

Claims under s182 of the Family Proceedings Act 1980

How to prevent them

It can be difficult to claim a share of property held by a family trust after separation. The Property (Relationships) Act 1976 (“PRA”) only allows a claim to be made in respect of trust property in very limited circumstances.

Section 182 of the Family Proceedings Act gives the Court a discretion to make orders in respect of settlements, including trusts, after parties dissolve their marriage or civil union.

The leading case on section 182 is the Supreme Court’s decision in *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30 (“**Claymark decision**”), which established that:

1. In approaching a s182 claim the first stage is to determine whether the trust is a nuptial trust; and the second is to assess whether and, if so, in what manner the Court’s discretion should be exercised[1].
2. To be a nuptial trust “*There must be a connection or proximity between the settlement and the marriage*”[2].
3. In determining whether and how to exercise the discretion the Court must compare the claimant spouse’s position in relation to the trust had the marriage continued against his or her position following the dissolution of the marriage[3]. If the dissolution of the marriage has resulted in a change in the applicant spouse’s position an order may be justified.

The Supreme Court in the *Claymark* decision held the following factors will be relevant when considering whether and how to exercise the discretion:

1. The interests of any children of the marriage[4].
2. The identity of the settlor[5].
3. The terms of the settlement[6].
4. How the trustees are exercising, or are likely to exercise, their powers in the changed circumstances[7].
5. The financial need of the applicant (this is not a prerequisite to the discretion being exercised)[8].
6. The wider benefits to the family, which the trust has provided or might have been expected to provide[9].
7. The suitability of the particular trust structure in light of the changed circumstances[10].
8. The length of the marriage[11].
9. The source and character of the trust assets[12].

If the discretion is exercised, unlike the regime under the PRA, there is no presumption that the trust assets will be split equally between the spouses[13]. However, if relationship property has been disposed to the trust that may justify an order that at least those assets be shared equally by them.

Don’t marry (or divorce)

The only real bulletproof method of preventing a claim under section 182 is to not get married or at least not get divorced because recourse to the section only occurs upon divorce. But marriage remains popular and divorce almost equally so.

Contracting out agreements

There is some debate about whether parties can contract out of the provisions of the Family Proceedings Act. Some practitioners take the position that subsection 182(6) allows the parties to contract out of section 182 subject to the Court making orders in the interests or any child of the marriage. That position has not been confirmed by the courts.

At the very least, it would be more difficult for a spouse to claim that they expected to receive a benefit from the trust if it has been agreed that they have no interest in it and they have received independent legal advice on that agreement.

It may be that the safer option is not to settle assets on a trust and instead adopt the conventional approach to protecting separate and relationship property by way of a contracting out agreement. But it should be remembered contracting out agreements can be overturned in some circumstances.

Don't create expectations in the terms of the trust

If possible, it is better to settle a trust long before any relationship begins in order to avoid it being characterised as a nuptial settlement. However, that may be difficult to achieve in practicality and pre-relationship trusts are not necessarily immune from claims under s 182.

It would also be advisable not to include any current, future or former spouse as a beneficiary of the trust. That way the claimant spouse will have no beneficial interest in the trust fund. It will also make it more difficult for them to establish that they expected to benefit from it.

However, in the *Claymark* decision, the Court held that, when assessing the expectation of an applicant spouse the Court should consider how that applicant spouse may have benefited from the trust as part of the family unit^[14]. A claimant spouse could argue that even as a non-beneficiary they expected, as part of the family unit that includes beneficiaries, to continue to benefit from the trust.

Consideration should also be given to setting up the trust in a way that protects any children's interests should the parties separate to prevent an argument later that an order must be made to protect their interests.

Don't create expectations in the administration of the trust

When making distributions from the trust, for the reasons above outlined above, the trustees should avoid providing a direct or indirect benefit to the spouse as part of the family unit.

It is also important not to settle relationship property on the trust. If separate property rather than relationship property is settled on the trust, it is harder for the claimant spouse to argue that they ever had any expectation to benefiting from the trust property. In that regard, a contracting out agreement can be handy to define what is separate and what is relationship property.

It should be noted too that if relationship property is settled on a trust so as to defeat a claim to it, a party may also have a claim under section 44 or section 44C of the PRA for either a settlement to be set aside or compensation.

[1] *Claymark* decision paragraph 27

[2] *Ibid* paragraph 86

[3] *Ibid* paragraph 54

[4] *Ibid* paragraph 57

[5] *Ibid* paragraph 58

[6] *Ibid*

[7] *Ibid* paragraph 58

[8] *Ibid* paragraph 59

[9] *Ibid*

[10] *Ibid*

[11] *Ibid*

[12] *Ibid* paragraph 58

[13] *Ibid* paragraph 56

[14] *Ibid* paragraph 50