The use of trusts and trust litigation as a form of financial abuse in Aotearoa New Zealand and what to do about it

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The Aotearoa New Zealand Family Violence Act 2018 includes in its definition of family violence that financial abuse is a form of psychological abuse. Violence is defined as behaviour that is coercive or controlling and abuse is defined as either a single act or number of acts that form a pattern. This article shows how, what would otherwise be relationship property and shared equally by the partners to the relationship, once it is put in a settlor controlled trust, extensive litigation is required to get access to that property. This article provides examples of how this form of coercive control over the claimant partner and assets which they are entitled to, is permitted by the Aotearoa New Zealand legal system. Whilst the legal system has made some concessions for the claimant partner, it has not gone nearly far enough to stamp out this form of financial abuse. This article proposes that the legal system re-prioritise the interest at stake by giving clear priority to relationship property interests and simple and inexpensive access to relationship property whether it be in a trust or any other form of legal fiction such as a company.

I The meaning of financial abuse

Financial abuse has only been recently recognised in the family violence laws of Aotearoa New Zealand. It is recognised as a form of psychological abuse in the *Family Violence Act 2018* (NZ).[1] The example is given in the legislation of unreasonably denying, or limiting access to financial resources. This article focuses on the denying and limiting of access to the crucial financial resource at the end of a relationship of relationship property, when it is held in a settlor controlled trust. The matter is particularly pervasive in Aotearoa New Zealand, a country which has a high number of family trusts, estimated by the Ministry of Justice to be between 300,000 to 500,000 family trusts.[2]

The *Family Violence Act* makes it clear[3] that psychological abuse (which financial abuse is a category of) does not need to involve actual or threatened actual physical or sexual abuse, however financial abuse can be just as coercive and controlling as any physical form of violence and it can cause the victims of financial abuse extensive cumulative harm both emotionally and financially. It is a form of social entrapment for primary victims of intimate

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1 *Family Violence Act 2018* (NZ) s 11(1)(c).

2 Law Commission (NZ), *Review of the Law of Trusts: A Trusts Act for New Zealand* (Report No 130, August 2013) [2.3].

3 *Family Violence Act* (n 1) s 11(4).

partner violence which as this article will show can go on for many years after a relationship ends.[4]

The devastating effects of financial abuse through the use of court processes has been very well researched and documented in New Zealand by Ayesha Scott,[5] Ang Jury, Natalie Thorborn, and Ruth Weatherall.[6] Heather Douglas's important work[7] reveals that legal processes provide an opportunity for perpetrators to control or even extend their repertoire of coercive controlling behaviours post separation. Vivienne Elizabeth uses the term 'paper abuse' for how coercive control can be maintained through court processes.[8]

As Anastasia, one of the participants in Ayesha Scott's study says:

> The whole system is set up to perpetuate abuse, my abuser's been able to drag this through the courts for years and ... with no ... impunity.[9]

This article's focus is on the use of settlor controlled trusts as a mechanism for controlling assets and for controlling the other partner by requiring expensive and extensive litigation through the courts to get access to their entitlement of relationship property.

II The *Property (Relationships) Act 1976* (NZ) and settlor controlled trusts

Whilst the *Property (Relationships) Act 1976* (NZ) ('*PRA*') goes back many years, it was updated in 2001 to include de facto relationships and also to strengthen the entitlement to equal sharing of all relationship property once the partners have lived together for 3 years or more. The primary purpose of the legislation is that all property acquired as a result of the fruits of the relationship or in contemplation of the relationship is relationship property to be shared equally.[10] Separate property (property acquired before or after a relationship[11] or acquired through inheritance, gift or as a beneficiary in a

4 Julia Tolmie et al, 'Social Entrapment: A Realistic Understanding of the Criminal Defending of Primary Victims of Intimate Partner Violence' [2018] *New Zealand Law Review* 181. Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007).

5 Ayesha Scott, 'Hidden Hurt: The Impact of Post-Separation Financial Violence in Aotearoa New Zealand' (2020) 33(3) *Australian Journal of Family Law* 82; Ayesha Scott, 'Surviving Post-Separation Financial Violence Despite the Family Court: Complex Money Matters as Entrapment' (2020) 10(2) *New Zealand Family Law Journal* 27.

6 Ang Jury, Natalie Thorburn and Ruth Weatherall, '"What's His Is His and What's Mine Is His": Financial Power and Economic Abuse of Women in Aotearoa' (2017) 29(2) *Aotearoa New Zealand Association of Social Workers* 69; Backbone Collective, *Out of the Frying Pan and into the Fire: Women's Experiences of New Zealand Family Court* (Report, 2017).

7 Heather Douglas, 'Legal Systems Abuse and Coercive Control' (2018) 18(1) *Criminology and Criminal Justice* 82.

8 Vivienne Elizabeth, 'From Domestic Violence to Coercive Control: Towards the Recognition of Oppressive Intimacy in the Family Court' (2015) 30 *New Zealand Sociology* 26.

9 Scott, 'Hidden Hurt' (n 5).

10 *Property (Relationships) Act 1976* (NZ) ('*PRA*'): s 8 defines relationship property, s 11 gives the entitlement to equal sharing.

11 Ibid s 9(4).

trust)[12] is not included but if it increases in value because of the use of relationship property or because of the actions of the other party then the increase in value of that property becomes relationship property.[13]

The major exception to separate property is that the family home and any family chattels are relationship property whenever they were acquired, even if it was many years before the relationship began. They are seen by their use as an essential item for the relationship and are given relationship property status by that means rather than having to be acquired by the fruits of the relationship.[14]

What counts towards contributing to the fruits of the relationship is set out under the heading of contributions of spouses or partners.[15] Contributions mean: care of children of the relationship, the care of aged or confirmed relatives or dependents, the management of the house and performance of household duties, provision of money, the acquisition or creation of relationship property, the payment of money to maintain the increase in value of relationship property or the separate property of either party, the performance of work or services in respect of relationship property or separate property, the forgoing of a higher standard of living that would otherwise have been available, the giving of assistance or support to the other party (whether or not of material kind) including the giving or assistance of support which enables the other party to acquire qualifications or aid the other party in the carrying on of his or her occupation business.

There is no presumption that a contribution of a monetary nature is of greater value than a contribution of a non-monetary matter.[16] One of the purposes of the Act is to recognise the equal contributions both partners make to their partnership.[17] A core principle of the Act is that all forms of contribution to the partnership are to be treated as equal.[18]

The *PRA* is social legislation which cuts across the normal rules of property law to ensure that after 3 years living together partners shall equally share all the fruits of their relationship. It is put another way by Lady Hale, who said that the ultimate object of dividing family finances is 'to give each party an equal start to independent living.'[19]

It is possible to contract out of an equal sharing regime in the legislation[20] provided the parties have independent legal advice and provided the agreement is not seriously unjust.

The most common legal device for avoiding obligations under the *PRA* and depriving partners of their entitlements under the Act is the use of trusts, where the settlor of the trust controls the assets of the trust. The settlor appoints themselves as a trustee of the trust, and there may be another nominal trustee such as lawyer or an accountant who commonly play little role in the

12 Ibid ss 10(1), (2), (3).
13 Ibid ss 9A(1), (2).
14 Ibid s 11.
15 Ibid s 18.
16 Ibid s 18(2).
17 Ibid s 1M(b).
18 Ibid s 1N(b).
19 *Miller v Miller; McFarlane v McFarlane* [2016] UKHL 24; [2006] 2 AC 618, [144].
20 *PRA* (n 10) s 21.

trust. The beneficiaries of the trust are discretionary beneficiaries which means that the settlor has absolute control over the assets in the trust. The settlor trustee is able to unilaterally transfer assets into the trust and keep them under their control. The *PRA* defines property as including — real property, personal property, any estate or interest in any real or personal property, any debt or anything in action, or any other right or interest.[21] What this means is that when property is in a settlor controlled trust, there is no right or interest in that property particularly if the only beneficiaries are discretionary beneficiaries. As the property is no longer owned by either of the parties, but instead is owned by the trust it is not available for distribution under the *PRA*.[22] So the settlor of the trust has the best of both worlds, they have control over the property because of their role as a trustee but the property is taken out of the property relationships pool.

There are a variety of reasons why a partner uses a settlor controlled trust to deny their partner their legitimate entitlements under the *PRA*. One is that they strongly believe that all or most of the property acquired in the relationship is due to their efforts and they want to keep as much of it as they can for themselves and they are prepared to put their partner through tortuous legal proceedings to defend what they selfishly believe is all theirs. Another reason is that they may be bringing a major asset into the relationship such as the home and they want to keep the home all for themselves, even if the other partner has made major contributions to the home and to their lives during the relationship. Other reasons which the law allows trusts to be set up for are to shelter assets from creditors, to protect against professional liability, for tax advantages and until it was put a stop to by legislation[23] to reduce assets in old age in order to get a government subsidy for housing. The common factor to the cases that we will look at, is that the partner who sets up the settlor controlled trusts wants to have total control over all the resources of the relationship and is prepared to fight hard to maintain that control which inevitably means that their partner is denied the resources that they are entitled to. As will be seen from the cases in this article, farms and businesses are the common assets put into settlor controlled trusts.

A major advantage to those who set up settlor controlled trusts is that unlike the contracting out provisions of the *PRA* which require independent legal advice, there is no requirement for independent legal advice when a settlor controlled trust is set up which has relationship property assets in it. For example in *RKR v TJH*[24] the claimant partner testified that she did not seek legal advice and signed what was put in front of her. She said had she understood what was happening she would never have agreed to it.

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21 Ibid s 2.

22 Jessica Palmer, 'What to Do about Trusts?' in Jessica Palmer et al (eds), *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia Publishing, 2017) 177, 178.

23 *Residential Care and Disability Support Services Act 2018* (NZ) schs 2, 3 enable gifts to trusts to lower the value of a person's assets to be counted as their assets.

24 [2012] NZFC 3779, [23].

III A classic example of the use of trusts, trust litigation and associated litigation for financial abuse

Once relationship property is in a trust, then it inevitably requires litigation in order to extract that property from the trust. As Vasiliya, one of the participants in Ayesha Scott's study said:

> The trust set up actually caused more harm than good in the relationship breakdown, but that was on purpose — for him because it kept him in control.[25]

A classic example of the use of trusts which caused major financial abuse for Mrs Clayton is the case of *Clayton v Clayton*.[26] Apart from the two judgments in the Supreme Court, at least 20 judgments were issued in respect of this dispute beginning in the Family Court going through to the High Court, Court of Appeal and the Supreme Court.

These judgments illustrate the depth that Mr Clayton went to to hide assets in trusts out of Mrs Clayton's reach in the event of a marriage dissolution and demonstrates how the legal proceedings often necessary to access trust assets can be used as a further tool of financial abuse.

Mr and Mrs Clayton began a de facto relationship in 1986. They married in 1989 and had two children. Before getting married, Mr and Mrs Clayton entered into a prenuptial agreement. The agreement stipulated that Mr Clayton would retain his separate property and in the event of dissolution of their marriage, Mrs Clayton would receive $10,000 if the dissolution occurred in the first year of marriage, $20,000 if it occurred in the second year of marriage and $30,000 if the dissolution occurred in the third or subsequent years of marriage.[27] Mr and Mrs Clayton separated in 2006 and their marriage was dissolved in 2009. At the time of dissolution, it was estimated that the assets held in the network of trusts and companies were worth approximately $30 million, the majority of which had been accumulated over the course of the relationship.

The agreement was ruled invalid and the default provisions of the *PRA* were to apply to the division of property. However, because the assets were owned by trusts and companies, significant litigation was required for Mrs Clayton to access them.

1 Mr Clayton's use of trusts

Most of the Clayton assets were held in either trusts or companies. Transfer of the assets to a trust and between the trusts occurred both during the relationship and post-separation. In 2003, Mr Clayton obtained an opinion as to the risks to Mr Clayton in the event of the dissolution of his marriage.[28] This advice was not disclosed in the court proceedings which appeared to indicate that Mr Clayton likely received advice that the assets would be vulnerable to

25 Scott, 'Hidden Hurt' (n 5).

26 [2016] NZLR 551 ('*Clayton* (Vaughan Road Property Trust)'); and [2016] NZFLR 189 ('*Clayton* (Claymark Trust)').

27 *Clayton v Clayton* [2013] 3 NZLR 236, [6] ('*Clayton* (2013)').

28 Ibid [92].

a claim by Mrs Clayton. Nevertheless, Mr Clayton continued to transfer assets to trusts by employing tactics to further attempt to remove the assets from the potential reach of Mrs Clayton.

In 2004, after receiving the legal opinion, Mr Clayton established three trusts. Mrs Clayton was not a beneficiary in any of them. Two of the trusts established were ostensibly for the education of their two daughters. However, Mr Clayton and any relative of his, any nominated business associate, employee or consultant of any business connected with Mr Clayton and companies, trusts and charitable organisations were also discretionary beneficiaries of these trusts.[29] There was nothing in the trust documents to suggest that either daughter had any greater entitlement to trust assets than the discretionary beneficiaries. In fact, they were not even the final beneficiaries. The court was not able to discern any reason to omit Mrs Clayton as a beneficiary of these trusts other than to prevent her accessing the property which Mr Clayton transferred into it. The High Court held under s 44 of the *PRA* that the dispositions to these trusts were made to defeat Mrs Clayton's relationship property claims as the omission of Mrs Clayton as a beneficiary while they were still married provided no other rational explanation.[30]

Another trust was established in 2008 to hold a property. A solicitor was the settlor. The sole trustee was Mr Clayton's sister. The beneficiaries were Mr Clayton's sister, her children and any relative of hers (including Mr Clayton).[31] Mr Clayton was the highest bidder for a property at auction, signed the sale and purchase agreement and paid the deposit. He then nominated the trust as the purchaser, with the deed of nomination signed contemporaneously with the deed of trust.[32] Mr Clayton's sister was not aware that she was a trustee of the property until she received the rates bill for the property. She regarded the property as Mr Clayton's and made no decisions regarding the property. Mr Clayton could not explain why the trust was set up for his sister and her children.[33] The High Court held under s 44 of the *PRA* that this trust was set up to defeat the rights of Mrs Clayton.[34]

A further trust was established in 2009 and held two properties. One of the properties was purchased by the trust pursuant to a deed of nomination which required the trustee to deal with the property at the request of the beneficiary and 'at the request and cost of the beneficiary, the trustee will transfer the trust property, or the benefit of the trust property, to the beneficiary as and when the beneficiary requires'. Mr Clayton was the sole beneficiary.[35] Despite the level of control Mr Clayton had over the assets, the High Court judge found that it was not clear that the likely or intended outcome of the transaction was to defeat a relationship property claim by Mrs Clayton.[36]

The disputes concerning Claymark Trust and Vaughan Road Property Trust

29 Ibid [93].
30 Ibid [102]. See discussion of s 44 later in this article.
31 *Clayton* (2013) (n 27) [111].
32 Ibid [112].
33 Ibid [113].
34 Ibid [117].
35 Ibid [118].
36 Ibid [123].

both reached the Supreme Court, where the court ruled in Mrs Clayton's favour. Claymark Trust was held to be a nuptial settlement for the purposes of a claim under s 182 of the *Family Proceedings Act 1980* (NZ) ('*FPA*').[37] The claim was settled out of court. Because Mr Clayton retained so much control over the Vaughan Road Property Trust the court held that the power he had over the trust was relationship property. Therefore as the power was over all the assets in the trust the value of it was the assets in the trust. The power of control became relationship property and subject to equal division under the New Zealand *PRA*.[38]

2 Use of legal proceedings as a means of financial abuse

Mr Clayton appealed almost every finding in Mrs Clayton's favour, including the s 44 orders made in the High Court.

He appealed maintenance awards in Mrs Clayton's favour.[39] Mrs Clayton was awarded maintenance of $15,000 per month. This included an allowance of $10,000 per month to cover her legal and accounting fees in the relationship property litigation. Mrs Clayton claimed that she incurred $855,113.86 in professional fees. She had sold the former family home and the proceeds of the sale were insufficient to meet her legal fees. She had a mortgage on her new home and had additional borrowings to meet her legal fees. She could not meet the legal fees from her salary.[40]

Mr Clayton lost the major grounds of appeal at almost every level and had awards of costs made against him. He appealed almost every order. One such appeal was an appeal against the order of costs and disbursements of $53,399.35 in favour of Mrs Clayton. Mr Clayton objected to paying this on the basis that he was paying Mrs Clayton $10,000 per month to cover legal and accounting costs. Mrs Clayton argued that her actual legal and accounting costs were much higher than the amount paid under the maintenance order. The court found that the $10,000 in maintenance was justified as the litigation between the parties was so expensive that it prevented Mrs Clayton from becoming self-supporting and able to meet her own reasonable needs.[41]

Mr Clayton was also reluctant to comply with orders made against him, including maintenance awards. One example was after Mrs Clayton received a cost judgment in her favour for a sum of $42,602. Mr Clayton did not make payment. Mrs Clayton was forced to issue a bankruptcy notice on Mr Clayton to have him comply with the notice. After the bankruptcy notice was issued but before it was served on him, Mr Clayton paid $12,602. He claimed the $30,000 he paid to Mrs Clayton in 2009 pursuant to the prenuptial agreement set-off the remainder of the judgment.[42] Mr Clayton argued that as the prenuptial agreement was ruled invalid, Mrs Clayton should return the $30,000 to him.[43] The High Court considered that the $30,000 payment made by Mr Clayton in 2009 was intended to settle relationship property claims and

37 *Clayton* (Claymark Trust) (n 26).
38 *Clayton* (Vaughan Road Property Trust) (n 26).
39 *Clayton v Clayton* [2015] NZHC 765.
40 *Clayton v Clayton* [2015] NZHC 550, [5].
41 *Clayton v Clayton* [2015] NZCA 330, [5].
42 *Clayton v Clayton* [2014] NZHC 135, [3]–[4].
43 Ibid [10].

not as consideration of a costs judgment made against him. The payment was therefore classified as an interim distribution of relationship property and not as a payment of costs.[44] The High Court ordered Mr Clayton to pay the outstanding $30,000 of the cost judgment.

A further bankruptcy proceeding was issued by Mrs Clayton later that year in respect to an order of costs in the sum of $212,471. Mr Clayton unsuccessfully appealed an award of costs made by the Rotorua Family Court.[45] Following the unsuccessful appeal, Mr Clayton still failed to pay the judgment. Mrs Clayton issued and served a bankruptcy notice on Mr Clayton. He did not comply with the notice and Mrs Clayton commenced proceedings to adjudicate him bankrupt. This series of proceedings involved three hearings in the High Court and Mr Clayton eventually paid the outstanding judgment with funds he was distributed from one of the trusts, demonstrating that Mr Clayton still had effective control over the assets he was denying Mrs Clayton access to.[46]

The combination of Mr Clayton's use of trusts to hide assets and continuous use of legal proceedings demonstrates how the use of settlor controlled trusts exercise coercive control both over the partner and the assets they are entitled to. While Mr Clayton had effective control over most of the assets in the trusts, Mrs Clayton had to undertake extensive litigation spanning 10 years before she was able to get what she was entitled to at the start, her equal share of the relationship property. The dispute was largely funded by further litigation to enforce maintenance payments and cost judgments against Mr Clayton. This came at a high cost to Mrs Clayton, both financially and emotionally.

Clayton v Clayton is a classic example of what Heather Douglas says namely that 'engagement with the legal system may be experienced by one partner as abuse at the same time the other partner justifies their engagement as a right.'[47] The only reason Mr Clayton could see it as a right is that the legal system allowed him to do what he did both in terms of putting major assets into trusts and being able to contest the legitimacy of it over many years. This is evidence that the legal system itself is not robust enough to protect Mrs Clayton's legitimate claims to her entitlements of relationship property.

IV Methods of accessing trust assets in New Zealand

Over time New Zealand Courts and New Zealand legislature have developed ways to access relationship property which is held in trusts. The court decisions have required costly and harmfully abusive litigation to get access to an entitlement which Parliament has guaranteed. The legislative provisions are inadequate and can be easily circumvented and do not go far enough to protect entitlements to relationship property.

1 Section 44 of the *PRA*

The first mechanism of obtaining access to entitled relationship property is making a claim under s 44 of the *PRA*. A s 44 claim requires a disposition to

44 Ibid [24].
45 *Clayton v Clayton* [2014] NZHC 3086.
46 *Clayton v Clayton* [2014] NZHC 2528, [3].
47 Douglas (n 7) 85.

a trust to be made with the intent of defeating the claim of the other partner.[48] Originally these claims were very rarely successful as they required an intention at the time of disposition to defeat the claim or rights of a person under the *PRA* which was difficult to prove and had to be inferred from the circumstances. As trusts can be established for a number of legitimate reasons, it was difficult to infer the requisite intention to defeat rights when property is disposed to a trust.[49]

However, in the Supreme Court case of *Regal Castings Ltd v Lightbody* ('*Regal Castings*'),[50] the test was made more accessible for litigants by replacing the necessity to prove an actual intent to defeat a claim with a more broadly based knowledge test of knowing that by setting up the trust it would defeat the claim of the other party.

In the *Regal Castings* case Mr and Mrs Lightbody owed a substantial amount of money to Regal Castings. Mr Lightbody had accepted personal liability for the term loan. Subsequently, without the knowledge of Regal Castings, Mr and Mrs Lightbody transferred their home, which was their only asset of significant value, to a family trust of which they and a solicitor were the trustees. Over the next 5 years they forgave payment of the purchase price by the trust. The company that Mr and Mrs Lightbody then owned was put into liquidation. A substantial sum of money was still owing to Regal Castings, including part of the term loan. Mr Lightbody was made bankrupt.

The Supreme Court held that Mr Lightbody, by putting his house in trust had an intent to defeat Regal's recourse to that asset even though he did not have the purpose of causing Regal loss. It was sufficient for Regal to establish that the impugned transfer into the trust exposed Regal to the risk of loss should Mr and Mrs Lightbody's company, as happened, be unable to pay its debts. The court ordered the trust to transfer half of the home property (the half share it received from Mr Lightbody) to the Official Assignee to be used to repay Mr Lightbody's debts.

It took a case funded by a corporate entity in order to expose the unfairness of avoiding obligations to others by placing assets in a trust. Eventually the more realistic interpretation of intention to defeat was applied in the context of s 44 of the *PRA*. In the case of *Ryan v Unkovich*[51] French J said:

> I accept the principles enunciated in Regal Castings are sufficiently general to apply to s 44 ... knowledge of a consequence can be equated with an intent.[52]

In that case Ms Ryan was seeking to strike out an application by Mr Unkovich who had made claims for two properties put into trust by Ms Ryan when the couple were living together in a de facto relationship. The transfer of the property into the trust was done at a time just before the *PRA* was amended to allow for claims by de facto partners. French J decided that the matter should not be struck out because of the wider interpretation of an intent to defeat in the *Regal Castings* case. This has allowed more cases to come

48 *PRA* (n 10) s 44(1).

49 See, eg, *Stewart v Stewart* [2003] NZFLR 400; *JCW v KFW* (Auckland Family Court, Judge Mather, 15 March 2005).

50 [2009] 2 NZLR 433 ('*Regal Castings*').

51 [2010] 1 NZLR 343.

52 Ibid [33].

through the wider threshold in New Zealand.[53] For example in the High Court, Mrs Clayton was able to use s 44 to hold that a number of the trusts Mr Clayton set up where done to defeat Mrs Clayton's relationship property claims as the omission of Mrs Clayton as a beneficiary provided no other rational explanation.[54]

There is a major limitation on this provision, if the trustees received the property in good faith and with adequate consideration, the property cannot be recovered.[55]

2 Section 44C of the *PRA*

Section 44C of the *PRA* was designed to be the main provision for enabling claims to access properties in trust, however it has major limitations. If relationship property has been disposed to a trust during the relationship and has the effect of defeating the claim of one of the spouses or partners, the court may make an order under s 44C. The word 'defeat' in this context does not require an improper motive.[56]

Dispositions made in contemplation of the commencement of a qualifying relationship are not covered, which means that one partner can shift property which would otherwise be classified as relationship property into a trust, contemplating the fact that a qualifying relationship would shortly be entered into and this disposition would not be caught.[57] A disposition like this, depending on when and how it was done, may now be covered by the wider interpretation of s 44, but there are no guarantees, it will likely end up in litigation in court to prove the motive of knowing that setting up the trust would defeat the claim of the other party. Further, only dispositions of relationship property are covered meaning that, if the property wasn't relationship property at the time of disposition, it does not fall within the confines of s 44C.[58] An example of this would be disposing of money that is separate property into a trust which then uses this money to purchase the family home and put it in the trust. But for the trust, the family home would be considered relationship property and therefore be subject to equal division. However, as the disposition of cash to the trust was not a disposition of relationship property, the other partner has no recourse. Again, this allows the abuser to have control over a capital resource, removing the agency and decision-making power from the victim.

Finally, the methods of redress are limited under s 44C. The court can order a transfer of money or property from one partner to another. This can be from relationship property or separate property. However, this remedy is premised on the assumption that there will be relationship property or separate property,

53 Stephanie Ambler, 'Where There's a Wrong, There's a Remedy: Or Is There with Trusts?' (2007) 5 *New Zealand Family Law Journal* 311, 313. See also *Potter v Horsfall* [2016] NZCA 514; and *Cannon v Cox* [2019] NZFC 5363.

54 *Clayton* (2013) (n 27) [102].

55 *PRA* (n 10) s 44(2). See, eg, *O v S* (2006) 26 FRNZ 459.

56 *Nation v Nation* [2005] 3 NZLR 46, [146].

57 Nicola Peart, 'Section 44C of the Property (Relationships) Act 1976: Conflicting Interpretations' (2003) 4(8) *Butterworths Family Law Journal* 199, 200.

58 Law Commission (NZ), *Dividing Relationship Property: Time for Change?* (Issues Paper No 41, October 2017) 445.

which is not always the case. Should compensation not be possible from any income or property held by the partner, the Court can order income from the trust to compensate the other partner. Again, this presumes that the trust has an income, which it may not.[59] It is not possible for the court to make an order regarding the capital of the trust. If there is no relationship property or separate property and the trust has no income, it may not be possible to have a remedy under s 44C.[60] This means that the financial abuser may be able to successfully hide all assets in a trust structure, which can have significant implications for the stability of the victim post-separation.

A classic example of this is the case of *Ward v Ward*[61] where all that would otherwise be relationship property was disposed into a trust at the beginning of the relationship. The property that was disposed into the trust was a farm which was the only asset of the marriage and also included the family home on the farm. What this meant was that s 44C could not provide any relief. The jurisdiction requirements of relationship property being disposed into a trust during the relationship clearly had the effect of defeating the claim to it by the wife in this case. However, because there was no other property outside the trust from which compensation could be paid to Mrs Ward, s 44C was of no use to her claim. Fortunately, this did not leave Mrs Ward with no remedy because s 182 of the *FPA* on proof of a nuptial settlement gives the court discretion to open up the trust. Mrs Ward, like Mrs Clayton, had to take her case to the Supreme Court of New Zealand in order to be successful under s 182 of the *PRA*.

3 Section 182 of the *Family Proceedings Act 1980*

Section 182 of the *FPA* comprises of a two-stage test. The first stage is considering whether the settlement is a nuptial settlement. The majority of the Supreme Court in *Clayton v Clayton*[62] said:

> Nuptial settlements are premised on the continuation of the marriage or civil union. The purpose of s 182 is to empower the Courts to review a settlement and make orders to remedy the consequences of the failure of the premise on which the settlement was made. Each case will require individual consideration.

In order to be a nuptial settlement, there must be:

> [A] connection or proximity between the settlement and the marriage. Where there is a family trust (whether discretionary or otherwise) set up during the currency of a marriage with either or both parties to the marriage as beneficiaries, there will almost inevitably be that connection.[63]

This wide definition of nuptial settlement usually applies to all family trusts made during marriage or in contemplation of marriage unless 'the trust is set

59 Peter Eastgate and Penny Henderson, 'Section 182 FPA' [2012](1) *New Zealand Law Journal* 32, 32.

60 Ambler (n 53) 315.

61 [2009] NZSC 125. Mrs Ward is not alone in *DAM v PRM* (Masterton Family Court, Judge Ellis, 30 March 2011). The majority of the assets acquired during a 38-year marriage were held in trust. The jurisdiction required of s 44(C) were met but there was insufficient property outside the trust for compensation.

62 *Clayton* (Claymark Trust) (n 26) [60].

63 Ibid [34].

up by a third party and there are substantial beneficiaries apart from the parties of the marriage and their children' or 'a settlement is made before marriage and a future spouse is named as a future beneficiary but, at the time of settlement, there is no particular spouse in contemplation'.[64]

The second stage of the test is for the court to exercise its discretion as to how it will vary the settlement of the trust.[65] In the *Clayton v Clayton* case, the Supreme Court did not need to make an order under s 182 of the *FPA*, even though they had found that there was a nuptial settlement trust, because the parties had already reached a private settlement on the issue.[66] The Supreme Court said that had the matter not settled, they 'would have made orders similar to those in *Ward* to split the trust equally into two separate trusts'.[67]

The Supreme Court in *Clayton v Clayton* agreed that the principles of the *PRA* do not underpin s 182 of the *FPA* and there is therefore no 'entitlement, or presumption, as to a 50/50 split or any other fractional division of the trust property'[68] However the Supreme Court did add that

> [s] 182 has to be applied in the 20th Century and that in the current social context it is recognised that parties to a marriage contribute in sometimes different but equal ways to the marriage and the accumulation of assets during the marriage.[69]

Both Mrs Clayton and Mrs Ward had to pursue emotionally draining, time consuming and costly litigation to the New Zealand Supreme Court before they could get a remedy, which in itself is a form of financial abuse.

The major limitation of s 182 of the *FPA* is that it only applies to marriages and civil unions and does not apply to de facto partners no matter how long they have lived together.

4 Constructive trust

Another potential way to access the value of relationship property that is in a trust, is to claim the trust is subject to a constructive trust. A claimant must establish contribution and mutual expectations that they will share in the assets. If a constructive trust is found to exist, the assets of the trust will be held on constructive trust for both partners based on contributions made to trust property.[70]

The four elements of a constructive trust claim are:

- Contributions, direct or indirect, to the property in question;
- the expectation of an interest in the property;
- that such expectation is reasonable; and
- that the defendant should reasonably expect to yield the claimant an interest.[71]

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64 Ibid [35]–[36].
65 Ibid [27].
66 Ibid [93]–[94].
67 Ibid [83].
68 Ibid [65].
69 Ibid [66].
70 Ambler (n 53) 321.
71 *Lankow v Rose* [1995] 1 NZLR 277, 294.

Three recent New Zealand Court of Appeal cases, *Murrell v Hamilton*,[72] *Vervoort v Forrest*[73] and *Hawkes Bay Trustee Ltd v Judd*[74] have held that a constructive trust can be imposed over the assets of an express trust in circumstances where a former partner made contributions to the assets of a trust on the understanding they will benefit from the contributions such as carrying out work on the assets in the trust. In these cases it only took an understanding given by one of the trustees (the partner of the claimant) to give the undertaking of benefit to the third party partner even though the other trustees were unaware of it to bind all the trustees. It was clear that in these trusts the other trustees did not play an active role in the trust and that the trust was set up for the settlor trustee to control the assets in the trust with the veneer and appearance of a trust structure of other trustees. The Court of Appeal in allowing these claims said it was not alienating trust property in favour of a third party but was ensuring that unjust enrichment to the trust is avoided — 'allowing the trustees to deny those who have enriched the property is not acceptable'.[75]

Claims of a constructive trust are likely to be more difficult in cases where the abuser exercises total control over the assets in the trust and does not give any expectation to the claimant with regard to any benefit to the assets in the trust from their efforts. The reality is that it will require costly and expensive litigation in order to run a successful constructive trust argument unless there is clear evidence of an undertaking to benefit the other party from the assets in the trust which should enable settlement of the case.

5 Sham trusts

The leading case on sham trusts is the Court of Appeal decision, *Official Assignee v Wilson*[76] where there was a very poorly administered trust whereby a discharged bankrupt purchased a property in Queenstown on behalf of the family trust and borrowed more funds than needed to purchase the house in order to pay off his personal debts. The discharged bankrupt then became bankrupt again and the Official Assignee argued that the property in the trust was so controlled by the discharged bankrupt that it was his alter ego and a sham. The Court of Appeal cited[77] an earlier English case of *Miles v Bull*:

> A transaction is no sham merely because it is carried out with a particular purpose or object, if what is done is genuinely done, it does not remain undone merely because there was an ulterior purpose in doing it.[78]

The sham argument is a difficult one to run, both the settlor and trustees need to have a common intention, at the time of inception, not to create the legal rights and obligations of a trust relationship. Once a trust has been validly created it remains a valid trust even if it is used for an ulterior motive. The Court of Appeal said that the alter ego trust argument is not an independent

72 [2014] NZCA 377.
73 [2016] NZCA 375.
74 [2016] NZCA 397.
75 *Vervoort v Forrest* (n 73) [68].
76 [2008] 3 NZLR 45.
77 [1969] 1 QB 258.
78 Ibid 262.

cause of action in New Zealand. Unfortunately the New Zealand Court Appeal set a very high bar for establishing a sham trust in New Zealand and a very low bar for what is necessary for a valid trust in order for property to be sufficiently alienated from the settlor of the trust.

6 Bundle of rights claims

This argument is based on the idea that a person may have 'various' rights or 'interests in a trust' that can be classified as relationship property for the purposes of the *PRA*. The possessor of the rights is then treated as owning assets the value of which will equate to the value of the assets of the trust that they control.

There have been a number of cases in the New Zealand courts[79] where the courts have recognised the bundle of rights argument, and applied it to such matters as discretionary interests under a trust and the power to appoint and remove a director of the trustee company.

In the very recent case of *Webb v Webb*,[80] appealed to the Privy Council, from the Cook Islands, the Privy Council decided that Mr Webb had the power at any time to secure the benefit of all the trust property to himself and to do so regardless of the interests of the other beneficiaries. The Privy Council used the bundle of rights concept to hold that the bundle of rights Mr Webb had in the trust were indistinguishable from ownership and therefore he had not alienated the property to the trust. This is an indication that the Privy Council is not going to be hood winked by the appearance of a trust when clearly the settlor has total control over the trust which is the case with many settlor controlled trusts in New Zealand.

7 The power of control over the trust

In *Clayton v Clayton* (Vaughan Road Property Trust) ('*Clayton* (Vaughan Road Property Trust)')[81] the Court held that Mr Clayton's power of control over the trust, including the unfettered power to remove all other discretionary beneficiaries leaving himself as the sole beneficiary and the ability to appoint all trust assets to himself, was sufficient to constitute property.[82] These powers were therefore relationship property as they were acquired after the commencement of the relationship.[83] The power of appointment was a power personal to Mr Clayton, which he attained during the course of the relationship, and did not have any fiduciary obligations attached to it.[84] The value of the power in this situation was the net value of the trust's assets, though the Court did not provide guidance on how those powers are to be

79 *Walker v Walker* [2007] NZFLR 772; *Harrison v Harrison* [2009] NZFLR 687; *Robertson v Robertson* (Judge Burns, 19 November 2009).

80 [2020] UK PC 22.

81 *Clayton* (Vaughan Road Property Trust) (n 26). See Jessica Palmer and Nicola Peart, '*Clayton v Clayton*: A Step Too Far?' (2015) 8(6) *New Zealand Family Law Journal* 114, 114–19 for a critical analysis of the approach taken by the Supreme Court in the *Clayton v Clayton* case.

82 *Clayton* (Vaughan Road Property Trust) (n 26) [69]–[80].

83 Ibid [86].

84 Ibid [64]–[68].

valued generally.[85] The Supreme Court was not prepared to rule that the trust was a sham and the property had not been sufficiently alienated from the settlor saying that there were differences of opinion in the court on that matter.[86]

The extent of powers which Mr Clayton had over the Vaughan Road Property Trust was very unusual and it is still unclear as to how it will apply in future.[87] The result from *Clayton* (Vaughan Road Property Trust) will, therefore, have limited practical application for settling disputes outside of court due to the fact-specific nature of the judgment, the highly controlled nature of the trust and the lack of guidance.[88]

V Preventing the use of trusts as a mechanism of financial abuse

A An application for a protection order

The primary remedy for protecting victims from family violence is a protection order which orders that the recipient is not to engage in any behaviour that amounts to any form of family violence.[89] Any breach of the order is a criminal offence.[90] Actions which deny access to financial resources fit the definition of financial abuse.[91] So far there is no application in Aotearoa New Zealand for a protection order to prevent the other party from denying legitimate claims to assets via the use of settlor controlled trusts. The main reason is, as is shown in this article, that the law allows such behaviour and the only way such behaviour will be stopped is if the law disallows such behaviour.

B Changes to the *PRA*

Before looking at the proposed changes recommended by the New Zealand Law Commission to the *PRA*, which will allow more access to property in trusts, it is important to also understand the context in which the Law Commission is making its proposal. The Law Commission has made another proposal[92] which may lessen the desire for some to put property into trust, particularly the family home which is often the largest asset in any relationship. The law at present says that the home the couple live in is the family home and subject to equal division after 3 years of living together no matter when it was acquired even if it was well before the relationship or marriage started.[93] After a long consultation period the Law Commission concluded that there is not sufficient support in the community for the family

85 Ibid [105].
86 Ibid [127].
87 John Caldwell, '*Clayton v Clayton*' [2016] (5) *New Zealand Law Journal* 190, 191.
88 Law Commission (NZ), *Dividing Relationship Property* (n 58) 476.
89 *Family Violence Act* (n 1) s 90.
90 Ibid s 112.
91 Ibid s 11(1)(e).
92 Law Commission (NZ), *Review of the Property (Relationships) Act 1976 (Te Arotake i te Property (Relationships) Act 1976)* (Report No 143, June 2019) Recommendations 12, 14.
93 *PRA* (n 10) s 8(1)(a).

home to be classified as relationship property if it was acquired before the relationship began. The proposal says that the increase in value of that home during the course of the relationship is relationship property but not the whole home itself. As the family home is often the only asset held in a trust in order to protect it from future claims particularly in second relationships, the proposal that it will no longer be relationship property if acquired before the relationship may take some pressure off the need to put such homes in to a trust.

The Law Commission's approach for enabling access to property that is in a trust is to rewrite s 44C. The purpose of the reform is to target trusts that contain property which ought to be shared based on the principles of the *PRA*.[94]

VI Expanding s 44C

A major way in which it is proposed to extend s 44C is by widening the scope of dispositions captured by it. The Law Commission's proposed change will capture dispositions of all property, whether separate or relationship property.[95] It will also extend to cover dispositions made in contemplation of entering into a qualifying relationship.[96] The proposed s 44C will apply to situations where property has been disposed of to a trust in a manner which has the effect of defeating a claim or right of either or both parties under the *PRA*, and where trust property has been sustained or enhanced by the application of relationship property or the actions of either or both of the partners during the relationship. Remedies are available if the property was sustained or enhanced even if the trust was settled by a third party, though a remedy is not available if property is disposed to a trust by a third party in a manner which defeats a right of either or both parties.[97] The proposed s 44C will explicitly extend to dispositions that have the effect of defeating the claim or rights of either or both partners under any other provision of the *PRA*.[98]

Subsection (2) of the proposed amendment to s 44C addresses the potential remedies. The Law Commission proposes broadening court powers to include access to trust capital, varying the terms of the trust or resettling some of the trust property in new trusts.[99]

A court may make one or more orders under the proposed s 44C if it considers it just in the circumstances, having regard to all the relevant matters, including the matters in sub-s (3). These considerations include the extent to which a claim or right has been defeated by the disposition; the extent to which the trust property has been sustained or enhanced by the application of relationship property or the actions of either or both of the partners; the date of the disposition or the sustainment or enhancement of the property; any benefits the partners have received from the trust; whether the disposition,

94 Law Commission (NZ), *Review of the Property (Relationships) Act 1976* (n 92) 282.
95 Ibid [11.73].
96 Ibid [11.77].
97 Ibid Appendix 3.
98 Ibid [11.80].
99 Ibid [11.89].

sustainment or enhancement was made with the informed consent of both partners; and whether the trust is intended to meet the needs of any minor or dependent beneficiaries.

Additionally, the Law Commission recommends amending the *PRA* to enable a partner to lodge a notice of claim against land held on trust if they have an arguable claim under s 44 or s 44C.[100] The Law Commission also recommends that s 44 of the *PRA* be retained unchanged.[101]

A Advantages

The proposed changes to the *PRA* may reduce the effectiveness of the use of trusts as a means of financial abuse in several ways.

1 Increases remedial powers available to the court

One of the main advantages is that it enhances the remedial powers of the court which will be instrumental in achieving just outcomes. One of the major disadvantages to the current s 44C is that the court has limited power of redress.[102] If there is no other relationship property, no separate property and the trust is not income-producing, there will be no remedy. There have been cases under the current scheme where it would have been beneficial for the court to have access to trust capital to make an order under s 44C but they have not had the power to do so.[103] The proposed section will alleviate this issue. Allowing access to the trust capital can help ensure a remedy and will mitigate the effects of financial abuse as trusts will be less effective at removing assets entirely from the property pool.

2 Proposed provision has a wide scope

The proposed s 44C has been extended to cover dispositions of separate property as well as relationship property. This is beneficial as, currently, dispositions of separate property are not covered by s 44C even if that disposition has the effect of defeating a claim under the *PRA*.[104] One party disposing of separate property cash to a trust which is then used to purchase the family home would be caught by the proposed s 44C. The proposed s 44C also extends to dispositions made in contemplation of entering a qualifying relationship. This is advantageous as it will lessen the likelihood of a partner strategically moving property and delaying progression of the relationship as to avoid triggering entitlements under the *PRA*.[105] Additionally, this will mean that a partner cannot unilaterally remove assets from a relationship property pool if the other partner will not sign a contracting-out agreement as the qualifying relationship would be reasonably contemplated at the time of these discussions.[106]

Extending s 44C to third-party trusts where the property has been sustained

100 Law Commission (NZ) (Report No 63).

101 Law Commission (NZ), *Deframing Politicians: A Response to Lange v Atkinson* (Report No 64, August 2000).

102 Peart, 'Section 44C of the Property (Relationships) Act 1976' (n 57) 200.

103 See, eg, *SJB v IRM* [2011] NZFLR 1087; *C v C [No 2]* [2006] NZFLR 908.

104 Law Commission (NZ), *Review of the Property (Relationships) Act 1976* (n 92) [11.71].

105 Ibid [11.78].

106 Jan McCartney, Submission to Law Commission (NZ), *Review of the Property*

or enhanced by their actions or relationship property will mitigate the effectiveness of trusts as a mechanism of financial abuse. This provision allows a remedy in situations where the couple both use income to pay the outgoings of a property owned by a trust settled by a third party. Outgoings could include rates, mortgage payments and maintenance. It will also allow for an order in situations where a partner has worked on a farm held in a trust settled by a third party.[107] An abuser could use third-party trusts as a mechanism of financial abuse by directing a large amount of income towards property held by a third-party trust. They could also engage in unpaid labour for a third-party trust or company controlled by the trust or pressure the victim into engaging in unpaid labour. This could impact on relationship property available at the end of the relationship. Allowing orders where the property has been sustained or enhanced by relationship property or the actions of either or both partner will provide for the victim to an extent and can mitigate some of the financial abuse that may have occurred during the relationship. It also recognises that but for the dispositions into the trust, the non-benefitting party could have invested that property or time into other avenues which they could have shared equally in.[108]

B Disadvantages

While the proposed changes may help reduce the effectiveness of using trusts as a method of financial abuse, there are still significant gaps in the proposal's ability to recognise and mitigate the effects of financial abuse.

1 Uncertainty due to broadness

Aspects of the section have deliberately been left broad. Relationship property disputes vary greatly, meaning there is some advantage in allowing the court some discretion in ordering a remedy. However, broadness will lead to uncertainty and the proposed s 44C is unlikely to decrease the amount of litigation concerning trusts.[109] While there will likely be case law developed which aids in the interpretation of the proposed section, certainty in the law requires there to be consistency in orders made. Historically, orders concerning relationship property and trusts have not been consistent, which may indicate that courts will continue to order remedies that they consider appropriate for the parties in front of them rather than developing and following explicit legal principles.[110] As the proposed s 44C is very broad, this means that lawyers, at least initially, will not be able to provide clients with advice on likely outcomes with any certainty. There will, therefore, likely be large amounts of litigation concerning trusts which will not result in

(Relationships) Act 1976: Preferred Approach: Issues Paper No 44, [28].

107 Nicola Peart, 'The Property (Relationships) Act 1976 and Trusts: Proposals for Reform' (2016) 47 *Victoria University of Wellington Law Review* 443, 457.

108 Ibid.

109 Jessica Palmer, Submission to Law Commission (NZ), *Review of the Property (Relationships) Act 1976: Preferred Approach: Issues Paper No 44*, 1.

110 John Priestley, 'Whence and Whither? Reflections on the Property (Relationships) Act 1976 by a Retired Judge' (2017) 15 *Otago Law Review* 67, 72.

inexpensive, simple and speedy resolutions.[111] Litigation may reduce if the court is consistent with the weighting and interpretation of the principles in the proposed s 44C(3) but it is unclear if this will occur. As discussed above, there are various factors which the court must consider when exercising their discretion in making an order. While it is possible that clear interpretation and weighting of these principles may develop, it is likely that these factors will be weighted differently depending on the facts of the case resulting in different outcomes. The issue of a victim of financial abuse being unable to inexpensively access trust assets is unlikely to be effectively addressed by the proposed s 44C.[112]

Another weakness of the proposed s 44C is that a remedy can be ordered under the proposed s 44C(2) 'if the court considers it just in the circumstances, having regard to all relevant matters'. While this is clearly incorporated to allow judicial discretion in ordering a remedy, what is 'just' is likely to be heavily disputed. Particularly if assets have been unilaterally transferred to a trust by one party when the qualifying relationship was reasonably contemplated, this would raise a question of what circumstances would result in it not being just to make an order. In the context of financial abuse, it will almost always be just to allow the victim access to trust assets to ensure financial stability post-separation.

2 Lack of remedy in some situations

Additionally, the proposed s 44C will not always provide a remedy where needed. An example of this is with dynasty trusts. As dynasty trusts have been settled by a third party, they cannot be subject to an order under the proposed s 44C(1)(a) which requires the disposition to be made by a party to the relationship. Property held by a dynasty trust can only be subject to an order under the proposed s 44C(1)(b) or s 44C(1)(c) if the property has been sustained or enhanced by either party or relationship property. This can result in continuing financial abuse as one party may retain access to the family home and still be supported by the trust. The couple may not have a large amount of relationship property due to the historical support of the trust and direction of relationship property and efforts towards trust property. The proposed s 44C will leave one partner with very few assets, even if the other partner still has access to the trust. The social cost of supporting the less well-off partner will generally fall to the State.[113]

3 Unilateral removal of assets

A further issue is that people are always going to attempt to remove assets from the relationship property pool and abusers will continue to find ways to financially abuse their victim. The prevalence of trusts increased after the passing of the original *Matrimonial Property Act 1976* (NZ) and again after the 2001 amendments as people saw the benefit of trusts as an effective means

111 Nicola Peart, Submission to Law Commission (NZ), *Review of the Property (Relationships) Act 1976: Preferred Approach: Issues Paper No 44*, [4.2.1].

112 Priestley (n 110) 85–6.

113 Palmer, 'What to Do about Trusts?' (n 22) 192.

of removing assets from the property pool.[114] If trusts are targeted and are no longer viewed as a successful means of asset protection and continuous financial control and abuse, people are likely to simply choose other methods to protect their assets such as utilising a company structure or parents retaining ownership of the property. While the issues regarding the use of trusts may be addressed, the resulting unfairness and abuse from assets being unilaterally removed from the property pool and controlled by one party, no matter the method, will not be.[115]

4 The case of *Kidd v Van Den Brink* is an example of gaps in the proposed new law which shows where cases will fall through the proposed system

The case of *Kidd v Van Den Brink*[116] is a clear case of financial abuse. It is a case where the current system does not provide a remedy for Ms Kidd, and the proposed law does not provide one either. The trust was settled by Mr Van Den Brink's father in 1990. At the time, Mr Van Den Brink's father had four children aged between 16 and 22. None of the children were married. Amongst the discretionary beneficiaries were 'any wife, husband, widow or widower of any Final Beneficiary'. The Final Beneficiaries were Mr Van Den Brink and his siblings. Ms Kidd and Mr Van Den Brink commenced living together in 1998 and married in 2001. They had one child together and separated in 2006.[117]

During the course of the relationship, the trust provided Ms Kidd and Mr Van Den Brink with a family home, paid outgoings, provided chattels such as cars and horse trucks and funded the acquisition of a landscaping business by way of loan.[118] During the course of the relationship, Ms Kidd provided various services to companies related to the trust and permitted various payments and arrangements which benefitted the trust or a company of which the trust was a shareholder. The relationship property was therefore very limited, and Ms Kidd was unable to house herself and her son without resort to the trust assets.[119]

Ms Kidd applied to the court for an order under ss 44 and 44C of the *PRA* in order to gain access to the trust assets. This was struck out. She then applied for an order under s 182 of the *FPA*. This was also struck out. It was held that the settlement on the trust was not related to any particular marriage and the possibility of a marriage was incidental to the primary object.[120] The trust was not premised upon the continuation of Ms Kidd and Mr Van Den Brink's marriage and the purpose was not to make provision for this marriage. Their nuclear family was not the principal beneficiary.[121] The court held that the

114 Nicola Peart, 'Intervention to Prevent the Abuse of Trust Structures' [2010] 3 *New Zealand Law Review* 567, 568.

115 Nicola Peart, Submission to Law Commission (NZ), *Dividing Relationship Property: Time for Change?: Issues Paper No 41*, 4.

116 *Kidd v Van den Brink* (Auckland High Court, CIV-2009-404-4694, 21 December 2009) [3].

117 Ibid [7].

118 Ibid [8].

119 Ibid [35].

120 Ibid [32].

121 Ibid [33].

purpose of the *FPA* was not to achieve fairness between parties and was not a mechanism for dividing what would have been relationship property but for the trust.[122]

This case demonstrates just how difficult it is for a victim of financial abuse to access trust assets and how this perpetuates inequalities. Upon separation, Mr Van Den Brink continued to benefit from access to trust assets whereas Ms Kidd was no longer supported by the trust. This was despite the fact that both parties worked for various companies which the trust was the shareholder of during the relationship and the fact that the trust significantly supported both parties during the relationship. There will be an inequality in the economic advantages and disadvantages of the relationship with the negative effects of the dissolution falling solely on Ms Kidd.

Does the reformed s 44C as proposed by the Law Commission provide a remedy for Ms Kidd?[123] Firstly there was no disposition into a trust, the disposition was into a company that owned the house. As the home was owned by the company it was not acquired by any partner for their common use and benefit and the increases in value via the efforts of Ms Kidd were not contributions to the trust but to the company. For the company provisions of the *PRA* to apply when assets are in a company, then one of the parties has to own half the shares under s 44D of the *PRA* and in this case neither of the parties did own half of the shares. This shows that the proposal does not fit all situations and Ms Kidd would still be denied access to the assets in the trust because of the way the arrangements had been structured.

VI The need for a more radical approach

As this article has shown, the courts have allowed settlor controlled trusts to exist, and made some attempts to give access to relationship property held in them. Established trust law academics accept that controlled trusts and dynasty trusts create 'very real barriers to the effective implementation of the policy of equal sharing that is fundamental to a property sharing regime' and accept that it is 'necessary to find a means of including trust assets in the process of property division'.[124]

The argument which trust lawyers and academics make to protect what they see as the 'sanctity' of property held in trust, is that once property is in a trust it 'enables their clients to retain control and benefit without the responsibility and burden of property ownership'.[125] It is unfair for the law to enable a partner to avoid the responsibility of sharing the property fruits of a relationship and denying a partner financial resources that Parliament entitled them to at an end of a relationship. A partner's right to order their private affairs must come second to their obligations and their responsibilities to share the property fruits of their relationship which have been built up by their joint efforts.

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122 Ibid [36].

123 Xin Yee Lau in an excellent dissertation shows that Ms Kidd is likely to still be without a remedy under the new proposal. Xin Yee Lau, 'Busting Trusts When a Relationship Breaks Down: Reforming s 44C' (Dissertation, University of Otago, October 2019).

124 Palmer, 'What to Do about Trusts?' (n 22) 201.

125 Ibid 202.

The law must make it unequivocally clear that relationship property entitlements must always trump any claim to the private interest of maintaining control over relationship property assets under a settlor controlled trust or any other device such as a company. The best way to do this, is for the law to declare that all relationship property, whether it is cloaked in a trust or a company or any other legal device, to prevent access to it, has priority over the interests of the trust or the company. The court then has power to go behind the cloak of the trust or other device and either remove the relationship property from the device or resettle the property in the trust or the company so that the relationship property is available to the other partner. There should be no discretionary element to the courts powers, because once the court has discretion to balance other interests against the interests of relationship property claims, there will inevitably be litigation and the room for the financial abuse.

In order for this to work it is crucial that disclosure laws are much more rigorous. The Law Commission[126] said that a clear theme of the submission they received was that the current disclosure obligations and penalty for non-disclosure do not facilitate an inexpensive, simple and speedy resolution of a property relationship dispute under the principles of the *PRA*.[127]

Sarah Sparks has suffered financial abuse since 2012 trying to get full disclosure of assets from her former husband and to protect her claim to relationship property assets, where the assets are tied up in a range of complex company structures. Sarah Sparks has incurred $2 million in legal fees and has represented herself for the last 4 years to cut back the costs.[128]

The Court of Appeal in *M v B*[129] has said that total disclosure and cooperation is required in relationship property proceedings, but it does not happen because the consequences of not doing it are weak.

What we need is a requirement of full disclosure of all assets that are associated with the person who has been claimed against, including all assets in trusts and companies to be fully disclosed within two months of a claim being lodged by the other partner for relationship property. Any delay means there will be an automatic $500,000 fine which will be paid to the claimant party. If there is any doubt that assets have not been fully disclosed, the court will appoint a forensic accountant, who will be paid for by the person whose assets are being investigated. If further assets are found, that should have been disclosed, they will immediately be forfeited to the claimant party.

The proposed regime will be seen as draconian. But the alternative is to limp along as we do at present with all the pressure on the claimant party. The proposal puts the pressure where it should be, on the party who has attempted to deny their partner access to financial resources.[130]

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126 Law Commission (NZ), *Review of the Property (Relationships) Act 1976* (n 92) [16.123].

127 *PRA* (n 10) s 1N(d).

128 David Fisher, 'Greg Olliver-Sarah Sparks Divorce Case: Property Developer's "Bad Faith" Attempt to Control Wife's Debts', *The New Zealand Herald* (online, 6 March 2020) <www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12313550>.

129 [2006] 3 NZLR 660, [49].

130 See Jesse Wall, 'Taking the Bundle of Rights Seriously' (2019) 50(4) *Victoria University of Wellington Law Review* 733 for a more deeply theoretical development of the argument that has been made here.

VII Conclusion

Trusts and the fact they often need litigation to access the property in them are used as a mechanism of financial abuse. They are particularly effective as they remove the property from the domain and control of the couple into the domain and the control of the trustees. A financially abusive partner is often a trustee of the trust, or the trustees of the trust will act in accordance with their wishes. Trusts are especially effective as a means of financial abuse as trust property is not normally considered relationship property, thus allowing the abuser to retain control of the assets and continue their financial abuse post-separation.

The current relationship property scheme in New Zealand does not adequately deal with trust property in a relationship property context, as it does not provide sufficient disincentives to prevent property in a trust being used to perpetuate financial abuse. Whilst the New Zealand courts have made inroads into accessing relationship property that is in settlor controlled trusts, it is not a fool proof, cost effective way of ensuring that full entitlements to relationship property which is in trusts can be obtained.

The New Zealand Law Commission's proposal goes some way to accessing relationship property in a settlor controlled trust. However as this article shows it does not go far enough and some partners will still walk away with nothing or very little relationship property.

This article takes the position that it is time for a clear line in the sand to be drawn to make it legally clear that relationship property trumps all other interests and that courts should have wide powers to access relationship property that is held in trust, companies or any other similar legal devices.