IN THE SUPREME COURT OF NEW ZEALAND

SC 40/2009
[2009] NZSC 125

BETWEEN	CHRISTOPHER BEDE WARD Appellant
AND	DIANE MARY WARD Respondent

Hearing: 3 November 2009

Court: Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ

Counsel: M E J Macfarlane for Appellant
H R Grayson for Respondent

Judgment: 8 December 2009

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is to pay the respondent for her costs in this Court the sum of $15,000 plus disbursements, to be fixed if necessary by the Registrar. The Court of Appeal's costs order stands. Costs in the High Court and the Family Court are to be fixed in those Courts in the light of the determination of this Court, unless the parties can agree or unless that has already occurred.

REASONS

(Given by Tipping J)

Introduction

[1] This appeal involves the interpretation and application of s 182 of the Family Proceedings Act 1980. That section empowers the Court, subject to the constraints of subs (6), to vary the terms of ante and post-nuptial settlements when the marriage or civil union of the parties comes to an end. The parties in the present case, Mr and Mrs Ward, were married on 17 August 1991. They entered into a post-nuptial settlement on 29 June 2000. It took the form of a trust, primarily for the benefit of themselves and their two children, a daughter born on 23 February 1994 and a son born on 8 December 1995. The parties separated on 1 March 2003 and their marriage was dissolved on 26 September 2005. On the dissolution Mrs Ward applied for an order under s 182.

[2] The Family Court[1] made an order in her favour dividing the trust into independent halves, one for the benefit of Mrs Ward and the children, and the other for the benefit of Mr Ward and the children. That order was set aside by Heath J in the High Court on Mr Ward's appeal.[2] The Judge considered that the order made by the Family Court was precluded by subs (6) of s 182. The Family Court order was reinstated by the Court of Appeal on Mrs Ward's successful appeal to that Court.[3]

[3] Mr Ward now appeals to this Court. He contends, first, that Heath J was right in his conclusion that s 182(6) precluded the making of the order. He contends, alternatively, that if there was jurisdiction to make an order, no order should have been made, or the order made should be varied because it went too far in Mrs Ward's favour. Our conclusion is that the Family Court did have jurisdiction to make the order; its making was not precluded by s 182(6). Furthermore, the order made by the Family Court was properly made, its terms being within a proper exercise of the discretionary power vested in the Family Court by s 182. Mr Ward's appeal should therefore be dismissed.

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1 *Ward v Ward* (Family Court, Hastings, FAM-2004-020-116, 20 April 2007, Judge Robinson).
2 *W v W* [2008] 3 NZLR 383.
3 *W v W* [2009] 3 NZLR 336.

[4] We will refer first to the basic facts of the case and the nature and terms of the post-nuptial settlement which is in issue. We will then examine the provisions of s 182 and its purpose. That will be followed by an examination of s 182(6) and our reasons for holding that its terms did not preclude the making of the order by the Family Court. We will finally explain why that order was properly made.

Basic facts

[5] Following their marriage in 1991, the parties lived on a farm which had been in Mr Ward's family since 1959, when it had been acquired by his father and uncle. Mr Ward started working on the farm in 1983 and has continued working there ever since. Not long before the parties married, it was agreed that Mr Ward would have the opportunity to purchase the farm which, at all material times, has been owned by a family company, Lang Park Ltd. Before he married, Mr Ward already owned 16.7 per cent of the share capital in that company. In August 1990 Mr Ward entered into an agreement with the other shareholders under which he acquired an option to purchase their shares at any time within the next six years. At that time he acquired the stock and plant on the farm from other family members for $155,208. He also began farming the property under a lease from Lang Park Ltd.

[6] In 1993 Mr Ward exercised his option and acquired the rest of the shares in the company for $312,000. He borrowed $200,000 from the National Bank. The rest of the purchase price was advanced to him by his father and uncle. The share capital of the company following this transaction was owned as to 10,099 shares by Mr Ward and as to 1 share by Mrs Ward, into whose name that share was transferred.

[7] On 29 June 2000, nearly nine years into their marriage, the parties entered into several related transactions of which the post-nuptial settlement in issue was one. The principal transactions were a deed of matrimonial property settlement, a deed of trust establishing the post-nuptial settlement, and a deed of partnership under which the parties were to run the farm. The effect of these transactions in broad terms was as follows:

(1) Under the matrimonial property settlement Mr Ward's shares in Lang Park Ltd were vested in the parties equally. To achieve this Mr Ward transferred half of the share capital to Mrs Ward.

(2) Mr Ward also transferred a half interest in the farming business to Mrs Ward and they henceforth farmed the property as equal partners.

(3) The post-nuptial settlement in the form of a trust to be known as the Cahirdean Trust was established on terms to be described more fully below.

(4) The parties transferred the half share that each now held in the capital of Lang Park Ltd to the Cahirdean Trust for a total sum of $540,000. Each party advanced to the Trust the sum of $270,000 to finance the Trust's acquisition of the shares. The parties intended to forgive this indebtedness at the maximum amount permissible each year without attracting gift duty. At the time of the hearing in the Family Court, the debt owing to each party by the Trust had been reduced to $198,000.

(5) The matrimonial property settlement was expressed to be in full and final settlement of all claims which each party might have against the other under the Matrimonial Property Act 1976.

[8] It is the Cahirdean Trust in respect of which Mrs Ward has been awarded relief under s 182 following the dissolution of the marriage. Its trustees are Mr and Mrs Ward, and a Mr Andrew Hildreth. The beneficiaries, who all take both income and capital at the sole discretion of the trustees, are primarily Mr and Mrs Ward and their children. Further beneficiaries are their children's direct descendants and any wife, husband, widow or widower of any of the previously identified beneficiaries, plus specified superannuation plans. The date of final distribution is 80 years from the date of establishment, with power in the trustees to bring that date forward as they may determine by unanimous resolution in writing. On the date of final distribution the trustees hold the trust property for such of Mr and Mrs Ward's children as they, the trustees, appoint, and in default of appointment equally for those

children, with substitution of grandchildren if a child has predeceased the final date of distribution.

[9] When the Trust was established Mr and Mrs Ward both signed a document which was entitled Memorandum of Intention and was addressed to the trustees. It reads as follows:

> OBJECTIVE:
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> We have arranged our property in such a way as to benefit the survivor of us and after that our children. We believe that over the course of our personal and business lives we have contributed by way of taxation. We see no conflict in the preservation of our capital assets and income where that preservation does not conflict with the law. We are agreed on the priorities for our family and assets.
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> INTENTIONS:
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> 1. During the remainder of our lives, or the life of the survivor of us, our interests and well being, or those of the survivor of us, shall be treated as paramount and of first priority.
>
> 2. We hope that the Trustees will exercise whatever discretion they may have to ensure that the sentiments expressed in 1. above are observed. That contemplates making available capital and/or income to either of us where appropriate. We don't want the financial affairs of the survivor of us to be restrained by the trustees taking a limited or negative interpretation of the powers conferred on them by our trusts or our Wills.
>
> 3. Our next priority is our children and grand-children. We hope that our trustees will exercise their powers so as to ensure that the interests of our children in relation to their health, education or advancement and benefit in life generally shall be benefitted by the use of our assets in whatever way our trustees think fit. In the event of an emergency involving our children or grand-children we hope that our trustees would be pro-active in supporting such child or grand-child. We anticipate that the trustees, where appropriate in their discretion, may disregard the normal criteria relating to security for monies advanced when dealing with our children, particularly in circumstances which they regard as an emergency. They may if they think appropriate disregard the inclination to treat our children equally in the distribution of funds.
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> 4. Our third priority is to preserve our assets particularly in regard to capital imposts by any Government or other authority whether it be taxation, welfare or health schemes or otherwise or threats to our property from creditors or other claimants. We want our trustees to manage the affairs of our trusts and if necessary our affairs, where practicable, in such a way as to reduce or avoid such imposts or other claims.

> 5. Subject to the above we want our children to share equally in whatever assets we have been fortunate enough to accumulate during our lifetimes. We believe that our children will be fair and non-judgmental where one of them benefits to a greater extent than the others because we or our trustees feel that a situation has required that extra provision be made for such child.
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> 6. We acknowledge that one of the assets of the Trust will be the farm, Cahirdean which Chris has purchased from his family. Whilst we would like the farm to remain in our family we acknowledge that circumstances can change quickly and that it may not be practical, prudent in the business sense or desirable that the farm does remain in the family or an asset of the Trust. Our trustees should make due enquiry of our family if they contemplate selling the farm – particularly of our children who may be interested in continuing farming. Where, after making due enquiry, our trustees feel it is appropriate that the property be sold out of the family they should feel enabled to do so without being burdened by the sentiment which can sometimes accompany such decisions.

[10] At the time the case was before the Family Court, the farm owned by Lang Park Ltd was valued at $2,035,000 on an unsubdivided basis or, allowing for potential subdivision, at $2,185,000. The secured and partnership operating indebtedness together was a little under $250,000. The Family Court declined to make any order under s 44C of the Property (Relationships) Act 1976 in Mrs Ward's favour. That matter has not been an issue on appeal but the terms of s 44C will require examination when we consider the scope and purpose of s 182.

[11] As already mentioned, the Family Court made an order in Mrs Ward's favour under s 182. It will be necessary to examine more closely the basis upon which the Judge exercised his jurisdiction. It is sufficient for the moment to indicate the terms of the order he made:[4]

> I order that the trustees of the Cahirdean Trust do transfer half the shares held by the Trust in Lang Park Limited to a trust to be established by Mrs Ward such trust to contain the following provisions:-
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> 1. The trustees are to be Mrs Ward and a suitable independent trustee acceptable to counsel for the children.
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> 2. The beneficiaries are to be the same as the beneficiaries of the Cahirdean Trust excluding Mr Ward.
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> 3. The terms and conditions of the trust are to be in all other respects the same as those contained in the Cahirdean Trust.

[4] At para [73].

4. It is a condition of this order that on transfer of the shares to her trust Mrs Ward shall forthwith resign as a trustee of the Cahirdean Trust and shall relinquish all claims to any interest in that trust as a beneficiary and all claims against that trust with regard to the shares she transferred to that trust.

5. The trust established by Mrs Ward shall accept the shares subject to the liability to pay all moneys owing to Mrs Ward for the transfer of her shares to the Cahirdean Trust and shall indemnify the Cahirdean Trust from all liability in respect of such payments.

[12] That then is the broad background against which the challenged order was made in the Family Court. In this Court our task is to determine whether the Family Court had jurisdiction to make the order subdividing the Trust into two separate trusts and, if that is so, whether the order made was properly made within the compass of s 182.

Section 182

Introduction

[13] Section 182 of the Family Proceedings Act is in the following terms:

> **182 Court may make orders as to settled property, etc**
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> (1) On, or within a reasonable time after, the making of an order under Part 4 of this Act or a final decree under Part 2 or Part 4 of the Matrimonial Proceedings Act 1963, a Family Court may inquire into the existence of any agreement between the parties to the marriage or civil union for the payment of maintenance or relating to the property of the parties or either of them, or any ante-nuptial or post-nuptial settlement made on the parties, and may make such orders with reference to the application of the whole or any part of any property settled or the variation of the terms of any such agreement or settlement, either for the benefit of the children of the marriage or civil union or of the parties to the marriage or civil union or either of them, as the Court thinks fit.
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> (2) Where an order under Part 4 of this Act, or a final decree under Part 2 or Part 4 of the Matrimonial Proceedings Act 1963, has been made and the parties have entered into an agreement for the payment of maintenance, a Family Court may at any time, on the application of either party or of the personal representative of the party liable for the payments under the agreement, cancel or vary the agreement or remit any arrears due under the agreement.

> (3) In the exercise of its discretion under this section, the Court may take into account the circumstances of the parties and any change in those circumstances since the date of the agreement or settlement and any other matters which the Court considers relevant.
>
> (4) The Court may exercise the powers conferred by this section, notwithstanding that there are no children of the marriage or civil union.
>
> (5) An order made under this section may from time to time be reviewed by the Court on the application of either party to the marriage or civil union or of either party's personal representative.
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> (6) Notwithstanding subsections (1) to (5) of this section, the Court shall not exercise its powers under this section so as to defeat or vary any agreement, entered into under Part 6 of the Property (Relationships) Act 1976, between the parties to the marriage or civil union unless it is of the opinion that the interests of any child of the marriage or civil union so require.

[14] The section can be traced back as far as s 37 of the Divorce and Matrimonial Causes Act 1867 which was itself based on English legislation enacted eight years earlier.[5] At that time marriage settlements were relatively common in families with property of any consequence. Settlements of this kind were generally made on or shortly before the marriage and, as it was often put, in consideration of the marriage. The beneficiaries were conventionally either the wife, or the husband and wife, and their children and grandchildren. That was a classic ante-nuptial settlement, as the section now describes it. Post-nuptial settlements were sometimes of the same general kind, effected shortly after the marriage. But more often they were made on account of some event during the marriage which rendered the establishment of a settlement trust necessary or desirable.

[15] Both ante and post-nuptial settlements had one fundamental thing in common. They both envisaged and were premised on the continuance of the marriage. If that premise ceased to apply, a fundamental change in circumstances came about. Parliament recognised that injustices could arise as a consequence and it was desirable to empower the Court to review the settlement on dissolution of the marriage. Associated with that review power was a power to make orders, either

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[5] Section 45 of the Matrimonial Causes Act 1859 (UK) which was based on divorce on the grounds of adultery.

varying the terms of the settlement, or allocating the property subject to it, in whatever way was appropriate to remedy the consequences of the failure of the premise on which the settlement had been made, and the property had been vested in the trustees.

[16] Although the matrimonial and property landscape has substantially changed since those times, what is now s 182 has not changed to any appreciable extent. It can be traced through s 37 of the Divorce and Matrimonial Causes Act 1928 and s 79 of the Matrimonial Proceedings Act 1963. It was retained when the equal sharing regime in the Matrimonial Property Act 1976 was introduced. That was a deliberate decision by Parliament, as evidenced by s 56 of the Matrimonial Property Act which amended s 79 of the Matrimonial Proceedings Act by inserting a new subsection (5). That subsection prevented the court exercising its powers under s 79 to defeat or vary an agreement made under s 21 of the Matrimonial Property Act 1976.

[17] Section 79(5) became s 182(6) when the Matrimonial Proceedings Act 1963 became the Family Proceedings Act 1980. Section 182 was retained when the Property (Relationships) Amendment Act 2001 was enacted. But there was no reference to any intended relationship between s 182 and s 44C, which was introduced into the Property (Relationships) Act 1976 by the 2001 amendment. Section 44C, as will be discussed in a moment, contains a more limited power to vary trusts. It was enacted because of concerns that the equal sharing regime was being undermined by the disposition to trusts of what would otherwise have been relationship property.

[18] Section 44C supplements s 44 which deals with cases where trusts are established with the intention of defeating claims or rights. The newly introduced section partially implemented a recommendation of the Ministerial Working Group on Matrimonial Property which had reported 13 years earlier in 1988.[6] But, contrary to the Working Group's recommendation,[7] the power to award compensation from a trust, when relationship property has been placed in that trust, was limited to income.

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6 Report of the Working Group on Matrimonial Property and Family Protection (October 1988).

7 At pp 13 – 14.

No power was given by s 44C to compensate out of the capital of a trust. The section's heading captures its essential purpose. It reads "Compensation for property disposed of to trust". The disposition must have had the *effect* of defeating a claim or the rights of one of the spouses. In such a case the Court may, so far as the trust is concerned, make an order requiring the trustees to pay to the applicant the whole or any part of the income of the trust, either for a specified period or until a specified amount has been paid. This limited approach was deliberately taken by Parliament which adopted the examining Select Committee's view that "trusts are created for legitimate reasons and should be permitted to fulfil that purpose, where there was no intention to defeat the spouse's claim at the time the trust was established".[8] Thus, subject to questions of intentional defeating of rights, it seems to have been Parliament's purpose that trusts (at least as far as capital is concerned) should prevail over relationship property rights.

[19] But Parliament did not legislate to remove or amend the court's power under s 182 to vary ante and post-nuptial settlements, when their essential purpose had been defeated by the dissolution of the marriage in respect of which they were established. There is, however, no necessary inconsistency in allowing the courts to exercise a trust varying power in these particular circumstances, while providing that, in the wider and distinct relationship property context, trusts will prevail, subject to ss 44 and 44C, over relationship property rights.

Purpose

[20] With that introduction we turn to the proper scope and purpose of s 182. The fundamental starting point is that under s 182 there is no entitlement to a 50/50 or any other fractional division of the trust property. Nor is there any presumption in favour of a 50/50 or any other fractional division. As already mentioned, a nuptial settlement, whether it be ante or post-nuptial, is premised on the continuation of the marriage. When the Court is addressing an application under s 182, it must assess whether an order is necessary and, if so, in what terms, to reflect the fact that this fundamental premise no longer applies. The expectations of the parties when the

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[8] Government Administration Committee, *Report on the Matrimonial Property Amendment Bill* (1988), p xii.

settlement was made may often have been defeated, at least in part, by the dissolution of their marriage. One of the purposes of s 182 is to prevent one party from benefitting unfairly from the settlement at the expense of the other in the changed circumstances.[9] In that situation the order should be directed at eliminating the unfair benefit. In *Chrystall*, Judge Inglis, who had considerable expertise in this field, placed substantial emphasis on the role of reasonable expectations in the s 182 assessment.

[21] Sixty years ago in *Coutts v Coutts* a four member Bench of the Court of Appeal[10] conducted a comprehensive review of the history and purpose of s 37 of the Divorce and Matrimonial Causes Act 1928, the then equivalent of the present s 182. There was some measure of disagreement between the members of the Court on certain aspects of the jurisdiction but the areas of disagreement were not material to the discussion of the broad purpose of the section. In his judgment O'Leary CJ cited with approval[11] the judgment of Lindley LJ in *Benyon v Benyon*,[12] in which his Lordship described the object of the corresponding legislation in the United Kingdom as being "to enable the Court to make an order which will give the parties the same benefits as they practically would have [had] if the conjugal relation had continued".[13] In his judgment in *Coutts* Smith J said that "[t]o hold that the jurisdiction under s 37 to inquire into any settlement is limited by a requirement that the applicant must prove, not only the decree for divorce or for nullity, but also that some 'injustice' exists which is connected with the divorce, or the conduct which occasioned the divorce, is, in my view, to impose a gloss upon the language of the section which it does not bear."[14] In this respect Smith J and Callan J differed from O'Leary CJ and Cornish J.

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9 See *Chrystall v Chrystall* [1993] NZFLR 772 at p 789 per Judge Inglis QC.
10 [1948] NZLR 591 (O'Leary CJ, Smith, Callan and Cornish JJ).
11 At p 605.
12 (1890) 15 PD 54.
13 At p 58.
14 At p 610.

[22] In reliance on *Hartopp v Hartopp and Akhurst*[15] and *Hodgson Roberts v Hodgson Roberts and Whitaker*[16] Smith J also said that the settlement should be reviewed for the purpose of placing the applicant party into the same position, as far as possible, as if the family life had not been broken up.[17] In his judgment Callan J said that while typical applications of the section were cases in which the court relieved some need arising upon the dissolution of the marriage, these were examples of cases in which the jurisdiction ought to be exercised rather than an exclusive definition of the only class of case in which the jurisdiction existed and should be exercised.[18] His Honour also made reference to the purposes "expected" by those who created the settlement as being significant in determining whether the court should intervene.[19] As will emerge, this concept of expectation is important, not only from the point of view of those establishing the settlement but also from the point of view of those benefitting from it.

[23] A few years later, another four member Court of Appeal reviewed the section again in *Preston v Preston*.[20] Particular attention was paid to the difference of view in *Coutts* between Smith J and Callan J, and the other two members of the Court, as to whether it was necessary for some injustice to have arisen by dint of the divorce or the conduct which occasioned it. In a judgment delivered by North J, the Court referred to three recent English cases[21] and cited[22] from the judgment of Lord Greene MR in *Tomkins v Tomkins*.[23] Their Honours then said that having studied the three English cases they were of the opinion that the correct view was that it was the fact of the divorce which enabled the parties to approach the court for a review of the terms of an ante-nuptial or post-nuptial settlement.[24] Their Honours indicated that when the application came before the court the "whole matter is regarded as being at

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15 [1899] P 65.
16 [1906] P 142.
17 At p 612.
18 At pp 618 – 619.
19 At pp 619 – 620.
20 [1955] NZLR 1251 (Finlay, Cooke, North and Turner JJ).
21 *Tomkins v Tomkins* [1948] P 170; [1948] 1 All ER 237 (CA), *Johnson v Johnson* [1950] P 23; [1949] 2 All ER 247 (CA), and *Jeffrey v Jeffrey (No. 2)* [1952] P 122; [1952] 1 All ER 790 (CA).
22 At p 1259.
23 At p 175.
24 At p 1259.

large; and the whole of the relevant circumstances, as they exist at the time of the hearing, are taken into account. In particular the Court will have regard to any changed circumstances of either party and their relevant financial positions".[25]

[24] Their Honours also indicated that they felt compelled to the view that the opinion expressed by Smith J in *Coutts* found strong support in the three decisions of the Court of Appeal in England to which they had referred.[26] As it turned out, it was not necessary for their Honours finally to resolve that matter. The approach to s 182 which we are about to outline is consistent with the approach taken in these previous New Zealand and English cases on the corresponding sections over quite a considerable period of time. Indeed, in one of the earliest reported decisions in England, Lord Penzance said that the Court would look at the "probable pecuniary position" the parties and their children would have occupied as regards the settlement if the marriage had not failed.[27]

[25] Based on the foregoing discussion we consider the proper way to address whether an order should be made under s 182, is to identify all relevant expectations which the parties, and in particular the applicant party, had of the settlement at the time it was made. Those expectations should then be compared with the expectations which the parties, and in particular the applicant party, have of the settlement in the changed circumstances brought about by the dissolution. The court's task is to assess how best in the changed circumstances the reasonable expectations the applicant had of the settlement should now be fulfilled. If the dissolution has not affected the implementation of the applicant's previous expectations, there will be no call for an order.

[26] Section 182(3) makes this point by directing the court's attention to the circumstances of the parties. By its reference to change of circumstances the subsection envisages that the parties' circumstances, both as regards the settlement, and generally, are to be compared with their circumstances at the date of the

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25 At p 1259.
26 At p 1259.
27 *March v March and Palumbo* (1867) LR 1 P&D 440 at p 442.

settlement. The court is also empowered by subs (3) to take into account any other matters it considers relevant. Among those matters it may, as here, be significant who established the settlement trust and, subject to subs (6), the source and character of the assets which have been vested in the trust. Obviously the terms of the settlement will be relevant, as will how the trustees are exercising, or are likely to exercise, their powers in the changed circumstances. Also relevant, of course, are the interests of any children or other beneficiaries involved. It is neither necessary nor desirable to attempt any comprehensive list of relevant circumstances because each case will require individual consideration. No formulaic or presumptive approach should be taken.

[27] It can therefore be seen that s 182 applies if the applicant's expectations of the ante or post-nuptial settlement have been wholly or partially defeated by the dissolution of the marriage. The relief to which the applicant is entitled in those circumstances is an order in terms of the section, in whatever form is best suited to the circumstances, restoring those defeated expectations. The parties should be restored in an appropriate way to the position they were in, as regards the settlement, immediately after it was made, not immediately before it was made.

Decisions below

[28] In the Family Court, Judge Robinson, understandably, did not attempt any general review of the s 182 jurisdiction. He concentrated on the circumstances of this particular case. In the High Court, Heath J upheld Judge Robinson's view that the formation of the trust was a post-nuptial "settlement" within the meaning of s 182(1). So did the Court of Appeal. This Court declined leave to appeal on that point on the basis that the Courts below were undoubtedly right. Heath J then considered s 182(6) and, on the basis that it precluded the making of any order under s 182(1), he allowed the appeal and did not have to consider any further issues.

[29] The Court of Appeal addressed the issue of when and how the powers under s 182 should be exercised at paras [48] – [62] of its reasons which were given by Glazebrook J. The Court said the s 182 jurisdiction should be exercised "with

caution" and only when, taking into account all relevant circumstances, it was necessary "in the interests of fairness and justice" to do so.[28] There are further references to "fairness and justice" as the governing criterion in the Court of Appeal's reasons.[29] We respectfully consider that these references are capable of being understood on too broad a basis, if they are not sufficiently related to the purpose of s 182. Nearer the mark is the Court's reference[30] to a passage from the decision in *Chrystall v Chrystall*. In the passage cited Judge Inglis said that s 182 is "designed to provide relief in a case where the dissolution of a marriage has altered the circumstances so that the legitimate and reasonable expectations in the context of which the settlement was formulated are no longer appropriate".[31]

[30] A little later the Court of Appeal referred to *Fisher on Matrimonial and Relationship Property*[32] for the proposition that underpinning the exercise of the discretion contained in s 182 are the principles of equal sharing under the Property (Relationships) Act.[33] That citation was made without any indication of disapproval, albeit their Honours did qualify its application in their next paragraph. In our view *Fisher's* statement is incorrect. As we have said earlier, equal sharing principles do not underpin s 182. The s 182 assessment, which may lead in some cases to equal sharing, is not underpinned by any entitlement to or presumption of equal sharing. The court's task is not to produce the outcome that would have applied if the relationship property had not gone into a trust. A fact specific judicial assessment is required in each case.

[31] However, as we have mentioned, in its next and concluding paragraph on this topic the Court of Appeal did say that while the aim of s 182 was to achieve a fair result, it was not intended to replicate the relationship property regime, although in a particular case that may be the fair result.[34] It is thus evident that, although the reasoning of the Court of Appeal was in places rather broadly expressed, their Honours did not ultimately conflate the exercise of the s 182 discretion with a

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28 At para [49].
29 At paras [51], [53], [54] and [62].
30 At para [58].
31 At p 784.
32 Looseleaf, para [6.14].
33 At para [61].
34 At para [62].

retrospective exercise of the relationship property jurisdiction. That said, the ultimate question for this Court is whether the order made in the Family Court was properly made in accordance with the principles which we have earlier identified in these reasons.

Section 182(6)

[32] This subsection provides that the court shall not exercise its powers under s 182 so as to defeat or vary any agreement entered into under Part 6 of the Property (Relationships) Act unless it is of the opinion that the interests of any child of the marriage so require. It has never been suggested in this case that the final part of the subsection applies. Although the interests of the Ward children are relevant to the s 182(1) assessment, their interests do not impact on the s 182(6) inquiry.

[33] Heath J regarded the subsection as applying because he viewed the matrimonial property settlement agreement and the trust deed as parts of a single overall transaction. Hence, on that basis, a variation of the trust deed would amount to a variation of the matrimonial property agreement. Mr Macfarlane endeavoured to support the High Court Judge's analysis and its outcome. But, with respect, we consider his conclusion was erroneous. We have particular difficulty with his reasoning in paras [87] and [89]. We do not consider the Judge's reference, in para [87], to Mrs Ward choosing to settle the shares she obtained under the matrimonial property agreement on the Trust, leads logically to his conclusion that, if the terms of the settlement are varied, this necessarily defeats the terms of the matrimonial property agreement. Nor do we follow the Judge's reference in para [89], to s 182(6) not applying in a case in which the validity of the matrimonial property agreement is impugned, and his consequential reference to the proposition that it is the absence of a valid matrimonial property agreement that precluded the application of s 182(6). None of this reasoning supports the conclusion that s 182(6) applied in this case. The Court of Appeal differed from Heath J in this respect but did not address the point in any detail.

[34] When a trust is established at the same time as a relationship property agreement is entered into, the trust should not be regarded as part of the relationship

property agreement unless it is a legal ingredient of that agreement. That will be so only if the establishment of the trust is a term of the relationship property agreement or if the trust is incorporated by reference into the relationship property agreement by the attachment of a draft or some other mechanism identifying the precise terms of the associated trust. Neither of these situations applied in the present case. As Judge Robinson recognised, there is no reference to the Trust in the matrimonial property agreement.

[35] There are good reasons for insisting on this degree of formality and connection before a nuptial settlement external to the property relationship agreement can be treated as forming a part of it for the purpose of s 182(6). First, if a settlement trust were too easily regarded as being part of a relationship property agreement, the remedial scope of s 182(1) would be significantly narrowed. The criteria for setting aside a relationship property agreement are more onerous than those that apply to the variation of a settlement trust when s 182 is engaged. Secondly, whereas relationship property agreements must, in order to be binding, be executed after receipt by each party of independent legal advice, deeds of trust are binding without that protection. If a deed of trust is incorporated into a relationship property agreement as a term of that agreement, the parties will have the benefit of independent legal advice before becoming bound to the terms of the trust. That will not be so if the deed of trust, as here, was executed separately and without there being any reference to it in the relationship property agreement. Mrs Ward, on that account, did not have the benefit of independent legal advice as to its terms and implications. The Trust was accordingly not rendered presumptively invalid by the absence of such advice, as would have been the case if it were treated as part of the matrimonial property agreement.[35]

[36] These factors support a construction of s 182(6) in accordance with its plain language. As there was no reference in the relationship property agreement to the deed of trust, variation of the latter cannot be regarded as varying or defeating the former. That brings us to whether the Family Court's order was properly made in terms of the purpose and principles applicable to s 182, as earlier identified.

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[35] Presumptively because the statutory invalidity in such circumstances may be cured by the Court under s 21H of the Property (Relationships) Act 1976.

Section 182 – this case

Introduction

[37] Judge Robinson discussed Mrs Ward's application under s 182 against a background in which he had considered the making of other orders which she had sought. His judgment should therefore, as regards factual matters, be read as a whole and not confined simply to that part which dealt with the s 182 application. The capital of the Cahirdean Trust has throughout comprised the shares in Lang Park Ltd which were transferred to it by Mr and Mrs Ward equally. The original indebtedness of the trust to Mr and Mrs Ward was $540,000. That had been reduced by the gifting programme to $396,000 at the time the case was heard in the Family Court.

[38] It is significant in this case that Mr and Mrs Ward were themselves effectively the joint settlors of the Trust and contributed equally to its capital. Mrs Ward acquired her shares under the matrimonial property agreement. Clause 2(a) of that agreement provided that the shares in Lang Park Ltd, formerly owned by Mr Ward as to 10,099 shares and by Mrs Ward as to 1 share, should, from 1 July 2000, be owned by them in equal shares. It will be recalled that of the husband's shares 16.7 per cent were, prior to the matrimonial property agreement, his separate property; they having been acquired by him before the marriage.[36] By the matrimonial property agreement he transferred half of those shares to his wife; that is 8.35 per cent of the total share capital.

Separate property point

[39] Mr Ward has throughout this proceeding advanced the proposition that he should, in any order made under s 182, receive credit for the fact that, as he puts it, he contributed separate property to the Trust by transferring shares which were his separate property to Mrs Ward. One reason for his doing this was, no doubt, to enable each party to make maximum use of the amount that could be gifted to the

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[36] No issue has arisen as to the classification of any increase in value of those shares between the date of the marriage and the date of the matrimonial property agreement. In view of the conclusion we will reach as to the separate property point, that issue is, in any event, immaterial.

Trust annually by way of forgiveness of debt without attracting gift duty. If the wife had been allocated only 41.65 per cent of the shares under the matrimonial property agreement, and the husband 58.35 per cent, the transactions would not have been as efficient from the point of view of the intended gifting programme. But the motivation of the parties does not matter for present purposes.

[40] This is because Mr Ward's argument runs up against subs (6) of s 182. Any retrospective adjustment of the equal contributions which the parties made to the capital of the Trust on account of Mr Ward's separate property would, to that extent, vary or defeat the terms of the matrimonial property agreement whereunder the shares were vested in the parties equally. The Court cannot therefore accede to Mr Ward's argument and treat some of the shares Mrs Ward transferred to the Trust as if they had still been Mr Ward's separate property. The matrimonial property agreement must be respected. If parties agree to turn their separate property into relationship property, they cannot thereafter contend that the property is separate property for the purposes of a s 182 application. This means that Mr and Mrs Ward must be treated as having contributed equally to the capital of the Trust.

Approach of Family Court

[41] Judge Robinson considered how Mrs Ward's position as regards the Trust had been affected by the dissolution of the marriage. He stated that at the time he heard the case the Trust, which was established primarily for the benefit of both parties, provided no benefit whatsoever to Mrs Ward.[37] The Trust earned no income after paying a management fee to Mr Ward for running the farm. Mr Ward received a benefit insofar as he occupied the farm property which forms the major asset of the Trust. He paid rent to the Trust but his doing so produced no disposable income. Mrs Ward no longer lived on the farm. Lang Park Ltd could dispose of the farm for a sum in excess of $2m, which was the Judge's assessment of its value at that time. He recorded that the capital sum which would become available from the sale of the farm would provide a significant income for both parties.[38]

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[37] At para [65].
[38] At para [65].

[42] The Judge also mentioned that in view of the disharmony between the parties the third trustee, Mr Hildreth, considered that there was unlikely to be any unanimity in decision-making over the sale of the farm or otherwise.[39] He was in a difficult position and anticipated that further assistance from the Court is likely to be required. The Judge contrasted the position then applying with that which had applied when the trust was established:[40]

> Thus the situation at present differs considerably from the situation existing at the time the shares were transferred to the Trust. At that time the parties were living together in harmony. They were farming the farm property in partnership and each sharing equally in the benefits available from the farming property. At present they are unlikely to agree on any major decision with regard to the Trust. Consequently unless this Court intervenes to make orders to facilitate an ending of this deadlock there is likely to be further litigation to resolve the disputes between the parties as Trustees. Furthermore in contrast with the position existing when the settlement was made only one party namely Mr Ward is receiving any benefit from the Trust in that he has the full use of the trust property and the other party namely Mrs Ward is receiving no benefit. I accept that when living with Mr Ward the children do receive a benefit from the Trust because when they are living with him they share his benefit of possession of the farm property.

[43] Being satisfied that Mrs Ward had made out a case for relief under s 182, the Judge turned to consider what order should be made:

> [69] Counsel for Mrs Ward sought an order requiring the Trustees to transfer half the shares in Lang Park Limited to Mrs Ward. I am satisfied that such an order would not be appropriate as the remaining half of the shares in the company would remain in the Cahirdean Trust. Any order would of course require Mrs Ward to resign as Trustee of the Cahirdean Trust and to relinquish all claims to any benefit under that Trust. However it would not be just to allow Mrs Ward to receive her shares whilst requiring the shares Mr Ward settled on the Trust to remain subject to the Trust.
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> [70] Furthermore the interests of the children must be considered. The memorandum of intention clearly established a desire on the parties to ensure not only provision for themselves but also that if possible for their children. By vesting half the shares in Mrs Ward the children's potential claim to an interest in those shares could be prejudiced particularly if Mrs Ward entered into another relationship which could make the shares the target of a claim by her partner under the Property (Relationships) Act 1976.
>
> [71] I have therefore concluded that it would not be appropriate for the shares to be vested in Mrs Ward's sole name. In *Compton (Marquess of Northampton) v Compton (Marchioness of Northampton) and Hussey* [1960] P 201 the Court in the exercise of its discretion under a provision similar in

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39 At para [66].
40 At para [67].

> terms to s 182 for reasons that would not be acceptable today directed the wife to execute a settlement of 140,000 pounds on her children. I am therefore satisfied that the discretion conferred on the Court under s 182 would authorise the Court to require Mrs Ward to enter into a similar provision. By requiring Mrs Ward to vest her shares in a separate trust with herself and an independent reliable person as trustee, the beneficiaries being herself and the children, the terms of trust being in all other respects the same as the Cahirdean Trust both she and the children will be able to enjoy the assets of the trust. Such an order would be consistent with the memorandum of intention executed by the parties on the 29th June 2000.
>
> [72] I accept that such an order will not result in an immediate sale of the farm. As the farm is owned by Lang Park Limited this Court does not have jurisdiction to order a sale. The order will result in the shares vested by Mrs Ward in the Cahirdean Trust being vested in a separate trust where Mrs Ward and the children are beneficiaries. Mr Ward would not be a beneficiary of that trust. If the impasse continues the Trustees of Mrs Ward's trust would be entitled to the rights as shareholders of Lang Park Limited which includes the right to apply for liquidation of the company on just and equitable grounds under section 241(4)(d) Companies Act 1993.

Approach of Court of Appeal

[44] The Court of Appeal dealt with the way the Family Court had exercised its s 182 powers quite briefly in the following paragraphs:

> [63] As noted at [42] above, the dissolution of Mr and Mrs Ward's marriage has resulted in greatly changed circumstances for Mrs Ward. Prior to dissolution Mrs Ward was sharing equal benefits with Mr Ward from the Cahirdean Trust. We accept Judge Robinson's finding that Mrs Ward is currently receiving no benefits from the Trust and is unlikely to in the conceivable future, given the trustee deadlock and the limited income achievable from the land. There was no other significant relationship property. This differs significantly from the situation in *X v X*, where after the dissolution of marriage, both parties were receiving entitlements from the trust at issue and both had access to a substantial pool of relationship property. In the circumstances, it was appropriate for Judge Robinson to decide to exercise his discretion under s 182 of the FPA.
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> [64] We also consider that Judge Robinson took the interests of Mr and Mrs Ward's children into account in an appropriate manner both in deciding whether to exercise his discretion and in the exercise of that discretion. The Judge's orders, set out below at [71], require the children to be recognised as beneficiaries of Mrs Ward's newly constituted trust. There is also the requirement for an independent trustee, approved by counsel for the children. The Judge was right to consider that an outright transfer to Mrs Ward would be unfair to Mr Ward and would not adequately protect the position of the children.
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> [65] As to the actual split, although Judge Robinson stated that he had a wide discretion, he did appear to assume that any split should be on a 50/50 basis. While he did not explain why that was the case, we consider that it

> was an appropriate split in terms of the principles set out above. There was virtually no other relationship property, apart from that transferred to the Cahirdean Trust. The division breaks the deadlock in the Cahirdean Trust and is in accordance with the intention of the parties, as evidenced by the MPA. We accept Mr Grayson's submission that Mr Ward should be bound by the MPA with regard to the 16.7 per cent of the shares that had been his separate property.
>
> [66] In all the circumstances of this case and in accordance with the principles set out above, at [50]-[62], we consider that the interests of fairness made the Court's intervention under s 182 appropriate. The Judge's actual orders were also appropriate.

[45] The Court's reference in the last of these paragraphs to "the interests of fairness" was a shorthand way of referring to the general discussion of legal principles which had preceded the paragraphs cited. We will not repeat our discussion of that aspect of the Court's decision in which we concluded that, although some of its reasoning was rather broadly expressed, and did not focus on defeated expectations, the Court did not ultimately conflate the s 182 jurisdiction with a relationship property assessment.

Submissions

[46] We turn now to address the submissions made by Mr Macfarlane on behalf of Mr Ward as to why the Family Court Judge had erred in the approach he took, and why the Court of Appeal had erred in upholding the Family Court's decision. Mr Grayson's submissions in response are inherent in what follows.

[47] Mr Macfarlane's principal submission was that s 182 should be seen as responding to the reasonable needs and circumstances of the parties. The concept of need must, however, in present circumstances, be used with care. An applicant for an order under s 182 must show a need for intervention by the court in the sense of justification for intervention. It is not, however, necessary for the applicant to show need in the sense of being in necessitous circumstances, albeit the presence of necessitous circumstances will obviously be a relevant factor. Indeed, historically this factor was often the reason for the making of an application under s 182 and its predecessors when there were no other assets available to provide for this need. The party in necessitous circumstances would usually have a reasonable expectation of benefit from the trust to relieve those circumstances.

[48] The section has, however, consistently with its terms, never been confined to relieving necessitous circumstances.[41] The jurisdiction is designed to restore the applicant's expectations of deriving benefit from the settlement trust to what they were when the trust was established. That may be done, in an appropriate way, despite the applicant not being in necessitous circumstances, a concept which, in any event, can involve awkward issues of relativity.

[49] In its judgment in *X v X*,[42] delivered about six weeks before its judgment in the present case, the Court of Appeal was also required to consider the correct approach to s 182. The Court there described the common thread of the cases as being to invoke s 182 when, to do so, was "necessary to achieve fairness and justice between the parties" and when there would be no detriment to children.[43] But unless the purposes and principles applying to s 182 are clearly identified and kept in mind, invocations of fairness and justice are not particularly helpful. The Court added in a potentially misleading way, that s 182 was a route available to the Courts when there was little, if any, relationship property available for division.[44] This circumstance may prompt an application under s 182 but, as we have seen, s 182 is not a surrogate mechanism for dividing what, but for the trust, would have been relationship property.

[50] In *X v X* the Court appears to have adopted "need" as a threshold for intervention.[45] A little later it referred to there being no concern in that case that either of the parties was "inadequately provided for financially".[46] The Court also referred to "hardship" as justifying intervention.[47] These references suggest too high a threshold for relief. Acceptance of Mr Macfarlane's submissions, to the extent that he invited this Court to apply a criterion of need in a maintenance and support sense, would confine the proper ambit of s 182 too narrowly.

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41 See the earlier discussion at paras [21] – [24] of *Coutts v Coutts* and *Preston v Preston*, and also more recently *Bishop v Bishop* [1980] 1 NZLR 9 (CA) per Cooke J.
42 *X v X [Family Trust]* [2009] NZFLR 956.
43 At para [44].
44 At para [44].
45 At para [46].
46 At para [65].
47 At para [44].

[51] Mr Macfarlane also argued that there was no basis upon which to justify 50 per cent of the shares in Lang Park Ltd being vested in a separate trust for Mrs Ward and the children. The change of circumstances brought about by the dissolution did not, in his submission, justify going that far, nor did Mrs Ward's needs and interests. Counsel submitted that Judge Robinson had treated the trust assets as if they were relationship property for the purpose of assessing the amount that should be directed by way of remedy. We are unable to accept these criticisms of the Judge's approach. The Judge was not obliged to identify need in the sense contended for, nor did he treat the trust assets as if they were relationship property. He expressly declined to order that half the shares be transferred to Mrs Ward free of the trust obligations.

[52] Furthermore, although the Judge did not expressly state why he considered it appropriate to divide the Trust in half, it is implicit in his reasoning overall that this division reflected the original expectations of the parties that each would benefit equally from the settlement trust they had together established. The Judge referred to the establishment of the settlement trust as being primarily for the benefit of both Mr and Mrs Ward whereas, following the dissolution, it was providing no benefit to Mrs Ward.[48] He contrasted the situation after dissolution with that prevailing before dissolution and again referred to Mrs Ward earlier "sharing equally" in the benefits of the trust property, in contrast with her now receiving no benefit and Mr Ward being the only party receiving any benefit.[49] These observations were made by the Judge in support of the view that Mrs Ward had made out a case for relief under s 182. But they must still have been operating on the Judge's mind when he came to consider what form of relief should be granted. Implicitly, therefore, the Judge was working, for relief purposes, from the premise that Mrs Ward was entitled to benefit equally from the Trust in the changed circumstances.

[53] Mr Macfarlane contended further that it was no part of the s 182 jurisdiction to make provision to end the apparent deadlock between the parties as to the sale of the farm and otherwise. But the deadlock was, and is, at least from Mrs Ward's point of view, a very significant consequence of the change in circumstances. It is

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[48] At para [65].
[49] At para [67].

also the essential cause of her reasonable expectations being incapable of fulfilment in the changed circumstances. Counsel suggested that the only deadlock lay in the refusal of the other two trustees to sell the farm and pay Mrs Ward a half share and s 182 was not designed to address this kind of issue. But that refusal lies at the heart of the Trust's inability to fulfil Mrs Ward's reasonable expectation that she should continue to be able to benefit from the Trust following the breakdown of the marriage in broadly the same way as she could have expected prior to the breakdown. It is quite unrealistic to deny Mrs Ward her expectation of benefitting from the Trust in the changed circumstances. Section 182 exists to provide a remedy for such denial.

[54] Through counsel, Mr Ward also complained that the Judge had made no mention of the benefits Mrs Ward could expect from her own family in comparison to his having no such expectations. But Mrs Ward's expectations are well short of being vested interests at the moment and are, in any event, impossible to quantify in any realistic way. Furthermore, they do not affect her expectations of the Trust in issue.

[55] Mr Macfarlane criticised the way the Judge had exercised his discretion by reference to a number of matters. We exclude points already addressed. It was suggested that Mrs Ward had not demonstrated "good cause"[50] for interfering with the Trust. We cannot accept that proposition in the way it was expressed. There was certainly good cause for intervening. The only possible issue is whether another form of order may have been more appropriate in the circumstances.

[56] Counsel made reference to the fact that Mr Ward had made an offer to settle the matter by raising $300,000 from the Trust to enable Mrs Ward to re-establish herself. That offer was declined. It is clear that the Judge must have considered that this proposal did not sufficiently reflect what was appropriate by way of relief under s 182. The Judge was no doubt concerned that to order payment of that amount to Mrs Ward absolutely would not have the benefit of preserving the trust structure. He

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50 *Fisher*, para [6.15].

must also have considered that the amount was not a sufficient reflection of Mrs Ward's expectations in the new circumstances. By the order he made, the Judge protected the interests of the children and other beneficiaries to the extent he could, while recognising Mr and Mrs Ward's jointly expressed intention that their own welfare and interests were to be a first and paramount priority for the trustees.

[57] Mr Macfarlane also argued that Mrs Ward had not explained why her residual relationship property entitlement, when supplemented by the proposed payment of $300,000, was not sufficient, and he contended that Mrs Ward had not established or even addressed any particular needs. That submission adopts an inappropriate approach to the concept of needs, as we have earlier discussed. The concept of need is, for present purposes, focused on satisfying reasonable expectations in the changed circumstances; it is not focused on aspects of maintenance and support.

[58] In conclusion, Mr Ward, through counsel, submits that the s 182 discretion should have been exercised without the intrusion of relationship property principles and issues. Instead the inquiry should have been to consider Mrs Ward's financial position and domestic circumstances "in the round" and for the future. The Court should have responded to those matters, if at all, by directing the trustees to pay her an appropriate capital sum. Should that sum have proved insufficient, the Court had the power of review given to it by s 182(5). Accordingly Mr Ward seeks the setting aside of the present order and its replacement, if any case for an order has been made out, with an order along the lines that Mrs Ward earlier declined.

[59] It is inherent in what we have already written, that we do not accept Mr Ward's contentions. Although the Family Court Judge did not articulate the relevant principles in his judgment, and although the Court of Appeal's statements of principle were not expressed in the same way as in these reasons, we are of the view that the order made by the Family Court represented a proper application of the relevant principles to the facts of this case. The Family Court's order was not made upon a wrong principle, nor can it be said to have been plainly wrong on the facts. All relevant facts were addressed and no irrelevancies were taken into account. We

have considered whether it is appropriate to refer the matter back to the Family Court for reconsideration following this Court's articulation of the relevant principles. While that course would undoubtedly have been possible, and as a fall-back position Mr Macfarlane suggested it should be taken, we have come to the conclusion that it is not necessary to do so.

Disposition

[60] In view of the already lengthy history of this litigation, a referral back would have been appropriate only if absolutely necessary. Such a course would have perpetuated the present state of affairs for some time. The status quo would, if anything, favour Mr Ward. We consider this Court is in a position to bring this litigation to an end, without injustice to any party. The essential facts are beyond dispute. We have already said that it is implicit in the Family Court Judge's reasons that he applied the correct legal approach and did not rely erroneously on relationship property principles when he decided to divide the Trust in half. Even if that were not so, we would ourselves have reached the same conclusion as the Judge. For reasons we will now summarise, when the correct legal principles are applied to the essential facts, subdivision of the Trust, as the Judge ordered, is the appropriate way to exercise the Court's discretionary powers in this case.

[61] Mr and Mrs Ward jointly and equally made a post-nuptial settlement on themselves, their children and others. That settlement envisaged the continuation of their marriage. They each had expectations of sharing equally in the benefits of the settlement, subject to the interests of the other beneficiaries. Their memorandum of intention, while not legally binding on the trustees, is good evidence of what the parties' expectations were. In it they spoke of "our" interests and well-being during the remainder of their lives as being paramount and of first priority. In context, the "our" can only be regarded as signalling a mutual expectation of equal benefit. The parties wished the farm to remain in the family but acknowledged that this might not be practical, prudent or desirable, particularly upon a change of circumstances. There was a change of circumstances of the most fundamental kind – the breakdown of the marriage. Its dissolution triggered the powers vested in the court under s 182.

Mrs Ward made an application under that section inviting the Family Court to inquire into the post-nuptial settlement and make such orders under the section as it thought fit. In exercising its discretion, the Family Court was empowered to take into account the circumstances of the parties and any change in those circumstances since the date of the settlement and any other matters which the Court considered relevant. At the time the settlement was made, Mrs Ward, who had contributed equally to the settlement, had every reason to expect to benefit equally with Mr Ward from it. The dissolution of the marriage brought about, at least in practical terms, a complete change in that expectation.

[62] The question for the Judge was how best to give effect to Mrs Ward's original expectation in the changed circumstances. Mrs Ward had no entitlement in the changed circumstances to a half or any share of the trust assets, nor was there any presumption to that effect. What order to make was in the discretion of the Judge after taking into account all relevant circumstances. The Judge was entitled, indeed obliged, to bear in mind the interests of the children and, to a lesser extent, the interests of the remoter beneficiaries. On that premise, his decision to maintain the trust structure as far as possible, rather than order any absolute payment out of the Trust, was a principled and entirely justified one. Having reached that point, the subdivision of the original Trust into two, with the two new trusts being for the benefit of each of the parties and the children and other beneficiaries, to the exclusion of the other party, was within a properly exercised discretion. It was not possible, in law, to order unequal division of the Trust on account of Mr Ward's separate property input, for reasons earlier given. This equality of division, but on the premise of continuing but separate trusts on both sides, was a logical and fair way of giving effect to Mrs Ward's original expectation of the Trust in the changed circumstances. Equal division of the Trust represented the application of appropriate s 182 principles. It should not be seen as based on relationship property principles.

[63] For these reasons Mr Ward's appeal should be dismissed. Mrs Ward should have costs in this Court in the sum of $15,000 plus reasonable disbursements, to be fixed if necessary by the Registrar. She should also have costs in all Courts below. The order made by the Court of Appeal where Mrs Ward was successful should stand. Costs in the High Court and Family Court should be fixed in those Courts in

the light of the ultimate outcome of the case, unless agreement can be reached, or unless that has already been done.

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