

# Trust assets protected on property settlement: further reassurance

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At 2012 WTB 34 [1373], we discussed the Family Court decision in *Morton v Morton* [2012] FamCA 30, which showed that the assets of a family trust are not necessarily at risk on a matrimonial breakdown. The following case adds further reassurance to this position.

## **Harris v Harris case**

Towards the end of 2011, the case of *Harris v Harris* [2011] FamCAFC 245 considered whether the assets of a family trust should be treated as assets of a marriage and so subject to division on a property settlement.

The case provides further context to the general attitude of the Family Court in relation to family trust structures, especially in relation to the concept of indirect control as outlined by the High Court in *Kennon v Spry* (2008) 238 CLR 366.

## **Facts of the case**

The case involved a property settlement in the divorce of Mr and Mrs Harris, a couple who had 2 children together, as well as others from previous relationships.

At the time of the divorce, the husband (H) was a beneficiary of a trust, The Harris Family Trust (Trust).

The Trust was established by H's father with the main beneficiaries being H and his siblings. At the time of the divorce, the appointor for the Trust was H's mother, with the shareholders of the trustee company (X Pty Ltd) being H's mother, H's son from a previous relationship and a friend of H.

The main asset of the Trust was a business which was run on a day-to-day basis by H and his wife (W). During the marriage, W received distributions from the Trust, however this ceased upon her separation from H.

## **Issues**

The main question before the Court was whether the assets of the Trust should be treated as the property of the H in the property settlement proceedings.

Consideration of statements made in the *Kennon v Spry* decision regarding direct and indirect control of the Trust played a significant role in answering this question.

The Court acknowledged that H did not directly control the Trust as he individually was neither the appointor nor the trustee and that he did not hold any position of control in the current trustee company.

W also argued that H's mother, in her role as appointor, was merely the "alter ego" of H, leaving him in effective control of the trust assets. This argument relied on the doctrine applied by French J (as he was then) in *ASIC, Re: Richstar Enterprises Pty Ltd v Carey (No 6)* (2006) 153 FCR 509.

The Court found that H did not have any indirect control of the Trust as it could not be proven that H's mother (in her role as appointor) was a "puppet" acting in accordance with H's directions.

While there was evidence the distributions to W ceased after the separation, there was no direct evidence of a puppet situation.

## **Decision**

Ultimately the Court held that:

- the Trust and its assets were not an asset of the marriage;
- at most, the Trust should be considered a financial resource for H;
- if a party to the marriage is not directly the appointor or in control of the trustee, then they do not have direct control;
- in order for there to be indirect control by a beneficiary, there must effectively be a situation where someone who has direct control is considered a "puppet" of the beneficiary; and
- in order to demonstrate indirect control (eg through a "puppet" scenario) there must be clear evidence to support the argument, and merely reviewing a history of trust distributions of itself will not be sufficient.

## **Implications of the decision**

The decision in Harris reinforces that many of the potentially concerning aspects of Kennon v Spry can be explained by the particularly unique circumstances of that case.

Furthermore, the importance of carefully considering all aspects of the control of a trust in light of the broader asset protection objectives of the family remains critical.

Weekly Tax Bulletin, 14 September 2012