, at [4.10]–[4.11].
177 Law Commission (NZLC R143), above n 9, at [11.63].

4 Trust Property Preserved or Enhanced by the Relationship

Section 44C's narrow scope enables trusts to defeat the application of ss 17 and 9A of the PRA.[178] The Law Commission proposes to broaden s 44C to situations where trust property is sustained or enhanced by the application of relationship property or the direct or indirect actions of either or both partners.[179] This would align s 44C with ss 17 and 9A. A partner can claim for his or her contributions, regardless of whether the preserved or enhanced property was the other partner's separate property or trust property.[180]

The proposed cl 44C also applies to trusts settled by third parties and trusts settled before a couple reasonably contemplated a relationship. In both cases, cl 44C(1)(a) would not apply if the trust property was used during the relationship, unless it was preserved or enhanced by the relationship.[181] Clause 44C(1)(c) enables a partner to claim the increase in the value of the family home that is attributable to the relationship, even if the family home was settled in a trust before the partners reasonably contemplated a qualifying relationship.[182]

Similarly, the proposed cl 44C will benefit partners who have contributed to dynastic trust property. Dynastic trusts are a potential source of inequality because they are outside the scope of the PRA. If the maintenance or enhancement of the trust property is the result of the partners' joint efforts, the contributing partner who is a discretionary beneficiary may, following separation, be severed from the trust. Meanwhile, the other partner continues to benefit from the trust property through his or her family connection.

This approach reflects the fact that trust property may be brought into the relationship through an external source and is not the result of the partners' joint efforts during their relationship. However, it also recognises the partners may contribute to the trust property in some way during the relationship, so it is appropriate to provide compensation for their efforts.[183] The approach would "prevent trusts from being unjustly enriched at the expense of the [contributors]".[184]

This proposal fails to consider the interest of others, such as settlors, trustees and beneficiaries. First, dynastic trusts are often settled by parents before a partner enters the picture. If the parents intentionally establish the trust to protect their child against claims from a future partner, then cl 44C does not give effect to the settlor's intentions. It instead dilutes the protection trusts have historically provided. Furthermore, the parents initially

178 See the discussion in Part III of this article.
179 Law Commission (NZLC R143), above n 9, at [11.85].
180 At [11.86].
181 At [11.72].
182 At [11.87] and [3.123].
183 Law Commission (NZLC IP41), above n 19, at [21.20].
184 Peart, above n 168, at [4.3.1].

own the trust property. Clause 44C allows partners to claim over assets the other partner never owned in the first place. Secondly, if a claim is successful, a remedy can be ordered from trust income.[185] If the trust has little income, a remedy to the affected partner will impact the distribution beneficiaries will receive. If the settlor is also a beneficiary, his or her initial expectations to benefit from the trust may be affected. Thirdly, legal ownership vests with the trustee. Clause 44C may impact the trustee's ability to satisfy his or her duties, such as paying trust debts or taxes.

Given the unjust results that have arisen, it is time trusts give way. By limiting compensation to the value increase attributed to the relationship, cl 44C sets appropriate legislative limits so the court does not have to strain to give justice. The court does not have to look at whether discretionary interests constitute property or determine the value of these interests.[186] The proposed cl 44C reduces the need for claims of constructive trust over trust property, simplifying and codifying remedies that are already available.[187] It adequately balances the rights of partners and, in the present author's opinion, will give rise to more equitable results. Clause 44C better reflects the policy objectives of the PRA — partners who have contributed to the property should share the "fruits of the relationship".[188] Ultimately, cl 44C allows the court to prioritise a partner's relationship property entitlements over the trust.

(a) Apportionment and Contributions

Only the increase in value of trust property attributable directly or indirectly to the application of relationship property or the actions of either or both partners will be relationship property.[189] Where there is a contribution, it is unclear whether the increase in value is automatically relationship property (and therefore subject to equal sharing) or whether the court will divide the increase according to the partners' respective contributions.

At first instance, a contribution approach may seem more appropriate, because each partner is entitled to the increase in value in proportion to his or her contributions. However, the amendment appears to be prone to the problems from which s 9A(2) currently suffers. Namely, it provides little practical guidance on how to determine each partner's respective contributions to the increase in value.[190] First, it is difficult to determine the proportion of a partner's contribution when it is partially or entirely non-monetary. Secondly, the Act includes indirect actions, which brings into question how far removed from the trust property the action can

185 PRA, s 44C(2)(c).
186 Peart, above n 168, at [4.3.1].
187 Law Commission (NZLC IP44), above n 6, at [6.80].
188 At [2.3].
189 Law Commission (NZLC R143), above n 9, at [11.85].
190 At [3.108]

be. Would a stay-at-home partner responsible for domestic duties and childcare satisfy the threshold?[191] Under the PRA, all forms of contribution are equal. There is no presumption that monetary contributions are valued greater than non-monetary contributions.[192] The PRA recognises one partner may take on domestic duties, which frees up the other partner to work outside for the benefit of the partnership.[193]

Despite the presumption of equal weighting, a contribution approach was problematic under the MPA 1976. The court historically undervalued non-monetary contributions, struggling to give domestic contributions such as housework and childcare equal weight to financial contributions such as producing income and purchasing property.[194] It was often difficult to show a causal connection between domestic contributions and the increase in value.[195] Following this, Parliament removed the discretion to divide domestic property unequally according to contribution and implemented the presumption of equal sharing to apply to all property acquired during the relationship.[196] Since then, the court has taken a more generous approach to s 9A, assessing contributions as a matter of "general impression".[197] The Supreme Court neared a presumption of equal sharing in its interpretation of s 9A, holding that:[198]

> … the effect of the word "indirectly" in subs (2) is that the parties will share increases in the value of separate property unless the actions of the non-owning party have not materially influenced the increase.

Clause 44C has similar wording to s 9A, so a similar interpretation is likely to be adopted. Including "indirectly" in cl 44C(c) removes the need to show that a "direct physical connection" to the property caused the increase in value.[199] This minimises the unfair results that may arise if the contribution to the *relationship* has been significant but does not reflect the contribution made to the *increase in value* of the trust property — thereby overcoming evidential problems when actions are too remote from any increase in value.[200]

Arguably, s 9A deals with separate property owned by a partner, whereas cl 44C deals with trust property owned by the trust. The causal link between the indirect action and increase in value should not be too far

191 E-mail from Nikki Chamberlain (Lecturer, Faculty of Law, University of Auckland) to the New Zealand Law Commission regarding submissions on the Property (Relationships) Act 1976 – Preferred Approach Paper (29 January 2019).
192 PRA, ss 1N(b) and 18(2).
193 Law Commission (NZLC R143), above n 9, at [45]–[46].
194 At 100.
195 At 111.
196 At 100–101.
197 *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [46].
198 At [26].
199 At [44].
200 Law Commission (NZLC R143), above n 9, at [3.122].

removed to ensure the apportionment is a proper reflection of a partner's contribution and prevent that partner from receiving a windfall. However, strict adherence to the contribution approach goes against the principles of the PRA, because this may result in undervaluing non-monetary contributions. Ultimately, whether a contribution approach or 50:50 split is adopted will depend on the facts of each case. The present author believes there should be a presumption of 50:50 sharing in the increase in value of trust property attributable to the relationship. Courts should only apply a contribution approach where the partner's actions have not materially influenced the increase in value.

5 Powers of the Court

The Law Commission proposes to extend the court's powers to order a distribution from the trust's capital to the affected partner.[201] Affected partners will benefit from cl 44C as it provides another source of compensation, ensuring the court can adequately recognise each partner's contributions. Without turning to other avenues, cl 44C would assist the court to achieve a just division of property.[202] Currently, judicial discomfort with trusts has resulted in increased use of s 182 and common law doctrines to access trust property. This backdoor approach is problematic, as discussed in Parts III–IV of this article. The PRA should be updated to reflect contemporary ownership structures that circumvent the Act and provide a more transparent and effective remedy reflecting what is happening in practice.[203]

It is uncertain whether Parliament will adopt this recommendation, given its past reluctance. In 1998, the Working Group on Matrimonial Property and Family Property made the same recommendation in its review of the MPA 1976 and it was made again in the recent Law Commission's review of trust law.[204] Parliament has been reluctant to provide the court with such broad powers, as it recognises:[205]

> [T]rusts are created for legitimate reasons and should be permitted to fulfil that purpose, where there was no intention to defeat the spouse's claim at the time the trust was established. Bona fide third party interests are protected.

The court's extended powers may be a threat to the security of existing property structures and private property rights.[206] Since cl 44C(1)(b) and

201 At [11.89].
202 See Law Commission (NZLC IP44), above n 6, at [6.62].
203 Peart, above n 32, at 444; and Law Commission (NZLC R143), above n 9, at [11.90].
204 Department of Justice, above n 44, at 28–31; and Law Commission (NZLC IP20), above n 16, at [3.29].
205 Matrimonial Property Amendment Bill 1998 (109–2) (select committee report) at xii.
206 Peart, above n 20, at 17.

44C(1)(c) can apply to situations where there was no fraud and both parties willingly established the trust, ordering a remedy from trust capital erodes the legitimate purpose for the trust's establishment and affects the interest of non-spouse or partner beneficiaries. Couples can establish trusts for a variety of legitimate purposes. A discretionary family trust might have only one property (for example, the family home). Therefore, to provide compensation to the affected partner, the trust property may need to be sold. This may harm the interests of other beneficiaries and reduce the certainty of commercial arrangements and beneficiaries' rights. If the trust is established for the maintenance of a couple's children, selling the property may hinder the trust's ability to make any future distributions and provide for the children, thereby harming their interests.

Similarly, final beneficiaries benefit when the trust comes to an end. If trust property is sold, there may be no remaining property for the final beneficiaries. Any disposition of property to a trust is not safe, and trustees and beneficiaries cannot be certain the trust property will remain intact.[207] Furthermore, in a dynastic trust, where underlying capital is often provided by a third party, ordering a distribution from trust capital goes against the third party settlor's intention and right to deal with assets as he or she sees fit.

Under the proposed amendment, the court can make an order against any trust property. It is not confined to trust property that would have been relationship property but for the trust.[208] This goes beyond the power conferred by s 182, which is limited to assets that have been settled for the couple's benefit. On the contrary, the court is already exercising broad powers by holding that s 182 can potentially be used to access dynastic trust property.[209]

While extending the court's power undermines certainty and property rights that trusts historically provide, we should weigh cl 44C against the need to compensate partners adequately. Courts are already starting to prioritise partners' rights over the certainty of trusts, so cl 44C provides a more transparent remedy. In light of the inequality and the PRA's objective of providing adequate protection for partners following separation, it is time Parliament adopts this recommendation.

6 Matters the Court Must Consider

Where cl 44C's requirements are satisfied, the court can make an order if it is *just* in the circumstances, considering:[210]

207 Peart, above n 32, at 458.

208 Peart, above n 168, at [4.2.4].

209 *Clayton (Claymark Trust)*, above n 61, at [36]. See the discussion in Part IV of this article. Assets in a dynastic trust would have been owned by a third party and would not be considered relationship property.

210 Law Commission (NZLC R143), above n 9, at [11.96].

(a) the extent to which the partner's claim or rights have been defeated by the disposition;
(b) the extent to which the trust property has been sustained or enhanced by the application of relationship property or the actions of either partner;
(c) the date when the property was disposed of to a trust or when the trust property was preserved or enhanced;
(d) whether the property was disposed to a trust or preserved or enhanced with informed consent of both partners;
(e) any benefits the partners received from the trust or the value of any consideration given for any disposition of property to the trust or for the preservation or enhancement of trust property;
(f) whether the trust is intended to meet the needs of any minor or dependent beneficiaries; and
(g) any other relevant matter.

Since cl 44C is broader than s 44C in enabling the court to access trust capital, cl 44C gives greater priority to relationship property entitlements over beneficiaries' interests. The mandatory considerations act as a positive restraint on the court's extended power by weighing the overall fairness of the circumstances before ordering compensation from trust capital.[211] Factors (a) and (b) — intended to reflect the compensatory nature of the remedy — are the starting point when assessing the value of compensation. They require the court to assess what the partner would have been entitled to had there been no trust. Factor (a) is broader because it requires the court to consider the extent to which the partner's right has been defeated under any provisions of the new Act and is not limited to considering the value of relationship property disposed to a trust as it currently stands.[212]

Only awarding a partner what he or she would have been entitled to does not always achieve a just division of property. For example, where both parties genuinely intended to settle property on a trust to provide for a third party (such as donations to a charity), compensation may not be just if the third party has altered his or her position.[213] The nature of relationships and trusts will vary considerably, so what a just division requires depends on the facts of each case. Factors (c)–(g) require the court to take competing interests into account. Informed consent is a new factor, not present under the current PRA. An award of no or reduced compensation may reflect these

211 At [11.98]
212 PRA, s 44C(4).
213 Section 44C(3) prevents the court from making an order against the trustee if a third person has, in good faith, altered his or her position in reliance on the trustee's ability to distribute income of the trust. This is removed by cl 44C.

circumstances.[214] Ultimately, these considerations help the court strike an appropriate balance between a partner's rights and preserving trusts.[215]

(a) Children's Interests

While the PRA is primarily about a partner's property entitlements following separation, children often play a key role in trust disputes if they are beneficiaries of family trusts.[216] Despite the PRA's reference to children's interests, they have not been central figures because the PRA focuses on adults.[217] The Law Commission recommends that "children's 'best interests'" should be a "'primary consideration'" under the PRA.[218] The court may give greater weight to the interests of any minor or dependent beneficiaries than to any other considerations contained in cl 44C.

(b) Beneficiaries and Purpose of the Trust

There is no requirement to consider the interests of non-minor or non-dependent beneficiaries (other beneficiaries), although courts may consider them under "any other relevant matter".[219] Since cl 44C is broader than s 44C, there is greater detriment to trusts and beneficiaries.[220] Discretionary beneficiaries have the right to require trustees to consider their interest when making a distribution.[221] The PRA should reflect this by making other beneficiaries and the trust's purpose mandatory considerations in cl 44C. Consideration of other beneficiaries may result in courts making more conservative awards adjusted for their interests.

Balancing a partner's rights with a beneficiary's rights may be difficult. Beneficiaries often do not give consideration for their interest under a trust. By contrast, the partner would have been entitled to the trust property as relationship property, if it was not in a trust. A partner's entitlement under the PRA recognises his or her contribution to the relationship. Arguably, then, a partner's rights should prevail over a beneficiary's right.

Focusing on preserving trust assets often overlooks the purpose to protect assets for the benefit of beneficiaries. The legitimate purpose of the trust should focus on how the trust deals with property for the benefit of both

214 Law Commission (NZLC R143), above n 9, at [11.69]. See, for example, *Grigson v Walker* [2012] NZFC 5566, where compensation was not awarded because the partner lived rent-free in the trust property for five years after separation and had the sole benefit of other items of relationship property.
215 See, for example, Law Commission (NZLC R143), above n 9, at [R60].
216 Bill Atkin "Children and financial aspects of family breakdown" (2002) 4 BFLJ 85 at 85.
217 At 90; and PRA, s 26.
218 Law Commission (NZLC IP44), above n 6, at [7.35].
219 Law Commission (NZLC R143), above n 9, at [11.96].
220 Peart, above n 32, at 461.
221 Gush, above n 31, at 157.

fixed and discretionary beneficiaries. This would impact whether the court should distribute trust property. For example, if the trust was settled to protect assets for partners' enjoyment and use, equally distributing trust property would be justified. If the trust was established primarily for children's education or charity, then there are less compelling reasons to distribute the trust assets to meet relationship property claims. This is especially so where the partner knew about the consequence of the disposition on his or her rights. This may be hard to discern in family trusts, as beneficiaries often include both partners and their children. It may be in the partner's interest to ensure the trust continues to provide for his or her child. Nevertheless, it is important for the court to look at the purpose of the trust and for whose benefit it was intended, rather than upholding asset protection as an end in itself.[222] The Law Commission has recommended that trustees, beneficiaries and any other person with an interest in the trust property have a right to be heard whenever the court hears a claim under cl 44C. However, considering other beneficiaries in cl 44C ensures a better balance between a partner's entitlements and the rights of beneficiaries.[223]

VIII REPEALING S 182 OF THE FPA

Part IV highlighted how s 182 of the FPA sits uncomfortably alongside the PRA. The Law Commission proposes to repeal s 182; there has been a resurge in use of the section recently due to the PRA's limited scope and inability to provide a just division. Since cl 44C will provide a comprehensive remedy and redress current limitations, there is arguably no need for s 182. Repealing s 182 would ensure courts resolve all property disputes by applying the same purpose and principles of the PRA. This approach would promote inexpensive, speedy and straightforward resolutions by enabling issues to be addressed at one time by one court.[224]

Retaining s 182 may conflict with the proposed amendments. *Kidd* and *Clayton* create a risk that dynastic trusts settled before marriage can be classed as post-nuptial and, therefore, vulnerable to s 182.[225] On a successful claim, s 182 enables the claiming partner to continue benefiting from the trust as if the marriage had not ended — even if he or she did not contribute anything to the trust property. Section 182 also enables the court to vary the

222 Law Commission (NZLC IP41), above n 19, at [21.16].

223 Law Commission (NZLC R143), above n 9, at [11.99]. Currently, third parties have limited rights to be heard in relationship property proceedings under s 37(1), but this does not extend to discretionary beneficiaries.

224 Law Commission (NZLC R143), above n 9, at [11.109]; and PRA, s 1N(d).

225 Eastgate and Henderson, above n 35, at 38. See the discussion at Part IV of this article regarding subsequent dispositions to a dynastic trust settled before marriage having the necessary connection with marriage.

terms of the trust, resettle the trust or vest trust capital in a spouse. An order could undermine cl 44C(1)(b)–(c), which only allows compensation to the extent the increase or maintenance is attributable to the actions of the partners. Repealing s 182 removes a tool from the toolkit, enabling the PRA to act as a code.

Conversely, separate legislation should deal with dynastic trust settlements settled by a partner's parents. In such settlements, the partners do not beneficially own the property. Separate legislation would better acknowledge this fact — the PRA is underpinned by principles, such as equal sharing, that deal with distributing property beneficially owned by the partners. This makes the PRA inappropriate to govern such settlements. However, Parliament could retain s 182 to acknowledge different ownership structures because there is no presumption to an equal resettlement of trust assets.

Furthermore, s 182 was intended to have wider application than the PRA as it covers nuptial settlements, which include more than trusts. If retained, s 182 could be used in other scenarios, such as "settlements created by parents for the benefit of their children, which may not include relationship property, but would nonetheless need to be varied because the relationship has ended".[226] In the context of wills and successions, s 182 can be invoked by a spouse's executor for a child's benefit.[227] A child may also be able to bring a s 182 claim.[228]

Section 182 emphasises providing support for children of the marriage post-dissolution. Children are mentioned in s 182(1), ahead of the parties to the marriage.[229] Section 182(6) allows the court to defeat or vary an agreement in the interest of any child of the marriage. Section 182(4) also states courts may exercise jurisdiction even if there are no children from the marriage. When granting an order, the court will consider the parties' reasonable expectations and their actual circumstances at the time of the hearing — including the support of children.[230] Therefore, a child may be given more priority under a s 182 order brought for a child's benefit — making it distinct from an order made under the PRA. The Law Commission recommends that courts should consider the best interest of any minor or dependent children. This may bring an outcome under cl 44C closer to s 182 by ensuring any order for compensation only has regard to the needs of any minor or dependent beneficiaries.[231] Nevertheless, the PRA's primary

226 Nicola Peart "Submission to the Law Commission's Issues Paper 41 on the Review of the Property (Relationships) Act 1976" at 15.
227 *Thakurdas v Wadsworth* [2018] NZHC 1106, [2018] NZFLR 451 at [68].
228 At [69].
229 *Clayton (Claymark Trust)*, above n 61, at [129].
230 At [125].
231 Law Commission (NZLC R143), above n 9.

concern is to ensure an equal division and, therefore, undertakes a different inquiry with different priorities.[232]

Overall, broadening s 44C will decrease the need for s 182, especially in light of the discrepancies between s 182 and the PRA. A coherent application of principles and rules must govern property division when a relationship ends.

Although s 182 still has potential value for claims brought for the benefit of children, the Law Commission's proposals focusing on the best interests of children and enabling third parties to be heard should reduce the need for s 182.

IX SECTION 44

Section 44 captures dispositions of any property made to defeat a partner's claim or right under the PRA. The Law Commission recommends s 44 remain the same, declining to lower the threshold to dispositions that have the effect of defeating a partner's rights. The Law Commission identified that dispositions to third party ownership structures other than trusts are not problematic and do not provide compelling reasons for reform.[233] However, this is only because of the current operation of trusts. When Parliament amended the MPA 1976 and PRA, the number of trusts dramatically increased to protect partners from PRA claims. Broadening cl 44C makes trusts less effective and more vulnerable to PRA claims. Partners are likely to find new ways to avoid cl 44C. Dispositions to other ownership structures are also likely to increase, including dispositions to third parties, companies, gifts and forgiveness of debt.[234] These dispositions will be subject to a higher threshold of intention in s 44 than trusts under cl 44C. If proving intention is not possible, and the disposition is not to a trust or company, the partner may have no remedy.[235]

An effects-based s 44 lowers the threshold, eliminating the need for a specific provision only dealing with trusts. Section 44 becomes more like the general anti-avoidance rule in s BG 1 of the Income Tax Act 2007.[236]

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232 Atkin, above n 216, at 87.

233 Law Commission (NZLC R143), above n 9, at [11.105].

234 Section 44F captures dispositions of relationship property to a company during a qualifying relationship that has the effect of defeating a partner's claim. Like s 44C, its scope is narrow. The Law Commission recommends that s 44F be kept the same because company shares are "property" under the PRA, whereas interests in a trust are not usually property: Law Commission (NZLC R143), above n 9, at [11.105].

235 See PRA, ss 44, 44F and 44C.

236 Section BG 1 is a broad rule, based on general principles, that aims to counter novel tax avoidance structures that may arise in the future. If there is a tax avoidance arrangement, the court will void the arrangement and deprive the taxpayer of the tax advantage he or she would have obtained under the arrangement: Michael Littlewood "Legislating against tax avoidance" [2019] NZLJ 295 at 296. The general anti-avoidance rule creates uncertainty for taxpayers regarding the tax

Similarly, a flexible s 44 can capture future dispositions to ownership structures other than trusts that defeat a partner's rights and cannot be predicted in advance. This flexibility is advantageous, because it discourages the use of other avoidance mechanisms. The court can anticipate and defeat the next trend of problematic dispositions as it arises, without waiting for Parliament to legislate. A concern is that this may result in common law arguments creating a state of disarray, as is currently the case with the court straining to target certain dispositions of trusts.

The burden of proving intention is a significant hurdle. Rightly so, because s 44 is a broad provision covering all types of dispositions and property (relationship and separate). Lowering s 44 to an effects-based test significantly limits property owners' freedom to dispose of property as they like. If partners cannot deal freely with their property during the relationship, it creates uncertainty for third parties, who cannot rely on those dealings.[237] An example is where both partners consent to gift relationship property (such as shares), to a parent. Lowering the threshold allows a partner, after separation, to seek to recover the parent's property, claiming the disposition defeated his or her right under the PRA. The court can make an order to transfer property if the parent did not act in good faith and for valuable consideration. If the parent received the shares in good faith but did not provide consideration, the court can order the parent to pay the difference between the value of consideration and the value of the property,[238] provided he or she has not altered his or her position.[239] Where the parent transfers the shares to a subsequent third party, orders can be made against them too.[240] Section 44 prioritises a partner's entitlements and provides more effective remedies than s 44C. The present author believes partners should not be able to make a claim reversing the disposition or receive compensation where there was no intention to defeat a partner's right under the PRA. If an effects-based approach is adopted, then s 44 will be triggered too easily. This may result in harsh consequences on third parties if they cannot show they altered their position. Retaining the current threshold maintains an adequate balance between a partner's right and a third party's right.

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implications of transactions because what exactly constitutes a tax avoidance arrangement is uncertain — as it is determined on a case-by-case basis: Craig Elliffe "Policy Forum: New Zealand's General Anti-Avoidance Rule—A Triumph of Flexibility over Certainty" (2014) 62 Can Tax J 147 at 163–164.

237 Conway, above n 79, at 30.

238 The value of property is likely assessed at the hearing date to compensate the partner for loss of a valuable appreciating asset: Kevin Muir and Sarah-Jane Telford "Dealing effectively with complex asset protection on separation" (2003) 4 BFLJ 167.

239 PRA, s 44(4).

240 Provided that parent did not act in good faith, nor provide valuable consideration.

X CONCLUSION

Overall, the Law Commission's recommendations are a welcome change. Trusts have allowed partners to circumvent the application of the PRA for far too long and it is time for reform. The PRA provides limited access to trust property, resulting in significant injustice for separating partners. Broadening s 44C to capture dispositions of all property is a positive development that overcomes some of the current limitations. However, the recommendation to capture dispositions made when the partners reasonably contemplated a qualifying relationship creates too much uncertainty — the current period capturing dispositions made during a qualifying relationship better balances both partners' rights.

Lowering the s 44C threshold to when either or both partners' rights have been defeated is also unconvincing. There is no inequality to remedy if both partners are equally affected by the disposition. Extending s 44C to trust property preserved or enhanced by the relationship better recognises each partner's contribution and sets appropriate legislative limits to access dynastic trusts. Broadening s 44C will reduce the need for s 182 of the FPA; repealing s 182 will remove the current inconsistencies in the law.

Lastly, the recommendation to extend the court's power to order compensation from trust capital is not novel. However, Parliament will hopefully follow the courts in light of the mounting evidence of inequality. These recommendations strike a better balance between a just division of property at the end of a relationship and preserving trusts than does the current PRA.