

Family Law Fact Sheet

How safe is my family trust?

Many of our clients set up family trusts as tax effective vehicles to distribute income from businesses on the advice of their accountant many years ago. Having assets held within a family trust also has asset protection advantages.

Many of our clients have been led to believe that assets held in a family trust are safe in the event of a divorce. However that is not always the case.

Family trusts in Family Law

The Family Court regularly treats assets held in a family trust as property to be divided between the parties. The Family Court is likely to do this where the Trust is controlled by parties to the marriage or by friends or family who will act on the direction of a party to the marriage.

In practice this means assets held within a family trust are usually included as part of the property to be divided between separating spouses.

Are the trust assets matrimonial property?

Whether property in a discretionary family trust is considered property to be divided between separating spouses is a broad question which usually involves consideration of the:

- Terms of the Trust Deed;
- Identity of trustee;
- Control of trustee, if the trustee is a company;
- Identity of appointor or principal of the trust;
- History of trust distributions from the trust;
- Assets held within the trust;
- How the assets in the trust were acquired and financed;
- The class of beneficiaries within the trust;
- The relationship between key individuals as defined in the Trust Deed.

Additionally, trust income and particularly the decision of the trustee to distribute trust income

to specific beneficiaries in the post separation period is often a key issue which can affect:

- Interim spousal maintenance applications;
- Child support assessments;
- Treatment of post separation income; and
- Division of property between separated spouses.

Protecting your family trust

It is important that separating spouses, trustees and appointors of family trusts receive legal advice at the time of separation to ensure litigation can be avoided and adverse treatment of trust property can also be avoided, if possible.

Our Family Law team have published articles of consideration by the High Court of the treatment of trust property within Family Law property settlements. We are able to provide expert advice regarding the treatment of trust property as part of an overall property settlement. We are also able to provide strategic advice as to the consequences of making distributions of income and capital from the trust to various beneficiaries in the post separation period.

Contact:

Sarah Minnery
Partner
Accredited Family Law Specialist
T: +61 7 3002 8714
F: +61 7 3221 3068
E: sarahm@hemhart.com.au

Debra Effeney
Senior Associate
Accredited Family Law Specialist
T: +61 7 3002 8771
F: +61 7 3221 3068
E: debrae@hemhart.com.au

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