

Court of Appeal divides sharply on trust validity

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In *Cooper v Pinney* [2023] NZCA 62 the Court of Appeal has divided sharply on the question of whether a trust which gave very wide powers to a man should be upheld or whether it should be regarded as the man's personal property which could be intercepted by his wife.

In a lengthy decision which includes no fewer than 133 footnotes, Miller J said the powers a man held in a trust "give him control of the trust and access to all its capital and income". [93]

He said the powers were to be classified as his "property" which the man's estranged de facto partner could intercept.

Gilbert J and Cooper P delivered a strident response to this analysis, saying Miller J's finding that the man had a general power of appointment of income and capital "is fundamentally inconsistent with his finding that a valid trust existed".

With judicial understatement, they said they were "troubled" by Miller J's suggestion "that the court would make an order requiring the trustees to exercise their powers to pay [the man's former de facto partner who was], a non-object of the trust". [118]

The division between the judges reflects a stark difference in attitude to what I will call the perceived "legitimacy" of many New Zealand discretionary trusts.

The trust deed in the *Cooper v Pinney* case required two trustees. The man (who was a trustee) could theoretically appoint as a co-trustee a corporate trustee of which he was its sole shareholder and director, but the majority said the power to appoint a new trustee was fiduciary and this would prevent the man "from removing all trustees not willing to comply with his directions and appointing only a corporate trustee of which he was the sole shareholder and director in order to take sole control of trustee decision-making". [114]

Relying on a proposition in the second edition of *Thomas on Powers*, Gilbert J and Cooper P said, "each trustee has a duty to bring an independent mind to the exercise of discretion and they are prohibited from acting under dictation

or instruction". [111]

It is common in New Zealand family trusts for a person to be simultaneously the settlor, a trustee and a beneficiary and to have an implicit right to make a distribution to himself/herself. However, the majority said the dispositive powers of a trustee in that situation are still "fiduciary in nature".

Miller J was clearly sceptical about what I will call the "legitimacy" of the trust. He referred to the Supreme Court's statement in one of the *Clayton* cases – that judges should bring "a judicious mixture of worldly realism" to the task of determining whether trust assets are the assets of a genuine trust or, in truth, are the assets of the settlor/trustee/beneficiary and to recognise that "strict concepts of property law may not be appropriate in a relationship property context". [68]

He said the trust was:

"so flexible as to leave the settlor or trustee with near-complete control over trust assets and no meaningful obligation to other beneficiaries. Such extremely discretionary trusts are a relatively modern phenomenon. In my view it cannot be said that the legislature sought to protect trusts of this kind." [80]

He said the powers of the man were "weakly fiduciary" – a new term in the lexicon of judicial scepticism about trusts – and noted that the Full Family Court of Australia had upheld a finding that a trust was under the husband's control in circumstances where the other directors "could be expected to follow his direction". [86]

I suspect many practitioners are trust sceptics who would be in Miller J's camp. But the message of the majority is important. New Zealand discretionary family trusts are not to be set aside lightly just because a court can theoretically thread a pathway through the terms of a trust that appear to give complete control of their assets to a trustee, because there can be fiduciary constraints that prevent the person from being able to go down that path. ■

Anthony Grant is an Auckland barrister and trustee who specialises in trusts and estates ■