IN THE SUPREME COURT
OF NEW ZEALAND **SC 32/2023**

I TE KŌTI MANA NUI
O AOTEAROA

BETWEEN	**RAEWYN PHYLLIS COOPER**
	Appellant
AND	**MARCUS ROBERT WILLIAM PINNEY**
	Respondent
AND	**JENNIFER JANE PINNEY and PHILIP JOHN SMITH as trustees of MRWP FAMILY TRUST**
	Interested parties

OUTLINE OF ORAL ARGUMENT FOR THE APPELLANT

DATED: 31 OCTOBER 2023

THIS outline is filed by **STEVEN JULIAN ZINDEL**, Solicitor for the abovenamed Appellant whose address for service is at the offices of ZINDELS, Barristers & Solicitors, 21 New Street (PO Box 1023), Nelson, phone (03) 548 0039, email steven@zindels.co.nz. Counsel Acting: Peter Watts KC (peter@peterwattskc.com)/Steven Zindel/Isaac Hikaka (isaac.hikaka@millslane.co.nz)

1. When does a beneficiary under a discretionary trust have more than a mere hope of an interest, but rather rights of access to trust assets, viz "a general power of appointment"? Not fixing beneficial interests cannot always entail that there is *no* interest before appropriation. Lines must be drawn; *Cooper* is on the general-power side of the line.

2. Since the 19th century the presence of other named beneficiaries in a discretionary trust has been no obstacle to a conclusion that one beneficiary has a general power. It is simply a question of construction of the trust deed whether a general power exists. Any presumption of fiduciary controls, and against a general power, is very weak, if it exists at all (*Penrose*, *Phillips*, *Pugachev*).

3. Powers shade into property (*Tasarruf*, *Webb*), and fit the statutory definition in s 2 PRA. The Court is entitled to have regard to avoidance of legislation, and should not assist such by turning a blind eye to powers to control. *Clayton* confirms all this. Nor should the Court accept the argument that fiduciary controls would enable children or other beneficiaries to prevent distribution of all capital to a single beneficiary (see *Kain v Hutton*).

4. There is no bar to a general power that the holder is a trustee (*Mills*), or needs the co-operation of the trustees (*Phillips*, *Dilke, Triffitt*, *Pugachev; Webb?*).

5. A holder of a general power need not be a settlor (*Mills*, *Penrose*), but intention of named settlor is relevant. Here the predominant intention was to benefit Respondent, not (future) children (*Clayton*, *Webb*, *Pugachev*).

6. The decision in *Clayton* does not turn on clause 11 of its trust deed, and other wording differences do not prevent *Clayton* applying here. *Clayton* is also not inconsistent with s 26 Trusts Act, nor does s 26 preclude general powers, or require trustees to promote the interests of all named beneficiaries.

7. In context, concentration of powers/control in one beneficiary can be sufficient for a general power (*Clayton*, *Webb*, *Pugachev*). Even where a general power is not intended, no presumption that the power to appoint/remove trustees is fiduciary (*Baba*, *Davidson*, *Montevento*).

8. Finding a general power on the present facts would not usurp the role of Parliament nor put New Zealand law out of line with other jurisdictions.

9. Recognising a general power need not entail that there is no trust. The above cases on general powers assume a valid trust. The separation of legal and beneficial title, with a trustee owing a beneficiary an obligation to comply with the terms of the deed, is sufficient without fiduciary duties (*Phillips*; Millett). If fiduciary duties are necessary, then they are owed to the holder of general power and/or to residuary beneficiaries if the holder surrenders power or dies intestate. If, per contra, there is no trust, that does not mean donee of power has no interests in the assets.

10. It is unnecessary for the Court in this case exhaustively to lay down what will confer a general power. But a beneficiary with the power alone to appoint and remove trustees, and the trustees having absolute discretion as to when and to whom to distribute the trust capital is sufficient to amount to a general power. An "absolute discretion" does not by itself create a general power, but the Court should reinforce that there is no warrant for ignoring such words in construing trust deeds (*Gisborne*, *Burgess v Monk, Grand View*).

11. Assuming the Respondent has a general power, his powers prima facie fall within PRA. Application of PRA on the present facts leads to s 9A. In the application of s 9A to the facts, the Appellant adopts the conclusions of Miller J, affirming Judge Grace. *Rose v Rose* applies, as by analogy does the reasoning in *Hawke's Bay Trustee.*

12. A finding of a general power does not necessitate Court taking a global approach to trust assets and measuring any change in value across the period of the relationship. Often, and the present case is an example, a general power will give rights in relation to individual assets. *Tasarruf* supports this, as does the presence of separate limbs (c) and (e) in the definition of property in s 2 PRA. Such an approach is also consistent with PRA where the domestic partner owns individual pieces of separate property.

13. The Respondent's approach to measuring a change in global value on the facts is, in any event, flawed.

14. As to remedy, the Respondent should be directed to pay Appellant $245,000 plus interest from 20 Nov 2018, and to direct the Trustees to find the judgment sum and distribute it to the Appellant (*Lewin* at [33-005]). Remedy of receivership of trust should also be ordered as a back-up.

15. Tikanga is a relevant and useful consideration in this case. The Court is not being asked to apply the tikanga of dealing with matters post-separation, as the PRA is a code and so it is not properly open simply to apply that tikanga directly. Rather, the Court is being asked to consider whether core values and principles of tikanga have relevance to the development of the law in this area – including through interpretation of PRA and the operation of fiduciary duties.

16. The relevant principles of tikanga that may provide assistance are, primarily, whanaungatanga, mana, manaakitanga, utu and ea. These are engaged because a relationship of whanaungatanga existed between Raewyn, Marcus and his family because of the relationship between Raewyn and Marcus. Consistent with her whanaungatanga obligations, Raewyn showed aroha and manaakitanga by working for the whanau, which work contributed to increase in value of the assets. There is a reciprocal obligation on Marcus and his family to recognise the mana of Raewyn in making those efforts. To fulfil the obligation required by whanaungatanga and manaakitanga they must give utu to bring about a state of ea. At present, matters are unbalanced and one cannot say "Kua ea".

17. The respondent and trustees say that fiduciary obligations prevent the trust assets from being available to provide utu. This is a narrow perspective, ignoring any of the values of tikanga. At tikanga, the bringing about of ea (and the restoration and enhancement of the mana of all involved) would be an honest and good faith use of resources, for a proper purpose and in the beneficiaries' interest.

18. Recognition of tikanga as part of the consideration of the PRA is particularly important. Within the rubric of the statutes dealing with the end of a relationship marriage according to traditional culture is recognised only as a de facto relationship, and so the remedies available are more limited than for married or civil union couples (for example, s 182 Family Proceedings Act is not available).

19. The Court should be wary of permitting persons to take advantage of a trust structure that gives few or no practical constraints on their actions in order to deny their spouse access to relationship fruits upon separation. This would hollow out the s 21 regime.

Dated 31 October 2023

P G Watts KC/ S J Zindel/ I T F Hikaka (Counsel for the Appellant)

Pursuant to the requirements under the Supreme Court Submissions Practice Note and having made appropriate inquiries, counsel hereby certifies that, to the best of their knowledge, this Outline of Oral Argument does not contain any suppressed information and is therefore suitable for publication.

31 October 2023

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PG Watts KC/SJ Zindel/ITF Hikaka
Counsel for Respondents