

# A new initiative in trust law

**The Cook Islands international relationship property trust is a novel way for couples to manage their assets in the event that they separate or divorce**

By Reuben Tylor

**T**he divorce or separation of high-net-worth (HNW) settlors of a trust, and the powers of matrimonial courts to reach and distribute trust assets to meet spousal claims, are a recurring problem for trustees.

The *International Relationship Property Trusts Act 2021* (the Act) is a new and unique initiative providing statutory authority for couples who wish to keep assets they choose intact under common management in the event that they separate or divorce. This concept was developed by Trustees & Fiduciaries (Cook Islands) Ltd, a trust company in the Cook Islands.

The Cook Islands is a recognised jurisdiction for the establishment of international trusts. The emphasis in the past has been on protecting trust assets from frivolous and sometimes vexatious claims by third parties against settlors. The Act does not protect trust assets from third parties, but rather is designed to protect couples, and their issue, from themselves.

## THE MISCHIEF

The mischief addressed by the Act is well understood by trustees. Having carefully administered the assets of a family trust over several decades, a trustee suddenly finds all its work undone by a divorce court when the settlors separate or divorce.

Assets invested into long-term investments are subject to a fire sale at a discount. Family businesses are subject to forced sale or retained subject to crippling refinancing obligations. Or an outside buyer may need to be found for the interest of a spouse.

Capital identified for the support of future generations is suddenly distributed outright to a spouse with no experience of investment and potentially exposed to opportunists. Contingency fees from lengthy litigation over competing claims amid strong emotions may consume a substantial part of the assets.

Children with expectant interests under a succession plan suddenly find themselves completely disinherited or taking a secondary position behind new relationships and new issue.

These results are completely at odds with the original purpose of creating a trust, as well as being contrary to all commonly understood principles of trust law. Yet it is becoming more common as both lawmakers and courts treat trusts as transparent when: (a) determining whether trust assets are part of matrimonial property subject to the court's jurisdiction upon divorce or separation; and (b) making distributions of trust assets to spouses.

## A NOVEL APPROACH TO RELATIONSHIP PROPERTY

The Act does not attempt to enter the fray as to what is and what is not matrimonial property, nor as to what entitlements the parties might have to that property. The Act deals only with assets that the parties have agreed are matrimonial property. It provides a statutory regime under which, in the event the parties separate, assets held by a relationship property trust (RPT) must be held intact and remain upon the trusts declared, and must not be divided and distributed in the event the parties separate unless the trust instrument provides otherwise.

There is nothing stopping the parties including a restriction of this type in a standard deed of trust. What is unique to the Act, however, and to the Cook Islands, is that the Act provides legislative authority for this restriction and reinforces it with a comprehensive regime to give certainty to the parties that their wishes will be honoured.

*'The Act ... creates a legislative regime that reinforces traditional concepts of trust law while complying with principles of matrimonial property law, which allow parties to enter into agreements addressing property rights in the event of their divorce'*



## PRINCIPAL FEATURES

The principal features of the Act are:

1. The Act applies to parties who declare themselves to be in a 'relationship' and is not restricted to marriage partners.
2. The parties select the property, and their respective shares, in the relationship property.
3. The Act sets out clear prerequisites for establishing an RPT, including: (a) independent representation; and (b) full disclosure of assets and income.
4. Parties are given a period after execution to ratify, or opt out of, the agreement.
5. The right of a party to challenge the terms at a later date is restricted, as are remedies available upon a successful challenge.
6. Recognition of foreign judgments inconsistent with the principles of the Act is restricted.

## FAMILY BUSINESS

The Act recognises a special category of property: a family-owned business. The forced sale of ownership interests in a family business can be catastrophic to both its value and the interests of the beneficiaries,

often resulting in the collapse of the business. Financial institutions lending to a family business must take this risk into consideration. In response to this problem, the Act makes special provision for the retention of a family business. It is also recognised that it may be in the best interests of the beneficiaries if management of a family business by a spouse, who is a key person, continues after divorce or separation.

## APPEARANCE BY TRUSTEES IN A FOREIGN COURT

Where assets of an RPT are located within a foreign court's jurisdiction, the Act provides for a trustee of an RPT to make a limited appearance in a foreign court without being deemed to have submitted to the jurisdiction of that court for the purposes of Cook Islands law.

## MARKETING ISSUES

The Act is designed primarily to appeal to married couples in jurisdictions where the norm is to dismember a trust upon divorce. It is not an alternative to a prenup, which is designed to divide and distribute assets. An RPT might be used where a recently married



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couple is just starting out and believe their joint efforts should be held for them and their issue without exception; or where there is a second marriage with different families. An RPT might also be used where matrimonial property is subject to the laws of more than one jurisdiction. Where parties are not married (or are not able to be married) an RPT can fulfil a useful purpose. An RPT can ensure succession of ownership of a family business as well as provide a higher level of security for lenders.

## SUMMARY

The Act gives planners a new tool with which to protect the assets of HNW families.

It creates a legislative regime that reinforces traditional concepts of trust law while complying with principles of matrimonial property law, which allow parties to enter into agreements addressing property rights in the event of their divorce. The regime is responsible, balanced and protective of a subordinate party. The requirements for disclosure and independent representation prior to entering into an RPT follow those set out in the *Uniform Premarital and Marital Agreement Act* (US federal) as well as principles of English and Welsh common law. Specific provisions address areas of possible abuse. Finally, the Act is constructive socially, with an emphasis on retaining social cohesion and traditional family values. It is anticipated that foreign courts will recognise the merits of this return to traditional trust principles.



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