

# Update Law of Trusts

## Service 63 — August 2022

### Legislative amendments

#### Charitable Trusts Act 1957

Section 25A of the Charitable Trusts Act 1957 was repealed by s 25A(2) on 31 May 2022.

Section 51(2)(b) of the Charitable Trusts Act 1957 was amended by s 104 and sch 3 of the Pae Ora (Healthy Futures) Act 2022 (2022 No 30) on 1 July 2022.

### Index

The index has been updated up to Service 62.

### Updated commentary

#### Trusts Act 2019, s 21 — guiding principle in performing duties — settlor's memorandum of wishes

In *Kain v Public Trust* [2022] NZSC 65 the Supreme Court dismissed the application of the Kain siblings for leave to appeal from the judgment of the Court of Appeal in *Kain v Public Trust* [2021] NZCA 685. The Supreme Court however stated at [17] “The Court may wish at some point to consider the approach to subsequent wishes ...”. See [TRU21.04] and [TRU21.05].

#### Trusts Act 2019, s 92 — who may remove trustee and appoint replacement

In *Mason v Triezenberg* [2022] NZCA 138 the Court of Appeal held that, on a proper interpretation of s 43 of the Trustee Act 1956, the other settlor did not have the power to unilaterally remove and appoint trustees while the mentally incapacitated settlor was alive. See [TRU92.01] and [TRU112.01].

#### Trusts Act 2019, s 112 — Court may make order for removal of trustee

In *Skelton v Eriwata* [2022] NZHC 1546 Ellis J held that the respondent had taken no steps to distribute estate in accordance with the will and there were no reasons given for delay. It was held that the removal of the respondent as both executor and trustee was the most expedient, necessary, and desirable outcome. See [TRU112.01].

#### Trusts Act 2019, s 124 — power of court to approve termination, variation, or resettlement of trust

In *Bensaude (Family Trust) (No 2) v Bensaude* [2022] NZHC 1214 orders were made pursuant to s 124 of the Trusts Act 2019 on behalf of minor, unborn and future beneficiaries, consenting to the resettlement of the assets of the trust. See [TRU124.01].

## **Trusts Act 2019, s 124 — power of court to approve termination, variation, or resettlement of trust — inherent jurisdiction to vary trusts**

In *Re Setter* [2021] NZHC 1603 at [36](b) Isac J confirmed the breadth of its inherent jurisdiction to vary a trust. See [TRU124.02].

## **Chapter 8 — Charitable trusts — advocacy — de-registration under Charities Act 2005**

In *Attorney-General v Family First New Zealand* [2022] NZSC 80 the Supreme Court set aside the Court of Appeal decision in *Family First New Zealand v Attorney-General* [2020] NZCA 366 that Family First New Zealand qualified for registration under the Charities Act 2005. See [8.20.9].

## **Chapter 9 — Trusts and family law — powers under trusts**

In *Brkic v White* [2021] NZCA 670, [2021] NZFLR 840 the Court of Appeal confirmed, in a creditor context, that the prohibition on self-benefit clause (absent in *Clayton* and *Webb*) was critical. The trust was found to be valid and its assets (including land over which the appellant sought a charging order) were not beneficially owned by Ms White. See [9.2].

## **Chapter 9 — Trusts and family law — powers under trusts**

In *Cooper v Pinney* [2021] NZHC 394, [2021] NZFLR 333 the Court of Appeal declined leave to appeal on the basis that the MRWT Trust was materially different to the trusts in *Clayton* and *Webb*. The restriction on self-benefit and existence of fiduciary duties was critical. See [9.2].

## **Chapter 9 — Trusts and family law — order of Court to transfer property**

In *Meads v Muldew* [2021] NZHC 1864 the High Court upheld the decision of the Family Court directing trustees to transfer the property transferred to the trust to defeat interests, back to Mr Meads. See [9.4] and [9.7].

## **Chapter 9 — Trusts and family law — defeating the claim or rights of any person — s 44, Property (Relationships) Act 1976**

In *Sutton v Bell* [2021] NZCA 645, [2021] NZFLR 610 the Court of Appeal held that the disposition must take place at a time when the disposer is “contemplating living together as a couple”. The Supreme Court has granted leave to appeal in *Sutton v Bell* [2022] NZSC 45 and a decision is expected in 2022. See [9.7].

## **Chapter 9 — Trusts and family law — Court’s discretion under s 182 of the Family Proceedings Act 1980**

In *Preston v Preston* [2021] NZSC 154, [2021] 1 NZLR 651, [2021] NZFLR 304 the Supreme Court overturned the Court of Appeal and High Court in respect of the exercise of the discretion under s 182 of the Family Proceedings Act 1980. The case involved very different facts to *Clayton* and *Ward*, involved a marriage of less than five years and assets acquired by the trust before the relationship. Ms Preston was added as a beneficiary prior to marriage. See [9.15] for fuller discussion.