

Keeping it in the Family - But Not Quite the Way We Expected!

By Sharon Winn, Special Counsel

Over the last 50 years, there have been significant changes in our society: increased wealth but also increased risk of financial problems, higher risk professions with greater chances for personal liabilities, later partnering and childbearing, an increase in the number of relationships and an increase in the rates of divorce and family breakdown.

These trends have seen the resurgence of the use of discretionary trusts as a vehicle to hold assets and investments and many of you may be familiar with trusts. Commonly, discretionary trusts are used as a means of quarantining and protecting assets from a former partner in the event of a relationship breakdown.

However care needs to be taken in the drafting of the trust if this is the purpose of using a trust. The recent decision of the High Court of Australia in *Kennon v Spry* reinforces the long standing position of the Family Court of Australia that where a party to the marriage is not only a discretionary beneficiary of the trust, but also the sole trustee of a trust and the appointor, there is high degree of likelihood that the assets of the trust and the powers vested in the controlling spouse will be considered in fact matrimonial assets available for division in a property settlement.

Even if the Family Court does not make an order in relation to the assets held in a trust, the Court will consider the rights which a beneficiary may have in relation to those assets and possible distributions, and treat those assets as a financial resource with the consequence of an adjustment in the property rights held by the parties in other matrimonial property.

Kennon v Spry is a salutary reminder to those of us using trusts for asset protection purposes to review the terms of the trust and how the trust is operated to ensure the benefits from using the trust are maximised. If a trust is being used to benefit a beneficiary who anticipates a matrimonial breakdown, you may need to consider excluding the spouse of the beneficiary as a beneficiary of the trust and excluding or removing control of the trust from the at risk partner in the marriage.

Trusts are often about keeping assets in the family....but maybe not quite how and with whom you want!

If you would like to know more about trusts or would like to review your trust and asset planning, please contact Sharon Winn of Flower and Hart's estate planning department on 07 3233 1247 or sharon.winn@flowerandhart.com.au.