# INCLUDING TRUSTS IN RELATIONSHIP PROPERTY ARBITRATIONS

Robert Fisher[[1]](#footnote-1)

A central feature of most complex relationship property disputes is the family trust. This article considers the extent to which trusts can be included in relationship property arbitrations.

The article is confined to disputes between the living parties to a former legal or de facto marriage or civil union (for present purposes referred to as “spouses” [[2]](#footnote-2)). The article assumes that all concerned are happy to resolve the dispute by arbitration so long as there is jurisdiction for it. The reasons for doing so have been traversed elsewhere.[[3]](#footnote-3)

# When do trusts arise in relationship property disputes?

Trusts can figure in relationship property disputes in a number of ways. They include:

* Claims for compensatory orders under s 44C of the PRA where relationship property has been settled on a trust;
* Claims for orders setting aside dispositions of property to trustees under s 44 of the PRA;
* “Bundle of rights” claims which seek to treat one spouse’s collective trust rights and powers as relationship property;
* Claims that the resources of a trust should be wholly or partially imputed to a spouse for the purpose of deciding what that spouse requires, or can afford, for maintenance purposes;
* Constructive trust claims against trustees;
* Claims that trust are shams.
* Claims for breach of trust brought in a spouse’s capacity as a beneficiary;
* Applications by a beneficiary to remove a trustee;
* Applications for the exercise of other discretionary powers under Part 5 of the Trustee Act 1956;
* Applications to vary a trust or apply its property under s 182 of the Family Proceedings Act 1980.

As a general proposition, any dispute which parties can resolve by way of agreement can be submitted to arbitration.[[4]](#footnote-4) It follows that in each of the above cases, the first step is to ask whether those involved would be capable of compromising the dispute by contract. If they would, it is necessary to decide who the parties to such a contract would need to be. In nearly all cases arbitration will be an available option if all interested parties can be identified, have contractual capacity, and agree to that course.

To examine those questions more closely, trust disputes can be divided into three categories:

1. Disputes where trusts indirectly affect the property rights of the spouses in their capacity as spouses (“inter-spouse disputes);
2. Disputes which could result in an order affecting the trust itself, therefore requiring the inclusion of the trustees as parties (“spouse-trustee disputes”); and
3. Disputes in which there are doubts over jurisdiction due to the need for separate representation for children or the association with dissolution of marriage (“disputes where jurisdiction is doubtful”).

These will be considered in turn.

# Inter-spouse disputes

As between the spouses themselves, s 21A of the Property (Relationships) Act 1976 (“the PRA”) provides that:

**21A Spouses or de facto partners may settle differences by agreement**

1. A husband and wife or de facto partners may, for the purpose of settling any differences that have arisen between them concerning property owned by either or both of them, make any agreement they think fit with respect to the status, ownership, and division of that property.

It follows that in any situation in which the spouses could enter into a binding compromise by contract under s 21A without involving the trustees or beneficiaries, they will be able to validly submit the same issue to arbitration. Three of particular significance are (i) claims under s 44C of the PRA, (ii) bundle of rights claims and (iii) claims to include the resources of a trust as part of a spouse’s means.

*(i) Claims under s 44C of the PRA*

A common method of unlocking the value of assets in a family trust is to invoke s 44C of the PRA. Section 44C permits orders where relationship property has been transferred to a trust during the relationship in circumstances where the disposition has the effect of defeating rights under the Act. The orders permitted under s 44C(2)(a) and (b) require one spouse to pay money to, or transfer property to, the other. If the relief sought is confined to an adjustment between the two spouses in that way, their agreement to arbitrate will suffice. There is no need to join the trustees as a party to the arbitration if no order is sought against them.

*(ii) Bundle of rights claims*

The same is true of a “bundle of rights” claim. The claim here is that, viewed collectively, the rights and powers of one spouse in relation to a trust represent relationship property which must be shared with the other spouse.[[5]](#footnote-5)

Without entering into the controversy surrounding the “bundle of rights” doctrine, it is sufficient to note that the outcome envisaged is that the bundle of rights will be regarded as an item of relationship property. As relationship property, it forms part of the total assets to be shared between the spouses.

In implementing the relationship property division the value of the bundle of rights is normally allocated to the spouse who already enjoys those rights. The remedy for the other spouse is a corresponding increase in his or her share of the remainder of the relationship property. Even if all or part of the bundle of rights is vested in the claimant, there is no suggestion that the interests of the trustees and beneficiaries will be affected. As the pursuit of a bundle of rights claim will not impact on the trust itself, the trustees do not need to be joined in any such arbitration.

*(iii) Claims to include the resources of a trust as part of a spouse’s means*

There is an indirect means of accessing trust resources whenever the exercise of a judicial discretion is influenced by a comparison between the respective means of the two spouses. In that situation the Court can have regard to the benefits which one spouse is likely to enjoy from a trust. This is particularly important where that spouse has de facto control or influence over the fate of a trust. It is a technique frequently employed in the United Kingdom.[[6]](#footnote-6)

Spousal maintenance is the most obvious jurisdiction in which this principle can be invoked. The means of each spouse must be taken into account under s 65(2)(a) of the Family Proceedings Act 1980. Importantly, s 69(1)(b) and (c), combined with s 70(2)(b), permits the making of an order to pay a lump sum towards the past or future maintenance of a spouse. Trusts aside, it is questionable whether in this country[[7]](#footnote-7) the power to order one spouse to pay the other a lump sum by way of maintenance has received the attention it deserves. For present purposes the point is that reliance on the resources of a trust when assessing a spouse’s means can be an effective method of obtaining indirect access to those resources.

The position over maintenance can be reviewed in any relationship property proceedings (PRA s 32). There are related discretions with respect to postponement of sharing (s 26A), occupation orders (s 27), the form of orders relating to specific kinds of asset (ss 28 to 31), the allocation of the family home as part of the division (s 37) and the terms on which one spouse may be required to pay the other (s 37). These are all situations in which the resources of a family trust may play a critical role in the exercise of the judicial discretion.

Notwithstanding the significance of trusts in those situations, there is no necessity or justification for joining the trustees as parties to the proceedings in question. Any relief afforded, whether by a Court or an arbitrator, takes the form of an order against the spouse concerned, not against the trust.

# Spouse-trustee disputes

Inter-spouse claims of that nature may be contrasted with claims which seek an order impacting upon the trust itself. Examples are (i) claims under s 44 of the PRA, (ii) claims under s 44C(2)(c) of the PRA, (iii) claims against trustees based on constructive trust or equitable estoppel, and (iv) claims that a family trust is a sham.

*(i) Claims under s 44 of the PRA*

One spouse can apply to set aside the other’s disposition of property to a trust under s 44 of the PRA on the ground that it had been made in order to defeat the first spouse’s rights under the Act. The same power arises under s 184 of the Family Proceedings Act where dispositions are made to defeat rights under that Act.

Since an order of that nature impacts upon the property and rights of the trust itself, any arbitration in question must include the trustees as a party. It is true that compromises affecting trusts are sometimes entered into between spouses on the basis that the spouse with de facto control over a trust agrees to take all reasonably possible steps to “procure” agreement by the trustees. But such an agreement must always be expressly or impliedly conditional upon the trustees’ independently taking the step sought by the spouses. A formula of that kind would not be a satisfactory basis for an arbitration in which an order impacting upon a trust is one of the remedies sought. Nor would it be sufficient for the arbitrator to direct that notice be given to trustees under s 37 of the PRA. Arbitration is a consensual process to which all who may be affected must agree.

In short any arbitration in which one of the parties seeks an order directly impacting upon a trust will be possible only if the trustees agree to be parties to the arbitration.

On the other hand there is no justification for adding the trust’s beneficiaries as parties in the absence of any potential for conflicts of interest within the trust. Section 20 of the Trustee Act 1956 materially provides:

**20 Power to compound liabilities**

A trustee may, if and as he thinks fit,—

…

(g) compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the trust or to the trust property,—

and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him seem expedient, without being responsible for any loss occasioned by any act or things so done by him in good faith.

In the absence of potential conflicts within the trust, trustees are competent to enter into an arbitration agreement with the two spouses on behalf of the trust. The trustees can be taken to represent the interests of all parties to the trust.

A theoretical qualification concerns persons who had received the disputed property in good faith and who had so altered their position in reliance on the property that it would be inequitable to return it to the spouses. Such persons could be potential parties to the arbitration if they required relief under s 44(4) of the PRA or s 184(4) Family Proceedings Act.

In practice the need to join extra parties under s 44(4) of the PRA or s 184(4) Family Proceedings Act will not arise in arbitration any more than it does in Court. In most cases the disputed property will have remained in the trust. If it has been further distributed to a beneficiary other than one of the spouses, the claimant spouse is likely to seek a non-proprietary remedy, such as a direction under s 44C of the PRA, in order to keep the arbitration (or for that matter court proceedings) within manageable proportions.

*(ii) Claims under s 44C(2)(c) of the PRA*

A second kind of claim which could impact upon the trust itself arises under s 44C(2)(c) of the PRA. That provision permits an order requiring trustees to pay all or part of the trust income to a claimant spouse.[[8]](#footnote-8) Again, if a claimant spouse seeks such an order it would be necessary for the trustees to join in the arbitration agreement.

Theoretically an order under s 44C(2)(c) impacts disproportionately upon income beneficiaries but no court-conducted cases under s 44C, or its equivalents, have yet been reported in which beneficiaries, or separate classes of beneficiary, have been separately represented. It seems safe to assume that in all but the most exceptional of cases the trustees will adequately represent all parties to the trust.

*(iii) Claims against trustees based on constructive trust or equitable estoppel*

A third type of trust claim involves civil proceedings against trustees based on constructive trust or equitable estoppel. Constructive trust and equitable estoppel claims between legal and de facto spouses were common before s 4 of the PRA excluded them. [[9]](#footnote-9)

As constructive trust and equitable estoppel causes of action have always been based on equitable principles of general application, there is still nothing to stop one spouse from bringing a claim of that nature against the trustees of a family trust. Thus a spouse may be in a position to argue that he or she contributed money, property or labour to a trust’s house, farm or business in circumstances where the trustees knew and encouraged a reasonable expectation that the he or she would be appropriately rewarded in due course. Clearly, where a claim of that character is to be pursued, the trustees must be joined in the arbitration agreement.

*(iv) Claims that a family trust is a sham*

A fourth type of trust claim is the contention that what purports to be a family trust is in fact a sham.[[10]](#footnote-10) Controversial formulations seeking to categorise a trust as “alter-ego” or “illusory” can be treated in the same way for present purposes. If successful, such claims impact upon the proprietary interests of the trust, and indeed the very future of the trust itself. Clearly the trustees must be included as parties to the arbitration but there is no basis for separate representation of beneficiaries.

In short, whenever a spouse seeks an order directly impacting upon a trust the trustees must be joined in the arbitration as a party. In the absence of potential conflict between different classes of beneficiary, or between beneficiaries and trustees, the trustees will be fully competent to represent all parties to the trust.

# Disputes where arbitral jurisdiction is doubtful

There remain two kinds of claim where arbitral jurisdiction is questionable - (i) Proceedings in which living or unborn children need to be separately represented; and (ii) claims under s 182 of the Family Proceedings Act.

1. *Proceedings in which living or unborn children need to be separately represented*

Some forms of proceeding create the potential for conflict within a trust. A spouse-beneficiary may bring an action for breach of trust against a spouse-trustee , seek a distribution or variation of the trust which would impact upon the interests of another class of beneficiary, or seek the exercise of the court’s supervisory powers under Part 5 of the Trustee Act 1956 or in equity. Examples of supervisory powers include the removal and replacement of trustees (s 51), directions authorising dealings with specific trust property (s 64), directions authorising variations of a trust (s 64A), and the exercise of similar jurisdictions enjoyed by a Court exercising its equitable jurisdiction.

There is no difficulty in these cases if all affected interests are ascertained and have the capacity to enter into a binding contract. All can then agree to have their respective rights determined by arbitration. Typically, however, a modern family trust includes provision for living and unborn children as discretionary beneficiaries. In cases of potential conflict between beneficiaries, living or unborn children may need to be separately represented. Whether this class of case can be dealt with by arbitration is presently controversial.

On the one hand it has been argued that as the Courts have the power to appoint counsel to represent beneficiaries who are children, unborn or unascertained, the same power must devolve upon arbitrators pursuant to ss 10 and 12 of the Arbitration Act 1996. On that view all adult parties can sign an arbitration agreement, all possible interests can be effectively represented by counsel or adults appointed for the purpose, and an arbitrator can determine rights between all classes of beneficiary.[[11]](#footnote-11)

The more conservative view, however, is that arbitrators do not have such powers, at least if relying upon arbitration clauses already embedded in the relevant trust deed.[[12]](#footnote-12) Supporting this view is the traditional role of the courts as the guardians of the welfare of children.

Until there is a definitive decision on the point there must remain a risk that an unsympathetic Court will set aside an arbitration award which purports to determine the rights of children. The legal grounds for setting aside could be formulated as incapacity, inability to present a party’s case, or conflict with public policy, in terms of art 34(2) of sched 1 to the Arbitration Act. The same grounds could be adopted under art 36 as a basis for declining to enforce an award.

1. *Claims under s 182 of the Family Proceedings Act*

A different kind of trust claim is possible under s 182 of the Family Proceedings Act 1980. On dissolution of marriage or civil union, either spouse can apply to vary an existing pre-nuptial or post-nuptial settlement or make orders as to the application of the trust property. Typically, spouses seek to use this provision to convert an interest as mere discretionary beneficiary into an entitlement to specific property or capital. The ground usually advanced is that once there is a divorce, the spouse who retains direct or indirect control over the trust is unlikely to continue distributions to the other spouse in that spouse’s capacity as a beneficiary.[[13]](#footnote-13)

In its own terms s 182 is confined to cases in which (i) a legal marriage or civil union is dissolved, (ii) the trust in question is a prenuptial or postnuptial settlement, (iii) the grounds for an order can be satisfied on the merits and (iv) the order would not defeat or vary any agreement that had been made under s 21 of the PRA unless required in the interests of children. The scope for relief under s 182 has diminished since an increased emphasis was placed on a comparison between expectations at the time of settlement and those following break-up of the marriage along with other discretionary hurdles.[[14]](#footnote-14) Nevertheless it remains an important weapon in the armoury of spouses seeking access to trust property.

It is uncertain whether an arbitrator could be given jurisdiction under s 182 by agreement. On the one hand it could be argued that the lack of reference to arbitration in the Family Proceedings Act is not a bar given that ss 10 and 12 of the Arbitration Act 1996 broadly equate the powers of an arbitrator with the powers of the Court. On the other it could be argued that there are two obstacles to jurisdiction. One is the potential need for representation of children already discussed. Another is that the power to grant a remedy under s 182 is ancillary to the dissolution of marriage which is a matter of personal status. It might be argued that it would be contrary to public policy to allow such matters to be determined by private decision-makers.

Until there is a definitive decision, or legislative reform, it would seem safer to leave applications under s 182 of the Family Proceedings Act to the Family Court.

**Do the gaps in arbitration jurisdiction matter?**

The aspects of a relationship property dispute which would be unsafe to refer to arbitration come down to (i) proceedings which may affect living and unborn children in circumstances where they require separate representation and (ii) applications under s 182 of the Family Proceedings Act.

It seems unlikely that the exclusion of those two matters will have significant impact on relationship property arbitrations.

For one thing separate representation for children when determining property rights after separation is possible,[[15]](#footnote-15) but rare,[[16]](#footnote-16) notwithstanding their interest in the outcome.

For another, hearing different issues before different forums is not unusual. All else being equal, a couple will always want to resolve all rights before one forum and in one hearing. Experience shows, however, that this is frequently unattainable. When a couple separates trust proceedings may be resolved in one court and the remainder of relationship property issues in another. This division into distinct proceedings may be prompted by the different combination of parties,[[17]](#footnote-17) limitations in the trusts jurisdiction of the Family Court,[[18]](#footnote-18) or differences in timing. On the last point the couple may not want to wait until the dissolution of their marriage before determining relationship property rights.

There would therefore be nothing unusual about resolving selected trust matters in court proceedings and all other matters – including most of those which affect trusts - in arbitration.

# Conclusions over jurisdiction

On the current state of the law it would be unsafe to attempt to confer jurisdiction on an arbitrator to determine:

* Proceedings in which living or unborn children need to be separately represented; or
* Applications under s 182 of the Family Proceedings Act.

An arbitrator can be given jurisdiction to determine all other trust matters in a relationship property arbitration. Assuming that the parties (and in certain instances the trustees) agree, an arbitrator can determine:

* Claims for compensatory orders under s 44C of the PRA where relationship property has been settled on a trust;
* Claims for orders setting aside dispositions of property to trustees under s 44 of the PRA;
* “Bundle of rights” claims which seek to treat one spouse’s collective trust rights and powers as relationship property;
* Contentions that the resources of a trust should be wholly or partially imputed to a spouse for the purpose of deciding what that spouse requires, or can afford, for maintenance and allied purposes;
* Constructive trust and similar claims against trustees; and
* Claims that a trust is a sham.

In addition any kind of internal trust dispute can be arbitrated where all affected parties agree and have the capacity to give a binding contractual consent.

1. Hon Robert Fisher QC, LLD is an arbitrator, mediator and consultant based in Auckland. [↑](#footnote-ref-1)
2. The meaning of “spouse” may well be in a state of transition. For welcome signs see the Wikipaedia definition “partner in a [marriage](http://en.wikipedia.org/wiki/Marriage), [civil union](http://en.wikipedia.org/wiki/Civil_union), [domestic partnership](http://en.wikipedia.org/wiki/Domestic_partnership) or [common-law marriage](http://en.wikipedia.org/wiki/Common-law_marriage)”. [↑](#footnote-ref-2)
3. For example see Rima Evans “A Decent Proposal” May 2013, The Resolver 11; Laura Ashworth “Islamic Arbitration of Family Law Disputes in New Zealand” (dissertation for LL.B (Hons) University of Otago 2010) and Robert Fisher “Relationship Property Arbitration” (2014) 8 NZFLJ 15. [↑](#footnote-ref-3)
4. Law Commission Arbitration NZLC R 20, 1991 at [231]. [↑](#footnote-ref-4)
5. *Walker v Walker* [2007] NZFLR 772 (CA); *Harrison v Harrison* [2009] NZFLR 687 (CA). [↑](#footnote-ref-5)
6. *Browne v Browne* [1989] 1 FLR 291 (CA); *RK v RK* [2011] EWHC 3910 (Fam). [↑](#footnote-ref-6)
7. Contrast the United Kingdom and Australia e.g. *Browne v Browne* and *RK v RK,* above, n 6. [↑](#footnote-ref-7)
8. The Law Commission has recommended that it be extended to capital as well as income: Law Commission *Review of the Law of Trusts: a Trusts Act for New Zealand* NZLC R130, 2013, Chapter 19. [↑](#footnote-ref-8)
9. For example *Hayward v Giordani* [1983] NZLR 140 (CA) and *Lankow v Rose* [1995] 1 NZLR 277 (CA). [↑](#footnote-ref-9)
10. *Official Assignee v Wilson* [2008] 3 NZLR 45 (CA); *F v W* HC Wellington, CIV-2009-485-531, 3 August 2009). [↑](#footnote-ref-10)
11. For a particularly illuminating commentary see Jeremy Johnson “The Arbitration of Trust Disputes: Opportunities and Risks”, paper presented to 2014 AMINZ Conference. [↑](#footnote-ref-11)
12. Toby Graham “The problems with compulsory arbitration of trust disputes” (2014) 20 Trusts and trustees 20). [↑](#footnote-ref-12)
13. For an example see *Chrystall v Chrystall* [1993] NZFLR 772. [↑](#footnote-ref-13)
14. *Ward v Ward* [2009] NZSC 125; [2010] 2 NZLR 31. [↑](#footnote-ref-14)
15. As in *X v X [Family Trust]* [2008] NZCA 20, [2009] NZFLR 956. [↑](#footnote-ref-15)
16. For example there was no separate representation for the children in *Ward* above, n 14, or *Chrystall* above, n 13, notwithstanding their role as beneficiaries. [↑](#footnote-ref-16)
17. As in *Hansard v Hansard* [2014] NZCA 433. [↑](#footnote-ref-17)
18. *F v W* (HC Wgton CIV-2009-485-530, 3 August 2009. [↑](#footnote-ref-18)