

Chapter five

Void and voidable trusts and sham transactions¹

5.1 The legality of trusts

If an otherwise valid trust contains an element of illegality or immorality or is contrary to public policy then it may be void or voidable.² It is proposed to discuss here some of the more important grounds of challenging the validity of a trust under these heads.

5.1.1 The rule against remoteness of vesting

This rule (or the rule against perpetuities, as it is frequently called) reflects the view that it is in the interest of the nation as a whole that wealth should circulate freely and that property should not be made inalienable. Property may be tied up indefinitely for a purpose that the law wishes to advance; for example, a charity. The details of this rule are complex and it is not proposed to cover them in a work of this nature. Readers are referred to books on the law of real property where the rule is dealt with at length. The New Zealand Law Commission has considered this rule in an issue paper.³

- 1 See N Kelly, C Kelly and G Kelly *Garrow & Kelly: Law of Trusts and Trustees* (6th ed, LexisNexis, Wellington, 2005) ("Garrow & Kelly") at chs 7–10; for England see PH Pettit *Equity and the Law of Trusts* (12th ed, Oxford University Press, Oxford, 2012) at chs 11–12; and for Australia see M Evans *Equity and Trusts* (3rd ed, LexisNexis Butterworths, 2012) at chs 28 and 52.
- 2 *Attorney-General v Sands* (1668) Hard 488, 145 ER 561. See also the Illegal Contracts Act 1970 in respect of trusts established under a contract to close.
- 3 Law Commission *Perpetuities and Revocation and Variation of Trusts* (NZLC IP22, 2011) at Part 1.

5.1.2 Trusts restricting the alienation of property

When an interest is given absolutely, any condition attached that provides that it is to cease on alienation is void.⁴ The effect is that the condition can be ignored, and any gift-over on its occurrence fails. It is possible, however, to achieve a desired end by not giving an absolute interest initially but rather a determinable interest, one which subsists until the happening of a particular event. Careful drafting ought to ensure that the settlor's aim is realised.

Section 42 of the Trustee Act 1956 establishes a statutory form of protective trust that, by combining a determinable life interest with a discretionary trust, provides a highly effective means of restraining spendthrift beneficiaries. The beneficiary's life interest will normally be made determinable on alienation or bankruptcy and will be followed in such an event by a discretionary trust in favour of the former life tenant and/or members of his family.

5.1.3 Trusts designed to defraud creditors

Several rules exist to prevent settlors avoiding their obligations to their creditors. First, it is of no use settling property on oneself with a gift over on the event of bankruptcy, as such a provision will be void as against one's creditors.⁵ Secondly, in the same way, if a person is given a vested interest in property, any proviso that it shall not be available to satisfy his or her creditors' claims is void. Thirdly, insolvency legislation can make a voluntary settlement of property voidable as against the Official Assignee if made within two years of the settlor's bankruptcy.⁶

Finally, under subpart 6 of Part 6 of the Property Law Act 2007, dispositions in fraud of creditors and subsequent purchasers may be overturned. The difficulty presented to settlors by these rules may be overcome by employing a protective trust (such as that in s 42 of the Trustee Act 1956), under which the trustee is directed to pay the income to the protected person until bankruptcy or attempted alienation, and then either to pay to him or her, or apply for his or her benefit during his or her lifetime, so much of the income as the trustee thinks fit, and to apply the balance of the income for the benefit of other persons, usually the dependants of the protected person. Since the bankrupt has no claim to any particular part of the income the creditors have no claim either.

Examples of cases under this heading include the following:

- 4 *Floyer v Bankes* (1869) LR 8 Eq 115 (Ch); *Official Trustee in Bankruptcy v Mitchell* (1992) 38 FCR 364, (1992) 110 ALR 484 (FCA).
 5 *Re Burroughs-Fowler* [1916] 2 Ch 251 (Ch).
 6 *Welch v Official Assignee* [1998] 2 NZLR 8 (CA); *Official Assignee v Williams* [1999] 3 NZLR 427 (CA). See Insolvency Act 2006.

Regal Casting Ltd v Lightbody, where Mr Lightbody had conveyed his property into a trust and the Supreme Court held that it was an alienation with intent to defeat creditors within the meaning of s 60 of the Property Law Act 1952.⁷

In *Penny v Commissioner of Inland Revenue*,⁸ P and H were orthopaedic surgeons who set up companies which were owned by a family trust or trusts. As shareholders, P and H sold their practices to companies and became company employees when the maximum personal tax rate increased to 39 cents in the dollar. P and H reduced their own remuneration and distributed the balance of the net practice income to family trusts as dividends taxed at 33 cents in the dollar. This arrangement produced yearly savings of \$20,000 to \$30,000 in tax. P also arranged interest free loans of distributions of company profits from family trust. P and H accepted they would not make such arrangements with unrelated parties and that the salaries were commercially unrealistic. The Commissioner's assessments for tax years ending 31 March 2002, 2003 and 2004 increased P's and H's taxable incomes by the difference between salary paid and estimated commercially realistic salaries.

The High Court held that the arrangements did not amount to tax avoidance and P's ability to access dividends arose from his status as a beneficiary. The High Court cancelled the assessments.

The Court of Appeal reversed the decision and held that the Commissioner was entitled to treat the arrangements as void.

Hammond J, in the Court of Appeal,⁹ held that the intertwined economic and commercial effects of what was done, in their proper legislative context, were that income derived from personal exertion should belong in its appropriate taxation band and should not be inappropriately diverted away. When Parliament had increased the top tax rate to 39 per cent, the taxpayers deliberately took themselves out of that category by interposing a company/trust structure but, significantly, they retained control over the whole of the income generated which they then applied for the benefit of themselves and their families. Their salaries were fixed at artificially low levels.

The case was incontrovertibly one of tax avoidance — "a rather obvious, indeed blatant, stratagem".

The Supreme Court agreed with the Court of Appeal.¹⁰

- 7 *Regal Casting v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 (SC). This case is also discussed in the context of remedial constructive trusts in Chapter 4.
 8 *Penny v Commissioner of Inland Revenue* [2012] NZSC 95, [2012] 1 NZLR 433 (SC), (2011) 25 NZTC 20-073 (SC).
 9 *Penny v Commissioner of Inland Revenue* [2012] NZSC 95, [2012] 1 NZLR 433 (SC), (2011) 25 NZTC 20-073 (SC) at [26].
 10 See also *Insolvency Act*, s 30; *LR v JR (A bankrupt)* [2011] NZFLR 797.

5.1.4 Trusts tending to restraint of marriage, or to infringe the sanctity of marriage or of the family

The law here has been overtaken by the Property (Relationships) Act 1976. For the law prior to this legislation see the previous edition of this text.¹¹

5.1.5 Trusts contrary to public policy

(a) Religion

Conditions restricting the religious freedom of beneficiaries used to be frequently discovered in trusts.¹² Such conditions are not void as against public policy but may be difficult to draft. Many have been struck down because of uncertainty; the requirement of "adhering to" or "professing the tenets of" a particular religious faith often being such that no court could safely say whether or not they were being complied with, or when, if at all, they had ceased to be complied with.

In *Blathwayt v Baron Cawley*, Lord Cross expressed the view that while it may be wrong for a government to discriminate on religion, it does not follow that it is against public policy for an adherent of one religion to distinguish in disposing of his or her property; any other view would amount to saying that "it is disreputable for him to be convinced of the importance of holding true religious beliefs and of the fact that his religious beliefs are the true ones".¹³

(b) Trusts tending to deter the beneficiary from entering the service of the Crown, or from taking public office

Such trusts are generally void as against public policy. Thus, in *Re Edgar*,¹⁴ a provision that the will-maker's sons should not become candidates for or enter Parliament, or undertake any other public office, was held to be void.

(c) Trusts for a criminal purpose

These are void, as are trusts for supporting a revolt against a friendly power.

11 See also *Garrow & Kelly* at [7.7]–[7.8].

12 See *Re Myers* [1947] NZLR 828 (SC now HC); *Re Allen* [1953] Ch 810, [1953] 2 All ER 898 (CA).

13 *Blathwayt v Baron Cawley* [1976] AC 397 (HL) at 429; and see *Re Sutcliffe* [1982] 2 NZLR 330 (HC and CA); *Lichtenstein v Lichtenstein* (1986) 4 NZFLR 25 (HC).

14 *Re Edgar* [1939] 1 All ER 635 (Ch).

5.1.6 The consequence of illegality

The general rule is that if an express trust fails because of unlawfulness, a resulting trust to the settlor or his or her estate arises. If only part of the express trust is unlawful then only that part will fail, as long as it is ascertainable.¹⁵ If it is not then the whole trust fails.¹⁶ If the purpose of the trust is not only unlawful but also fraudulent, the court will prevent the illegal trust from taking effect and will also refuse its assistance to help the settlor recover the property. As Lord Truro LC said in *Benyon v Nettlefold*: "Those who violate the law must not apply to the law for protection."¹⁷ The principle is not, however, applied in every situation and a settlor is entitled to recover the property if the illegal purpose has only been contemplated so that no fraud has in fact been perpetrated.¹⁸ Similarly, if it is not necessary for the settlor to plead his or her own illegality then he or she may recover his or her property.¹⁹

5.2 Other situations when a trust may be avoided

Normally a completely constituted trust is irrevocable unless the deed contains an express power of revocation, but there do arise situations in which the court will avoid a trust. If there has been a total failure of the purpose for which the trust was created the trust may be avoided.

In the case of ignorance,²⁰ mistake²¹ and fraud,²² settlements are more readily avoided by the court when they are voluntary, although consideration is not an absolute bar to relief. The onus of proof of the ignorance, mistake or fraud is on the settlor,²³ except when the provisions of the settlement are so absurd that no sane person²⁴ would have consented to them, or when the beneficiary is in a fiduciary position towards the settlor that raises a presumption of undue influence. If a mistake has occurred in the preparation of the trust instrument, the court will order rectification on proof that the instrument does not express the real intentions of the settlor.

15 *Mitford v Reynolds* (1842) 1 Ph 185, 51 ER 602 (Ch).

16 *Chapman v Brown* (1801) 6 Ves 404.

17 *Benyon v Nettlefold* (1850) 3 Mac & G 94 at 102, 42 ER 196 (Ch).

18 *Symes v Hughes* (1870) LR 9 Eq 475, 39 LJ Ch 304.

19 *Chettiar v Chettiar* [1962] AC 294, [1962] 1 All ER 494 (PC). See *Tinsley v Milligan* [1994] 1 AC 340, [1993] 3 All ER 65 (HL), discussed in Chapter 4.

20 *Wright v Carter* [1903] 1 Ch 27 (CA).

21 *Re Daniel's Settlement* (1875) 1 Ch D 375 (CA).

22 *Torre v Torre* (1853) 1 Sm & G 518, 65 ER 227 (Ch).

23 *Hall v Hall* (1873) LR 8 Ch 430.

24 *Re Butlin's Settlement Trusts* [1976] Ch 251, [1976] 2 All ER 483 (Ch); *University of Canterbury v Attorney-General* [1995] 1 NZLR 78 (HC).

trustees or the settlor. This is known as the rule in *Saunders v Vautier*.⁷¹ The rule also applies to disregard a restriction imposed on a vested interest to accumulate the income until the beneficiary attains an age greater than full age. Lord Langdale MR in *Saunders v Vautier* stated:⁷²

Where a legacy is directed to accumulate for a certain period or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge.

12.2.4 Right to bring an action for accounts

If the beneficiary cannot obtain accounts then he or she may bring an action for accounts. This has a limitation of six years under s 21 of the Limitation Act 1950, subject to the exceptions contained in that section.⁷³

12.2.5 Right to follow trust property

The complexities of tracing are beyond a book of this size; however, the topic of tracing is fully covered by Pettit in England,⁷⁴ Evans in Australia⁷⁵ and Garrow & Kelly in New Zealand.⁷⁶

71 *Saunders v Vautier* (1841) 4 Beav 115, 49 ER 282 (LC Ct).
 72 *Saunders v Vautier* (1841) 4 Beav 115, 49 ER 282 (LC Ct) at 282. See *Capral Fiduciary Ltd v Ladd* (1999) 1 NZSC 40,455 (HC); *Re Phillips New Zealand Ltd* [1997] 1 NZLR 93 (HC); *Re Dunn* HC Christchurch M178/90, 22 February 1991.
 73 See Chapter 13; and *Kerr v Ecurie Topgear [Top Gear]* SA CA39/98, 3 May 1999.
 74 PH Pettit *Equity and the Law of Trusts* (12th ed, Oxford University Press, 2012) at ch 24.
 75 M Evans *Equity and Trusts* (3rd ed, LexisNexis Butterworths, 2012) at ch 19.
 76 *Garrow & Kelly* at ch 25.

Chapter thirteen

Breach of trust and relief of trustees

13.1 The liabilities of trustees

The liabilities of trustees are considerable.¹

If a trustee has made any mistakes he or she may have to pay in full for them, even if these mistakes were made with the best of intentions, and even if they were made under the advice of counsel learned in the law.² Thus, if a trustee, tired of seeing the real value of trust investments depreciate during an inflation, decides in breach of trust to buy some shares that are expressly unauthorised by the trust deed, to protect the trust capital, and all his or her choices go up in value except one, he or she can be made to repay to the trust estate the loss on the one that went down. The profit on the others belongs to the trust. This rule applies to any two separate breaches of trust, one of which shows a gain and the other a loss.³ Other examples of this sort are discussed later.

Briefly, the position is that so long as trustees observe the terms of the trust, and carry them out with prudence and diligence, and with due observance of the general law of trusts, the trustees cannot be made liable for what they have done, or failed to do, even if loss results to the trust, since trustees are not insurers of the trust property.⁴ A trustee is liable only if he or she deviates from the terms of the trust by doing that which is forbidden, by

1 See N Kelly, C Kelly and G Kelly *Garrow & Kelly: Law of Trusts and Trustees* (6th ed, LexisNexis, Wellington, 2005) ("Garrow & Kelly") at chs 27 and 28; PH Pettit *Equity and the Law of Trusts* (12th ed, Oxford University Press, Oxford, 2012) at ch 23; M Evans *Equity and Trusts* (3rd ed, LexisNexis, Butterworths, 2012) at ch 34. See also *Commissioner of Inland Revenue v Duncan* [2007] NZLR 360 for trustee personally liable for GST payable by the trust following discharge from bankruptcy. See also *Dorchester Finance Ltd v Ngahuia Ltd* HC Auckland CIV-2009-404-2529, 8 February 2010.
 2 *National Trustees Co of Australasia v General Finance Co of Australasia* [1905] AC 373 (PC).
 3 *Wiles v Gresham* (1854) 2 Drew 258, 61 ER 718 (VC Ct), where Kindersley V-C said: "If a trustee loses part of the trust estate he must answer for it whatever may be the improvement of the other part."
 4 *Re Hurst* (1892) 67 LT 96 (CA); *BNZ v NZ Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA).

doing more than is permitted or by omitting or neglecting to do that which is directed; or if he or she concurs or acquiesces in the commission of a breach of trust by a co-trustee, and then only if a loss actually results to the trust property.⁵ Leaving the administration of a trust to a co-trustee who commits a breach of trust amounts to acquiescence. Not only express trustees but all persons who in any way hold or are considered to hold the position of trustee can be liable for breaches of trust, including a tenant for life under s 88 of the Trustee Act 1956 in matters in which the Act places him or her in the position of a trustee.⁶

The liability of a trustee for breaches of trust is precisely the same when he or she settled the trust estate.⁷ This may seem harsh but is perfectly logical. There is no reason why the rights of the beneficiaries should be altered by the fact that the settlor chose himself or herself as trustee. The trustee's past generosity has nothing to do with the case.

In any case where a trustee is uncertain as to whether his or her intended actions will amount to a breach of trust, he or she should apply to the court for directions under s 66 of the Trustee Act 1956.⁸

The three major ways of obtaining compensation for breach of trust are account, equitable compensation and interest.⁹

13.1.1 Measure of responsibility

Generally the measure of what a beneficiary can claim in an action for breach of trust is the loss to the trust. There is no claim to damages in equity, but only a claim to have the trustee restore the property that he or she is bound to account for and, when the trustee has retained the property in his or her own hands, to account further for any profit that he or she either has in fact made or is presumed to have made.¹⁰ The courts have no power in such an action to punish the trustee for what he or she has done. The remedy is by way of account and is not penal.¹¹

⁵ See, for example, *White v Williams* [2011] EWHC 494 (Ch).

⁶ *Middlemas v Stevens* [1901] 1 Ch 574 (Ch). See also *Re Shail Superannuation Fund & Commissioner of Taxation* [2011] AATA 940.

⁷ *Drosier v Brereton* (1851) 15 Beav 221, 51 ER 521 (Rolls Ct).

⁸ See Trustee Act 1956, s 69.

⁹ Discussed in Maxton et al "Trusts Conference 2003" (NZLS Seminar, August 2003) at 13. See also *Target Holdings Ltd v Redfern* [1996] AC 421, [1995] 3 All ER 785 (HL).

¹⁰ *Re Collie, ex parte Adamson* (1878) 8 Ch D 807 (CA).

¹¹ *Attorney-General v Alford* (1855) 4 De GM & G 843, 43 ER 737 (Ch); *Mulligan v Perpetual Trust Co* HC Christchurch M119/02, 10 March 2003 at [35]; *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 (CA) at 473.

(a) Morally innocent breaches

If the breach of trust is morally innocent, then the trustee is liable only as set out above. If a loss occurs, however, the trustee cannot be heard to say that a loss would also have occurred had he or she strictly observed the conditions of the trust. Thus, if a trustee is instructed to invest in Auckland City debentures only but instead invests in Wellington City debentures, then if all debentures go down in value owing to a rise in interest rates, he or she will have to make good the loss, notwithstanding that the trustee can show that the Auckland debentures have fallen by a similar amount:

- (1) *Investment in unauthorised securities.* The beneficiaries are entitled to elect either to ask the trustee to replace the unauthorised securities with the precise amount of the authorised securities that he or she could have bought when buying the others, or to replace the fund in cash.¹² In the example given above, they would of course ask for cash. It would be the other way around if the authorised securities had risen in price in the meantime. This rule does not apply if the trustee had discretion to invest in any of several forms of investment and has committed a breach of trust by investing in some other way. The beneficiary cannot elect to require the trustee to purchase the security that happens to have proved best. All that can be required in such a case is that he or she replace the trust fund with interest.¹³
- (2) *Failure to realise.* If the breach of trust is in failing to realise at the proper time, the measure of the trustee's liability is the difference between what would have been realised then and what is in fact obtained.¹⁴
- (3) *Failure to invest.* If a trustee is supposed to invest trust moneys and does not, he or she will be charged with the interest he or she ought to have received. This leads to various results. As a general rule simple interest is charged, but in certain cases the court may in its discretion allow compound interest, and has done so where there was an express or implied direction to accumulate.¹⁵ If a trustee calls in a high-interest-earning security without authority, he or she may be charged with the rate he or she should have earned.¹⁶ Following the same line of reasoning, the Court in a New Zealand case¹⁷ charged a trustee with 10 per cent interest on trust funds

¹² *Ouseley v Anstruther* (1847) 10 Beav 453, 50 ER 656 (Rolls Ct).

¹³ *Robinson v Robinson* (1851) 1 De GM & G 247, 42 ER 547 (Ch).

¹⁴ *Gainsborough (Lord) v Watcombe Terra Cotta Clay Co Ltd* (1885) 54 LJ Ch 991 (Ch).

¹⁵ *Gilroy v Stephens* (1882) 30 WR 745 (Ch); *Knott v Cottee* (1852) 16 Beav 77, 51 ER 707 (Rolls Ct).

¹⁶ *Jones v Foxall* (1852) 15 Beav 388, 51 ER 588 (Rolls Ct).

¹⁷ *Sinclair v Stuart* (1887) NZLR 5 (CA) 191.

retained in his hands where he could have used them in paying a debt carrying interest at that rate.

- (4) *Loan on mortgage in excess of proper sum.* If a trustee lends money on a mortgage that is in all respects proper, except that he or she has advanced more than the correct amount, his or her liability is limited by s 13Q of the Trustee Act 1956 to the excess amount lent, even when the loss in fact proves greater. However, the Act will not protect him or her if the security is improper or the mortgage is not authorised.¹⁸ In such cases he or she normally has the right to take over the security, provided he or she makes good the amount lent.¹⁹

(b) *When the trustee has not been morally innocent*

If a loss is incurred as a result of a breach of trust committed otherwise than in good faith, the trustee, of course, must account for that which should not have been lost, but the court may treat him or her with greater severity than would have been the case if the breach had been innocently committed. Further, there will be no prospect of relief under s 73 of the Trustee Act 1956.²⁰ The court will incline towards applying strictly against the trustee any presumptions about profits that should have been earned, sometimes charging compound interest. Thus, in *Wroe v Seed*,²¹ a trustee who admittedly was illiterate and seems in other ways to have been highly unsuitable, failed for five years to pay legacies or give any information, and did not keep accounts. He was charged compound interest on the trust moneys.

In *Spencer v Spencer*,²² the Court found that the trustees had acted dishonestly even though they believed their actions to have been morally correct. Other breaches of trust, which are regarded with marked lack of approval by the court, compared to the innocent breaches dealt with in (a) above, are as follows:

- (1) *Using trust funds in trade or speculation.* In such a case the beneficiaries have an election either to ask for the principal and interest, or to demand the profits actually made if these are greater. The court, in the case of beneficiaries electing to take the interest, will usually allow compound interest.²³ The rate of interest allowed

18 *Re Walker* (1890) 59 LJ Ch 386 (Ch); *Owen-Smith v Carlyle* HC Wellington CP342/92, 1 September 1992.

19 *Re Salmon* (1889) 42 Ch D 351 (CA).

20 As to which see [13.2.1].

21 *Wroe v Seed* (1863) 4 Gif 425, 66 ER 773 (VC Ct).

22 *Spencer v Spencer* [2003] 3 NZLR 299 (HC). See also A Grant "Trusts: Clauses that exonerate trustees from fault may be worthless" *NZLawyer* (10 February 2012) at 13; and *Spread Trustee Company Ltd v Hutcheson* [2011] UKPC 13 concerning trust deeds that exonerate trustees from liability.

23 *Jones v Foxall* (1852) 15 Beav 388, 51 ER 588 (Rolls Ct).

is also apt to be high.²⁴ The charging of compound interest in these cases is not a punishment, but a presumption that the trustee did in fact earn it and must not be allowed a profit. When a solicitor used trust funds in his own business, only simple interest was decreed as the Court considered that a solicitor did not earn compound interest on his moneys as a trader may be presumed to do.²⁵

- (2) *Failing to account when called on.* In such cases a higher rate of interest may be charged.²⁶

13.1.2 Nature of liability

(a) Civil liability

Normally the liability of a trustee for breach of trust is a civil one, to restore the trust property. The debt owing by the trustee to the trust is an equitable debt subject to a six-year period of limitation of action, except where the trustee has bound himself or herself by covenant, when it becomes a specialty debt.²⁷ The liability is joint and several, even though all are not equally blameworthy. Where constructive trustees are implicated along with properly appointed trustees, the joint and several liability embraces them all.²⁸ A bare trustee who facilitates a breach of trust by the active trustee can also be brought into the joint and several liability.²⁹ No particular trustee is primarily liable.³⁰

The result of the joint and several liability is that a beneficiary may receive part of his or her claim from one defaulting trustee and still prove for the

24 These interest rates may vary with the economic climate: *Bartlett v Barclays Bank Trust Co (No 2)* [1980] 2 All ER 92 (Ch).

25 *Burdick v Garrick* (1870) LR 5 Ch App 233 (CA).

26 For higher rates, see *Bartlett v Barclays Bank Trust Co (No 2)* [1980] 2 All ER 92 (Ch), and see *Pearse v Green* (1819) 1 Jac & W 135, 37 ER 327 (Ch); *Gordon v Gonda* [1955] 2 All ER 762 (CA).

27 *Adey v Arnold* (1852) 2 De GM & G 432, 42 ER 940 (Ch).

28 *Cowper v Stoneham* (1893) 68 LT 18 (Ch).

29 *Angier v Stannard* (1834) 3 My & K 566 at 571, 40 ER 216 (Ch) per Leach MR:

"If he who has the mere legal estate so deals with it as to sanction any act done by the equitable trustee to the prejudice of the *cestuis que trust* he thereby becomes a party to the breach of trust and is answerable accordingly; where the equitable trust is for the purpose of sale, he who has the legal estate is, for the benefit of the *cestuis que trust*, bound, when required to convey it to the equitable trustee to enable him to execute his trust. If, in parting with the legal estate, he goes beyond the mere purpose of conveying it to the equitable trustee, and so deals with it as to facilitate a breach of trust by the trustee, and a breach of trust be in consequence committed, he is deemed a party to such breach of trust and is responsible for it."

30 *Wilson v Moore* (1834) 1 My & K 126, 39 ER 629, [1824-34] All ER Rep 508 (Rolls Ct); *Fletcher v Green* (1864) 33 Beav 426, 55 ER 433 (Rolls Ct).

she actually died at that date. By s 81(5)(b) of the Administration Act 1969, the successor is considered for all purposes neither to have become entitled to, nor to have disposed of, the disclaimed interest.

Section 81, however, must be read subject to s 82(1), which deals with the effect of subsequent bankruptcy on disclaimer under either an intestacy or a will. For the purposes of the Insolvency Act 2006 (and any other Act or rule of law relating to the protection of creditors), such a disclaimer is considered to be a transfer of the disclaimed interest by the successor to the person or persons who become entitled thereto in consequence. The administrator is protected if he or she distributes in accordance with a disclaimer, if at the date of distribution the successor is not bankrupt and the administrator has no reason to believe that he or she is about to become so, or that the disclaimer is or is about to become void for that reason.²²

Chapter eighteen

Restrictions on testamentary freedom of action

In New Zealand three particular statutes operate to prevent a will-maker from leaving his or her estate to whomsoever he or she wishes. These statutes are:

- (a) the Family Protection Act 1955;
- (b) the Law Reform (Testamentary Promises) Act 1949; and
- (c) the Property (Relationships) Act 1976.

The first two Acts permit the courts to recast wills or alter the destination of property on an intestacy if responsibilities that the will-maker has in his or her lifetime have not been properly met by the terms of the will. In the case of the Family Protection Act 1955, the relevant responsibilities are the moral duties the will-maker owes to close relatives. As regards the testamentary promises provisions, the responsibilities relate to the duty of the deceased to remunerate persons for work done under promise of testamentary provision. The Property (Relationships) Act 1976 allows the surviving partner to choose to have the provisions of the Act apply rather than the will. The Act makes a fundamental change to the law by extending the principle of equal sharing beyond the lifetime of the spouses/partners to cover the position when they have died. Each piece of legislation will be considered in turn.

18.1 Family protection¹

Until 1900, New Zealanders shared with most other English-speaking peoples the doubtful privilege of unfettered testamentary freedom. Just before the turn of the century, the agitation for a curb on this freedom resulted in legislative action. There were plenty of examples to follow. Scotland, most European and many Asiatic countries treat at least some part of a deceased's estate as the inalienable property of his or her dependants. This method of

¹ See generally WM Patterson *Law of Family Protection and Testamentary Promises* (3rd ed, LexisNexis, Wellington, 2004) ("Patterson"); R Sutton (1995) 25 VUWLR 53; J Caldwell "Family Protection Claims by Adult Children: What is Going On?" (2008) 6 NZFLJ 4.

²² Administration Act 1969, s 82(2).

settling by statute what could not be alienated has a certain appeal. Under it, everyone knows exactly where they stand. The legislature, however, decided instead on an experiment. The experiment was to throw on the courts the burden of deciding when a will-maker had failed to do his or her moral duty by his or her dependants, and of remedying that failure. The result is that now no one knows where they stand, in cases when applications under the Act are possible, for at least a year after death and sometimes for much longer. Executors are left not knowing what they can distribute, or to whom. On the other hand, the system enables justice to be done according to the facts. Both systems have their disadvantages, but the courts have done their best to give reasonable certainty to the flexible system under which they now work by laying down, in the course of many decided cases, the principles by which they will be guided in administering the Act.

The first statute, the Will-maker's Family Maintenance Act 1900, and its successor, the Family Protection Act 1908, admirable though they were in principle, were naturally somewhat experimental. Both Acts have been very considerably amended by an extension of the persons entitled to apply and by a provision that the legislation can cover cases of intestate estates. The Family Protection Act 1955 can still be evaded either by transfers inter vivos or by the acquisition of a foreign domicile.

18.1.1 Object of the Act

In *Flathaug v Weaver* the Court of Appeal² stated that:

The relationship of parent and child has primacy in our society. The moral obligation which attaches to it is embedded in our value system, and underpinned by the law. The Family Protection Act recognises that a parent's obligation to provide for both the emotional and material needs of his or her children is an ongoing one. Though founded on natural or assumed parenthood, it is, however, an obligation which is largely defined by the relationship which exists between parent and child during their joint lives.

The object of the Family Protection Act 1955 is set out in s 4(1) as follows:

(1) If any person (in this Act referred to as the deceased) dies, whether testate or intestate, and in terms of his or her will or as a result of his or her intestacy adequate provision is not available from his or her estate for the proper maintenance and support of the persons by whom or on whose behalf application may be made under this Act, the Court may, at its discretion on application so made, order that such provision as the Court thinks fit shall be made out of the estate of the deceased for all or any of those persons.

² *Flathaug v Weaver* [2003] NZFLR 730 at [32] per Rodney Hansen J.

It may be seen from the words of the section that the court's jurisdiction arises when "adequate provision is not available [(from the will-maker's estate)] for the proper maintenance and support" of those entitled to apply under the Act. Whether the court has such jurisdiction is determined at the date of death. The exercise of the court's discretion, however, operates at the date of the hearing.³ Nevertheless, it is probably more theoretical than real to analyse the workings of the statute in that way, as any meaning of inadequacy must involve objective as well as subjective elements.

The application of the Act in cases of intestate estates⁴ frees the courts from their traditional reluctance to interfere with the expressed intentions of the will-maker as found in his or her will, while at the same time giving effect to the intestate's responsibilities and moral duties. The Act, of course, may also operate in cases of partial intestacy.

Section 4(3) states that an application must be served on the following persons:

- (3)(a) the spouse or civil union partner of the deceased;
- (b) a de facto partner who was living in a de facto relationship with the deceased at the date of his or her death;
- (c) a child of a marriage, civil union, or de facto relationship of the deceased, or a child of a marriage, civil union, or de facto relationship of any such child;
- (d) a person entitled to apply who the Registrar of the Court considers, in his or her discretion, ought to be served because there are special circumstances rendering that desirable;
- (e) a person entitled to apply who the Court considers, in its discretion, ought to be served because there are special circumstances rendering that desirable.

(3A) Where an application has been filed, orders for representation must be made in respect of the following persons:

- (a) the persons referred to in subsection (3)(a) to (c); and
- (b) any other person entitled to apply who the Court considers, in its discretion, ought to be represented because there are special circumstances rendering that desirable.

18.1.2 Method of application of the Act

Early on the courts laid down the general limits within which it would act. In 1901, in an application by a widow for further provision, Stout CJ said:⁵

³ *Williams v Aucutt* [2000] 2 NZLR 479 (CA); *Re McLean (dec'd)* (1991) 8 FRNZ 321; recently applied by the Court of Appeal in *Fisher v Kirby* [2012] NZCA 310. See also *Moon v Carlin* HC Auckland CIV-2010-404-5486, 23 February 2011; and *Kirby v Sims* HC Wellington CIV-2010-485-794, 22 August 2011.

⁴ For example, see *C v D* FC Kaikohe FAM-2007-027-37, 30 May 2008; *Chapman v HP* HC Wellington CIV-2007-485-1372, 12 October, 9 December 2009, Mallon J.

⁵ *Re Phillips* (1907) 4 GLR 192.

"I do not think the will should be altered further than is absolutely necessary for the maintenance of the wife." It has since been emphasised in numerous cases that the court is not prepared to rewrite the will-maker's will, and judges at first instance who have gone too far in this direction have had their awards varied by the Court of Appeal.⁶

The current law in this regard is that stated in the leading case of *Williams v Aucutt*:⁷

In the last few decades an expansive view appears to have been taken of the power of the Court to refashion the will of a deceased in order to fulfil what has been regarded as his or her moral duty. This trend has not met with universal approval, as reference to the Working Group's report of 1988⁸ mentioned by the President, and to the Law Commission's report in 1997 will confirm. I would not wish to be thought to endorse all that the Commission has said on the subject of the claims of adult children. I venture to suggest that it has taken a rather extreme position. Nonetheless, there is substance in the criticisms of the way in which Courts sometimes apply the present law. It is to be remembered that the Court is not authorised to rewrite a will merely because it may be perceived as being unfair to a member, and it is not for a beneficiary to have to justify the share which has been given. Rather, it is for a claimant to establish that he or she has not received adequate provision for proper maintenance and support.⁹

The Court cited with approval the following statement from *Little v Angus*:¹⁰

The principles and practice that the Courts follow in family protection cases are well settled. The inquiry is as to whether there has been a breach of moral duty judged by the standards of a wise and just will-maker or testatrix; and if so, what is appropriate to remedy that breach. Only to that extent is the will to be disturbed. The size of the estate and any other moral claims on the deceased's bounty are highly relevant. Changing social attitudes must have their influence on the existence and extent of moral duties. Whether there has

6 *Allardice v Allardice* (1909) 29 NZLR 959, 12 GLR 753 (affirmed on appeal to the Privy Council, *Allardice v Allardice* (1911) NZPCC 156); *Allen v Manchester* [1922] NZLR 218, [1921] GLR 613.

7 *Williams v Aucutt* [2000] NZLR 479 at [68] per Blanchard J.

8 *Report of the Working Group on Matrimonial Property and Family Protection* (Department of Justice, Wellington, 1988). See also Law Commission *Succession Law; Testamentary Claims* (NZLC PP24, 1996); Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997); R Sutton and N Peart *Testamentary Claims by Adult Children — The Agony of the "Wise and Just Testator"* (2003) Otago LR, vol 10 No 3 at 385.

9 In *Lewis v Cotton* [2001] 2 NZLR 21, (2000) FRNZ 86, the Court of Appeal reiterated that the Court did not undertake the exercise of rewriting a will merely because it could be perceived as being unfair to a family member who was not actually in need of maintenance and support. See also *Auckland City Mission v Brown* [2002] 2 NZLR 650 at [37], where the Court considered that the High Court's assessment had been tantamount to rewriting the will.

10 *Little v Angus* [1981] 1 NZLR 126.

been a breach of moral duty is customarily tested as at the date of the will-maker's death; but in deciding how a breach should be remedied regard is had to later events. Experience in administering this legislation has established the approach in this Court that on an appeal the Court will not substitute its discretion for that of the Judge at first instance unless there be made out some reasonably plain ground upon which the order should be varied. All this is so familiar that authorities need not be cited.¹¹

Another statement from the Court in a different case was: "Mere unfairness is not sufficient and ... it must be shown that in a broad sense the applicant has need of maintenance and support."¹²

In more recent years the courts have been concerned with adult claimants who have no economic need but who seek provision in recognition of being part of the family.¹³ In *Williams v Aucutt*,¹⁴ the Court of Appeal held that:

The test is whether adequate provision has been made for the proper maintenance and support of the claimant. "Support" is an additional and wider term than "maintenance". In using the composite expression, and requiring "proper" maintenance and support, the legislation recognises that a broader approach is required and the authorities referred to establish that moral and ethical considerations are to be taken into account in determining the scope of the duty. "Support" is used in its wider dictionary sense of "sustaining, providing comfort". A child's path through life is supported not simply by financial provision to meet economic needs and contingencies but also by recognition of belonging to the family and of having been an important part of the overall life of the deceased. Just what provision will constitute proper support in this latter respect is a matter of judgment in all the circumstances of the particular case. It may take the form of lifetime gifts or a bequest of family possessions precious to its members and often part of the family history. And where there is no economic need it may also be met by a legacy of a moderate amount. On the other hand, where the estate comprises the accumulation of the family assets and is more than sufficient to meet other needs, provision so small as to leave a justifiable sense of exclusion from participation in the family estate might not amount to proper support for a family member.

Section 4(1) of the Family Protection Act 1955 uses the language of "adequate provision for proper maintenance and support" of those entitled to make application under the Act. But it has become customary for Judges to refer to the deceased's "moral duty" and in fact Parliament itself adopted that terminology in 1967 when adding s 3(2) to the statute and directing the Court "in considering the moral duty of the deceased" to have regard to certain matters upon an application by a grandchild.¹⁵

11 *Little v Angus* [1981] 1 NZLR 126 at 127.

12 *Re Leonard* [1985] 2 NZLR 88 (CA) at 92 per Richardson P.

13 *Williams v Aucutt* [2000] NZLR 479. See below under the discussion on "Children".

14 *Williams v Aucutt* [2000] NZLR 479. See also *Re Crozier (dec'd)* (2003) 23 FRNZ 999, [2004] NZFLR 360.

15 *Williams v Aucutt* [2000] NZLR 479 at [58] per Blanchard J.