

# Proper trust arrangements vital

## Key is be up-to-date

It is estimated there are more than 400,000 family trusts in New Zealand, many of which have been set up to protect assets from a relationship breakdown.

However, there is an ever increasing number of ways for claims to be made to "trust-bust".

One of those claims, usually run when Property (Relationships) Act claims are exhausted or not an option, is that of a constructive trust.

A successful constructive trust claim can provide a way for a



### LEGAL MATTERS

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claimant to gain an interest in property owned by an express trust (for example, a home or company shares owned by a family trust).

If a constructive trust is imposed by the court, then the claimant will have an interest in the property.

The requirements of a constructive trust claim against an asset(s) of an express trust are:

- The claimant must have made direct or indirect contributions to the property in question.

- The claimant must have an expectation of an interest in the property.

- That expectation must be reasonable in the circumstances of the particular case.

- The trustees should reasonably be expected to yield an interest in the property to the claimant.

- Contributions could include direct contributions to an asset, such as a house. (This includes applying relationship income to the home, maintaining gardens, renovating or even organising the tradespeople and repairs where required).

- They could also be indirect contributions, which can include

looking after children, allowing the other party the time to acquire assets.

The contribution must be more than minor.

In one case, the claimant successfully established a constructive trust in relation to a business that was owned by a trust.

The female claimant had contributed directly to the business, providing advice on debtor control, revising company documents, manuals and promotional material.

In addition, she had managed the household and cared for the parties' two children.

This was a franchise business, and although the company shares were owned by a family trust, the claimant was able to establish a constructive trust, allowing her to gain an interest in the business.

The Court of Appeal has made it clear that a constructive trust can be imposed on assets owned by an express trust.

This case involved a home that was built and owned by a family trust.

There were two trustees, the male partner to the relationship and his solicitor.

The first three requirements of a constructive trust were established.

However, the High Court rejected the constructive trust

argument on the basis that the solicitor co-trustee did not stimulate the claimant's expectation that she should expect to receive an interest in the home.

The Court of Appeal disagreed, finding that the solicitor trustee had handed over his responsibilities in respect of the house, allowing the partner to deal with it as he saw fit.

The solicitor trustee had allowed him to bind the trust in many other ways, and as such it was considered unconscionable for the trustees to deny the claimant's constructive trust claim.

The Court of Appeal imposed a constructive trust and the claimant was awarded a 15 per cent interest in the home.

To avoid such a claim, it is crucial that a trust is operating properly and that robust records are kept.

It is also important that parties to a relationship are clear about their expectations in respect of asset sharing.

Those wanting to protect their assets from relationship breakdowns should consider up-to-date advice on the asset protection mechanisms they have in place.

■ Column courtesy of Rainey Collins Lawyers, phone 0800 733484. If you have an inquiry, email [aknowsley@raineycollins.co.nz](mailto:aknowsley@raineycollins.co.nz).

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