

## CAN WE TRUST IN TRUSTS?

### Supreme Court Delivers Definitive Ruling on Circumstances in Which Trusts Can Be Varied – Ward v Ward [2009] NZSC 125

In a decision released this week, the Supreme Court has clarified the law on when Courts can vary trusts following a divorce.

Christopher and Diane Ward were married in 1991. From that time they lived on a farm, which had been in Mr Ward's family since 1959. Not long before they married, it was agreed that Mr Ward would have the opportunity to purchase the farm, which was owned by a family company. Mr Ward eventually acquired all the shares in the company.

After nine years of marriage Mr and Mrs Ward decided to transfer the company shares to a trust. When the marriage ended six years later, the trustees could not agree on how the trust was to be administered.

In the meantime, Mr Ward remained living and working on the farm. He had the use of the home and control of the family finances. There was little relationship property left, because much of the relationship property debt from the trustees to Mr and Mrs Ward for the transfer of the company shares had been forgiven. Meanwhile, the value of the farm had increased significantly. Mrs Ward applied to the Family Court for an order under section 182 of the Family Proceedings Act 1980 varying the terms of the trust.

#### Varying a Trust – section 182 of the Family Proceedings Act 1980

Section 182 of the Family Proceedings Act 1980 gives the Court power to vary the terms of a trust after a married couple divorce or civil union partners dissolve their civil union. The Court has a broad discretion to take into account the circumstances of the parties when the trust was settled, any changes in circumstances since then, and any other matters which the Court considers relevant.

In recent times, section 182 has been considered a useful tool in situations where one or both of the parties had transferred all their property to a trust, much of the debt had been forgiven, and there was little relationship property left. The section allowed the Court to do broad justice in the circumstances, where the trustees of the trust (usually under an obligation to act unanimously) were in a deadlock situation.

#### Litigation History

In **Ward** the Family Court judge agreed that an order should be made under section 182. He ordered that the trustees of the family trust were to transfer half the shares in the company to a trust to be established by Mrs Ward, for the benefit of her and the children. The trustees were to be Mrs Ward and a suitable independent trustee.

The case then wound its tortuous way to the High Court (where the Family Court decision was overturned), to the Court of Appeal (where the Family Court decision was upheld), and finally to the Supreme Court (where the Family Court decision was upheld some three and a half years after the Family Court hearing had first taken place).

## The Supreme Court speaks – It's All About Expectations

The Supreme Court judges disagreed with the broad approach taken by the Court of Appeal in **Ward** (and in an earlier decision this year)<sup>1</sup>. The Court of Appeal had described the common thread of the cases as being to invoke section 182 when, to do so, was necessary to achieve fairness and justice between the parties, and when there would be no detriment to children. The Supreme Court said that "invocations of fairness and justice are not particularly helpful". Their view was that the proper way to address whether an order should be made under section 182 is to:

- identify all relevant expectations which the parties had of the settlement on the trust at the time it was made;
- compare those expectations with the expectations of the parties in the changed circumstances brought about by the marriage breakdown;
- assess how best, in the changed circumstances, the reasonable expectations of the applicant should now be fulfilled.

Predictably, using this approach Mrs Ward was entitled to an order under section 182. A memorandum of intention signed by Mr and Mrs Ward when they settled the trust made it clear that the objective of the trust was to provide for Mr and Mrs Ward, and ultimately, the trust property was to go to their children. As matters stood, Mrs Ward was not receiving her expected provision from the trust, and Mr Ward was controlling it entirely.

### Conclusion

However, sometimes, trusts are settled, either before or after marriage, and they are not for the ultimate benefit of both parties. In those circumstances, it may be difficult for the non-beneficiary party to assert that they had an expectation of provision from trust property on dissolution of the marriage. However, where there is limited relationship property, varying such a trust is one of a limited number of ways of providing relief to the non-beneficiary party<sup>2</sup>. By departing from the "fairness and justice" approach the Supreme Court has made section 182 a less potent remedy.

This is good news for those who consider we should be able to trust in trusts, and they should not be varied to do what a judge thinks is "fair". However, it is not such good news for the party left without significant wealth at the end of a long relationship, where the assets are held in trust, and the other party is able to continue to enjoy the benefit of those assets.

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<sup>1</sup> X v X [Family Trust] [2009] NZFLR 956

<sup>2</sup> See *Burrell v Burrell* (2007) 26 FRNZ 346