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## FAMILY TRUSTS AND MARRIAGE BREAKDOWN

A very recent case decided by the High Court of Australia has clarified the law regarding the treatment of assets held by a Family Trust in a property settlement between a husband and wife following the breakdown of their marriage. The Court has confirmed that in most cases assets held by a Family Trust can be included in a family law property settlement, particularly where:

- The husband or the wife is the “Trustee”, “Settlor” and/or “Appointor” of the Family Trust and as such has ultimate control over how the Family Trust operates; and
- Either or both of the husband and wife are beneficiaries of the Family Trust; and
- The assets of a Family Trust have built up due to the financial and non financial contributions made by the husband and wife during the course of their marriage;

In the case of *Kennon v Spry: Spry v Kennon [2008] HCA 56*, Dr Spry established a Family Trust many years

before his marriage. Dr Spry was the *Settlor* and *Trustee* of this Trust. Dr Spry was also a *beneficiary* of the Trust. In 1978 Dr Spry married and he and his wife had four children. By a deed varying the Trust in 1983, Dr Spry excluded himself as a beneficiary of the Family Trust. He appointed his wife as Trustee on his death or resignation, with his eldest daughter to take over the role from Mrs Spry upon her death or resignation. In December 1998, Dr Spry made a further variation to the Trust which excluded himself and Mrs Spry as beneficiaries. This was done, “at a time when his marriage was in difficulty” in the words of Chief Justice French in the High Court. In 2001 Dr and Mrs Spry separated. In 2002 Mrs Spry applied for a Divorce and property settlement in the Family Court of Australia.

In January 2002 Dr Spry created 4 new Trust Funds; one for each of his children. He transferred into each new Trust one quarter of the assets of the main Spry Family Trust. He later transferred into the children’s Trust Funds, shares he held beneficially. In May 2002 Dr Spry appointed his



solicitor Mr Kennon as joint Trustee with him of each of the Children’s Trusts.

Mrs Spry asked for Court Orders that she receive one half of all of the assets and resources held by herself and her husband, including the assets of the Family Trust. Mrs Spry also asked for Court Orders pursuant to Section 106B of the *Family Law Act* that the variation to the Family Trust in 1998 and the Trusts created for the children in 2002 be set



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aside. The Family Courts can “set aside” transactions where there is evidence which shows that the action taken was intended to defeat an anticipated claim for property settlement.

Justice Strickland in the Family Court of Australia, the majority Judges in the Full Court of the Family Court at the Appeal and the majority of the Judges in the High Court at the final Appeal all agreed that all of the assets, including the assets of the Spry Family Trust, should be taken into consideration in the property settlement. In the High Court Chief Justice French stated that the Trust assets should be treated as “property” of the marriage as, *“Where property is held under such a trust by a party to a marriage and the property has been acquired by or through the efforts of that party or his or her spouse, whether before or during the marriage, it does not, in my opinion, necessarily lose its character as “property of the parties to the marriage” because the party has declared a trust of which he or she is trustee and can, under the terms of that trust, give the property away to other family or extended family members at his or her discretion.”*

The majority Judges in the High Court were also prepared to accept that Mrs Spry had the right to include the assets of the Trust in her property settlement as she was a beneficiary of the Trust. Even though the Family Trust was a Discretionary Trust, and Dr Spry as the Trustee was not obliged to give Mrs Spry any particular part of the Trust, Mrs Spry as a beneficiary was entitled to the due administration of the Trust, even if her entitlement to part of the Trust could not be accurately valued.❶

What does this mean for the status of Family Trusts? It has been the case for many years in the Family Courts that where one of the parties to a marriage has effective control over the assets of the Trust, usually when that person is the Settlor, Appointor, Trustee and a beneficiary of a Trust, then the assets of that Trust will not be excluded from consideration in a property settlement – See *In Marriage of Goodwin* (1990) 101 FLR 386. Where the assets of a Trust are not directly

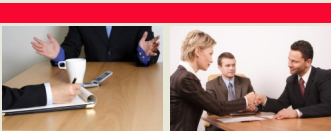


included as “property” to be divided between a husband and wife, it is likely that those assets will be treated as a “financial resource” of one of the parties, which must be taken into account when determining how the overall asset pool should be divided.

If a person is considering marriage, but is worried about any future claim for property settlement their partner may have, they should seriously consider asking their partner to enter into a Binding Financial Agreement, which will set out clearly how their assets will be divided in the event that they separate.

Further, when establishing a Family Trust, serious thought should be given to the level of control a person has in that Trust, as if the reality is that if they are “one and the same” with the Trust, it is likely that the Trust structure will offer limited protection to them in the event of the breakdown of their marriage.

❶ Information regarding the case of *Kennon v Spry: Spry v Kennon [2008] HCA 56* contained in this article was taken from the published Judgment delivered by the High Court on 3 December 2008



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