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IN THE FAMILY COURT
AT AUCKLAND

FAM-2010-092-001818
[2016] NZFC 4757

IN THE MATTER OF	The Property (Relationships) Act 1976
BETWEEN	DENISE KAY CAMPBELL GOLDIE Applicant
AND	ROBIN MCGREGOR CAMPBELL First Respondent
AND	ROBIN MCGREGOR CAMPBELL, JOHN CHARLES WILKINSON AND ROGERS & RUTHERFORD TRUSTEES 2007 LIMITED AS TRUSTEES OF THE ROBIN CAMPBELL FAMILY TRUST Second Respondent

Hearing:	9 March 2016
Appearances:	Mr B O'Callahan for the Applicant Ms La Mantia for the First Respondent Mr A Rogers in person - the third named Second Respondent
Judgment:	16 September 2016

RESERVED DECISION OF JUDGE M SOUTHWICK QC

Issues to be Considered by the Court

[1] The applicant and first respondent are currently engaged in relationship property proceedings. The court has been asked to consider and make findings on the following preliminary agreed questions:

(a) Does the first respondent have property interests by virtue of his powers pursuant to the Robin Campbell Family Trust Deed?

(b) If the answer to (a) is 'yes', are such property interests relationship property?

(c) Is the answer to (b) affected in any way by whether or not the property at 14A Takutai Avenue (owned by the trust) was the family home and if so, in what way is the answer to (b) affected?

[2] The Court is not asked to make any findings with respect to the balance of the disputes between the parties. Those matters are to be dealt with in a three day substantive hearing later in the year. I note that in submissions dated 20 April 2016, counsel for the first respondent suggests that the second question is not to be answered as further evidence may be required in this area. This decision, nevertheless, provides a preliminary comment in response to that question which is posed in each counsel's first submissions.

[3] Extensive submissions were made on 9 March 2016. The parties agreed, however, that the decision of *Clayton v Clayton,* which was at that time shortly to be released by the Supreme Court, could have impact upon each party's approach to the issues. Accordingly, it was directed that further submissions could be filed within a defined timeframe following release of that decision.

[4] On 23 March 2016 the Supreme Court delivered its judgment in *Clayton v Clayton* [2016] NZSC 29 and further submissions were filed as directed. I note that the first respondent filed two sets of submissions, the second dated 27 April 2016 and seeking to respond to those filed by the applicant's counsel. This was not directed, however. The applicant has, as a consequence, been invited to respond further if such was sought.

Relevant Background

[5] In 1995 two mirror Trusts were established. Those Trusts were the EM Campbell Family Trust (EMCFT) and the RM Campbell Family Trust (RMCFT)

[6] In the case of the EMCFT, Mrs Campbell was settlor and held the Power of Appointment. Mr Campbell was Trustee with two independent Trustees. Mr Campbell was a discretionary beneficiary and the couple's two daughters were both discretionary and final beneficiaries. Mrs Campbell was not a beneficiary.

[7] In the case of the RMCFT, Mr Campbell was settlor and held the Power of Appointment. Mrs Campbell was a discretionary beneficiary and the couple's two daughters were both discretionary and final beneficiaries. The Trustees were Mrs Campbell, together with the same independent Trustees as that of the EMCFT. Mr Campbell was not a beneficiary.

[8] The mirror trusts were unremarkable, with each trust owning 50% of the couple's family home at 14A Takutai Avenue ("Takutai"). The transfer to the trusts of the home owned by Mr and Mrs Campbell occurred in the same year that the trusts were established.

[9] In 2000, Mr & Mrs Campbell separated. It is alleged that the relationship between the applicant, Ms Goldie, and the first respondent in these proceedings, commenced in 1998 and that they began living together on a permanent basis in December 2001. One of the issues for the substantive hearing will be the nature of this relationship, which is said to have included periods of separation and reconciliation.

[10] The applicant and first respondent married in February 2006.

[11] In July 2007, the trustees of each of the mirror trusts resolved to re-settle the assets of each of the mirror trusts on new trusts. This was because the structure of the trusts, in particular the holder of the power of appointment, was no longer appropriate

in the context of Mr and Mrs Campbell's separation. The resolution which confirmed the resettlement used the following wording when referring to the newly established trusts:

> *"…for the benefit of Robin, his daughters and certain other beneficiaries" (*in the case of the (EMCFT) *Trust and for "Elaine, her daughters and certain other beneficiaries"* (with respect to the RMCFT Trust)".

The share each mirror trust owned was transferred directly to each new trust.

[12] The first respondent's new trust was the Robin Campbell Family Trust (RCFT) which was established on 27 July 2007. The settlors of that trust were the Trustees of the EMCFT, namely the first respondent and two independent parties.

[13] The trustees were the respondent, John Charles Wilkinson and Rogers & Rutherford Trustees 2007 Limited. The beneficiaries remained the same as the mirror trust had provided with the addition of any trust which included among its beneficiaries any beneficiary of the RCFT; any company in which any beneficiary of the RCFT directly or indirectly held not less that 50% of the shares or of the voting power of the company or was entitled to not less that the surplus assets of the company.

[14] The terms of the RCFT (the trust in issue in this case) are referred to in more detail hereunder. Both Mr and Mrs Campbell's trusts were expressed in the same terms and generally reflected the terms of the earlier trusts.

[15] In a Memorandum of Guidance provided by the first respondent to the trustees of the RCFT on 12 October 2007, the following statements are included:

> (2) *I have set up the trust for the general purpose of ensuring that certain family assets are owned through a coherent ownership vehicle and to ensure that members of my family are able to benefit from the capital and income of the trust from time to time.*
>
> (3) *It is my wish that my reasonable needs are met from the trust during my lifetime*
>
> (4) *After making such provision as may be necessary to give effect to that wish in paragraph 3 above, in exercising your discretion you should:*
>
> > *(a) consider the reasonable needs and requirements of my daughters Meredith Susan Campbell and Claire Adrianne Campbell as*

> *paramount and having priority over the needs and requirements of all other beneficiaries particularly with respect to their educational requirements, health ,general welfare, maintenance and wellbeing;*
>
> *(b) take into account the age and circumstances of each daughter and encourage their self reliance and independence"*

[16] In 2009, as part of Mr and Mrs Campbell's eventual resolution of their relationship property disputes, the half share in Takutai held by Mrs Campbell's Trust was transferred to the RCFT at an agreed price. This was because Mrs Campbell was unable to finance weather-tight remediation required. It is submitted by Mr Campbell that this remediation was financed in 2009 and 2010 out of his separate property interests, together with mortgage finance secured by his trust against Takutai. That is not a matter which this court needs to confirm.

[17] On 3 August 2012, the first respondent signed a memorandum of wishes addressed to the trustees of his trust. This sought that the needs of his new partner (the applicant and first respondent having separated) and the new partner's children should be taken into account. These persons have been added as discretionary beneficiaries.

Terms of the RCFT

[18] In order to answer the questions put to the Court, the terms and provisions of the RCFT need to be clearly understood. In summary these are:

(i) Settlors: The first respondent, Robert Thom and Ross Crawford.

(ii) Trustees: The first respondent, John Charles Wilkinson (replaced by John Carter in 2012) and Rogers & Rutherford Trustees 2007 Limited

(iii) Appointor: The First Respondent, who has the power to remove and replace trustees (subject to limitations referred to hereunder) and the power to remove and replace some discretionary beneficiaries.

(iv) Discretionary Beneficiaries:

- The first respondent
- Any final beneficiary.

- Any issue of any final beneficiary.
- Any trust which includes for the time being among its beneficiaries, contingent or otherwise, any beneficiary.
- Any company in which one or more of the beneficiaries directly or indirectly holds or beneficially owns not less than 50% of the issued capital or of the voting power of the company, or is entitled to not less than 50% of the surplus assets of the company.
- Any association, club, institution, society, organisation or trust not carried out for private profit, or any person whose funds are applied wholly or principally to any civic, community, charitable philanthropic, religious or either land or cultural purpose, whether within New Zealand or elsewhere.
- Any person appointed pursuant to clause 7.1(a) - (ie further beneficiaries who may be added by the appointor).

(v) Final Beneficiaries:

The two named daughters of the appointor (ie the daughters of Mr and Mrs Campbell).

(vi) The Trustees are empowered to pay or apply all or any part of both the income and capital of the trust fund to or for such one or more of the discretionary beneficiaries who are then living.

(vii) The trustees' discretion is unfettered. Clause 11 provides - *"for the avoidance of doubt and notwithstanding anything in this deed or any rule of law which imposes upon the trustees the duty to act impartially towards beneficiaries, the trustees shall have unfettered discretion as to exercise of the powers, and discretions conferred upon them by this Deed even though:*

(a) The interests of all beneficiaries are not considered by the trustees.

(b) The exercise would or might be contrary to the interests of any present or future beneficiaries.

(c) The exercise results at any time whether before or on the vesting day, in the whole or in any part of the capital or income of the trust being distributed to any one beneficiary or to any two or more beneficiaries in equal or unequal proportions, in either case to the exclusion of the other beneficiaries.

(viii) The exercise of the trustees' powers is limited in clause 12 of the Trust Deed by the following:

*"**Except where a corporation** is the sole trustee notwithstanding anything contained or implied in this Deed, if at any time there is only one trustee of the trust, no power or discretion conferred on the trustees by law or by this Deed other than that of appointing a new trustee, shall be exercised by the surviving trustee until such time as an additional trustee has been duly appointed".*

(ix) No Self Benefit:

No trustee who is also a beneficiary may exercise any power or discretion vested in the trustees in his/her or its favour.

(x) Unanimity Required:

Where there is more than one trustee all powers and discretions of the trustees are to be exercised unanimously. A corporate trustee only may act as sole trustee.

(xi) Appointor may transfer his powers of appointment and removal of trustees to such a person or persons as the appointor may nominate by deed or will.

(xii) Power of Appointment Unrestricted:

"The holder of any power of appointment of Trustees may, subject to any contrary intention expressed in the Deed (if any) transferring the power to that person, exercise that power in favour of himself or herself (Clause 17.5).

(xiii) Appointment of Sole Trustee:

Notwithstanding anything contained or implied in the Deed, the holder or the holders of the power of appointment may (jointly if more than one) appoint a corporation to be the sole trustee of the Trust and may at any time remove such a trustee.

(xiv) Trustee's Conflict of Interest:

A trustee may act as such and exercise all of that trustee's powers and discretions notwithstanding that:

"(i) He/she or it is associated as a director or otherwise in a private capacity or as a trustee of any other trust with any company or other person to which the trustees sell or lease any property forming part of the Trust fund or in which trustees hold or propose to acquire shares,

securities or other rights as part of the Trust fund, or with which the trustees otherwise deal as trustees of the Trust.

(ii) That trustee may be a trustee of any other Trust to or from which the trustees propose to sell or purchase shares, securities or other rights or property or with which the trustees otherwise deal as trustees of the trustee.

(iii) The interests or duty of that trustee in any particular matter may conflict with the duty of that trustee to the trust fund or any beneficiary".

(xv) The trustees of the trust, with the consent of the appointor, may vary, revoke or enlarge the terms of the deed concerning the management or administration of the trust.

(xvi) The settlors direct the trustees to receive and review any memoranda received from the appointor as if that memorandum had been issued by the settlors.

The Ramifications of *Clayton v Clayton* [2016] NZSC 29

[19] The trust in issue in the *Clayton* case was considered by the Family Court, High Court, Court of Appeal and ultimately the Supreme Court. It is the similarities (or otherwise) with the terms of the Clayton trust that form the basis of submissions presented to this Court.

[20] In the Clayton trust (VRPT) the provisions set out hereunder were found by the Supreme Court to support an ultimate conclusion that Mr Clayton held a combination of powers and entitlements which were tantamount to ownership of the assets of the VRPT :

- Mr Clayton was sole settlor and sole Trustee. In addition, he was defined in the deed as "*principal family member*" .
- Discretionary beneficiaries included Mr Clayton as principal family member, Mrs Clayton and their two daughters, who were also named as final beneficiaries.
- The principal family member had the power to appoint and remove Trustees and could exercise that power in favour of him or herself, subject to any expressed contrary intention.
- The principal family member held the power to add and remove discretionary beneficiaries before the expiry of the trust period.

- A trustee who was also a beneficiary was able to exercise any power or discretion vested in trustees in his, her or its favour.

- The trustee was authorised to exercise a power of discretion even though the interests of all beneficiaries were not considered and the exercise resulted in the whole of the capital or income being distributed to one beneficiary to the exclusion of others.

- The trustee was able to distribute income and capital prior to the vesting day. On the vesting day, the capital was distributable to those of the discretionary beneficiaries whom the trustees appointed (Mr Clayton having being sole Trustee throughout). In default of the appointment, the trust fund was to be vested in the final beneficiaries (the children of Mr Clayton).

- The trustee was able to resettle all or any of the trust on any other trust if one or more of the discretionary beneficiaries were also beneficiaries of that other Trust.

- The trustee was authorised to exercise any power notwithstanding that the interests of the trustee may conflict with his duties to all or any beneficiary

[21] Whilst both the Family Court and the High Court found that the Clayton Trust was "illusory" (different reasons being provided by each court), the Supreme Court was not attracted to the use of the term "illusory", preferring the term "non- trust ". Such might be an appropriate description, it was said, where a trust did not fit the definition of "sham" but where the attempt to create a trust still failed so that no valid trust ever came into existence. In such a case, the trust would fail and the assets of the trust revert to the settlor.

[21] In *Harrison v Harrison* High Court Auckland CIV 2008-404-001270, 18 September 2008, Fogarty J said "*Trust is a word used to sum up a relationship where equity will compel a person holding the legal interest in a property to use it for the benefit of someone else".* This provides a useful test in deciding whether a trust might be an illusory or non-trust. The fact is that in *Clayton* apart from his daughters, who were final beneficiaries, Mr Clayton was answerable to no one.

[22] The Supreme Court said at paragraph [129] and [130]:

> *"As we have already said, we do not find the term "illusory trust" helpful. What the Family Court and High Court meant by that term was that no trust was created. In such a case the document as executed does represent the terms to which the party or parties intended to agree but, despite their subjective intention to create a trust, they failed in their attempt to do so.*

> *In the present case, Mr Clayton intended to create a trust on the terms recorded in the VRPT Deed. The issue would be whether the powers held by Mr Clayton are so broad that what he intended to be a trust was not in fact a trust. As already noted, we are not determining that issue".*

[23] Although the Supreme Court did not tackle the illusory/non-trust claim in the *Clayton* case, the statement made by the Court confirms that even if a trust is not a sham, if that trust does not fulfil the basic requirements of a trust, it may equally not be a trust. The impact of a finding that a trust does not fulfil those basic requirements is that the assets of the trust will revert to the settlor/s.

[24] Having decided not to adopt a " non-trust" approach, the Supreme Court then turned its attention to the question – were the cumulative powers held by Mr Clayton "property"? The Court of Appeal had concluded that Mr Clayton's sole power to appoint and remove discretionary beneficiaries was enough to result in a finding that he had a general power of appointment which in turn was a property right, the value of which was the value of the assets of the trust.

[25] The Supreme Court rejected this notion, noting that Mr Clayton had the ability to remove discretionary beneficiaries but not to remove final beneficiaries. As a consequence, the power was not a general power of appointment analogous to the power of revocation in *TMSF v Merrill Lynch* [2011] UKPC 17 (the latter decision being relied upon by the Court of Appeal).

[26] The Supreme Court, instead, embarked on an examination of the cumulative powers of the Trust, stating at paragraph [50]:

> *"We consider it necessary to analyse the VRPT deed more closely to see whether Mr Clayton's powers and entitlements as Principal Family Member, Trustee and Discretionary Beneficiary,* ***give him such a degree of control over the assets of the VRPT that it is appropriate to classify those powers as rights or interests in terms of paragraph (e) of the definition of property in s 2 of the PRA****. We will refer to these powers and entitlements as "VRPT powers". In order to do this, it is necessary to consider what practical limitations the rights of the Final Beneficiaries had on Mr Clayton's ability to appoint the property of the VRPT to himself".*

[27] After completing that exercise, at paragraph [58] the Court held:

> *"These provisions mean that Mr Clayton is not constrained by any fiduciary duty when exercising the VRPT powers in his own favour to the detriment of the final beneficiaries. The fact that he cannot remove the final beneficiaries*

> *does not alter the fact that he can, unrestrained by fiduciary obligations, exercise the VRPT powers to appoint the whole of the trust property to himself. That leads to the next question:* ***Are the VRPT powers of sufficiently similar effect to a general power of appointment that it is appropriate to treat them as property for the purposes of the PRA****?"*

[28] The conclusion reached was that the combination of powers reserved to Mr Clayton were indeed sufficient to amount in effect to a general power of appointment which, in turn, were "rights" or "interests" satisfying the definition of "property" in s 2 of the PRA.

[29] The decision rekindles the "bundle of rights" approach first raised in *Walker v Walker* [2007] NZCA 30. Having said that, it is not clear from the *Clayton* case when a "bundle of rights" will reach the point of properly being defined as property. Clayton was undoubtedly an extreme example of very broad and largely unfettered powers being vested in a party. The conclusion to be reached is that each case will turn on its own facts.

[30] This Court is not asked to consider any issue of valuation However, it is worth noting that the Supreme Court found that Mr Clayton's powers and entitlements were such that they would be likely to have the value of the net assets held by the Trust. This reflects the Court's view of the breadth of power held by Mr Clayton.

To What Extent are the Terms of the RCFT Analogous to those of the VRPT?

[31] The applicant argues that the powers vested in the first respondent are so similar to those held by Mr Clayton that they too constitute "property", as defined by the PRA.

[32] In answering that submission, the first respondent says that among the many distinguishing factors which exist and particularly fatal to the applicant's proposal, is the fact that Mr Clayton was sole trustee of the VRPT whereas the first respondent is one of three trustees and does not have the power to appoint himself as sole trustee of the RCFT.

[33] Emphasis is also placed upon the existence of the "no self benefit" clause in the RCFT, whereas the VRPT contains a clause which specifically empowers a trustee

who is also a beneficiary (Mr Clayton) to exercise any power or discretion vested in trustees in his favour. These factors alone represent significant differences.

[34] For the applicant, it is argued that, despite this, other powers the first respondent holds would enable him to place himself in the same position as that of Mr Clayton and so vest the trust property in himself before the trust's vesting date.

[35] The submission is twofold – firstly that there are no limitations upon the first respondent's ability to remove and replace any of the discretionary beneficiaries named and, therefore, in that regard the RCFT is on fours with the VRPT.

[36] Secondly, as appointor, the first respondent has vested in him the power to appoint and remove trustees. The provisions of the RCPT include the ability to appoint as sole trustee a corporate. It is argued that the first respondent could be sole director and shareholder of such a company and that if such was to occur, the difference between the two trusts would largely evaporate as the first respondent would, in effect, be a sole trustee.

[37] In amplifying this submission it is suggested that as appointor exercising his power to alter the trusteeship in this manner, the first respondent is not constrained by any fiduciary duties to the beneficiaries. In this regard it is said that the powers vested in the first respondent are the same as those vested in Mr Clayton.

[38] The first respondent and Mr Rogers (director of Rogers and Rutherford, trustee) both submit that fiduciary duties attach by reason of the context in which the trust was created and on the basis of current legal precedent. They argue that the Supreme Court's finding that Mr Clayton's extraordinary combination of powers and entitlements were such that the normal constraints of fiduciary obligations "were not of any practical significance" , does not apply to Mr Campbell's situation.

[39] Furthermore, the submission is that fiduciary duties apply not only in the first respondent's performance as trustee but also as appointor.

[40] The issue of whether or not fiduciary duties attach to a power of appointment was not dealt with directly by the Supreme Court. What the court did do was consider

a cluster of provisions found in the VRPT which authorised the trustee of that trust (Mr Clayton) to take steps which made it possible to resolve, as trustee, to apply trust capital and income to himself alone. The Court found that clauses 14.1(ability to self benefit), 11.1 (trustees discretion unfettered) and 19.1 (negation of conflict of interest) of the VRPT meant that Mr Clayton, as trustee, lacked "the normal constraints".

[41] The powers vested in Mr Clayton were indeed extraordinary, perhaps raising the real possibility of a non-trust. Nevertheless, the power to appoint and remove trustees has generally been held to be fiduciary in nature. In academic comment upon the Court of Appeal decision in : *Clayton* - "Clayton v Clayton*:* a step too far?" Jessica Palmer and Nicola Peart comment:-

> *"The significance that the Court of Appeal attaches to the capacity in which the power is held is therefore misplaced in our view.* ***Rather it is the nature of the power that should determine whether it is fiduciary or not. If the power can be exercised in a manner that could adversely effect beneficial interests, it ought to be constrained by fiduciary obligations to ensure that it is exercised with these interests in mind, allowing a settlor to construct a trust that enables him or her to reorganise the distribution of the property or change the beneficiaries after the trust is settled, risks undermining the institution of the trust****. For that reason the power should be fettered so that any exercise of it will give effect to the trust. The power must not be exercised in bad faith; capriciously or irrationally; outside of the scope or proper purpose of the power (known as fraud on a power); or otherwise in breach of fiduciary duty."*

[42] In *Carmine v Ritchie* [2012] NZHC 1514, Gilbert J was dealing with a case where Ms Ritchie as Principal Family Member held the power to appoint and remove trustees. She was also settlor and a discretionary beneficiary. It was held in that case that a power to appoint and remove trustees is generally acknowledged to be a fiduciary power, even where not conferred upon a trustee – "*the subject matter of the power is the office of the trustee which lies at the core of the trust and carries fundamental and onerous obligations to act in the best interests of the beneficiaries as a whole*" (paragraph [66]). Gilbert J commented further –

> "*This does not mean that Rachel was free to exercise the power in bad faith or contrary to the interests of the beneficiaries. To do so would be a fraud on the power.* ***It is, therefore, necessary to consider whether Rachel exercised her power of removal for a proper purpose, consistent with the object of the power, acting in the best interests of the beneficiaries as a whole" (paragraph [70]).***

[41] There is subsequent authority confirming such an approach in *New Zealand Maori Council v Foulkes,* CA 247/2014 [2015] NZCA 552, in which case the Court of Appeal confirmed that the power to appoint new trustees is fiduciary in nature - *"in every case the power is to be exercised according to the best interests of the beneficiaries and cannot be delegated"*.

[43] Where there has been a contrary view expressed, that view has rested largely upon consideration of the settlor's intention. The applicant submits that the settlors of the RCFT reserved the power of appointment to the first respondent deliberately "to allow Mr Campbell to exercise the powers to benefit himself as there is no other logical reason for reserving the power to Mr Campbell". On that basis, it is submitted that no fiduciary duty applies.

[44] Whilst that contention would lead to the very real possibility of the trust being held to be a "non-trust", it is not in any event a sound conclusion to reach with respect to the RCFT. The following factors are significant in considering the intentions of the settlors of the RCFT as being quite different to those suggested by the applicant :

(a) The history of the establishment of the trust and the consistently stated intention to benefit the two named daughters of Mr and Mrs Campbell (discretionary and final beneficiaries).

(b) The existence of the no self benefit clause

(c) The inability of trustees to act alone (except in the case of a corporate trustee).

(d) The inability to remove original discretionary beneficiaries (see discussion hereunder).

[45] All of these factors detract from any suggestion that the power of appointment was vested in Mr Campbell with the deliberate intention of permitting unfettered and self benefitting decision-making as appointor.

[46] I find that in his role as both trustee and appointor, the first respondent owed a fiduciary duty to the beneficiaries of the trust. This duty imposes a restraint upon the first respondent's powers and upon his potential ownership of the assets of the trust, so distinguishing the provisions of the RCFT from those of the VRPT.

[47] In relation to the power to remove and replace discretionary beneficiaries, the first respondent and Mr Rogers both say the provisions of the RCFT are quite different from the broad powers provided in the VRPT. They point to the plain meaning of the words included in clause 7.1 of the RCFT. The relevant clause reads as follows:

> "7.1 *Power to appoint and remove beneficiaries:*
>
> *The appointor may, by deed, before the expiry of the Trust period:*
>
> *(a) Appoint any person to become a member of the class of discretionary beneficiaries and any person so appointed shall, from the date specified in such deed (or, if no date is specified from the date of the deed) become a discretionary beneficiary as if such person had been specified or named in this deed as a discretionary beneficiary.*
>
> *(b) Remove any **such** person from the class of discretionary beneficiaries and any person so removed shall, from the date specified in such deed (or, if no date is specified, from the date of the deed) cease to be a discretionary beneficiary as if such person had not been Specified or named in this deed as a discretionary beneficiary. Any removal of a discretionary beneficiary pursuant to this clause shall be without prejudice to any benefit to which the beneficiary has become indefeasibly entitled.*

[48] In the VRPT Mr Clayton had an unambiguous ability to remove and replace any discretionary beneficiaries (although not the final beneficiaries).

[49] The wording in 7.1(b) of the RCFT and, in particular, the words "*remove any **such** person*" leads to a proper conclusion that it is intended that the appointor is limited to appointing new beneficiaries and later removing those same additional new beneficiaries. That is, he does not have the power to remove discretionary beneficiaries as named in the original deed.

[50] The applicant refutes this. It is submitted on her behalf that the wording in 7.1(b), when referring to a removed beneficiary as ceasing to be a discretionary beneficiary "*as if such person had not been specified or named in this deed as a discretionary beneficiary*", supports an interpretation that the first respondent may remove and replace all discretionary beneficiaries, including those named initially in the deed.

[42] However, this argument avoids logical explanation as to why the word "*such*" appears before "*person"* in 7.1(b). In addition, reference to beneficiaries "*specified or named in the deed as a discretionary beneficiary"* does not need to refer to the originally named beneficiaries given the wording in 7.1(a) that a newly-appointed discretionary beneficiary will become a discretionary beneficiary "*as if such person had been specified or named in this deed as a discretionary beneficiary"*.

[51] Neither is it reasonable to argue that there is no logic in the interpretation offered by the first respondent. Given the background to the establishment of the RCFT, it is entirely possible that it was the intention of both Mr & Mrs Campbell that each spouse's new trust would always preserve the position of their daughters as discretionary and final beneficiaries, hence the wording which ensures the inability to remove those beneficiaries.

[52] I find that the interpretation offered by the first respondent and Mr Rogers is reasonable and reflects the intended meaning of the words used. Accordingly, the first respondent is not able to remove the originally named discretionary beneficiaries but is able to add and subsequently remove new discretionary beneficiaries. This represents a significant difference when comparing the provisions of the VRPT.

[53] Neither can the existence of the no-self benefit clause in the RCFT be regarded as a small matter. The VRPT was unusual in making specific provision which allowed Mr Clayton to benefit himself in the roles of sole trustee and discretionary beneficiary. The first respondent as a trustee and beneficiary is specifically prevented from exercising any power or discretion vested in the trustees in his favour .

[54] In reaching the conclusion that the clauses included in the VRPT amounted, in effect, to a general power of appointment in relation to the assets of that trust, the Supreme Court placed particular emphasis upon three provisions.

[55] Firstly, clauses 4 and 6.1(a) of the VRPT gave Mr Clayton, as sole trustee, the power to pay or apply all of the capital and/or income of the trust fund to any of the discretionary beneficiaries. As Mr Clayton was both sole trustee and a discretionary beneficiary, this resulted in an ability to pay or apply the entire trust capital to himself.

In that exercise he was specifically protected by the "self-benefit" provision referred to above.

[56] That is not the position with respect to the RCFT, given the inability of the first respondent to act alone as trustee, unless it is successfully argued that the first respondent could achieve that result by replacing all of the trustees with a sole corporate trustee, of which he had complete control.

[57] In that exercise, the first respondent would need to be able to establish that the "no-self benefit" provision would not apply, on the basis that the corporate and the first respondent were not one and the same. For the reasons provided later in this decision, I consider this to be an unsupportable argument.

[58] Secondly, the Supreme Court placed some emphasis upon Clause 10 of the VRPT, which provided that distribution of the trust capital would occur on the trust's vesting day but that date could be brought forward to any date of Mr Clayton's choosing. The persons entitled to the trust capital in that event were expressed to be such discretionary beneficiaries (Mr Clayton being one) as the trustee (Mr Clayton) elected. As a consequence, Mr Clayton, as sole trustee, was able to appoint the capital to himself to the exclusion of other beneficiaries. If he brought forward the vesting day to a date of his choosing and had appointed all the trust capital to himself, that would give him both legal and beneficial ownership of the trust capital and the VRTP would be at an end.

[59] In the case of the RCFT the trustees may, by deed, appoint an earlier vesting date. Clause 10 of the RFCT provides that the trust fund may be distributed on the vesting date "*for such of the discretionary beneficiaries or such one or more of them to the exclusion of the other or others of them in such shares as the trustees may by deed appoint on or before the Vesting Day"*.

[59] Clause 12.4 provides that no power or discretion conferred on a trustee (except where there is one corporate trustee) is to be exercised by one surviving trustee until such time as another trustee is appointed. Decisions of trustees are to be unanimous. Furthermore, the "no self-benefit" provision in 14.1 would prevent the first respondent as both trustee and beneficiary to exercise the power to distribute in his favour.

[60] Central to any legitimate trust is the duty to perform the trust honestly and in good faith for the beneficiaries. This central duty remains enforceable by beneficiaries and has done so since *Armitage v Nurse* [1997] 2All ER 705 . If it is submitted that clauses existed in the RCFT which rendered those trustee duties unenforceable, that must raise the spectre of an illusory or "non-trust" existing.

[61] That fact is frequently confirmed in academic comment, for example: "*Non-trusts have the underlying intention but lack some vital element that is required for it to be a valid trust – for example, a lack of accountability to the beneficiaries other than the trustee*" (Chris Kelly and Greg Kelly " Trusts Under Attack : the Legal Landscape Following Clayton Litigation". Hence, in the case of the RCFT, clause 11 may well preserve the unfettered discretion of the trustees but it cannot oust the central duty of trustees to act honestly and in good faith.

[62] The various provisions referred to above significantly curtail the ability of the first respondent to appoint the capital to himself. This conclusion is based upon acceptance of the submission that the first respondent could not replace the existing trustees with a sole corporate trustee over which he had effective control but which avoided the self benefit clause (see discussion hereunder).

[63] The third provision focussed upon by the Supreme Court was that which provided a broad resettlement power to Mr Clayton. The provision allowed Mr Clayton (as sole trustee) to resettle any of the trust onto any other trust if one or more of the discretionary beneficiaries were also beneficiaries of that other trust.

[64] In the RCFT, the same resettlement provision applies. However, the existence of independent trustees, their duty to the beneficiaries and the existence of the "no self-benefit" clause would all protect against the scenario that presented in the VRPT.

[65] Pivotal to the argument put by the applicant in this case is the proposition that the first respondent (as appointor) could appoint a corporate as sole trustee, hence placing himself in the same position as Mr Clayton by reason of his control of such a company.

[66] The first respondent and Mr Rogers both make the robust submission that such a move on the part of the first respondent would not be possible, given that it would be successfully challenged as a "fraud on a power" It is submitted that this would be the case, given that the exercising of the first respondent's appointor's power in this way would be specifically and transparently to benefit himself, thereby attempting to circumvent the "no self benefit" clause.

[67] To support this submission, reference is made to the Supreme Court decision in *Kain v Hutton* [2007] NZCA 199 [2008] 3 NZLR 589 (SC), in which case Tipping J said :

> *"[46] The expression "fraud on a power" is historical language for when a power is misused in an ultra vires manner. When an appointment is made pursuant to a power of appointment, the person making the appointment (who can be called either the donee of the power or the appointor) is acting pursuant to a mandate granted by the donor of the power and must stay within that mandate.*
>
> *"[47] A general power of appointment entitles the donee/appointor to appoint to anyone at all, including himself. There cannot, therefore, be excessive execution of, or a fraud on, such a power because it is logically impossible for the donee/appointor to exceed the donor's mandate. By contrast, a special power enables the donee/appointor to appoint only to those specifically permitted by the donor's mandate. A special power is one where the objects of the power are limited by the terms upon which the power is granted. An appointment to a person who is not a permitted object will usually represent an excessive execution of the power. The species of excessive execution known as a fraud on the power normally comes about when the appointment is in form to an object but the substance to a non-object. In such a case, the object is simply a vehicle through, or by means of whom, the appointor's purpose of benefiting the non-object is carried out.* ***Hence a fraud on a power is a clandestine excessive execution because it is regular on its face but in reality is undertaken for a purpose not within the donor's mandate".***

[68] Particularly, given the existence of the "no self-benefit" clause in the RCFT, it would not be possible to conclude anything other than that the appointment of such a corporate trustee controlled solely by the first respondent, would be outside his mandate and, hence, a fraud on a power. A sole corporate of which the first respondent had complete control would be perceived as being a thin disguise of an effort to operate outside the donor's mandate and for the first respondent's own benefit.

[69] A further significant distinction in the Clayton case is that the donor of the power was Mr Clayton (as settlor). In the RCFT, the donor of the first respondent's powers are the settlors of that trust, namely Mr Campbell, Mr Thom and Mr Crawford.

[70] In referring to the settlors' mandate (already referred to at Paragraph 43 et seq above) the applicant points to the following factors to support the contention that argues that the first respondent had a mandate to exercise his powers as appointor for his own benefit:

(a) The nature of the resettlement which took place in 2007. It is said that this would have involved the trustees considering the beneficiaries of the EM Campbell Family Trust, who included the first respondent. It is said that in reserving the powers of appointment to the first respondent, it must have involved a deliberate decision to allow him to benefit himself. That argument avoids reference to the rights of other named beneficiaries and omits explanation as to why, in that event, a no self-benefit clause was included.

(b) The deed of resettlement refers to "a new trust for the benefit of Robin McGregor Campbell and other beneficiaries of the trust". It is a step too far to suggest, as the applicant does, that a reasonable inference to be drawn from those words is that the first respondent's interests are to take preference over those of others, simply because they are not specifically named.

(c) The name of the trust - "Robin Campbell Family Trust" - is said to support a view that the donors intended that the first respondent would be the primary beneficiary and control how trust funds are distributed. The name of a trust cannot be said to be intended to reflect a donor's intention. The name of a trust is no more than that – a name or title to be used as identification.

(d) It is further submitted that because the first respondent is the first person named in a list of discretionary beneficiaries – this supports the conclusion that it was intended that he could exercise the powers provided for his own benefit. That proposal is also rejected and could lead to an absurd conclusion that trustees of all trusts must consider the needs of beneficiaries in the order in which they are listed in the trust deed.

(e) Finally, it is suggested that the donor's intentions are reflected in the fact that the first respondent has general and unfettered power to make

himself the sole discretionary beneficiary. This proposition is rejected, as discussed above.

[71] It is worth noting as an additional point that the purpose of the RCFT and for the original mirror trusts remains the same – that is, for the benefit of Elaine/or Robin Campbell and their daughters, and for other beneficiaries. Memoranda provided by the first respondent in 2007 confirm that intention.

[72] Finally, trumping all suggestions that the donors intended that the appointor should be empowered to exercise his powers for his own benefit, is the "no self-benefit" clause. That clause would be rendered meaningless if it was intended by the donors that the first respondent could utilise his role as appointor to find a way to "legitimately" breach the provision.

[73] The force of a "no self benefit" clause is considerable and cannot be diluted. In *Harrison v Harrison* [2015] NZHC 293 Faire J said: *"... the legal authorities are clear that wherever self-dealing occurred* [in the face of a no self benefit provision] *the court must invalidate the transaction in question*". This extends to direct or indirect transactions.

[74] Accordingly, the notion that the first respondent as appointor was intended to be in a position to self benefit, as was the case in *Clayton,* is rejected.

[75] The various factors referred to above lead to an inevitable conclusion that there are critical distinguishing factors in the RCFT which render it an entirely different trust from that of the VRPT.

ANSWER TO QUESTION 1 – DOES MR CAMPBELL HAVE PROPERTY INTERESTS BY VIRTUE OF HIS POWERS UNDER RCFT?

The definition of "property" within the PRA includes:-

> *"(a) Real property.*
>
> *(b) Personal property.*
>
> *(c) Any state or interest in any real property or personal property.*
>
> *(d) Any debt or thing in action.*
>
> *(e) Any other right or interest.*

[76] The question is whether, in spite of the limitations and constraints which must be applied in the RCFT, the powers vested in the first respondent are nevertheless properly "property" as defined in the PRA. The Supreme Court said at paragraph [38]:

> "*We see the reference to "any right or interest" [5.2 PRA] when interpreted in the context of social legislation, as the PRA is, as broadening traditional concepts of property and as potentially inclusive of rights and interests that may not, in other contexts, be regarded as property rights or property interests."*

[77] In *Clayton* the Supreme Court was able to conclude that the powers and entitlements vested in Mr Clayton reflected such a degree of control that they were tantamount to a general power of appointment appropriately classified as relationship property as a "right or interest ". The Court rejected the notion that a general power of revocation existed but considered the group of provisions contained within the deed and their consequential impact. In doing so, the conclusion reached was that those provisions crossed the threshold between normal trust obligations, including duties to others and the ability to treat trust assets as those of Mr Clayton.

[78] The provisions of the RCFT are entirely distinguishable as discussed above. The first respondent is fettered both as trustee and appointor so that any powers he has fall far short of any mantle of ownership of the trust assets. It was the ability on the part of Mr Clayton to operate as the owner of the VRPT property which lead the Court to the view that Mr Clayton's group of powers were "property".

[79] Accordingly, the answer to this question is "*no – the first respondent does not have property interests by virtue of his powers in the RCFT".*

***ANSWER TO QUESTION 2 – ARE THESE PROPERTY INTERESTS RELATIONSHIP PROPERTY*?**

[80] Given the answer provided to question 1, it is not necessary to answer this question. However if that conclusion is wrong and accepting that further evidence may be necessary, there is significant evidence to suggest that the first respondent would have a separate property argument.

[81] Section 8 of the PRA defines "relationship property". Among those definitions are the following:

> *"8 (e) subject to sections 9(2) to (6), 9A, and 10, all property acquired by either spouse [or partner] after their marriage, [civil union], or de facto relationship began;*
>
> *8 (ee) subject to sections 9(3) to (6), 9A, and 10, all property acquired, after the marriage, civil union, or de facto relationship began, for the common use or common benefit of both spouses or partners, if—*
>
> *(i) the property was acquired out of property owned by either spouse or partner or by both of them before the marriage, civil union, or de facto relationship began; or*
>
> *(ii) the property was acquired out of the proceeds of any disposition of any property owned by either spouse or partner or by both of them before the marriage, civil union, or de facto relationship began.*

[82] Section 9 defines "separate property" as including:

> *"(2) Subject to sections 8(1)(ee), 9A(3), and 10, all property acquired out of separate property, and the proceeds of any disposition of separate property, are separate property.*
>
> *" (3) Subject to section 9A, any increase in the value of separate property, and any income or gains derived from separate property, are separate property.*
>
> *" (4) The following property is separate property, unless the court considers that it is just in the circumstances to treat the property or any part of the property as relationship property:*
>
> *(a) all property acquired by either spouse or partner while they are not living together as a married couple or as civil union partners or as de facto partners:*
>
> *(b) all property acquired, after the death of one spouse or partner, by the surviving spouse or partner, as provided in section 84.*
>
> *(c) Became the spouse or [partner] is a beneficiary under a trust settled by a third person".*

[83] S 10 precludes beneficiary interests in a trust settled by a third party.

[84] It is indisputable that any powers which the first respondent has in the RCFT had their genesis in the mirror trusts established well before the relationship of the parties commenced. The resettlement process involved rearrangement of trusts which had existed since 1995 with the same expressed purpose. Without the existence of those earlier trusts and the required resettlement clauses contained within them, the RCFT could not have been established.

[85] Accordingly, there may be a strong argument available to support a separate property submission.

ANSWER TO QUESTION 3 – IS THE ANSWER TO QUESTION 2 AFFECTED IN ANY WAY BY WHETHER THE 14A TAKUTAI AVENUE PROPERTY IS THE FAMILY HOME AND, IF SO, IN WHAT WAY IS IT AFFECTED?

[86] Again, there is no need to deal with this question given the answer provided to Question 1. However, I comment briefly on the proposition that the nature of Takutai (said to be the family home) might alter the position in some way. The submissions addressing this question are slight, hence the basis of the proposal that such a scenario might change the answer to Question 2 is not altogether clear.

[87] Whilst "relationship property" is defined in s 8 as including "*the family home whenever acquired*", the fact is that the house referred to as the family home has, since 1995, remained in the ownership of a trust and is not therefore relationship property.

[88] Nor could there be any argument that the family home was transferred to a trust to defeat the applicant's claims or with the effect of defeating a valid claim. The house was held by mirror trusts well before the parties ever met and the restructuring process occurred for good reason when the first respondent and his first wife separated. At no time relevant to the applicant's claims did the first respondent own the house.

[89] Hence, the fact that Takutai was the "family home" has no relevance other than the possibility of a party claiming compensation pursuant to s 11B of the PRA.

M J Southwick
Family Court Judge