

A wife takes half the assets of a very big Trust

One of the most common complaints about family trusts in New Zealand is that a spouse is able to put relationship property into a Trust and shrink the pool of property that is available for distribution at the end of the relationship.

The philosophy of the PRA is that all property created by spouses during a relationship is relationship property which should be available for division. When relationship property goes into a Trust the Courts have invoked a number of different means to try to get it back into the collection of assets that are available for distribution. I refer, in particular, to the bundle of rights "doctrine"; the notion of sham trusts; the notion of "alter ego" trusts; the notion of illusory trusts; a finding that the settlor has not ceded control of the Trust property; and to the outright winner of these devices at present - the constructive trust.

Our Courts are not alone in grappling with this issue. The law of trusts is widely regarded as perpetuating unfairness where property created during a relationship has been settled on a trust.

The legislatures in some countries have chosen to override Equity by statute. So, in England, Australia and Hong Kong the legislatures have stipulated that the assets of Trusts that include "*financial resources*" to which a party has access are to be regarded as the assets of that person, and available for distribution to a spouse.

Today's article concerns a case that was decided a few days ago by the Hong Kong Court of Final Appeal ("the Court"): *Kwan v Otto & Another* FACV No.21 of 2013, 17 July 2014.

Why am I writing about a Hong Kong case for a New Zealand audience? Because the Hong Kong Court has international credibility. Its stature is enhanced by the presence of what are called "*non-permanent Judges*". In this case Bill Gummow, one of Australia's foremost Equity lawyers, and a former Judge of the High Court of Australia, who sat on the appeal.

The husband established an engineering business which, in the course of a long marriage, proved to be very profitable. Most of the shares in the business were settled on a Jersey Trust of which the husband was the settlor and protector.

The Trust was held not to be a sham. Nor was it a case where the settlor had "*not ... effectively divested himself of the Trust property.*" [36].

It was held that if the husband asked the trustee (HSBC) to advance the whole or part of the capital or income of the Trust to him, it, would on the balance of probabilities, do so.

Gummow NPJ ("NPJ" stands for "Non-Permanent Judge") had sat on *Kennon v Spry* [2008] HCA 56 where, he held that a wife "*was an eligible object of benefaction*" of a Trust established by a husband and was accordingly entitled to the benefit of its assets. [43]

The Hong Kong husband, although not a trustee, had considerable influence over the Trust. As protector, he had the power to remove the trustee and appoint a new trustee. Further, some of the trustee's powers were circumscribed by a requirement that they were only exercisable with the protector's consent.

The Court's conclusion that the assets of the trust were resources that were available to the husband, was a no-brainer. First, the husband contended that two-thirds of the value of the Trust's asset should be treated as matrimonial property. Second, following the orders of the lower Courts that he was to pay HK\$380m to his wife, the trustee advanced the husband that sum to enable him to pay it. Third, prior to the hearing before the Court of Final Appeal, the husband made a memorandum of wishes in which he asked the Trustee to advance any additional sum that the Court of Final Appeal might order him to pay. The husband's actions may remind some readers of the scene in "A Fish Called Wanda" where Kevin Kline is left standing in a patch of quick drying cement, leaving him defenceless as Michael Palin proceeds to drive a road rolling machine over him.

The *Kwan* case shows that in England, Australia and Hong Kong, relationship property that has found its

way into Trusts can be extracted by the statutory device of providing that "resources" that are available to a spouse are to be taken into account when determining the property that is to be divided upon a couple's separation.

A benefit of a regime which requires that the "resources" available to be taken into account when spouses divide their property is that the statutory regime does not extend into creditor/debtor relationships.

By contrast, our law is confined to a notion of "property". And if an asset is to be categorised as "property" for the purposes of the laws relating to relationship property, it will be an item of "property" that can be taken by a creditor, and by others.

But there is a more compelling reason why the *Kwan* case is not a model that New Zealand Courts should follow. When it modified the Matrimonial Property Act in 2001, Parliament refused to give the Courts power to order trustees to make payments of capital to a "disadvantaged" spouse when relationship property had gone into a Trust. Although the Courts ought not to walk where Parliament has said they should not tread, the Court of Appeal's recent decision in *Marshall v Bourneville* (2013) 3 NZTR 23-007 will be seen by some as contradicting that principle. In that decision the Court has promoted the use of the constructive trust doctrine to extract relationship property from Trusts.