

The Cook Islands' New International Relationship Property Trust and its Role in Preserving Wealth for Future Generations

Asiaciti Trust, a leading international trust and corporate services provider, is a keen proponent of the Cook Islands' International Relationship Property Trust, a new form of responsible planning and a practical solution to help protect the parties from the often very profound effects of a relationship breakup. Tine Ponia, Managing Director of Asiaciti Trust Cook Islands, recently offered a detailed analysis of the key advantages of this new offering to the world, one that she firmly believes will significantly enhance the likelihood of dispute-free divorces and relationship disintegration.



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TINE PONÍA
Asiaciti Trust

Tine opens the conversation by offering an overview of the new Cook Islands' International Relationship Property Trust (IRPT), its purpose, the requirements involved, and the key features for clients to be aware of.

She explains that from December 2021 via the passing of the International Relationship Property Trust Act by the Cook Islands parliament, there is a genuinely effective new option available to clients to help overcome challenges around matrimonial or relationship breakups.

Protect and preserve

The rationale for the new IRPT legislation is to provide an international trust to maintain and administer relationship property during a relationship and to protect and preserve the value of that property for the benefit of the designated beneficiaries in the event the marriage or the relationship breaks up.

"The background for the creation of the IRPT is that, as we all know, such breakups occur all too often, and then, again all too regularly, there is very often an argument in court

The Cook Islands, Trusts and the Arrival of the New IRPT

The Cook Islands is made up of 15 islands with a total land area of 240 square kilometres and an Exclusive Economic Zone of approximately 2 million square kilometres. It is located in the Pacific north of New Zealand with Rarotonga being the main island. It is an independent and self-governing nation in free association with New Zealand, and all its people are classified as New Zealand citizens. It has a parliamentary system of government of the type that originated in England.

The Cook Islands courts are presided over by New Zealand judges, and the Privy Council is the highest court of the Cook Islands. This means the Cook Islands has a strong and stable judiciary, which is important given that the courts provide recognition to trusts.

The Cook Islands established themselves as an International Financial Centre in the early 1980s with the enactment of the International Companies Act 1981-82. And then in 1984, the Cook Islands Parliament passed into law the Cook Islands International Trusts Act 1984 (ITA).

The ITA comprised innovative trust legislation that significantly enhanced the use of trusts to protect family assets, providing a range of flexible options for trust structuring, such as purpose trust and dynasty trust with no perpetuity period. Since that time, through amendments to those acts and subsequent legislation, the Cook Islands has developed a robust asset protection framework, and accordingly, Cook Islands' practitioners have been administering international trusts for almost 40 years.

Cook Islands international trusts have since 1984 therefore been widely used to protect assets from challenging (sometimes vexatious) third-party claims. Almost 40 years later, the Cook Islands is now one of the foremost jurisdictions for international trusts, which are widely used for asset protection, estate planning, wealth preservation, and to facilitate global diversification of trust investments.

To further enhance its position as a leading trust jurisdiction, the Cook Islands, in December 2021, introduced the International Relationship Property Trust (IRPT) as a vehicle to preserve matrimonial or relationship assets via the IRPT Act.

The IRPT is essentially a new form of international trust to own relationship property, in other words, property owned by partners in a matrimonial or other personal relationship. The primary purpose of such a trust is to manage and preserve the wealth attributable to a couple's relationship, with the added benefit of failsafe mechanisms to protect the trust property in the event of a breakdown in that relationship.

over what constitutes matrimonial or relationship property and what each party's share of that property might be," she says. "This usually further damages the already broken relationship between the parties and resulting in heightened animosity."

At the mercy of the courts?

In these situations, the couple is at the mercy of a court order for the division of property that may favour one spouse or partner over the other. Family or relationship wealth that was meant for the mutual future generations of the couple and was invested in long-term investments may have to be liquidated or sold quickly at a discount in order to satisfy a division of property directed by the court.

And court-ordered division of property can sometimes mean third parties, for example, issues from a second or prior marriage, who weren't beneficiaries of a family trust set up by the couple during their relationship become entitled to the assets of the trust.

Avoiding costly litigation

The result is very often costly litigation, which is often more complicated and more expensive when a couple has residences and assets in multiple jurisdictions. "These cases can go on for years," she says. "Prolonged litigation over the division of relationship property means the couple and the families endure an enormous amount of emotional stress."

Tine, therefore, explains that those interested in the new IRPT should be anyone involved in advising their clients on their wealth management and planning, perhaps especially family lawyers

Key Features and Requirements of an IRPT

Tine Ponia, Managing Director of Asiaciti Trust Cook Islands, succinctly reviews the key features and requirements of the new International Relationship Property Trust.

- » The settlors must be in a relationship, which can be a marriage or a de facto relationship, and it can be with the same sex or opposite sex.
- » The settlors must enter into a legally binding relationship agreement which becomes part of the trust instrument.
- » The relationship agreement concerns property that the settlors own either jointly or individually while in a relationship with each other.
- » The purpose of the agreement is to affirm, modify or waive any rights or obligations the settlors have in regard to the property that they wish to transfer to the trust.
- » The IRPT Act requires that the trust instrument must restrict the division and distribution of trust assets only to the settlors' beneficiaries, meaning third parties such as children from a subsequent relationship who are not named as beneficiaries cannot claim against the assets of the trust.
- » The trust instrument must also provide for the administration and the management of assets during the couple's relationship and after separation. This means that what happens to the trust assets in the event the couple separates would not be left solely to the mercy of a court order.
- » Each settlor must receive separate and independent legal advice concerning their relationship agreement and the trust instrument.
- » Each settlor must make full disclosure to the other of their property, income, and liabilities.
- » The parties have up to 45 days after the date they sign the trust instrument to ratify or opt out of the trust.
- » The trust must be registered under the IRPT Act, and it must be irrevocable. Though there are restricted rights available to challenge the terms of the trust, the powers to amend the trust are limited and foreign judgments inconsistent with the purpose of the IRPT Act are unenforceable in the Cook Islands.
- » Once the trust is settled under the IRPT Act, and it is registered with the Registrar of International Relationship Property Trusts, the trust must be administered in accordance with the trust instrument. In the event the couple separates the trust property must remain intact and remain on the trusts declared.

and estate planning lawyers who have a strong appreciation of the value of this type of structure.

Covering the bases

Tine says that the IRPT arrives in an environment to plug a significant gap. The options to mitigate these types of risks currently include really only the typical pre- or post-nuptial agreements, or PNAs as they are often known.

“The problem there, as case law demonstrates, is that they’re not always legally binding and the courts have jurisdiction to override them,” she explains. “But what our solution does is essentially incorporate the key elements of a PNA within the trust itself.”

The IRPT’s tight rules and procedures

And Tine elaborates on those comments, noting that because the IRPT Act prescribes a very strict process that must be followed – including independent legal advice for both, full disclosure, and ratification of the trust agreement – the Cook Islands lawmakers believe this product will be more palatable to the courts than the PNA or the standard family trust.

“The IRPT has the backing of a statutory authority, and all the elements therein were included specifically so that when a court looks at this trust, they should conclude that it is fair and reasonable,” Tine comments.

She says this is made even more robust by the 45-day grace period for both parties to reconsider after signing but before ratifying. “This type of cooling off period – particularly important after negotiating these delicate, sensitive personal matters – will

Getting Personal with Tine Ponia

Tine Ponia is the Managing Director for Asiaciti Trust Pacific Limited in the Cook Islands, and is a full member of STEP. Tine says she was actually born in Samoa and is Samoan by ethnicity. She later left Samoa for university studies in Australia graduating with a degree in history and politics. Tine subsequently studied law at Victoria University of Wellington in New Zealand and graduated as a top commercial law student and is a licensed Barrister and Solicitor of the High Courts of the Cook Islands and New Zealand.

She has over 20 years post-admission experience holding Legal/General Counsel roles in various firms. Prior to joining Asiaciti Trust in April 2013, Tine was an Associate at a specialist New Zealand commercial law firm and had significant experience in the Cook Islands offshore trust industry.

Tine is married and has four children with her husband from the Cook Islands, the oldest being a son at university currently in New Zealand; then she has two daughters aged 11 and nine, and another son aged just four years old.

Her favourite moments are often spent with her family in the great outdoors and keeping fit and healthy. She also professes to be a ‘foodie’ who loves seafood and the pleasures of New Zealand wines such as Sauvignon Blanc from Marlborough or Pinot Noir from Central Otago.

make it even more difficult for any court to strike down,” she says. “The result means greater predictability, and potentially saving the individuals and the family huge stress and possibly enormous cost later on if the parties should separate.”

A major step forward

Tine also zooms in on the value of the IRPT in relation to other planning tools in the context of family wealth. She cites three major advantages of the new legislation that set it apart from other planning tools – the relationship

agreement, the process, and the trust (see box below).

As to the relationship agreement, she explains that it will be a different process for setting up a trust from what many practitioners will be used to in terms of an offshore trust.

The process itself has to be fair, and transparent, not just when the parties are negotiating the relationship agreement but also if separation should later happen. The trustee has a mandatory obligation, for example, if they receive a separation notice from one of the settlors, and that

becomes a trigger event for the trustee to review the terms of the trust and to take certain actions.

Trustees and obligations

And finally, the trust instrument is cast in stone, and the trustee must follow it precisely. She explains that one of the distinguishing features of this legislation is in addition to that very core fiduciary obligation of a trustee to follow the terms of the trust, the trustee must also always bear in mind the purpose of the legislation.

"In particular," she notes, "the stated purpose of the legislation is to provide the IRPT, so that relationship property held is managed and administered during the settlors' relationship and the value and benefit of the relationship property is preserved and retained if the settlors separate."

Moreover, she adds that there is a unique opportunity in this legislation for dual registration of the trust under this Act and also under the International Trust Act, so that the property in the trust can be protected from creditors and benefit from the restricted limitation periods for creditor claims.

In PNAs, we cannot trust...

Tine also drills down in somewhat more detail into the role of the IRPT to cover the potential for a PNA not being enough or ironclad, in other words failing if challenged in court.

PNAs, she reiterates, aren't always legally binding, and they don't override the court's jurisdiction; this is the case in the UK and Hong Kong, where the jurisdiction for providing couples with relief in divorce resides squarely with the courts.

PNAs also do not protect property during the relationship; they are

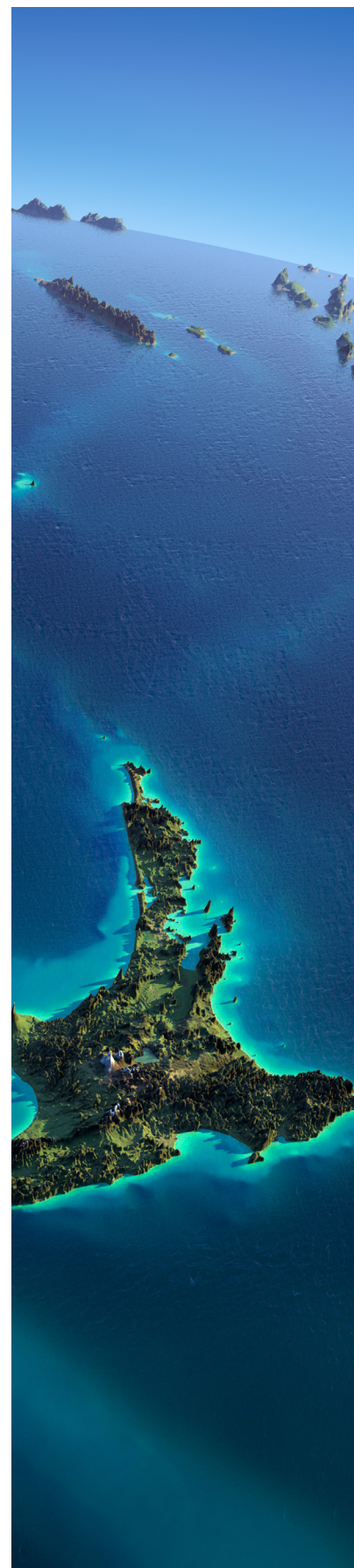
focused typically on what happens when there is a relationship breakdown whereas the IRPT is all about properly managing the property during the relationship, and also in the event that the couple separates. And lastly, PNAs don't protect assets from the spouses' or partners' creditors.

She adds that while PNAs are not binding contracts under for example UK or Hong Kong law, they are however enforceable by the courts, which are likely to enforce them provided the PNA is unvitiated [meaning pure, not corrupted in its substance or qualities], and its terms are fair. An unvitiated PNA, she elucidates, is one where there is no concern about the fairness of the circumstances surrounding the creation of the PNA, that there was no fraud misrepresentation or undue pressure at that time, and that it was entered into freely.

The armour-plated IRPT

"Meanwhile, the IRPT is irrevocable, and as both parties must confirm their agreement to it, this cannot be challenged at a later date, and we believe there really are limited avenues to challenge an IRPT, because of those three key advantages I have elucidated," Tine states.

"Accordingly," she adds, "the IRPT will be subject to the jurisdiction of the Cook Islands court; it can only be declared void if the procedural fairness requirements weren't met, a foreign judgment is unenforceable in the Cook Islands if it is inconsistent with the purpose of the IRPT Act, and the IRPT is irrevocable and can only be amended in a manner that's consistent with the purpose of the IRPT Act."



Cases in point

Tine draws the discussion toward a close by offering a typical case scenario, this one comprising a wife from Hong Kong and the husband from the US. They have two different residences and citizenships, and they have assets in the US and in Hong Kong and in other jurisdictions. When their marriage falls apart, there are major cross-border issues that they need to resolve.

“On top of already having a fight as to who owns what, they have to determine which laws apply to which assets, and also, where are they domiciled and therefore which law presides over the breakup of the marriage and the division of property,” Tine explains. “But if they had, for example, clearly and openly identified their property in multiple jurisdictions and their respective shares in

those properties and put them under an IRPT governed by Cook Islands law, there will be no argument over who owns what and the assets can continue to be administered and managed for their benefit without the stress of litigation complicated by cross-border issues.”

In another simple example, one partner in a marriage had been divorced before and has children from that prior marriage. In the new marriage, they can identify certain property that they own together, or they individually own and put it in this trust for their benefit during the marriage, and for the benefit of their mutual children.

“But if they don’t have this type of IRPT, perhaps they just set up a normal family trust, that would potentially be open to claims by children from the

previous marriage,” Tine explains. “However, with the IRPT in place, their whole planning is far better articulated and more robust.”

Preserving your future

Tine closes the conversation by reminding all of us of the perils of matrimonial or relationship break-ups and just how stressful, costly, lengthy, and destructive litigation can be.

“We believe that this IRPT offering genuinely provides a new form of responsible planning and a practical solution to help protect parties from the often very profound effects of a relationship breakup and should be considered seriously by any wealthy clients and families who wish for peace of mind and who value sensible, prescient and robust estate and assets planning,” she concludes. ■

