

+ Trust law

Can trusts that parents create for their children be intercepted by the children's spouses?

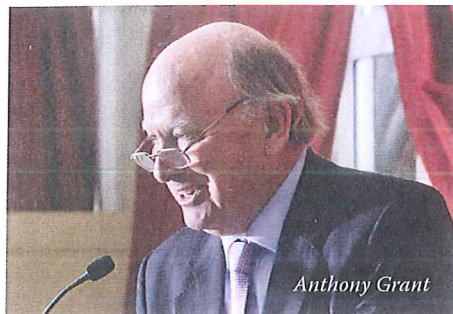
By Anthony Grant, Trusts & Estates Litigator

Section 182 of the *Family Proceedings Act 1980* (FPA) empowers courts to re-write "pre-nuptial" and "post-nuptial" settlements in any ways they want. Does this mean that if a parent establishes a trust for a married child, the child's spouse can use the section to intercept the trust's wealth?

That was one of the questions for decision in *Da Silva v Da Silva & Another* [2016] NZHC 2064 (1 September 2016). During the course of a daughter's marriage, her mother established a trust for herself, her daughter, and her daughter's children. Justice Peters held that the trust was not a "post-nuptial settlement" and that the daughter's estranged husband could not invoke section 182. I suspect that most lawyers who work in this area of the law would say that this ruling was correct.

They would say this because the decision accords with the statutory prescription in section 10 of the *Property (Relationships) Act 1976* (PRA) that gifts and inheritances are to be classified as "separate property" and that property received as a beneficiary of a trust that was settled by a third person is separate property. If gifts, inheritances and distributions from trusts settled by third persons are all to be classified as separate property, then surely the assets of a trust established by a third party should not be able to be taken by a separated spouse?

But this form of reasoning takes no account of the origin of section 182 and how it was intended to operate. Section 182 had its origins in England in 1857 when women had the legal status of chattels. They were not allowed to own property. They were not allowed to vote. Being chattels, they would literally be "given away" by a parent during the course of a wedding service. In those distant days, parents who wanted to provide some financial assistance for their daughters, and for the children who would be born during a daughter's marriage, established "marriage settlements". A trustee would be given property for the benefit of the daughter and any children who would be born to her, but not necessarily for the husband. If the wife committed adultery,



Parliament thought it appropriate that power should be given to modify any pre-nuptial or post-nuptial settlement so that the wife could be punished financially. This was one of the reasons for section 182's introduction into our law.

Coming back to the case of *Da Silva*, there will be judges who disagree with Justice Peters and who say that the trust the mother established was a "post-nuptial" settlement. While it is true that the mother was a beneficiary and the daughter's husband was not, it is incontestable that the trust was intended to benefit her married daughter and the children of the daughter's marriage.

The Supreme Court spoke clearly about this in *Clayton* [2016] NZLR 590, where Justice Glazebrook said: "Where there is a family trust ... set up during the currency of a marriage with either [of the] parties ... as beneficiaries there will almost inevitably be [a post-nuptial settlement]."

Justice Peters has taken the words "almost inevitably" to distinguish the *Da Silva* trust. She said that "there must be a connection or proximity between the settlement and the marriage" (para [87]). In her Honour's opinion (at para [88]):


"I do not consider that such connection or proximity exists in this case. [The mother] established the trust for the benefit of herself, [her daughter] and the children. [The husband] was not included as a beneficiary, although he and [the daughter] had been married for some

14 years at the date the trust was settled. The only conclusion to be drawn is that [the mother] made a deliberate decision not to include [the husband] as a beneficiary. Nor did [the mother] appoint [the husband] or [the daughter] as a trustee. [The daughter] was only appointed after [the mother's] death."

If Justice Peters is correct – and I would like to believe that she is – then trusts that are established for children and which exclude, as beneficiaries, a child's spouse, will be immune from judicial intrusion. This is not how the equivalent section has been interpreted in England.

The breaching of a trust by a non-beneficiary is morally objectionable. Most parents who have some wealth will want to leave assets for the benefit of their children and they will be deeply offended if the assets can be intercepted by estranged spouses of their children.

One way to resolve the conflict between section 182 of the FPA and the provisions of section 10 of the PRA is to accept that a trust established by a parent for a married child is a "post-nuptial settlement" for the purposes of section 182 but to refuse to exercise the discretion to modify the trust since Parliament made it very clear in section 10 of the PRA, more than 100 years after section 182's predecessor sections were enacted, that assets a spouse receives from gifts, inheritances and trusts that are settled by third parties are to be classified as "separate property" which cannot be intercepted by the other spouse except in the circumstances where the PRA provides for separate property to be converted into relationship property.

Justice Peters held in the *Da Silva* case that if an appellate court should find that the trust in that case was a "post-nuptial settlement", then she would refuse to exercise her discretion to modify the trust. In doing this she was entirely correct since she was following the edict of Parliament in section 10 which should obviously take precedence over an archaic law that was intended to provide some flexibility for trusts that were established to assist women who, having the legal status of chattels, were not permitted to own property themselves. 

+ ADLSI notice

Notice of Annual General Meeting 2017

The AGM of members of the Auckland District Law Society Incorporated (ADLSI) will be held on Tuesday 14 March 2017, 6th Floor, Norman Shieff Room, Chancery Chambers, Auckland at 5:30pm.

AGM Business:

- Annual Report on ADLSI

- Confirmation of President and two Council Members for 2017
- Approval of 2016 AGM Minutes
- Appointment of auditors
- Amendments to the Rules (with more detailed information to follow)
- Notices of motion

- General business

Any notices of motion for consideration at the meeting must be received by the Chief Executive Officer at ADLSI's premises by Friday 3 March 2017 at 5:00pm.

For more information, please telephone (09) 303 5270 or visit www.adls.org.nz.