



**Supreme Court of New Zealand  
Te Kōti Mana Nui**

**23 March 2016**

**MEDIA RELEASE – FOR IMMEDIATE PUBLICATION**

**MARK ARNOLD CLAYTON v MELANIE ANN CLAYTON**

**(SC 23/2015) [2016] NZSC 29**

**PRESS SUMMARY**

**This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest [www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz)**

Mr and Mrs Clayton married in 1989, separated in December 2006 and the marriage was dissolved in 2009. There have been various issues between the parties about trust and relationship property matters associated with the marital breakdown. This appeal and cross-appeal relate to a trust known as the Vaughan Road Property Trust (VRPT).

The parties settled after the oral hearing of the appeal in the Supreme Court. The parties accepted that, as the appeal had been fully argued and the issues are of wider public interest, it is nevertheless appropriate to issue a judgment. The Supreme Court’s judgment relating to one of the other trusts, the Claymark Trust, is being delivered at the same time.

The VRPT was settled on 14 June 1999, some thirteen years after the relationship between the Claytons commenced. Mr Clayton, Mrs Clayton and their two daughters are discretionary beneficiaries. The daughters are also final beneficiaries. Mr Clayton is the sole trustee and settlor of the trust. He also holds the position of “Principal Family Member” under the trust deed.

Mrs Clayton brought a claim that the VRPT was a sham or, if that claim was not upheld, that it was an illusory trust. In that case the assets of the trust would belong to Mr Clayton. In the alternative, Mrs Clayton claimed that the powers belonging to Mr Clayton under the trust deed were

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relationship property of value equivalent to the value of the assets of the VRPT.

The Family Court and High Court found that the VRPT was an illusory trust, though for differing reasons. The Court of Appeal overturned the finding that the trust was an illusory trust, but found that Mr Clayton's power to appoint and remove beneficiaries as "Principal Family Member" under the VRPT deed was relationship property of equivalent value to the assets of the VRPT. The Claim that the trust was a sham failed at all levels.

Mr Clayton appealed against the finding that his power under the trust deed was relationship property. Mrs Clayton cross-appealed against the findings that the trust was not a sham and was not illusory.

The Supreme Court has unanimously found that, although the power to appoint and remove beneficiaries under cl 7.1 of the VRPT deed is not property on its own, the combination of powers available to Mr Clayton under the VRPT deed do amount to property and relationship property of value equivalent to the assets of the trust.

The Court found that the clauses under the deed allowing Mr Clayton to appoint all of the capital of the Trust Fund to any one discretionary beneficiary (cl 6.1), to bring forward the vesting day (cl 8.1), the clause allowing him to appoint and remove beneficiaries as "Principal Family Member" (cl 7.1), and the clause allowing him a broad resettlement power (cl 10.1) effectively amount to a general power of appointment. The Court viewed this finding as possible when these clauses are read in light of a number of other clauses in the deed (cls 14.1, 11.1 and 19.1(c)) which mean that Mr Clayton is not constrained by any fiduciary duty when exercising the VRPT powers in his own favour to the detriment of the other discretionary beneficiaries and the Final Beneficiaries of the trust. These powers fit the meaning of "property" under the Property (Relationships) Act 1976.

The Court has unanimously upheld the findings in the lower courts that the trust is not a sham. The Court has not made a ruling on whether the trust is an illusory trust. The Court said there was no particular value in the term "illusory": what was in issue was whether the attempt to establish a trust failed, so that no valid trust came into existence.

The Court formally allowed the appeal but the practical outcome of the Court's decision is the same as that of the Court of Appeal.

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