Clayton v Clayton — the last chapter

What does it mean?

By Ross Knight

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On 23 March the Supreme Court delivered its long awaited judgments on Melanie and Mark Clayton's appeals against the Court of Appeal judgment handed down 12 months earlier.[1]

But before the judgments were delivered, the Claytons managed to settle all matters in issue between them. Somewhat unusually, but unsurprisingly given the public interest considerations at play, the Supreme Court considered it appropriate to deliver its judgments in any event. But in so doing it stopped short of expressing a view on outcome, except to say that but for the settlement, it would have bifurcated the Claymore Trust and remitted issues of valuation back to the High Court.

The judgments comprised three separate decisions. Two were on Mrs Clayton's appeal[2] – both as to the status of the Claymark Trust, (Claymark) the application or otherwise of s 182 the Family Proceedings Act 1980 (FPA) and s 44C the Property (Relationships) Act 1976 (PRA) – (Mrs Clayton's appeal).[3] One was on Mr Clayton's cross-appeal – both as to the status of the Vaughan Road Property Trust (VRPT) and his power of appointment under the deed of trust (Mr Clayton's appeal).[4]

On appeal

Specifically, the Court held that:

- Claymark was not a nuptial trust and so Melanie Clayton could not rely on s 182 the FPA to seek a variation of it in her favour;
- There had been no transfer nor disposition of relationship property into Claymark and so Melanie Clayton could not claim a compensatory adjustment under s 44 PRA;
- The VRPT was neither a sham or illusory trust; but
- Mr Clayton had effective control over VRPT and its assets by virtue of his power to add and or remove beneficiaries with impunity; that the power was unconstrained and/or affected by fiduciary obligations or responsibilities and was therefore in the nature of a personal (as opposed to fiduciary) power compromising relationship property, the value of which could be determined by reference to the net assets of VRPT.

Earlier predictions

In an article published in *LawTalk* (issue 877, 5 November 2015) written shortly after the Supreme Court hearing, I mused over possible outcomes in this case based upon my impressions sitting through the hearing that took place over three days in early September 2015.

For the most part, what I so boldly anticipated might happen, did happen – more or less – with the obvious exception of the court's decision in relation to the status of the VRPT.

In each of the lower courts, the sham argument had failed. Instead, in the Family and High Courts, the VRPT was found to be an *illusory* trust – but a valid trust nonetheless. The Court of Appeal disagreed. It rejected the concept of an *illusory* trust and said that the only question was whether or not the trust was a sham. It concluded that it was not.

I came away from the hearing in the Supreme Court convinced that their Honours might see this case as an opportunity to put a gloss on *Official Assignee v Wilson* – the leading case in New Zealand on sham trusts.[5] But that did not happen. Indeed, *Wilson* barely got a mention in the judgment.

Shortly put, the Supreme Court upheld the Court of Appeal finding that the VRPT was not a sham, but set aside its finding that the VRPT was not an *illusory* trust and declined to make a ruling on the issue.

What happened?

Mrs Clayton's appeal

This judgment was in two parts: first, decisions by Justices William Young, Glazebrook, Arnold and O'Regan and secondly by Chief Justice Elias.

In each, their Honours were unanimous in holding that Mrs Clayton's appeal should succeed. In each, their Honours were at pains to say that in assessing a claim under s 182, the court should not slavishly adhere to the subjective *reasonable expectations* test – for which its earlier decision in *Ward v Ward*[6] has been credited; that although in that case, what the court said at [25] (see below) could be taken to be a general test applicable in all cases. In fact, what was said as to the application of s 182 was to be read in light of the circumstances in *Ward*; were that not the case, *Ward* would be inconsistent with the case law relied on by the court and s 182 itself.

The majority decision emphasised the need for the court to take an *objective* approach when deciding whether or not to exercise jurisdiction under s 182 and that reference to "reasonable expectations" at [25] (see below) denotes that.

But it was the Chief Justice who, in her opinion, expressed the *objective* approach more vigorously than the majority when she said that the courts below had "failed properly to address the question whether the VRPT was a nuptial settlement",[7] but that whether the trust was a nuptial settlement or not turned on an objective assessment of its effects and purposes; that the courts below had erred in

treating the subjective expectations of Mr and Mrs Clayton as to benefit and the business purpose of the trust as the controlling consideration in making that assessment, which her Honour considered to be a "misapplication" of *Ward*.[8]

In sum then the court found:

- the enquiry under s 182 involves a two staged process: the first to determine whether [the] trust is nuptial, the second to assess whether and, if so, in what manner the Court's discretion should be exercised;
- a generous approach should be taken at the first stage but;
- there must be a connection or proximity between the settlement and the marriage or civil union;
- the nature of the assets is not determinative of whether the settlement is nuptial or not. A nuptial settlement can be made for business reasons and contain business assets;
- the courts below relied upon Ward v Ward[9] and specifically the approach adopted by the court at [25]:

  "… the proper way to address whether an order should be made under s182, 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…"* [emphasis added];
- *Ward* did not establish a general test applicable in all cases;
- the courts below wrongly conflated the two staged test which gave rise to an error of law or principle;
- while the *subjective* views of the parties (especially if mutual and set out in a memorandum of intention as in *Ward*) may be relevant, it is the overall circumstances that must be assessed by the court, *objectively*;
- there is no warrant in the legislative history to suggest that the powers to vary nuptial settlements in s 182 are to be read down by reference to ss 44 and 44C PRA.

Mr Clayton's appeal

Justice O'Regan gave the judgment.

As earlier foreshadowed, the court found that the VRPT was a valid trust. The primary question then was whether or not Mr Clayton's powers – or any of them – were personal to him or were held by him in his capacity as trustee and therefore fiducary by nature. If personal, the question was then whether the power(s) were property for the purposes of s 2, PRA.

The court unanimously found that by a combination of several clauses in the deed to the VRPT, Mr Clayton would not be constrained by any fiduciary duty were he to choose to exercise the VRPT powers in his own favour to the detriment of the other discretionary and final beneficaries of the trust. It followed that these powers were personal and therefore [relationship] property, given that the VRPT was a nuptial trust.

Importantly, the court was clear that its findings did not amount to extending the definition of "property" under the PRA, although it recognised that "property" is a fluid concept that had extended to include interests which might not earlier have been covered by it.

The court referred to *Z v Z (No 2)*[10] where the Court of Appeal said the meaning and scope of property must also be affected by the statutory and wider context (including changing social values, economic interest and technological developments) in which it is used.

Where to now?

The title of my both my first article and this piece is: *The Last Chapter*.

Certainly that is true for the Claytons, but not for the future development of this dynamic area of law. The interface and indeed tension between trust and relationship property law will continue to present challenges to the courts until Parliament commits to a process of meaningful law reform.

If anything *Clayton* creates more uncertainty rather than better definition of the law and principle. Some will argue – and I have – that this is a landmark decision, and it is. The finding of the court that read together a series of powers were "personal" and therefore "property" of Mr Clayton was significant. Although arguably not novel,[11] the finding as to the status of the powers was followed by a reasoned methodology for fixing a value for relationship property purposes which will, for the time being, provide great assistance to those working in this area of law.

But moves are afoot to give the PRA a much needed and comprehensive review. In late May 2016, following the *Clayton* decision, the Law Commission announced that it would be undertaking a PRA review. That review, says Law Commission senior legal and policy advisor Lisa Yarwood, will also look at de facto relationships, protection of children, prenuptial agreements, and division of property after death. The Law Commission expects to report its findings by November 2018. ■

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1 *Clayton v Clayton* [2015] NZCA 30.
2 The first decision was that of Justices William Young, Glazebrook, Arnold and O'Regan, the second of Chief Justice Elias.
3 *Clayton v Clayton* [2015] NZSC 30.
4 *Clayton v Clayton* [2016] NZSC 29.
5 [2008] 3 NZLR 45 (CA). See also *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115.
6 [2009] NZSC 125.
7 At [97].
8 At [98].
9 [2009] NZSC 71.
10 [1997] 2NZLR 258 (CA).
11 *Walker v Walker* [2007] NZCA 30. See also *Kenyon v Spry* [2008] HCA 56.