

The courts' intolerance with toxic trusteeships

By Anthony Grant, *Trusts & Estates Litigator*

The typical New Zealand family trust works well enough when the family is cohesive and members get on with each other. But, when times turn bad, the trusts tend to turn toxic.

In *Connor v Connor* [2018] NZHC 1721, Justice Thomas gave this caustic characterisation of a typical New Zealand family trust.

"Family trusts are set up with the best of intentions by a settlor parent who still wishes to retain full control over the assets of the trust which he or she continues to regard as their personal property. Control is retained by constantly changing trustees, threatening to do so, demanding [that] children resign as trustees or sign resignation deeds which can be considered effective by the settlor parent at their whim. Matters often come to a head when the settlor parent dies. Confusion reigns and, unless the settlor parent has been open with all children, suspicion abounds and the trust descends into dysfunction ... and paralysis." (para [40])

This was said of a trust where the relationship between a parent settlor and his children had broken down. The same principles apply to spouses, partners, siblings, blended families and other family relationships.

In these cases, there is generally one person who asserts control over the trust. As relationships degrade, the management of the trust becomes dysfunctional with an absence of meetings, an absence of decisions, and an inability to act impartially.

The dominant trustee generally exploits the trust, using the trust's assets without the other trustees' consent or with the approval of what might euphemistically be called "co-operative" trustees.

I suspect that all trust practitioners in this country have at least one such case in their files. I have several. Such disputes often take years to resolve and the expense can be greater than many litigants can afford.

Justice Peters has recently spoken about the way in which the courts tend to respond to applications to remove estranged spouses as trustees.

"It is not uncommon for the court to make an order removing estranged spouses as trustees of a family trust, if one or both are beneficiaries ... This is because the court cannot be confident that all trustees (not just one but all) are able to act impartially."



Anthony Grant

Her Honour recommended that, in such cases, the spouses "should retire and appoint trustees independent of all concerned". Notice the criterion that she used to justify the removal of estranged spouses: the requirement for a trustee "to act impartially".

When relationships break down, spite, anger, resentment and other negative emotions tend to prevail and to cloud a trustee's judgement. A need for impartiality is essential for a trust.

One of the problems with the overwhelming popularity of family trusts in this country is that partisanship can almost be taken for granted.

Going back to the quotation of Justice Thomas at the beginning of this article, there is usually an assumption that a settlor will "wish to retain full control over the assets of the trust" and there may well be an absence of impartiality in the consideration of which beneficiaries might receive distributions.

The law of trusts in this country has swung like a pendulum. When gift duty and estate duty were on the books, trusts were tightly regulated.

The abolition of those taxes has led to much more liberal deeds of trust which purport to tolerate substantial degrees of settlor control and these developments have tested the boundaries of the law of trusts.

It is time for the pendulum to swing back a little and a robust requirement by the courts for trustees to act impartially is one factor that will bring the law of trusts back closer to where it ought to be.

The expense of litigation is a major deterrent for many people. One way for the courts to help people who are trapped in toxic trust relationships is for the courts to identify the boundaries between acceptable and unacceptable conduct.

If there is general agreement on a fundamental need for impartiality, many disputes will be able to be resolved without the need for litigation. And the cowboy tinge in this area of the law will hopefully fade a little too. ❖