NOTE: PURSUANT TO S 169 OF THE FAMILY PROCEEDINGS ACT 1980, AND S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS.

IN THE SUPREME COURT OF NEW ZEALAND

SC 38/2015
[2015] NZSC 30

BETWEEN	MELANIE ANN CLAYTON Appellant
AND	MARK ARNOLD CLAYTON First Respondent
	MARK ARNOLD CLAYTON AND BRYAN WILLIAM CHESHIRE AS TRUSTEES OF THE CLAYMARK TRUST Second Respondents

Hearing:	2 and 8 September 2015
Court:	Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	D A T Chambers QC and J R Hosking for Applicant M J McCartney QC and K E Sullivan for First Respondent C R Carruthers QC and A S Butler for Second Respondents
Judgment:	23 March 2016

JUDGMENT OF THE COURT

A The appeal is allowed.

B There is no order of costs.

REASONS

WILLIAM YOUNG, GLAZEBROOK, ARNOLD AND O'REGAN JJ
(Given by Glazebrook J)

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Introduction

[1] Mr and Mrs Clayton began a de facto relationship in 1986. They married in 1989, separated in December 2006 and the marriage was dissolved in 2009. They have two adult daughters. The Court of Appeal dealt with various appeals by Mr and

Mrs Clayton and associated parties with regard to various trust and relationship property issues arising out of the marriage breakdown.[1]

[2] On 18 June 2015, leave to appeal from part of that judgment was granted by this Court to both Mr Clayton and Mrs Clayton.[2] The appeal by Mr Clayton has been dealt with in a judgment to be released on the same date as this judgment.[3]

[3] This judgment deals with the appeal by Mrs Clayton and concerns two issues: first, whether, as regards the Claymark Trust (the Trust), the Court of Appeal was correct in its interpretation and application of s 182 of the Family Proceedings Act 1980; and secondly, whether the Court of Appeal was correct not to make an order under s 44C of the Property (Relationships) Act 1976.

Section 182

[4] The first issue is whether there should have been an order made with regard to the Trust under s 182 of the Family Proceedings Act 1980. That section provides:

> **182 Court may make orders as to settled property, etc**
>
> (1) On, or within a reasonable time after, the making of an order under Part 4 of this Act or a final decree under Part 2 or Part 4 of the Matrimonial Proceedings Act 1963,[4] a Family Court may inquire into the existence of any agreement between the parties to the marriage or civil union for the payment of maintenance or relating to the property of the parties or either of them, or any ante-nuptial or post-nuptial settlement made on the parties, and may make such orders with reference to the application of the whole or any part of any property settled or the variation of the terms of any such agreement or settlement, either for the benefit of the children of the marriage or civil union or of the parties to the marriage or civil union or either of them, as the Court thinks fit.
>
> (2) Where an order under Part 4 of this Act, or a final decree under Part 2 or Part 4 of the Matrimonial Proceedings Act 1963, has been made and the parties have entered into an agreement for the payment

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1 *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 (Ellen France, Randerson and White JJ) [*Clayton* (CA)].

2 *Clayton v Clayton* [2015] NZSC 84 (Elias CJ, William Young and Arnold JJ) [*Clayton* (SC Leave)].

3 See *Clayton v Clayton* [2016] NZSC 29 [*Clayton* (SC VRPT)]. Mr Clayton's appeal deals with another trust settled by Mr Clayton, the Vaughan Road Property Trust (VRPT).

4 The Matrimonial Proceedings Act 1963 was repealed by virtue of sch 2 of the Family Proceedings Act 1980. Part 4 of the Family Proceedings Act deals with a number of matters relating to marriage and civil unions, including dissolution.

> of maintenance, a Family Court may at any time, on the application of either party or of the personal representative of the party liable for the payments under the agreement, cancel or vary the agreement or remit any arrears due under the agreement.
>
> (3) In the exercise of its discretion under this section, the Court may take into account the circumstances of the parties and any change in those circumstances since the date of the agreement or settlement and any other matters which the Court considers relevant.
>
> (4) The Court may exercise the powers conferred by this section, notwithstanding that there are no children of the marriage or civil union.
>
> (5) An order made under this section may from time to time be reviewed by the court on the application of either party to the marriage or civil union or of either party's personal representative.
>
> (6) Notwithstanding subsections (1) to (5) of this section, the Court shall not exercise its powers under this section so as to defeat or vary any agreement, entered into under Part 6 of the Property (Relationships) Act 1976, between the parties to the marriage or civil union unless it is of the opinion that the interests of any child of the marriage or civil union so require.

[5] Section 182 has a long history. It can be traced back to s 37 of the Divorce and Matrimonial Causes Act 1867, which in turn was based on English legislation enacted in 1859.[5] It then became s 37 of the Divorce and Matrimonial Causes Act 1928 and s 79 of the Matrimonial Proceedings Act 1963, the immediate predecessor of s 182. The Matrimonial Proceedings Act came into force at the same time as the Matrimonial Property Act 1963.

[6] Section 79 of the Matrimonial Proceedings Act was retained when the equal sharing regime in the Matrimonial Property Act 1976 was introduced. The only change was to insert s 79(5) of the Matrimonial Proceedings Act, the equivalent of s 182(6). Section 79 became what is now s 182 of the Family Proceedings Act in 1980. Section 182 was not amended when the Matrimonial Property Act was renamed the Property (Relationships) Act in 2001.[6] It was amended in 2005 to extend its coverage to civil unions, at the same time as the Property (Relationships) Act was extended to the same effect.[7]

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5 See s 5 of the Matrimonial Causes Act 1859 (UK) 22 & 23 Vict c 61.

6 The name change of the Act was pursuant to s 5 of the Property (Relationships) Amendment Act 2001.

7 Civil Union Act 2004, s 44(1). Section 182 does not, however, apply to de facto relationships.

Factual background

Claymark Trust

[7] The Trust was settled on 10 May 1994 just after the birth of Mr and Mrs Clayton's second child. Mr Clayton was the settlor. The original trustees were Mr Clayton, Kim Thompson (an accountant) and Richard Pryce (a solicitor). The power to appoint and remove trustees rests in the settlor, Mr Clayton. The current trustees of the Trust are Messrs Clayton and Cheshire, the second respondents in this appeal (the Trustees). Mrs Clayton's evidence (which does not appear to be disputed) was that she was responsible for keeping the ledger book of the Trust and communicating with third parties on behalf of the Trust until 2003.

[8] The Trust is a discretionary trust, with the beneficiaries being the settlor, his wife, any former wife and his widow, together with any children of the settlor, grandchildren of the settlor and their spouses.[8] The Trustees are entitled to add "[a]ny other persons, corporations, trusts or other entities" as beneficiaries and to benefit any charitable, educational or religious organisations or purposes. The Trustees have the power to exclude any person as a discretionary beneficiary for such period as they determine.

[9] Both income and capital can be paid out or applied to the "maintenance, education, advancement, well being or benefit in any way" of one or more of the discretionary beneficiaries at the Trustees' discretion.[9] The Trust can (either wholly or partly) also be resettled for the benefit of any of the beneficiaries.[10] Any capital or income remaining at the distribution date[11] is for the benefit of the final beneficiaries, being the children of the settlor.[12]

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8 The beneficiaries also include a trust or superannuation scheme of which any one or more of the beneficiaries are beneficiaries. Adopted children are also explicitly included.

9 However, capital cannot be distributed unless at least one of the trustees is not a discretionary beneficiary or a relative of a discretionary beneficiary.

10 There is also a power to amend or revoke all or any of the trusts for the benefit of any one or more of the beneficiaries.

11 80 years from the Trust's settlement.

12 Or, if they have died leaving issue, that issue.

[10] There was evidence from Mr Cheshire, an accountant who helped Mr Clayton "identify and manage risk",[13] that the primary purpose of the Trust was to keep "assets out of the circle of bank guarantees", which had been required for the financing of various companies in the Claymark Group. There was also evidence to suggest that the secondary purpose of the Trust was to provide a buffer zone for resource consent purposes by acquiring property surrounding the Claymark Sawmill in Katikati.[14]

[11] The accounts for the period between the Trust's inception and 1999 were not in evidence before the Family Court. The accounts for the years 2000 to 2007 and 2009 to 2011 were in evidence, as were the Trust's tax returns for the years 2000 to 2004.[15] No minutes or resolutions of the Trustees of the Trust were produced.

[12] Judge Adams in 2008, when dealing with discovery issues in the Family Court, said that Mr Clayton should identify the assets he owned when the de facto relationship began and prove how and to what extent they can be traced into existing assets. The Judge said that, to the extent Mr Clayton does not do this, assets will be deemed not to have been acquired out of separate property.[16]

Trust assets

[13] The properties owned by the Trust adjacent to the Claymark Sawmill in Katikati are, according to the Trustees, leased to Claymark Ltd. These properties were purchased during the financial year ending 31 March 2001.[17] The Trust also owns all the shares in Kaimai Developments Ltd, which owns an avocado orchard adjacent to the sawmill. The avocado orchard was purchased in 2000 at a time when the Trust held 50 per cent of the shares in Kaimai Developments. Subsequently (but

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13 As noted above at [7], Mr Cheshire is now a trustee of the Trust and one of the second respondent trustees in this appeal.

14 See *MAC v MAC* FAMC Rotorua FAM-2007-063-652, 2 December 2011 (Judge Munro) [*Clayton* (Fam)] at [71]; and *Clayton v Clayton* [2013] NZHC 301, [2013] 3 NZLR 236 (Rodney Hansen J) [*Clayton* (HC)] at [143]. Mr Clayton has significant sawmilling and timber processing interests. The business and other interests are owned and controlled by a number of companies and trusts in New Zealand and the United States. For a more detailed description of the business arrangements, see *Clayton* (Fam), at [6]–[16].

15 There were no accounts for 2008 in evidence.

16 *Clayton v Clayton* FC Rotorua FAM-2007-063-652, 2 July 2008 at [43].

17 According to the Financial Statements for that year, one was purchased on 29 September 2000 and the other on 31 January 2001.

it is unclear when), the Trust acquired the remaining 50 per cent of the shares. The Trust also purchased a Mitsubishi Pajero on 22 July 2000.[18]

[14] Mrs Clayton maintains that the Trust also owned the couple's first home (as a rental) and an apartment in central Auckland. She says that the Trust owned this apartment from 1994 to 2003 in part for personal use. The Trustees say that the courts below were not asked to decide whether the couple's first house was owned by the Trust. Nor have there been any findings on whether there was personal use of the Auckland apartment, which the Trustees say was purchased by the Trust in 2000 as the Claymark group offices in Auckland. Rent was paid to the Trust by Claymark Holdings Ltd and the purchase was funded by bank borrowings.[19]

[15] It appears that the Trust also has over the years invested in other trusts and entities in the Claymark group. For example, in the accounts for the year ending 31 March 2000, investments of $124,595 and $230,361 in Clayton Holdings Ltd and the Vaughan Road Property Trust (VRPT),[20] respectively, are recorded in the Trust's accounts. In the year ending 31 March 2001, there are investments in Clayton Holdings Ltd and VRPT recorded as well as advances and loans to Kaimai Developments Ltd totalling $73,001. At least some of these investments appear to have resulted in interest income being paid to the Trust.[21]

Trust financing

[16] The Trust was initially settled with a sum of $10. The evidence was that "[a]ll assets of the Claymark Trust have been acquired by borrowing, including by way of advance from [Mr Clayton]".[22] From the financial accounts, it appears that

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18 At some stage this appears to have been replaced by a Mercedes ML320.

19 We are unable to resolve the above issues (including how the purchase of the apartment was funded and the date of purchase) but, on the view we take of the matter, this is of no moment.

20 The VRPT is another trust settled by Mr Clayton and the subject of the other judgment this Court released contemporaneously with this judgment: see above n 3.

21 For example, in the year ending 31 March 2000, there is interest income of $11,423 and for the year ending 31 March 2001, there is interest income of $19,449.94.

22 This evidence was from Mr Giesbers, former director of Claymark Ltd.

the borrowings included personal advances (interest free) from Mr Clayton,[23] advances from various companies in the Claymark Group (Clayton Holdings Ltd, Claymark Industries Ltd and Claymark Finance Ltd), and loans from outside financiers, including the Bank of New Zealand. There were also distributions from the VRPT.[24]

[17] The Family Court held that there had been three gifts by Mr Clayton (of $27,000) between 1995 to 1998.[25] On inspection of the accounts, there also appear to be gifts of $27,000 to the Trust (by an unspecified donor) in 2000, 2001, 2002, 2006 and 2007.[26] As it is unlikely there were gifts to the trust from anyone outside the family circle, it is likely that these gifts were also made by Mr Clayton or associated entities.[27]

[18] Mrs Clayton may also have made advances to the Trust. The financial statements for the year ended 31 March 2000, under Term Liabilities, indicate that there are funds owed to "M Clayton". For the year 1999 there was a balance of $86,947. In the year 2000, this was reduced to nil. The reference to M Clayton is immediately below the record of a term liability owed to M A Clayton (Mr Clayton's full name is Mark Anthony Clayton). It may be therefore that M Clayton stood for Melanie Clayton. Counsel were not, however, able to shed any light on this issue.[28]

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23 The accounts show liabilities (both current and non-current) to Mr Clayton totalling $166,047 in year ending 31 March 1999, $158,543 in 2000, $88,021 in 2001, $568,377 in 2002, $288,245 in 2003, $246,132 in 2004, $445,029 in 2005, $363,876 in 2006, $298,588 in 2007, $135,044 in 2009, $60,365 in 2010 and $5,093 in 2011. There were no accounts for 2008 in evidence. However a table of current accounts/borrowings in the evidence appears to suggest that in 2008 the Trust owed $164,000 to Mr Clayton.

24 While Mrs Clayton claims there was a total of $1,621,097 of distributions from the VRPT Trust, the Trustees dispute this figure and say it has not been the subject of findings in the lower courts. We also note there are discrepancies between the VRPT accounts and the Trust's accounts; some of the alleged distributions are not recorded in the VRPT accounts or different sums are recorded from those recorded in the Trust accounts.

25 See *Clayton* (Fam), above n 14, at [69]. The High Court accepted that $81,000 in gifts was made by Mr Clayton: see *Clayton* (HC), above n 14, at [146]. The Court of Appeal, however, seems to have thought that the $81,000 related to distributions from the VRPT Trust: see *Clayton* (CA), above n 1, at [161].

26 There were no gifts recorded in the years 2003–2005.

27 Mr Clayton made reference in his evidence about a gifting programme but it is not clear the extent to which this evidence related to the Trust.

28 On the view we take of the matter, this also is of no moment, however.

Distributions from the Trust

[19] Mrs Clayton benefited from the Trust throughout the marriage by virtue of the use of a vehicle.[29] Since the marriage break up she has been charged for the use of the vehicle.[30]

[20] There was evidence from Mr Cheshire that distributions from the Trust have been made to the couple's children (through automatic payment to Mr Clayton's bank account). As far as we can tell, these distributions are not recorded in the financial statements that are before the Court or in the tax returns, and no minutes or resolutions of the Trustees relating to them were in evidence. Mr Clayton's bank statements for August and September 2006 produced in the Family Court[31] do show deposits of $500 per week from the Trust.[32]

Decisions below

Family Court

[21] Mrs Clayton argued before the Family Court that the Trust is a nuptial settlement in terms of s 182 of the Family Proceedings Act on the basis that it was set up during the marriage and she would have had an expectation of benefit under the Trust had the marriage not been dissolved.[33] This submission was rejected by Judge Munro for two reasons.

[22] The first was that the trust was set up for business purposes "to enable the purchase of properties adjoining the sawmill for strategic purposes, including creating a buffer to reduce difficulties with obtaining resource consents from

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29 Mr Clayton said in evidence that the Mitsubishi Pajero was not bought for Mrs Clayton but we do not understand him to dispute that Mrs Clayton had the use of that vehicle during the marriage. She now has the use of a Mercedes. We are unsure whether this change of vehicle occurred before or after separation.

30 Mr Cheshire's brief states that "Claymark Trust is the owner of the Mercedes motor car driven by Mrs Clayton. For accounting purposes, the costs of the running of the Mercedes are recorded as an advance to her from the trust."

31 These appear to have been the only relevant bank statements that were produced in evidence.

32 In cross-examination, Mr Clayton could not recall the reason why these periodic payments of $500 were made to him from the Trust.

33 The submission is recorded in the Family Court judgment: see *Clayton* (Fam), above n 14, at [71].

neighbours regarding operating hours for the mill".[34] This meant that the "intention of setting up the Trust was not to provide for Mr and Mrs Clayton in the future".[35] In any event, it was unclear whether Mrs Clayton knew at the time that the Trust had been set up.[36]

[23] The second was that, at the time the Trust was set up and throughout the marriage, both Mr and Mrs Clayton were aware of a pre-nuptial agreement specifically excluding Mrs Clayton from claiming a share in Mr Clayton's business interests.[37] This meant that she "could not have, therefore, had a reasonable expectation of a share in the property purchased by the Claymark Trust."[38] It was held that her interest is limited to a share in any debt owing by the Trust to Mr Clayton or associated entities.[39]

High Court

[24] The High Court held that consideration of the expectations of the parties was not confined to the terms of the settlement but included all relevant circumstances, including the knowledge and intentions of the parties.[40] Rodney Hansen J saw no reason to differ from Judge Munro's assessment of the expectations of the parties at the time the trust was set up. In his view, the Trust was undoubtedly formed for business purposes, primarily to keep "assets out of the circle of bank guarantees" but also, as a secondary purpose, to provide "a buffer zone for resource consent purposes".[41]

[25] The Judge considered that the Trust "had all the hallmarks of a conventional family trust" and that there was nothing to suggest it was "perceived as a means by which Mrs Clayton would acquire an interest or expectation in business assets".[42] To the contrary, the ante-nuptial agreement, entered into a relatively short time before

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34 At [71].
35 At [71].
36 At [71].
37 At [71].
38 At [71].
39 At [71].
40 *Clayton* (HC), above n 14, at [142].
41 At [143].
42 At [143].

marriage, excluded Mrs Clayton from any claim to business assets.[43] There was thus no basis for a finding that the dissolution of the marriage affected Mrs Clayton's expectations when the Trust was formed.

Court of Appeal

[26] The Court of Appeal upheld the decisions in the courts below that the Trust was "not a 'nuptial settlement' and that therefore no order for provision should be made or for variation of the Trust under s 182".[44] The Court outlined the following reasons for that decision:

(a) The focus under s 182 is on the expectations of the parties, especially the applicant, at the time of the settlement (relying on this Court's decision in *Ward v Ward*).[45] These expectations are to be ascertained from all relevant evidence, not just the terms of the settlement itself.[46]

(b) The Trust was established for business purposes and not as a means by which Mrs Clayton would acquire an interest or expectation in business assets. "The problem for Mrs Clayton is not the characterisation of the trust, but that there are concurrent findings of fact that Mr and Mrs Clayton did not have the necessary expectations."[47]

(c) That the dissolution of the marriage did not affect Mrs Clayton's expectations.[48]

(d) There was no good basis to depart from the findings in the courts below.[49]

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43 At [143].
44 *Clayton* (CA), above n 1, at [177].
45 *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31 [*Ward* (SC)] at [25]–[27]. We discuss these paragraphs below at [46]–[56].
46 *Clayton* (CA), above n 1, at [177](a).
47 At [177](b).
48 At [177](c).
49 At [177](d). The Court rejected Mrs Clayton's argument that, because the properties bordering the sawmill were not purchased until some years after the Trust was settled, this meant that the parties' expectations were different from those found by the courts below.

Preliminary point

[27] There is a two-stage process under s 182. The first is to determine whether the Trust is a nuptial settlement. The second is to assess whether and, if so, in what manner the Court's discretion under s 182 should be exercised.

[28] The parties were not agreed about the basis of the decisions in the courts below. The submission on behalf of the Trustees is that the courts below had decided the issue by refusing to exercise the s 182 discretion in Mrs Clayton's favour and that this refusal could only be challenged on more limited grounds than under a general appeal.[50] The submission on behalf of Mrs Clayton is that the courts below had wrongly conflated the two-stage process and thus had proceeded on the basis of an error of principle.

[29] The Court of Appeal specifically said that it was upholding the decision of the courts below that the Trust was not a nuptial settlement.[51] It was as a result of it not being a nuptial settlement that the Court of Appeal said that no order could be made under s 182. The Court of Appeal therefore did not consider it was dealing with an appeal relating solely to the refusal to exercise the discretion under s 182. We agree. In the Family Court, the submission made and rejected was that the Trust was a nuptial settlement.[52] The High Court upheld that decision.

[30] The courts below seem at least partially to have used the approach adopted at [25] of *Ward* to decide that the Trust was not a nuptial settlement.[53] In fact, *Ward* was only concerned with the second stage relating to the exercise of the discretion and not with whether the trust in that case was a nuptial settlement.[54] The fact that the courts below used the approach in *Ward* does not, however, mean that they

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50 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32]. In that case this Court said that, in appeals against a decision made in the exercise of a discretion, an appellant must show: "(1) error of law or principle; (2) taking into account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong".

51 *Clayton* (CA), above n 1, at [177].

52 *Clayton* (Fam), above n 14, at [71].

53 See *Ward* (SC), above n 45, at [25]. We discuss that paragraph below at [46]–[56].

54 Leave had been declined on that point: *Ward v Ward* [2009] NZSC 71 [*Ward* (SC Leave)] at [2].

decided the case by refusing to exercise the discretion.[55] Instead, it means, as was submitted on Mrs Clayton's behalf, that the courts below wrongly conflated the two stages of the process under s 182. There was thus an error of law or principle. Given that there was an error of law or principle, we do not need to assess whether the jurisdiction in s 182 is a true discretion or whether there may be the possibility of an appeal on wider grounds.

Nuptial settlement

What is a nuptial settlement?

[31] As noted above, in *Ward* this Court did not deal with the issue of whether there was a nuptial settlement in that case. In the leave judgment, this Court said that it "declined to give leave on the ground of whether what occurred in this case was a settlement within the meaning of s 182 because we are of the view that the decision of the Court of Appeal on this point is undoubtedly correct".[56]

[32] The Court of Appeal in *Ward* emphasised that there "should be a generous approach to the interpretation of the term 'settlement'".[57] The Court said that this was the traditional approach, giving as an example the case of *Blood v Blood* where it was said:[58]

> Those words [nuptial settlement] are extremely wide, and I am anxious that they should not, by any construction the Court may put upon them, be narrowed in any way. To narrow them would be undesirable for this reason: the various circumstances which come before the Court, and for which this section is brought into operation, are so diverse that it is to my mind extremely important that, so far as possible, the Court should have power to deal with all the cases that come before it, and, in dealing with them, to meet

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55 It was suggested on behalf of Mr Clayton that the courts below had not needed to decide the question of whether there was a nuptial settlement because they had decided there was in any event no basis for the exercise of the discretion. We do not accept that characterisation of the decisions. If that had been the Courts' reasoning, one would have expected them to say so explicitly.

56 *Ward* (SC Leave), above n 54, at [2].

57 *Ward v Ward* [2009] NZCA 139, [2009] 3 NZLR 336 [*Ward* (CA)] at [27].

58 *Blood v Blood* [1902] P 78 (Gorell Barnes J) at 82. The Court of Appeal in *Ward* (CA), above n 57, also referred to the comments of Lord Nicholls in *Brooks v Brooks* [1996] 1 AC 375 (HL) at 392: "[t]hese expressions [ante-nuptial and post-nuptial] are apt to embrace all settlements in respect of the particular marriage, whether made before or after the marriage." For a variety of cases showing the wide definition given to the term "settlement", see *Jump v Jump* (1883) 8 PD 159; *Bosworthick v Bosworthick* [1927] P 64 (CA); *Halpern v Halpern* [1951] P 204; *Ulrich v Ulrich* [1968] 1 WLR 180 (CA); and *Smith v Smith* [1945] 1 All ER 584.

> the justice of the case. I, therefore, do not desire to see any narrow interpretation placed upon the words of the section.

[33] The Court of Appeal in *Ward* went on to say that to come within the term "settlement" as used in s 182, any arrangement must be one that "makes some form of continuing provision for both or either of the parties to a marriage[59] in their capacity as spouses, with or without provision for their children".[60] It was also made clear that discretionary family trusts can be settlements for the purposes of s 182.[61] Further, property acquired by a trust after it is settled can also come within the definition of settlement. This is because the settlement is "the trust itself and any trust property (whenever acquired) must be part of the settlement".[62]

[34] We agree with the analysis of the Court of Appeal in *Ward*. We add that we see the requirement that the settlement be for both or either of the parties "in their capacity as spouses" as meaning only that there must be a connection or proximity between the settlement and the marriage.[63] Where there is a family trust (whether discretionary or otherwise) set up during the currency of a marriage with either or both parties to the marriage as beneficiaries, there will almost inevitably be that connection. As Lord Penzance said in *Worsley v Worsley*:[64]

> The Court would have a great difficulty in saying that any deed which is a settlement of property, made after marriage, and on the parties to the marriage, is not a post-nuptial settlement.

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59 When we use the term marriage, it should be read as including civil unions.

60 *Ward* (CA), above n 57, at [27], using the test from *Brooks v Brooks*, above n 58, at 391. The Court of Appeal in *Ward* noted that the property transferred must be impressed with an extant obligation and not be an absolute transfer to one of the spouses. The particular form of the arrangement does not matter, however. The parties to the marriage do not need to be the settlors; the settlor can be a third party: see the comments of Hill J in *Prinsep v Prinsep* [1929] P 225 at 235 where he said "whether a settlement is [a nuptial settlement] does not depend on who is the settlor. In many ante-nuptial settlements, neither the husband nor the wife are themselves the settlors."

61 *Ward* (CA), above n 57, at [28]–[31]. Similar comments were made in *Lort-Williams v Lort-Williams* [1951] P 395 (CA) at 402–403 per Somervell LJ, with Denning LJ concurring at 403.

62 *Ward* (CA), above n 57, at [32]–[33].

63 Adapting the words of the Full High Court in *Kidd v Van Den Brink* HC Auckland CIV 2009-404-4694, 21 December 2009 (Harrison and Winkelmann JJ) [*Kidd* (HC)] at [18]. See *Kidd v Van Den Brink* [2010] NZCA 169 [*Kidd* (CA)] at [8]. See also the comments in *Re Public Trustee (SA)* (1985) 10 Fam LR 610 at 622. It has also been said there will be a nuptial settlement if a particular marriage is a fact a settlor takes into account in framing the settlement: see *Joss v Joss* [1943] P 18 at 20, cited with approval in *In the Marriage of Knight* (1987) 90 FLR 313 at 316. See further Paul Brereton "The High Court and family law: Two recent excursions" (2013) 3 Fam L Rev 63.

64 *Worsley v Worsley* (1869) 1 LR P & M 648 at 651. Lord Penzance's comment was endorsed by Lord Hanworth MR in *Melvill v Melvill* [1930] P 159 (CA) at 171.

[35] An exception may be where the trust is set up by a third party and there are substantial other beneficiaries apart from the parties to the marriage and their children.[65] The other view may be that, as long as the trust has the relevant connection to the marriage and one or both of the parties are beneficiaries, the trust will be a nuptial settlement. But we do not need to decide this point. In this case the trust was set up by Mr Clayton during the marriage and there were no substantial other beneficiaries.

[36] The test may be more difficult to meet where there is a settlement made before marriage and a future spouse is named as a possible beneficiary but, at the time of settlement, there is no particular spouse in contemplation. One view may be that once a marriage has taken place and the spouse identified, then there will be the necessary connection with the marriage.[66] Even if that is not the case, however, it may be that each disposition of property to such a trust after marriage could constitute a post nuptial settlement.[67]

[37] A settlement does not cease to be a nuptial settlement because other parties may benefit from it. Indeed, the fact that the children of a marriage may benefit has been seen as a strong indication of a nuptial trust.[68] It has been held that a settlement does not cease to be nuptial because a spouse by a later marriage might benefit.[69] The same can be said where children of any future marriage could benefit.[70] It has even been held that the fact that a settlement is expressed to terminate on divorce is irrelevant.[71]

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65 See for example *In the Marriage of Knight*, above n 63, at 318.

66 See Nicola Peart "Equity in Family Law" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 1161 at 1193.

67 This was Kiefel J's view in *Kennon v Spry* [2008] HCA 56, (2008) 238 CLR 366 at [228]–[230]. In New Zealand, the Court of Appeal in *Kidd* left this point expressly open: see *Kidd* (CA), above n 63, at [14]–[16].

68 See Greer LJ's comment in *Melvill v Melvill*, above n 64, at 177.

69 *Lort-Williams*, above n 61, at 403. In *Brooks v Brooks*, above n 58, the House of Lords noted in passing that a settlement may be made in respect of a particular marriage even though in certain circumstances the wife or husband by a subsequent marriage might be the person to take, referring to *Lort-Williams* as an illustration of this (at 392).

70 As in *Prinsep v Prinsep*, above n 60. This decision was overturned in relation to the terms of the variation order, not as to whether a nuptial settlement existed; see *Prinsep v Prinsep* [1930] P 35 (CA). See also *Melvill v Melvill*, above n 64.

71 See *Dormer v Ward* [1901] P 21 (CA).

[38] Finally, we comment that the exercise of deciding whether a settlement is a nuptial settlement is, where the settlement is in written form, primarily one of construction of the settlement documentation.[72] This documentation would be construed in accordance with ordinary principles,[73] while remembering that a generous approach to the issue of whether a settlement is a nuptial settlement is required.[74]

Is the Claymark Trust a nuptial settlement?

[39] In this case, the Trust is a conventional discretionary family trust.[75] There is a clear connection between the marriage and the settlement. It was settled during the marriage and just after the birth of the couple's second child. Mr Clayton is a beneficiary of the Trust and the other primary beneficiaries are identified by their relationship to him (including marital).[76] Mrs Clayton, as his wife, and now former wife, is a beneficiary of the trust. The final beneficiaries are Mr Clayton's children. There is power to benefit charities and to add beneficiaries but in context this must be seen as intended to allow flexibility, not to displace the primary focus of the Trust. Those in Mr Clayton's immediate family unit were clearly intended to be the core beneficiaries. Indeed, Mrs Clayton has benefited from the trust during the marriage through the use of the vehicle,[77] although the extent, if at all, she did benefit is not material to the question of whether the Trust is a nuptial settlement.

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72 See for example, *Prinsep v Prinsep*, above n 60, at 236; *Melvill v Melvill*, above n 64, at 173 per Lord Hanworth MR and at 179 per Romer LJ; *Prescott (formerly Fellowes) v Fellowes* [1958] P 260 (CA) at 278 per Hodson LJ; and *N v N* [2005] EWHC 2908 (Fam), [2006] 1 FLR 856 at [33]. See also Anthony Dickey *Family Law* (6th ed, Law Book Company, 2013) at 658.

73 For the latest exposition by this Court of the ordinary principles of interpretation see *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]–[63] per McGrath, Glazebrook and Arnold JJ. If the principles outlined in that case are applied, then the approach of the courts below (*Clayton* (HC), above n 14, at [142]; and *Clayton* (CA), above n 1, at [176]) that all relevant circumstances must be taken into account when deciding whether a settlement is a nuptial settlement may not be correct. All of the circumstances are taken into account only to the extent consistent with ordinary principles of interpretation.

74 See above at [32]. See also the comments of Pearce J in *Parrington v Parrington* [1951] 2 All ER 916 at 919.

75 As Rodney Hansen J noted: see *Clayton* (HC), above n 14, at [143].

76 Given the Trust was settled during marriage it would not, however, matter if the other beneficiaries in the immediate family were identified only by name.

77 See above at [19].

[40] Despite the factors set out above showing that the Trust is a nuptial settlement, it is argued on behalf of the Trustees[78] that the courts below were correct to hold that the Trust was not a nuptial settlement because it was set up for business reasons.[79] We do not accept this submission. For a start, one of the purposes of the Trust was said to be to take assets out of the circle of bank guarantees related to the business.[80] It seems to us that the separation of property from the risks associated with business assets must have the purpose of protecting assets for the family.

[41] More importantly, counsel were unable to point to any cases where the nature of the assets settled was seen as relevant to the question of whether or not the settlement was a nuptial settlement.[81] Indeed, it would make no sense to have such a restriction. If the aim of a settlement is to provide for the parties to the marriage and their children, then it would not be unusual that income earning (including business) assets form at least part of the settlement. In this case, the properties may have been purchased by the Trust to keep them separate from the bank guarantees and for resource consent purposes, but they were nevertheless income producing. Even if that had not been the case, however, the Trust would still have been a nuptial settlement because of the clear connection between the marriage and the settlement.

[42] For all of the above reasons, we hold that the Trust is a nuptial settlement.

Discretion

[43] The next step is to assess whether and, if so, how the discretion under s 182 should have been exercised in this case. We first set out and comment on this Court's approach in *Ward*. We then set out the factors to be considered in the

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78 We understand that Mr Clayton also supports those submissions in his personal capacity.

79 Mrs Clayton submits that the finding of the Family Court on this point (upheld by both the High Court and the Court of Appeal) was wrong. As she did in the Court of Appeal she points out that the Trust had been settled some six years before the acquisition of the properties adjoining the mill. On the view we take of the matter, the motive for setting up the trust and the nature of the assets are of no moment and so it is not necessary for us to address that submission.

80 See above at [10].

81 To the contrary, company pension schemes entered by a spouse have been held to amount to a nuptial settlement (see *Brooks v Brooks*, above n 58) and in *Parrington v Parrington*, above n 74, a business partnership between husband and wife was held to be a nuptial settlement. Interestingly, Pearce J in that case said at 920, "[e]ven if it was predominately a business transaction and related in a lesser degree to the marriage, it would, I think, on the authorities be a post-nuptial settlement". We also note that the subject-matter of the trust in *Ward* was a business asset, shares in the company that owned the family farm: see *Ward* (SC), above n 45, at [5]–[8].

exercise of the discretion and deal with the submission that s 182 should be interpreted in light of the regime relating to trusts in ss 44 and 44C of the Property (Relationships) Act. Next, we assess whether the reasoning in the courts below accords with the proper approach to the section. Finally, we consider whether, and if so how, the discretion should have been exercised in this case.

This Court's decision in Ward

[44] In *Ward*, this Court made the following comments as to the premise underlying s 182 and the courts' role. It said that both ante and post-nuptial settlements are premised on a continuing marriage.[82] If that premise ceases to apply, Parliament recognised that injustices could arise.[83] Section 182 empowers the courts to review the settlement and make orders to remedy the consequences of the failure of the premise on which the settlement was made – that is, continuation of the marriage.[84] One of the purposes of s 182 is to prevent one party benefitting unfairly from the settlement at the expense of the other in the changed circumstances.[85]

[45] The Court referred to numerous English authorities, as well as two New Zealand Court of Appeal decisions, *Coutts v Coutts*[86] and *Preston v Preston.*[87] The Court said that its approach to s 182 was in line with the case law, both from England and New Zealand, over a considerable period.[88] It referred to one of the earliest reported cases in England where Lord Penzance said that the courts would look at the "probable pecuniary position" the parties and their children would have occupied regarding the settlement if the marriage had not failed.[89]

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82 *Ward* (SC), above n 45, at [15].
83 At [15].
84 At [15].
85 At [20].
86 *Coutts v Coutts* [1948] NZLR 591 (CA) (O'Leary CJ, Smith, Callan and Cornish JJ).
87 *Preston v Preston* [1955] NZLR 1251 (CA) (Finlay, Cooke, North and Turner JJ).
88 *Ward* (SC), above n 45, at [24].
89 *March v March* (1867) LR 1 P & D 440 (Prob). Similar comments were made by Gorell Barnes J in *Hartopp v Hartopp* [1899] P 65 at 72 where he said that the section "ought to place the petitioner and the children in a position as nearly as circumstances will permit the same as if the family life had not been broken up". See also Lindley LJ's comments in the Court of Appeal case of *Benyon v Benyon* (1890) 15 PD 54 (CA) at 58 where he said the object of the order is to allow "the parties the same benefits as they practically would have [had] if the conjugal relations had continued".

[46] At [25], the Court went on to say:[90]

> [25] Based on the foregoing discussion we consider the proper way to address whether an order should be made under s 182, 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.

[47] Although [25] is expressed in terms that appear to imply this is a general test applicable in all cases, we are satisfied that the paragraph was in fact intended to describe the application of s 182 to the circumstances in *Ward*. If that were not the case, the paragraph would be inconsistent with the purpose of the section identified by the Court in *Ward*, the caselaw on which the Court was relying, and indeed with s 182 itself.

[48] In addition, some of the language in [25] may be open to differing interpretations. In light of the earlier caselaw on which the Court was relying, the term expectations, as used by the Court at [25] of *Ward*, must be an objective concept, as the use of the term "reasonable expectations" in [25] denotes. Of course the subjective views of the parties (especially if mutual and set out in a memorandum of intention as in *Ward*[91]) may be relevant to the assessment, but it is the circumstances overall that must be assessed.

[49] Secondly, although the expectations of the applicant may be relevant, too much emphasis on this factor can encourage a tendency to look narrowly at the particular financial expectations that an applicant might have from the settlement, rather than making an objective assessment of the circumstances as a whole. After all, the subjective expectations of one party as to possible financial benefit could be manipulated by the actions of the other party or by the settlor to extinguish any subjective expectation of benefit after dissolution of a marriage (or at all).

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90 Ward (SC), above n 45.

91 Ward (SC), above n 45, at [9].

[50] Further, the expectations of an applicant are particularly difficult to assess in the context of a discretionary family trust. There is no guarantee of future benefit from a discretionary trust, even if a person has benefited in the past. In the case of a discretionary family trust, we consider therefore that the situation must be looked at from the perspective of the family unit of which the applicant is part. Looked at from the perspective of a continuing marriage, as it must be,[92] the applicant, as part of the family unit, would have continued to benefit directly or indirectly from the trust. This of course includes any current distributions to the family that the trust provides, as well as possible future distributions, including in case of need.[93] It also includes any other current or future benefits to the family, including the separation of trust assets from personally held assets[94] or keeping assets intact for future generations.

[51] Third, the Court's reference at [25] of *Ward* to the expectations at the time of the settlement must be taken as referring to the expectation of a continuing marriage. This is because the purpose of s 182, as outlined by the Court in *Ward* at [15] of its judgment,[95] is to empower the courts to remedy the consequences of the failure of the premise (a continuing marriage) on which the settlement was made.

[52] The Court did comment in *Ward* that the relevant comparison is between the parties' circumstances at dissolution and their circumstances at the date of settlement.[96] Such a comparison was appropriate in the circumstances in *Ward*. In *Ward* the parties, in their memorandum of intention at the time of settlement, had clearly set out their expectations with regard to the trust and the contemplated arrangements were not unreasonable or unfair. There had been no relevant change in circumstance, apart from the dissolution of the marriage, since the time of settlement. It is unlikely that this will be the situation in the majority of cases and

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92 As this Court recognised in *Ward*, nuptial settlements are premised on the continuation of the marriage: *Ward* (SC), above n 45, at [20].

93 For example distributions to minor children have obvious benefits for the parents, including relieving the parents from expenditure on the children and often incurring lower taxation rates than if the distributions had been made to the parents.

94 In the current case, one of the aims of the Trust was to keep assets out of the "circle of bank guarantees": see above at [10].

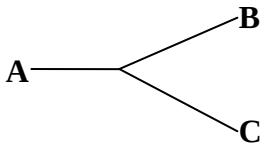
95 See at [44] above.

96 *Ward* (SC), above 45, at [26].

thus the Court's approach should be seen as applicable only to the particular circumstances in Ward.[97]

[53] In terms of the earlier case law, the purpose of the exercise of the discretion is to remedy the consequences of the failure of the premise of a continuing marriage.[98] The comparison is undertaken not at a fixed point but is a general comparison between the position under the settlement had the marriage continued and the position that pertains after the dissolution.[99] This is not backward looking to the time of settlement. It is forward looking, comparing the position under the settlement assuming a continuing marriage against the current position under a dissolved marriage.

[54] To put this diagrammatically:



In the diagram A is the time of settlement, B is the position of the spouse under the settlement with the marriage dissolved and C would have been the position under the settlement assuming a continued marriage. The comparison is not between A and B but, rather, between B and C.

[55] To freeze the position at the time of the settlement does not accord with the statutory language, which directs that the court may take into account the circumstances of the parties and any change in the circumstances of the parties since

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97 The Court also said in *Ward* that the parties should be restored to the position they were in immediately after the settlement was made, not immediately before: *Ward* (SC), above n 45, at [27]. This was in response to the husband's argument that he should be put in the same position as he would have been before he transferred separate property to the wife, which was in turn settled on the trust: *Ward* (SC), above n 45, at [39].

98 See above at [44]–[45]. See also the comments in *Coutts v Coutts*, above n 86,at 605 per O'Leary CJ, citing Lindley LJ's comments in *Benyon v Benyon*, above n 89, at 58. Smith J said, at 612, that "the Court has said that the settlement should be reviewed for the purpose of placing the other party and the children in the same position, as far as possible, as if the family life had not been broken up". Cornish J said at 624 that "The purpose of this English legislation was to redress in favour of one of the former spouses a balance that had been, or would be, disturbed". Callan J did not comment on this point.

99 See above at [44].

the date of the settlement.[100] The language of s 182(3) makes it clear that any change in circumstances since the settlement is generally relevant to the exercise of the discretion.[101]

[56] This makes sense in policy terms. For example, if one of the parties had become ill in the course of the marriage, the s 182 discretion could well be exercised differently than it would have been had both parties remained in perfect health. Further, the parties may not have had children at the time of settlement. The section makes it very clear, however, that a provision directly from the settlement, or any variation of it, can be for the benefit of the children of the marriage.[102] Indeed, children are mentioned in s 182(1) before the parties and the restriction in s 182(6) does not apply if the interest of the children so require. This suggests that the interests of the children (and particularly dependent children) are a primary consideration under the section.

Factors to be considered

[57] Section 182(3) provides that the court, in exercising its discretion, may take into account other relevant factors as well as the circumstances of the parties and any change in circumstances. This Court in *Ward* said that it is neither necessary nor desirable to attempt any comprehensive list of relevant considerations because each case will require individual consideration.[103] There should be no formulaic or presumptive approach. We agree.

[58] Among the relevant factors identified in *Ward* were the terms of the settlement and how the trustees are exercising, or are likely to exercise, their powers in the changed circumstances. The Court said that it could be significant who established the trust and the source and character of the assets which have been

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100 See s 182(3). Contrary to what was said by this Court in *Ward*, we do not see this subsection as supporting the interpretation that the comparison is between the position at the time of settlement and that under the dissolution: *Ward* (SC), above n 45, at [26].

101 The fact that changed circumstances are taken into account in the exercise of the discretion does not, however, necessarily mean that they would have the same weight or relevance to both sides of the comparison: that is, between the position assuming a continuing marriage and the position under the dissolution.

102 Family Proceedings Act, s 182(1).

103 Ward (SC), above n 45, at [26].

vested in the trust.[104] The Court also identified as relevant the interests of any children or other beneficiaries. In our view, for the reasons outlined above, particular attention must be paid to the interests of dependent children.

[59] We would add that it follows from the comparison between B and C above[105] that the manner in which the trustees would have exercised their discretion, assuming a continuing marriage, would also be a relevant factor, as would the wider benefits to the family the trust has provided or might have been expected to provide. The suitability of the particular trust structure in light of the changed circumstances may also be relevant. For example, a trust which runs a family business with both the husband and wife as trustees may not be an appropriate structure where a marriage has been dissolved. Further, while need is not a prerequisite,[106] it can be taken into account in the exercise of the discretion. Another relevant factor would be the length of the marriage.

[60] Ultimately it is the task of the judge faced with an application under s 182 to exercise the discretion in accordance with the terms of s 182 and in light of its purpose, taking into account all relevant circumstances in the particular case. Nuptial settlements are premised on the continuation of the marriage or civil union. The purpose of s 182 is to empower the courts to review a settlement and make orders to remedy the consequences of the failure of the premise on which the settlement was made.[107] Each case will require individual consideration.[108]

Effect of ss 44 and 44C

[61] It was submitted by the Trustees that ss 44 and 44C of the Property (Relationships) Act should be seen as Parliament's chosen remedies for dealing with trusts in the context of relationship breakdowns. Consequently, s 182 should not be

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104 The Court said this was subject to s 182(6): see *Ward* (SC), above n 45, at [26]. See also our comments below at [66].

105 See above at [54].

106 As this Court made clear in *Ward* (SC), above n 45, at [47]–[48]. The Court also, at [50], rejected the Court of Appeal's approach in *X v X* [2008] NZCA 20, [2009] NZLFR 956 on the basis that *X v X* suggested too high a threshold for relief under s 182.

107 It has been suggested that s 182 has no clear purpose or rationale: Nicola Peart "Relationship Property and Trusts: Unfulfilled Expectations" (Paper presented at NZLS and CLE Seminar, August 2010) at 20. We do not agree.

108 See further at [65]–[68] below.

interpreted in a manner that encroaches on the choice made by Parliament when enacting s 44C not to allow orders under that section to affect the capital of trusts set up for legitimate purposes. Resort to the capital of trusts is only where s 44 applies.

[62] This argument must be premised on the assumption that ss 44 and 44C partially implicitly repealed s 182. We do not accept that submission. The legislative history makes it very plain that it was a conscious choice to retain s 182 and its immediate predecessor, despite the existence of the matrimonial (now relationship) property regime and despite the existence of the equivalent of s 44 in both the 1963 and 1976 matrimonial property regimes.[109] It is also clear that there was a conscious decision to retain s 182 when s 44C was introduced, both because s 182 was not amended at the time of that section's introduction but also because s 182 was later amended to include civil unions, with no attempt to limit its scope by any reference to s 44C.[110] The existence of s 182 had clearly not been overlooked.

[63] There is thus no warrant in the legislative history to suggest that the powers in s 182 are to be read down by reference to provisions (ss 44 and 44C) in an entirely separate piece of legislation. Section 182 has different historical origins and a different purpose from the Property (Relationships) Act. It is associated with dissolution of marriages.[111] Further, s 182 deals with nuptial settlements, which by definition, are not the property of the couple. Indeed, the settled property may never have been the property of one of the parties to a marriage. It may have been settled on the parties to a marriage by a third party (for example a parent) out of his or her own assets.

[64] It has been suggested that the policies behind s 182 on the one hand and ss 44 and 44C on the other are inconsistent.[112] We do not accept that this is necessarily the case, given they are dealing with different matters and have different rationale. We agree that the remedies available are different. Section 182 allows the variation of a

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109 See Matrimonial Proceedings Act 1963, s 81; and Matrimonial Property Act 1976, s 44.

110 For further discussion on the legislative history of s 182 and s 44C, see *Ward* (SC), above n 45, at [14]–[19].

111 Nicola Peart "Intervention to Prevent the Abuse of Trust Structures" [2010] NZ Law Rev 567 at 593.

112 See for example, Anthony Grant and Nicola Peart "The Case for the Spouse or Partner" (paper presented to NZLS Trusts Conference, Wellington, 2009) at 136.

nuptial settlement and includes specific powers in relation to children.[113] The remedies are more limited under s 44C and do not include recourse to the capital of a trust. This could be explained by the different context but, even if that is not the case and the policies behind the provisions are inconsistent, this is no reason to apply the policies underlying s 44C to s 182 and thus constrain the powers of the courts under s 182 artificially by reference to the detailed provisions and different purposes of a separate piece of legislation.

[65] For all these reasons s 182 is to be interpreted in light of its own historical context and rationale as was emphasised by this Court in *Ward*. The Court said that the principles of the Property (Relationships) Act do not underpin s 182.[114] This means that there is no entitlement, or presumption, as to a 50/50 or any other fractional division of the trust property.[115] We agree. The characteristics of settlements are so disparate, as are the particular circumstances of the parties, that any type of presumption would be inappropriate.

[66] Having said this, s 182 has to be applied in the twenty-first century.[116] This Court, in *Ward*, said that the source and character of the assets which have been vested in a trust are factors to be taken into account in the exercise of the discretion.[117] In the current social context it is recognised that parties to a marriage contribute in sometimes different but equal ways to the marriage and to the accumulation of assets during the marriage. This is relevant when assessing the source and character of assets. Section 182 also has to be applied to the most common current form of settlement, the discretionary family trust. In such cases, as we set out above, the situation must be considered from the perspective of the family unit, assuming a continuing marriage, and compared to the position under the dissolved marriage.[118]

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113 We note that s 26 of the Property (Relationships) Act contains general powers to make orders for the benefit of children out of relationship property and that the ancillary powers under s 33(3)(m) include making "an order varying the terms of any trust or settlement, other than a trust under will or testamentary disposition". We make no comment, however, on the scope of these provisions.

114 Professor Peart has made a similar point: Nicola Peart, above n 107, at 19–20.

115 Ward (SC), above n 45, at [20].

116 See s 6 of the Interpretation Act 1999, which states "[a]n enactment applies to circumstances as they arise".

117 See above at [58].

118 See above at [53].

[67] Where, as here, a trust is settled during marriage and contains or is sustained by assets accumulated by one or both of the spouses only during the marriage, it may well be that the discretion will result in equal sharing, absent other countervailing circumstances. As noted above, where there are children (and in particular dependent children) their interests will be a primary consideration.[119] Depending on the circumstances their interest may be best served by creating two trusts in a similar manner to what occurred in *Ward*.[120] This has the advantage of retaining the integrity of the trust structure for the benefit of all the beneficiaries and avoids interfering too much with the settlement by requiring assets to be removed from the trust in circumstances where there has been no exercise of discretion by the trustees.[121]

[68] We comment that characterisation of the assets placed in, or sustaining, a trust as having a source outside of the marriage (from a third party or from separate property) may be a relevant factor in the exercise of the discretion but it would not necessarily be decisive or even material in all cases. The assets in any trust (whatever their origin) are part of the nuptial settlement.[122] As noted above, s 182 is not part of the Property (Relationships) Act regime. All relevant circumstances must be taken into account in considering the exercise of the s 182 discretion and it must be exercised in light of the purpose of that section.

Did the courts below apply the proper approach?

[69] The next question is whether the courts below applied the proper approach to the exercise of the discretion. As we noted earlier, the courts below conflated the two stages of the inquiry under s 182 so it is not possible to work out which of the points made relate to the question of whether the trust was a nuptial settlement and which (if any) relate to the discretion. For these purposes, we will assume that the points made in the courts below relate to the exercise of the discretion.

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119 See at [56] above.

120 We are not to be taken as saying a direct provision from the trust to one of the spouses or to their children would never be appropriate. This will depend on the circumstances of the parties and the particular trust.

121 Even if equal sharing is not seen as appropriate, a split of the trust may still be the best way of effecting the transfer of an unequal share because it retains trust integrity.

122 Except, perhaps, if the situation is similar to that discussed above at [36].

[70] The first factor relied on by the Family Court and the High Court was the existence of the pre-nuptial agreement.[123] This provided that Mrs Clayton was to have no share in any of Mr Clayton's businesses and business assets and capped her share of matrimonial assets at $30,000 if separation occurred in the third or subsequent year of marriage.[124] The agreement was set aside by the Family Court as enforcing it would cause serious injustice.[125] That decision was upheld by the High Court[126] and not challenged on appeal to the Court of Appeal.[127]

[71] The courts below would have been in error had they relied on this agreement in refusing to exercise their powers under s 182.[128] Given the ante-nuptial agreement was set aside, s 182(6) can have no application and Mr Clayton did not seek to argue that it did.[129] If the legislative response to relationship property agreements was not engaged because the pre-nuptial agreement was set aside due to serious injustice, then it is hardly appropriate nevertheless to take it into account in the exercise of the discretion under s 182(1).

[72] The courts below may have been led into error on this point through misconstruction of [25] of *Ward*, by treating it as a general test and also by placing too much reliance on subjective expectations. Mrs Clayton would have considered the pre-nuptial agreement binding at the time she entered into it (as no doubt Mr Clayton did). That could well have remained their view throughout the marriage. If the matter is looked at objectively, however, the agreement was unenforceable and therefore cannot have had any effect on Mrs Clayton's position, whether the marriage had continued or not. In any event, the pre-nuptial agreement was primarily concerned with what would occur in the event of a breakdown of the marriage. An agreement that relates primarily to what would occur on the

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123 See *Clayton* (Fam), above n 14, at [71]; and *Clayton* (HC), above n 14, at [143].

124 Business assets were not defined in the agreement.

125 *Clayton* (Fam), above n 14, at [35].

126 *Clayton* (HC), above n 14, at [14].

127 See *Clayton* (CA), above n 1, at [4] where it was recorded that there was agreement that the ante-nuptial agreement should remain set aside.

128 The Court of Appeal did not specifically rely on the pre-nuptial agreement when dismissing the appeal as regards to s 182, but, in upholding the decision of the courts below, it did not suggest there had been error in the lower courts relying on that factor.

129 On s 182(6), we agree with the Chief Justice's judgment, at [98].

breakdown of a marriage cannot be relevant to the consideration of the position assuming a continuing marriage.[130]

[73] The Family Court in this case also appears to have placed some significance on the fact that Mrs Clayton may not have known that the Trust had been settled.[131] We note that she must, however, have known about it soon afterwards as she was involved with the administration of the trust.[132] Be that as it may, the Family Court's reliance on this factor shows an erroneous concentration on Mrs Clayton's subjective views and, what is more, her views at the time of settlement, rather than considering the difference in her position assuming a continuing marriage and her position under the Trust in the current situation now the marriage is dissolved.[133]

[74] The second reason given by the courts below was that the Trust was set up for business purposes.[134] The Trust was, however, a nuptial settlement and all of its assets were part of that settlement, whether business assets or not. The fact that assets of a trust are business assets does not, on its own, provide a reason for not exercising the discretion.

Should the discretion have been exercised?

[75] The first task is to assess the position Mrs Clayton is likely to have been with regard to the Trust, assuming continuation of the marriage. It is reasonable to assume that the direct benefits to her from the Trust would be the continued use (without cost to her) of the vehicle and any substitute vehicle, as well as the possibility of the Trustees exercising their discretion to make a distribution in her favour in the future. Even if Mrs Clayton was unlikely to receive distributions from the Trust (other than the vehicle) in the near future, this is not determinative. The wider benefits to her of the Trust must be considered.

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130 See above at [44]. We also note *Dormer v Ward*, above n 71.

131 *Clayton* (Fam), above n 14, at [71].

132 See above at [7].

133 As noted above, the comparison made in *Ward* between the position at settlement and the position at dissolution is not of general application, even if though was appropriate in *Ward*: see above at [52]–[53].

134 *Clayton* (Fam), above n 14, at [71]; *Clayton* (HC), above n 14, at [143]; *Clayton* (CA), above n 1, at [177](b).

[76] As a member of the family unit, Mrs Clayton would have continued to enjoy the benefits the Trust conferred on the family. This would include the availability of the assets of the Trust if needed for family purposes. It would also include any distributions that may be made to other members of the family and in particular to the children, which would indirectly benefit Mr and Mrs Clayton by reducing their personal expenditure on their daughters. Also to be taken into account are the more general benefits to the family that the Trust provides in protecting assets and isolating them from the business borrowings and in financing the business Mr Clayton would continue to use (assuming a continuing marriage) to provide for the family, including Mrs Clayton. Further, Mrs Clayton, as well as Mr Clayton, worked in the business in the early years of the marriage.[135] In addition, Mrs Clayton, as the main childcare provider, supported Mr Clayton in building the business.[136]

[77] This is to be compared to the position under the dissolution of the marriage. Mr Clayton is the settlor of the Trust with the power to remove the Trustees. The other trustee was appointed by him and is one of his close business advisors. While Mrs Clayton remains a discretionary beneficiary of the Trust as a former wife of Mr Clayton, it seems unlikely that in the future she will enjoy distributions as a discretionary beneficiary. Her changed status is evidenced by the fact that, although a vehicle is still being supplied to her by the Trust, she is being charged for its use.[137] Further, Mrs Clayton is no longer part of Mr Clayton's family unit (although of course the children of the marriage are) and thus does not enjoy the general benefits to the family and the business that the Trust provides.

[78] There is thus clearly a difference between Mrs Clayton's likely position as regards the Trust assuming a continuing marriage and that pertaining in the current situation where the marriage is dissolved. There is therefore a clear basis for

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135 From the 1990s to 2003. In the Family Court, Judge Munro said that Mrs Clayton "played a significant role in the office work" and "contributed not just by working in the business, but also by foregoing a proper income for that work": *Clayton* (Fam), above n 14, at [62].

136 At [63], Judge Munro said "Mrs Clayton has undertaken the major part of the childcare during the marriage. She has taken care of the home and from time to time entertained business associates … I find that she has provided support for him and been prepared to forego a higher standard of living … in order to support the business."

137 As noted above at [19], these expenses are treated as being of an advance by the Trust.

exercising the discretion. The next question is how this should be exercised in the circumstances of this case.

[79] The Trust is the paradigm version of the discretionary family trust referred to above.[138] It was settled during the marriage by Mr Clayton for the Clayton family unit. Its assets were acquired through money, both from independent financiers and from Mr Clayton and associated entities, borrowed during the course of the marriage.[139] There had been gifts of at least $81,000 to the Trust from Mr Clayton.[140] The Trust also received distributions from the VRPT.[141] Both the VRPT and the Trust were part of the web of companies and trusts through which the Claymark business was conducted. There seems to have been borrowing and lending at various times by the Trust to and from various trusts and companies in the Claymark business structure.

[80] It is argued on behalf of the Trustees that the discretion should not be exercised in favour of Mrs Clayton because of the finding in the Family Court, upheld by the High Court, that no relationship property was disposed of to the Trust.[142] They say that the Court of Appeal was wrong when it said that the loans by Mr Clayton to the Trust probably came from relationship property.[143]

[81] We accept that it may be relevant to the exercise of the discretion under s 182 that the assets in a trust have been sourced from separate property. In this case, however, there has been no attempt to trace[144] any of the assets in the Trust to the agreed figure of $500,000 held to be referable to the separate property of Mr Clayton prior to the relationship beginning.[145] The Family Court finding that no relationship

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138 See above at [39].

139 See above at [16]–[18].

140 See above at [17].

141 See above at [15].

142 *Clayton* (Fam), above n 14, at [70]; and *Clayton* (HC), above n 14, at [149].

143 The Court of Appeal said that they remained as assets in Mr Clayton's hands and divisible as relationship property and thus no order for compensation was necessary under s 44C: see *Clayton* (CA), above n 1, at [163].

144 Despite Judge Adam's judgment summarised above at [12].

145 It was argued on behalf of Mr Clayton that it is only the increase in value of the Claymark business, notionally severed from the underlying property, that is relationship property and that the underlying property is, and at all times was, the separate property of Mr Clayton. To the extent that this submission rests on that argument, it is rejected. Where the increase in value of an asset is relationship property, there is an interest in the underlying asset to the extent of the increase.

property was disposed of to the Trust is in any event puzzling. The advances made by Mr Clayton to the Trust were held by the Family Court to be divisible equally between Mr and Mrs Clayton, presumably on the basis that the loans were relationship property.[146] There had also been gifts during the marriage of at least $81,000 made to the Trust from Mr Clayton.[147]

[82] In saying that no relationship property was disposed of to the Trust, the Family Court must have meant that there had been no such dispositions other than the advances and the gifts. Those advances and the gifts made to the Trust by Mr Clayton helped the Trust to acquire and sustain its assets (and without compensation being received for the use of those funds through interest).[148]

[83] We therefore do not accept the Trustees' submission. In this case, the Trust was set up by Mr Clayton and all the assets of the Trust were acquired during the marriage.[149] Had the matter not settled, we would have made orders similar to those in *Ward* to split the Trust equally into two separate trusts.[150]

[84] For completeness, we deal with the Trustees' submission that, where a party's expectation of financial provision has been met by other means (in this case the division of relationship property under which Mrs Clayton will receive a share of property valued at $6.995 million at least), then there should be no provision from or variation of a trust under s 182. We do not accept that submission. As stated above, we consider the concentration on expectations (and particularly expectations assuming a separation) to be misplaced. Further, need is not a prerequisite for the Court's jurisdiction under s 182.[151] In any event, the discretion under s 182 is a separate exercise from the division of property under the Property (Relationships) Act.

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146 *Clayton* (Fam), above 14, at [71].

147 See above at [17].

148 As to the distributions from the VRPT, as noted in *Clayton* (SC VRPT), above n 3, at [86]–[90], there had already been a $500,000 allowance for separate property.

149 In any event, as we have noted above at [68], the status of assets as relationship property or separate property may be influential but is not decisive.

150 There was no suggestion that the position of Mr and Mrs Clayton's daughters required any special consideration. This is understandable given their current ages. Their position would thus have been adequately protected with the split of the Trust into two.

151 The presence of need can of course nevertheless be relevant to the exercise as the discretion, see above at [59].

Summary

Nuptial trust

[85] When faced with an application under s 182 relating to a settlement (usually a trust in modern times), the first task is to decide whether the settlement is a nuptial settlement. A generous approach should be taken to that question.[152]

[86] To come within the term "nuptial settlement", as used in s 182, the arrangement must make some form of continuous provision for either or both of the parties to a marriage or civil union in their capacity as spouses. This means that there must be a connection or proximity between the settlement and the marriage or civil union.[153]

[87] 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.[154]

[88] The exercise of deciding whether a settlement is a nuptial settlement is primarily one of construction of the settlement documentation, where there is written documentation. This documentation should be construed in accordance with ordinary principles, while remembering that a generous approach to the issue of whether a settlement is a nuptial settlement is required.[155]

Discretion

[89] Apart from the fact of the dissolution of the marriage or civil union, there is no pre-requisite to the exercise of the discretion under s 182. In particular, an applicant does not need to show need.[156]

[90] The discretion should be exercised[157] in accordance with the terms of s 182 and in light of its purpose, taking into account all relevant circumstances. Nuptial

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152 See above at [32].
153 See above at [33]–[37] for a more detailed discussion of this requirement and its application to discretionary trusts.
154 See above at [40]–[41].
155 See above at [38].
156 See above at [59].

settlements are premised on the continuation of the marriage or civil union. The purpose of s 182 is to empower the courts to review a settlement to remedy the consequences of the failure of the premise on which the settlement was made. Each case will require individual consideration.[158]

Other issues

[91] The second issue in this appeal was whether the Court of Appeal was correct not to make an order under s 44C of the Property (Relationships) Act. Given our decision on s 182, it is not necessary to deal with that submission.[159]

[92] Mrs Clayton also asked this Court to deal with the valuation of the advances made to the Trust by Mr Clayton. Had there not been a settlement between the parties, we would have remitted this issue to the High Court for determination.

Result

[93] The parties have settled the proceedings. As the appeal was fully argued and the issues involved are of wider public interest, we consider it appropriate to issue a judgment.[160] The parties accepted that a judgment should be issued.

[94] Mrs Clayton's appeal relating to the Claymark Trust and s 182 is allowed. As the matter has settled we, however, make no orders with regard to that trust.

[95] There is no order for costs, given that the parties have settled in a manner that is intended to be in full and final settlement of the dispute.

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157 Subject to s 182(6).

158 For a more detailed discussion, see in particular at [44], [54]–[60] and [64]–[68] above.

159 This also means that there is no need to deal with the submissions that the VRPT distributions to the Trust are relationship property.

160 *Osborne v Auckland City Council* [2014] NZSC 67, [2014] 1 NZLR 766, at [39]–[44].

ELIAS CJ

[96] When a marriage is dissolved, the Family Court has jurisdiction under s 182 of the Family Proceedings Act 1980 to "inquire into the existence of … any ante-nuptial or post-nuptial settlement made on the parties" and to make such orders as the Court thinks fit "with reference to the application of the whole or any part of any property settled or the variation of the terms of any such … settlement, either for the benefit of the children of the marriage … or of the parties to the marriage … or either of them".

[97] The question on the appeal is whether the Court of Appeal was correct in its interpretation and application of s 182 when finding that the Claymark Trust, in which the husband and wife are beneficiaries, is not a nuptial trust. For the reasons to be given, I am of the view that the courts below failed properly to address the question whether the Trust was a nuptial settlement. The Court of Appeal held that Mrs Clayton's case failed, not because of "characterisation of the trust", but because "there are concurrent findings of fact [in the Family Court and High Court] that Mr and Mrs Clayton did not have the necessary expectations".[161] Contrary to this view, I consider that whether the Trust was properly characterised as a nuptial settlement or not was the critical question the Court of Appeal had to answer. If a nuptial settlement, s 182 provided jurisdiction to make orders adjusting the Trust on dissolution of marriage if the Court thought fit in all the circumstances.

[98] Whether the Trust was a nuptial settlement turned on objective assessment of its effect and purpose. The courts below in my view were in error in treating the subjective expectations of Mr and Mrs Clayton as to benefit and the "business purposes" of the Trust as the controlling consideration in making that assessment, in what I consider to be misapplication of the decision of this Court in *Ward v Ward*.[162] In addition, I am of the view that the courts below were wrong to rely on the parties' ante-nuptial agreement for division of relationship property under Part 6 of the

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[161] *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 (Ellen France, Randerson and White JJ) at [177](b).

[162] *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31.

Property (Relationships) Act 1976 (an agreement set aside in the Family Court)[163] as evidence bearing on whether the Claymark Trust was a nuptial settlement for the purposes of the jurisdiction under s 182. The two regimes – of relationship property and s 182 adjustment of nuptial settlement – are distinct. Unless a trust is expressed to be part of a relationship property settlement or is incorporated into a relationship property agreement by reference, in the manner considered in *Ward v Ward* to be necessary to raise the protection of relationship property agreements under s 182(6),[164] I consider that the existence of a relationship property agreement limiting the wife's share of relationship property does not impact upon whether a settlement is a nuptial settlement.

[99] The determination in the lower courts that the Trust was not a nuptial settlement meant that the question of appropriate orders was not considered. That, together with the fact that the matter has settled, makes it inappropriate to express any concluded view of the orders that might have been made here in exercise of the jurisdiction to adjust the Trust under s 182. I refer in what follows to the wide range of considerations indicated by the terms and purpose of the legislation. It is necessary to do so because it seems that the emphasis placed on the expectations of the parties at the time of settlement by this Court in *Ward v Ward*, although understandable in the context of that case, is being treated as a general approach (a mistake contributed to by the generality of expression in *Ward* itself). As the authorities described below at [112] indicate, the matter is "at large" once a nuptial settlement is defeated by dissolution of the marriage on which it is based. In a particular case, the expectations of the parties may potentially be relevant to exercise of the jurisdiction. *Ward v Ward* illustrates this. But such expectations could not be decisive or even always material without undermining the breadth of the statutory jurisdiction to make the orders the court thinks fit in the altered circumstances of the failure of the marriage which prompted the settlement.

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163 *MAC v MAC* FC Rotorua FAM-2007-063-652, 2 December 2011 (Judge Munro) at [35]. The setting aside of this agreement was upheld by the High Court: *Clayton v Clayton* [2013] NZHC 301, [2013] 3 NZLR 236 (Rodney Hansen J) at [14].

164 At [34]–[35]. Two "good reasons" for insisting on this degree of formality were identified: if the settlement trust were too easily regarded as part of the relationship property agreement, "the remedial scope of s 182(1) would be significantly narrowed"; and there is no requirement of independent legal advice in relation to trusts, as there is under Part 6 of the Property (Relationships) Act 1972.

History of the appeal

[100] The Claymark Trust was settled by Mark Clayton, the husband, on 10 May 1994. That was five years after the marriage of Mark and Melanie Clayton and soon after the birth of their second child. Mr Clayton, his accountant, and his lawyer were the original trustees and the Trust deed provides Mr Clayton as settlor with the power to appoint and remove trustees. The present trustees are Mr Clayton and Mr Cheshire, Mr Clayton's financial adviser. The Trust is a discretionary one to pay income and capital to the beneficiaries. It determines 80 years from the date of settlement but can be resettled earlier for the benefit of any of the beneficiaries. The discretionary beneficiaries are Mr Clayton, his wife, any former wife or widow, Mr Clayton's children (including any adopted or stepchildren) and grandchildren, and any spouse of a child or grandchild. The trustees have power to add as beneficiaries any person, trust, superannuation scheme of a beneficiary, or corporation, to exclude any beneficiary for such period as they may decide, and to pay trust funds for charitable purposes. The final beneficiaries are Mr Clayton's children.

[101] The Trust was initially set up with nominal capital and its assets have been acquired principally through borrowings. The principal assets of the Trust consist of properties at Katikati (leased to the sawmill owned by a company controlled by Mr Clayton), shares in Kaimai Developments Ltd (another company controlled by Mr Clayton), and advances to further entities controlled by Mr Clayton. Its net assets position in the accounts at 31 March 2011, the last year for which accounts are available, was $1,342,307.

[102] In the Family Court, Judge Munro held that there was no evidence that the funds advanced from time to time by Mr Clayton to the Trust were relationship property beyond a debt owed by the Trust to Mr Clayton.[165] In respect of gifts amounting to some $81,000 made to the Trust by Mr Clayton, the Judge found that there was no intention to defeat Mrs Clayton's relationship property interests. In that connection, the Judge noted that Mrs Clayton was a discretionary beneficiary under the Trust. Because there was no intention to defeat Mrs Clayton's interests, there

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[165] *MAC v MAC* FC Rotorua FAM-2007-063-652, 2 December 2011 at [70]–[71].

was no question of the application of s 44 of the Property (Relationships) Act 1972 (the trust-breaking provision under the Act).[166]

[103] The question remained whether the Trust, although outside the scheme of the Property (Relationships) Act, was a post-nuptial settlement for the purposes of the jurisdiction under s 182 of the Family Proceedings Act. Judge Munro concluded that the Claymark Trust was not a "post-nuptial settlement made on the parties" under s 182.[167] Her reasons turned on the "business purposes" for which she considered the Trust to have been set up and the existence at the time of a pre-nuptial settlement which meant that Mrs Clayton had no "reasonable expectation" of a share in the property owned by Claymark Trust. The Judge considered that the "business purposes" for which the Trust was set up was to own land associated with Mr Clayton's sawmill (although in fact the land was not acquired until some years after the Trust was established). The pre-nuptial settlement was later set aside by the Family Court following breakdown of the marriage.

[104] In full, the reasons given by the Judge for the conclusion that the Trust did not constitute a nuptial settlement were:

> [71] I am invited by Mrs Clayton to find that this is a nuptial settlement in terms of s 182 Family Proceedings Act on the basis that the trust was set up during the marriage and that she would have had an expectation of benefit under this trust had the marriage not been dissolved. Reliance is placed on the case of *Kidd v Van den Brink* [2010] NZCA 169 for this proposition. There is a difficulty, however, in that it is clear that this trust was set up for business purposes and particularly, according to the evidence, to enable the purchase of properties adjoining the Katikati mill for strategic purposes, including creating a buffer to reduce difficulties with obtaining resource consents from neighbours regarding operating hours for the mill. The evidence was that one of these neighbours was reluctant to sell to Mr Clayton and so the Claymark Trust was set up to distance Mr Clayton from the proposed transaction. It is unclear whether Mrs Clayton was aware of the formation of the Trust at the time. The intention of setting up the Claymark Trust was not to provide for Mr and Mrs Clayton in the future. Indeed, at the time the trust was set up and throughout the marriage, both Mr and Mrs Clayton were well aware that there was a prenuptial agreement in place which specifically excluded Mrs Clayton from a share in any of Mr Clayton's business interests. She could not have, therefore, had a reasonable expectation of a share in the property purchased by the Claymark Trust. For these reasons, I find that Mrs Clayton's claim in respect of the Claymark Trust is limited to her share in any debt owing by the Claymark

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166 At [70].
167 At [71].

> Trust to Mr Clayton or to any entities which are found in this judgment to comprise property in the hands of Mr Clayton.

[105] On appeal to the High Court, it was argued by counsel for Mrs Clayton that Judge Munro had been wrong to look at the business character of the assets of the Trust, rather than the purpose of the Trust itself.[168] It was submitted that it had also been an error for the Judge to place emphasis on Mrs Clayton's knowledge of the existence of the Trust at the time it was set up instead of the objective expectations of the beneficiaries.[169] Rodney Hansen J however considered that the discussion in this Court's decision in *Ward v Ward*[170] made it clear that "all aspects of the expectations of the parties at the time of settlement must be considered".[171] Such expectations were, he thought, not limited to those that appeared from the terms of the settlement, but included "[a]ll relevant circumstances, including the knowledge and intentions of the parties".[172] On that basis, the Judge could "see no reason to differ from the Judge's assessment of the expectations of the parties at the time the Trust was set up":[173]

> It was undoubtedly formed for business purposes, the primary objective at the time, as Mr Cheshire [Mr Clayton's adviser and a trustee] put it, being to keep "assets out of the circle of bank guarantees". It achieved the secondary purpose of providing a buffer zone for resource consent purposes. It had all the hallmarks of a conventional family trust. There is nothing to indicate that it was perceived as a means by which Mrs Clayton would acquire an interest or expectation in business assets. On the contrary, as the Judge pointed out, the ante-nuptial agreement, entered into a relatively short time before, excluded her from any claim to business assets. There is no basis for a finding that the dissolution of the marriage affected Mrs Clayton's expectations when the Trust was formed.

[106] The Court of Appeal dismissed an appeal by Mrs Clayton against the determination on the application of s 182.[174] The Court considered that a successful claim under s 182 required that the "agreement" or "settlement" relating to the

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168 *Clayton v Clayton* [2013] NZHC 301, [2013] 3 NZLR 236 at [140].

169 At [141].

170 *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31.

171 At [142].

172 At [142].

173 At [143]. It is to be noted that in this extract Rodney Hansen J corrected the view taken erroneously in the Family Court that the principal purpose in setting up the Trust was to acquire land as a buffer around the Katikati mill (that land was not acquired until some years after the settlement): *MAC v MAC* FC Rotorua FAM-2007-063-652, 2 December 2011 at [71].

174 *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293.

property "must be shown to exist between the former spouses".[175] It was not persuaded that the Family Court and High Court had erred in deciding that the Trust was not a "nuptial settlement". The Court felt able to state its reasons "shortly":[176]

> (a) As the Supreme Court held in *Ward v Ward*, the focus under s 182 is on the expectations of the parties, especially the applicant, at the time of the settlement. Those expectations are to be ascertained from all relevant evidence, not just the terms of the settlement itself.
>
> (b) Here both Courts below found that the expectations of Mr and Mrs Clayton when the Trust was established were that it was formed for business purposes and not as a means by which Mrs Clayton would acquire an interest or expectation in business assets. The problem for Mrs Clayton is not the characterisation of the trust, but that there are concurrent findings of fact that Mr and Mrs Clayton did not have the necessary expectations.
>
> (c) Both Courts below also held that there was no basis for finding that the dissolution of the marriage affected Mrs Clayton's expectations.
>
> (d) We were not persuaded by [counsel for Mrs Clayton] that there was any good basis for us to depart from the findings in the Courts below on this issue. In particular, the fact that the properties bordering the sawmill were not purchased until some years after the Trust was settled does not mean that the parties' expectations were otherwise than as found by the Courts below.

[107] Mrs Clayton appeals with leave to this Court.[177]

The s 182 jurisdiction

[108] The history of s 182 is referred to in *Ward v Ward* at [14]. Nuptial settlements (settlements typically made in consideration of marriage and to benefit either or both parties to the marriage and, often, their children and grandchildren) have been able to be adjusted in New Zealand on dissolution of marriage by

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175 At [176].
176 At [177] (citations omitted).
177 *Clayton v Clayton* [2015] NZSC 84.

statutory jurisdiction conferred on the courts since 1867.[178] The New Zealand legislation was itself patterned on earlier English statutory powers of adjustment if the marriage which occasioned the settlement came to an end.[179]

[109] The current New Zealand jurisdiction is contained in s 182 of the Family Proceedings Act:

> **182 Court may make orders as to settled property, etc**
>
> (1) On, or within a reasonable time after, the making of an order under Part 4 of this Act or a final decree under Part 2 or Part 4 of the Matrimonial Proceedings Act 1963,[180] a Family Court may inquire into the existence of any agreement between the parties to the marriage or civil union for the payment of maintenance or relating to the property of the parties or either of them, or any ante-nuptial or post-nuptial settlement made on the parties, and may make such orders with reference to the application of the whole or any part of any property settled or the variation of the terms of any such agreement or settlement, either for the benefit of the children of the marriage or civil union or of the parties to the marriage or civil union or either of them, as the Court thinks fit.
>
> (2) Where an order under Part 4 of this Act, or a final decree under Part 2 or Part 4 of the Matrimonial Proceedings Act 1963, has been made and the parties have entered into an agreement for the payment of maintenance, a Family Court may at any time, on the application of either party or of the personal representative of the party liable for the payments under the agreement, cancel or vary the agreement or remit any arrears due under the agreement.
>
> (3) In the exercise of its discretion under this section, the Court may take into account the circumstances of the parties and any change in those circumstances since the date of the agreement or settlement and any other matters which the Court considers relevant.
>
> (4) The Court may exercise the powers conferred by this section, notwithstanding that there are no children of the marriage or civil union.
>
> (5) An order made under this section may from time to time be reviewed by the Court on the application of either party to the marriage or civil union or of either party's personal representative.
>
> (6) Notwithstanding subsections (1) to (5) of this section, the Court shall not exercise its powers under this section so as to defeat or vary any agreement, entered into under Part 6 of the Property (Relationships) Act 1976, between the parties to the marriage or civil union unless it

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178 Divorce and Matrimonial Causes Act 1867, s 37.

179 Matrimonial Causes Act 1859 (UK) 22 & 23 Vict c 61, s 45.

180 The Matrimonial Proceedings Act 1963 was repealed by virtue of sch 2 of the Family Proceedings Act 1980.

> is of the opinion that the interests of any child of the marriage or civil union so require.

[110] The terms "ante-nuptial or post-nuptial settlement" apply to all settlements made "on the parties [to the marriage]", whether before or after the marriage is entered into.[181] These are not technical terms. Nor are they viewed narrowly.[182] Discretionary family trusts may be nuptial settlements within the meaning of s 182, as is illustrated by *Ward v Ward* (where the payment of capital and income under the trust to any beneficiary was in the discretion of the trustees). Any settlement of property on the parties to a marriage (with or without explicit provision for benefit to the children of the marriage) may properly be regarded as a settlement which, on dissolution of the marriage, gives rise to the jurisdiction under s 182.

[111] There is no inconsistency between the limited power under s 44C of the Property (Relationships) Act to award compensation out of trust income only and the very wide powers given under s 182(1) in respect of nuptial settlements, as *Ward v Ward* indicates.[183] Section 44C applies where a trust, although not set up to defeat the relationship property regime, is settled with relationship property and has the effect of defeating the equal sharing regime. In those circumstances, s 44C permits compensation to be paid, but only out of the income of the trust and not its capital. The jurisdiction under s 182 in relation to nuptial settlements is quite different. It arises when the premise on which the settlement was made – the marriage – has gone. The jurisdiction to review the settlement in the light of that fundamental change is conferred to avoid the injustice entailed in the removal of the justification for the settlement. It is not a mechanism for sharing property according to the principles in the Property (Relationships) Act, as was made clear in *Ward v Ward*.[184] And the orders available to the Court in respect of a nuptial settlement once the marriage is dissolved are accordingly not limited by the policies which, under the Property (Relationships) Act, protect the assets of trusts not set up with the intention of defeating the relationship property regime, by limiting compensation for settlement of relationship property on the trust to compensation out of trust income.

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181 *Brooks v Brooks* [1996] 1 AC 375 (HL) at 392 per Lord Nicholls.
182 *Blood v Blood* [1902] P 78 at 82.
183 *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31 at [19].
184 At [30].

[112] In a 1948 case, *Coutts v Coutts*, the Court of Appeal was divided as to whether the s 182 jurisdiction (then s 37 of the Divorce and Matrimonial Causes Act 1928) was premised on some "injustice".[185] But by 1955, after considering later English decisions the Court of Appeal held, in *Preston v Preston*, that the jurisdiction in respect of a nuptial settlement arose simply on divorce.[186] At that stage, the matter was entirely "at large":[187]

> … the whole of the relevant circumstances, as they exist at the time of the hearing, are taken into account. In particular, the Court will have regard to any changed circumstances of either party and their relative financial positions.

In *Ward v Ward*, this statement from *Preston* was cited with approval by the Court.[188]

The Claymark Trust is a nuptial settlement

[113] In the emphasis on the "expectations" of the husband and wife (and particularly the applicant wife) when deciding whether the Claymark Trust was a nuptial settlement, the Court of Appeal and the High Court relied in particular on the approach taken in application of s 182 in *Ward v Ward* by this Court. I consider that this reliance was misconceived. *Ward v Ward* was concerned with the orders appropriately made in respect of what was undoubtedly a post-nuptial settlement under s 182.[189] In that context, and given the express statement of what the parties intended in the settlement (especially the indication of intended priority for and equality of treatment of the husband and wife), the intentions of the parties were part of the circumstances to be weighed in considering the appropriate order. Here, however, expectations beyond the marriage implicit in the nuptial settlement itself (the basis for the jurisdiction) were not in point on the prior question whether a settlement is a nuptial settlement. *Ward v Ward* does not suggest otherwise.

[114] It may be accepted that not every trust in which discretionary beneficiaries include the parties to a marriage may amount to a nuptial settlement for the purposes

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185 Compare *Coutts v Coutts* [1948] NZLR 591 (CA) at 607 per O'Leary CJ, at 610–611 per Smith J, at 619–621 per Callan J and at 625 per Cornish J.
186 *Preston v Preston* [1955] NZLR 1251 (CA) at 1259.
187 At 1259.
188 *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31 at [23].
189 At [28].

of s 182. The settlement must be one it is possible to characterise as one "made on the parties" to a marriage or on either of them by reference to the marriage. Residuary or subsidiary interest may be insufficient if the focus of the settlement is not with the parties to the marriage. In cases where the husband and wife are simply within a wide class of possible beneficiaries from whom the trustees can select, it may be that the settlement is not referable to their marriage and is not properly to be treated as a nuptial settlement on them as parties to the marriage. That is not, however, the present case.

[115] Here, the settlement was made by the husband five years after the marriage and shortly after the birth of the second child of the marriage. The principal objects of the Claymark Trust were the husband and his wife and children. While one of the purposes of the husband in setting up the Trust may well have been, as the High Court Judge accepted, to protect assets from the guarantees given in respect of the husband's businesses, such protection was also for the benefit of the immediate family. It does not detract from the character of the Trust as a nuptial settlement, referable to the marriage then subsisting and set up for the benefit of the parties to the marriage and the children.

[116] The essential character and focus of the Trust is not affected by the fact that it provides also for the benefit of subsequent spouses of the husband and his children, including those not of the marriage then subsisting, and that it looked to the appointment of charities and corporate entities as potential beneficiaries in the future.[190] These are not uncommon provisions in discretionary trusts, provided to meet new circumstances and provide flexibility. They do not affect the principal purpose of benefiting the immediate family members, identified by reference to marriage or descent from Mr Clayton. Nor does the fact that the assets held by the Trust were assets used in the husband's business detract from the nature of the Trust itself, which was for the benefit of the family. Such business assets are not uncommonly settled on trusts, as is illustrated by *Ward v Ward*, where the trust assets

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[190] Benefit to a future spouse did not affect the character of a settlement as nuptial in *Lort-Williams v Lort-Williams* [1951] P 395 (CA), as was noted without disagreement in *Brooks v Brooks* [1996] 1 AC 375 (HL) at 392. The fact that children of a future marriage might be beneficiaries did not affect the nuptial nature of the settlement in *Melvill v Melvill* [1930] P 159 (CA).

included shares in the company that owned the farming business operated by the family.

[117] For these reasons, I consider the courts below were wrong to conclude that the Claymark Trust was not a nuptial settlement. I consider it was. The dissolution of the marriage gave jurisdiction to make an order under s182.

Application of s 182

[118] As indicated, in circumstances where the lower courts have not considered exercise of the s 182 jurisdiction and the litigation is settled, I do not think it appropriate to consider what orders might have been made had the courts below not mistakenly considered the settlement was not a nuptial one. I make some general remarks only as to the approach, principally to counter the view that seems to have developed following *Ward v Ward* that the expectations of the parties at the time of settlement are, as the Court of Appeal put it in the present case, "the focus under s 182".[191]

[119] In some cases, of which *Ward v Ward* may be an illustration, a division of the settlement assets following dissolution of the marriage may be appropriate to "give the parties the same benefits as they practically would have if the conjugal relation had continued".[192] In this vein *Ward v Ward* cited a decision from 1867 in which Lord Penzance indicated a court would look at the "probable pecuniary position" the parties and their children would have occupied as regards the settlement if the marriage had not failed.[193] The authorities cited in *Ward v Ward* look to any change in circumstances of the parties, as indeed the terms of s 182(3) require of a court exercising jurisdiction under s 182. It was in that connection that the Court referred to the "reasonable expectations" of the parties, a touchstone familiar to lawyers when considering the meaning of contracts or instruments but which may be less helpful in connection with settlements "on the parties to a marriage" (who might have had no

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191 *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [177](a).

192 *Benyon v Benyon* (1890) 15 PD 54 (CA) at 58 per Lindley LJ; cited with approval in *Coutts v Coutts* [1948] NZLR 591 (CA) at 605 per O'Leary CJ.

193 *March v March* (1867) LR 1 P&D 440 at 442; cited in *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31 at [24].

involvement in the terms of settlement or may not have had any knowledge of and therefore expectation of benefit at the time of the settlement).

[120] The authorities cited in *Ward v Ward* do not suggest that the expectations of the parties are critical in all cases to the making of orders. Tipping J, who delivered the decision of the Court, cited with approval the view expressed in *Preston v Preston* that "the fact of the divorce" provides the jurisdiction under s 182 and that, on this condition being satisfied, "the whole matter is regarded as being at large".[194] As *Preston* made clear, the whole of the relevant circumstances "as they exist at the time of the hearing" are taken into account. They include "any changed circumstances of either party and their relative financial positions".[195]

[121] The terms of s 182(3) require the court not only to consider any change in the circumstances of the parties but also the circumstances of the parties at the time of the hearing, without any comparison with their position at the time of settlement. The exercise of the jurisdiction under s 182 does not then depend on change in the circumstances of the parties (although any such change may be highly significant in a particular case). Still less does it depend on any changes in the expectations of the husband and wife from the date of settlement to the date of the hearing (although any such changes may in a particular case influence the court in the adjustment orders it thinks it fit to make).

[122] In *Ward v Ward*, after reviewing the authorities and expressing agreement with them, the Court explained the approach it took in considering the jurisdiction under s 182, in a passage relied on in the present case in the judgments of the lower courts and in argument in this Court:

> [25] Based on the foregoing discussion [of the authorities] we consider the proper way to address whether an order should be made under s 182 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

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194 *Preston v Preston* [1955] NZLR 1251 (CA) at 1259; cited in *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31 at [23].

195 *Preston v Preston* [1955] NZLR 1251 (CA) at 1259.

> 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.
>
> [26] Section 182(3) makes this point by directing the court's attention to the circumstances of the parties. By its reference to change of circumstances the subsection envisages that the parties' circumstances, both as regards the settlement, and generally, are to be compared with their circumstances at the date of the settlement. The court is also empowered by subs (3) to take into account any other matters it considers relevant. Among those matters it may, as here, be significant who established the settlement trust and, subject to subs (6), the source and character of the assets which have been vested in the trust. Obviously the terms of the settlement will be relevant, as will how the trustees are exercising, or are likely to exercise, their powers in the changed circumstances. Also relevant, of course, are the interests of any children or other beneficiaries involved. It is neither necessary nor desirable to attempt any comprehensive list of relevant circumstances because each case will require individual consideration. No formulaic or presumptive approach should be taken.
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> [27] It can therefore be seen that s 182 applies if the applicant's expectations of the ante or post-nuptial settlement have been wholly or partially defeated by the dissolution of the marriage. The relief to which the applicant is entitled in those circumstances is an order in terms of the section, in whatever form is best suited to the circumstances, restoring those defeated expectations. The parties should be restored in an appropriate way to the position they were in, as regards the settlement, immediately after it was made, not immediately before it was made.

[123] It must be acknowledged that the terms in which these paragraphs are expressed may be taken to suggest that the approach being adopted was one of general application in all cases where the s 182 jurisdiction is available. But I do not think that is how they are properly to be read. They are, rather, addressing the context in *Ward v Ward*.

[124] There, the husband and wife were the settlors. Whether their reasonable expectations at the time of the settlement had been defeated by the dissolution of their marriage and the reality of the altered circumstances in which the trusts would be administered was contextually highly relevant to exercise of the jurisdiction under s 182 in that case. To the extent that such comparison of expectations is contextually important (as in *Ward v Ward*), absence of any effect on those expectations post-dissolution may well make it unnecessary to adjust the trust by order under s 182(1), as the last sentence in [25] of *Ward* indicates. That was not the case in *Ward* because the discretion to benefit the wife was, realistically, unlikely to be used

in her favour by the trustees post-dissolution, as the Court found.[196] Even so, the Court in *Ward* did not suggest that the comparison was simply between the expectations the parties had of the settlement at the date it was established and after dissolution of their marriage. At [26] the Court acknowledged that the circumstances of the parties "generally" (as well as in relation to the settlement) were to be compared at the date of settlement and at the date of hearing.

[125] Comparison of the positions at settlement and at the date of hearing was appropriate in *Ward v Ward* because it was the change in circumstances brought about by the dissolution of the marriage that was put forward as the reason why orders should be made, rather than the actual circumstances in which the wife was placed at the time of hearing. Section 182(3) makes it clear that the Court is not only to consider changes in the circumstances of the parties (including in what might have been reasonably envisaged for the settlement) but also the actual circumstances of the parties at the time of the hearing. I do not accept that the Court in *Ward v Ward* was purporting to exclude consideration of the circumstances of the parties at the date of hearing by requiring that in all cases "the applicant's expectations" of the nuptial settlement be "wholly or partially defeated by the dissolution of the marriage".[197] It was responding to the case put to it.

[126] Section 182, in its terms, does not refer to "expectations" of the parties. It should be noted that a settlor of a nuptial settlement may not be a party to the marriage at all. The only necessarily relevant expectation in a nuptial settlement under the section is the one on which the power to make orders under s 182 is premised: the existence of the marriage. It is the failure of that expectation that provides the basis for the powers of adjustment in s 182.

[127] In some cases, dissolution of a marriage may not affect the benefit available to the parties to the marriage under a nuptial settlement. In *Ward v Ward*, the Court expressed this outcome in terms of there being no change to the "reasonable expectations" of the parties. As use of the word "reasonable" indicates, the assessment is objective. Although "reasonable expectations" is conventionally used

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196 *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31 at [53].
197 At [27].

as a touchstone when construing agreements or other instruments, in substance what is being ascertained is the objective effect of the agreement or instrument. Since in *Ward v Ward* the parties were the settlors of the trust, reference to their "reasonable expectations" was understandable. But in cases where one or both of the parties to the marriage is not involved in the setting up of the trust which is settled on them, reference to their "expectations" may be apt to mislead. Once the jurisdiction is available, whether an order should be made depends on all the circumstances indicated in s 183(3) or suggested by the breadth of the orders available under s 182(1).

[128] The orders available under the section relate to:

- "application of the whole or any part of any property settled"; or
- "variation of the terms of any such … settlement"

"either for the benefit of the children of the marriage or civil union or of the parties to the marriage or civil union or either of them, as the court thinks fit".

[129] The concern of the section with the support of children post-dissolution is shown by the fact that children are first mentioned in subsection (1), ahead of the parties to the marriage. It explains also the exception under subsection (6) which permits the powers under s 182 to be used "so as to defeat or vary any agreement, entered into under Part 6 of the Property (Relationships) Act 1976" if in the interests of any child of the marriage. The emphasis on children of the marriage in s 182 explains the inclusion of subsection (4), which makes it clear that the jurisdiction under s 182 may be exercised "notwithstanding that there are no children of the marriage". The fact that the section is also concerned with on-going support following dissolution is indicated by the inclusion of subsection (2) (concerning agreements for the payment of maintenance) and subsection (5) (which permits review of orders "from time to time").

[130] The variety of the orders looked to in the section (ranging from provision of periodic support to "the application of the whole or any part of any property settled

or the variation of the terms of any such agreement or settlement") and the fact that orders may be "either for the benefit of the children of the marriage … or of the parties to the marriage … or either of them" underscores the breadth of the jurisdiction. It is not consistent with a controlling emphasis on the expectations of the parties to the marriage at the time the settlement is made. The contextual application of s 182 in *Ward v Ward* should not be treated as laying down a sufficient test to be applied in all cases. Such approach would be contrary to the terms of s 182.

[131] The type of orders available and the context provided by the section as a whole indicate an inquiry of some breadth, depending on context in the particular case. In *Ward v Ward*, the "expectations" of the husband and wife of equal benefit in the trust were matters still contextually relevant in the altered circumstances of the dissolution of the marriage when arriving at the appropriate orders (which included continued provision for the children to be beneficiaries in the divided trusts). In other cases, any such expectations might well be overtaken by the circumstances of the family at the time of the hearing.

[132] Section 182(3) requires the court to take into account both the circumstances of the parties at the time of exercise of the discretion post-dissolution as well as any change in the circumstances (since the date of the agreement or the date of any nuptial settlement). It is therefore a mistake to treat the subjective or indeed the objective expectations of the parties in the settlement or agreement as decisive or even always as material without undermining the breadth of the statutory jurisdiction. The jurisdiction is to make the orders the court thinks fit in the altered circumstances of the failure of the marriage which prompted the settlement or agreement.

Outcome

[133] For the reasons given I agree that the appeal should be allowed on the basis that the Trust was a nuptial settlement.

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