

## TRUSTS AND THEIR ROLE IN THE ASSET POOL FOR THE PURPOSE OF FAMILY LAW PROCEEDINGS

It is often the case in Family Law matters that the financial structure of a family will include a Discretionary Trust. There has been a long standing debate as to what extent the assets of a Trust constitute property for the purposes of family law proceedings under the Family Law Act ("FLA").

We set out hereunder are some illustrations as to the way the property of a Trust is treated under the FLA.

### DOES THE PROPERTY OF A TRUST CONSTITUTE PROPERTY FOR THE PURPOSE OF FAMILY COURT PROCEEDINGS?

- Section 79 of the FLA gives a wide discretionary power to a Court to vary the interests in any property of parties to a marriage.
- The decision as to whether an interest in a Trust constitutes "property" under the FLA, depends upon the facts and circumstances of each case. Of particular significance is the recent High Court decision in *Spry and Kennon*<sup>1</sup> wherein the High Court confirmed the long standing practice in the Family Court that if a party to a marriage has the power to remove and appoint the Trustee of a Trust then the assets of that Trust can be held to be the "property" of that party, the "Trust" is seen as the "alter ego" of that person.

### THE STANDING OF DISCRETIONARY BENEFICIARIES?

- If a party is a potential beneficiary in a discretionary Trust their interest in that Trust must be disclosed.
- Full and frank disclosure of such interest is required and includes providing to the other party documents such as the Trust Deed; Minutes of Meeting of the Trustee and all financial records of the Trust including Financial Statements and Tax Returns.
- It frequently happens that families do not provide their children with financial statements for a Trust, however any beneficiary of a discretionary Trust has a right to inspect Trust documents (i.e. the Trust Deed and the Financial Statements).<sup>2</sup> It is no excuse to say "my father (or mother) will not give the records to me".

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<sup>1</sup> [2008] HCA 56

<sup>2</sup> *Spellson and George* (1987) 11 NSWLR 300

## IS THE INTEREST OF A DISCRETIONARY BENEFICIARY CAPABLE OF VALUATION?

- In *Spry and Kennon*<sup>3</sup> the High Court held that:

*'[In the absence of] a specific application of Trust capital or income to one of the [beneficiaries] there was no equitable interest in its assets held by anyone [capable of valuation]'*.<sup>4</sup>

- Therefore the rights of discretionary beneficiaries extend only to a right to due consideration and due administration of the Trust. It is difficult to value those rights when the beneficiary has no present entitlement, and may never have any entitlement to any part of the income or capital of the Trust.
- If a party is a discretionary beneficiary to a Trust, the interest of the party is generally seen by the Court as a financial resource only. How this will affect the property settlement depends on many factors.

## IMPORTANT ISSUES TO BE MINDFUL OF IN RESPECT OF TRUSTS

1. If you are the appointor of a Trust, that is, if you can remove or appoint the Trustees and thus are seen to have the ability to control the Trust, then the assets of that Trust will constitute "your property" in proceedings involving you under the FLA.
2. The Court has the power to set aside any document which alters a party's rights under a Trust pursuant to Section 106B of the FLA. The Court will set aside any such Deed of Variation, if a party to a marriage can successfully establish that the other party's action in implementing the Variation had the effect of moving Trust property beyond the reach of the Court, so as to reduce that party's entitlement to a property settlement, if there was a sufficient connection between a separation and an anticipated property settlement and the disposition.

## ADDITIONAL POWERS OF THE COURT

1. It is also important to note Section 85A of the FLA gives the Court power to cause the assets of a Trust to be distributed to a party if the Trust is "a Trust in relation to the marriage".
2. Section 85A was held by Kiefel J in *Spry* to give the Court power to deal with all property held for the use and benefit of the parties to the marriage and which represented an accumulation of their assets in the course of the marriage.
3. Part VIII AA of the FLA was introduced in 2003 and overcomes the decision in *Ascot Investments*. The Court now has the power in an appropriate case to disregard the terms of the Trust Deed and to take money or assets out of a Trust if it is seen as necessary in order to do justice between the parties so as to arrive at an appropriate property settlement.

**Dated 29 April 2010**

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<sup>3</sup> [2008] HCA 56

<sup>4</sup> *Spry and Kennon* [2008] HCA 56 at paragraph 49