Using trusts and super funds to protect assets from family law attack

by Matthew Burgess, Director, View Legal

The ability of the Family Court to attack assets held via a discretionary trust has been in little doubt, at least since the decision in Kennon & Spry [2008] HCA 56 (Spry).

In Spry — a trust that, according to the husband, did not at the relevant times feature him as a trustee, appointor or beneficiary — still saw its assets considered property of the marriage, and allocated to the wife. An intervening "trust split" that saw four sub-trusts created and 25 per cent of the assets of the original trust held for the primary benefit of each of the four children of the marriage was effectively unwound by the decision.

Numerous cases since Spry have, however, confirmed that appropriately structured and administered trusts can provide significant protection in the event of a spousal relationship breakdown.

The decision in *Rigby & Kingston* (No. 4) [2021] FamCA 501 provides a compelling example in this regard.

Recent decision

In dismissing the husband's claims and determining that the wife's interests in the assets of the various trusts were not property of the marriage, the court confirmed:

(a) The starting point in relation to the question of whether the property of the trust is, in reality, the property of the parties or one of them is a matter dependent upon the facts and circumstances of each particular case, including the terms of the relevant trust deed (see *In the Marriage of Goodwin and Goodwin Alpe* [1990] FamCA 147);

(b) The beneficiary of a non-exhaustive discretionary trust who does not control the trustee directly or indirectly has a right to due consideration and to due administration of the trust, but 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 (see Spry);

(c) The only property that a trustee has in the assets of a discretionary trust is the bare legal title, which is of no practical value; and the only property that a potential beneficiary has is the right of due administration which — although it is property, in the sense that it is a chose in action — is also of no practical value (see *Gartside v Inland Revenue Commissioners* [1967] UKHL 6). This means that, without more, the interest of a trustee or potential beneficiary in a discretionary trust, although they might be within the wide definition of "property", are of little practical worth when it comes to matrimonial property adjustment. In particular, they do not equate to an interest in trust assets (see *Karllson & Karllson* [2014] FamCA 571);

(d) In Spry, the treatment of the assets of the trust as property of the parties or either of them arose as a result of a combination of factors including control, legal title, powers of distribution and the source of the trust fund. In the case here, none of those factors existed, for example:

  (i) The wife did not control any of the trust; rather, legal title was held either jointly with her two brothers or by a corporate trustee in which the wife was one of three directors;

  (ii) The wife alone could not make decisions to distribute trust funds to herself;

(iii) The source of the funds in the testamentary trust (and essentially all other inter vivos trusts in the group) was from a stranger to the marriage, being the wife's father, and not through the efforts of the wife or the husband.

(e) Ultimately, the rights that the wife had were of little practical worth and, in the absence of control, did not equate to a proprietary interest in the assets of the trusts;

(f) Furthermore, the court noted that the entirety of the testamentary trust assets could be distributed at the election of the wife's brothers to beneficiaries other than the wife prior to the vesting date and that any such decision would be entirely consistent with the clearly articulated purpose of the trust (created by the father under his will, as a stranger to the marriage) that none of his property should benefit a spouse of his children.

Superannuation

Unlike the conclusion reached in relation to the various trusts (where the wife was held to have no interest of value), in relation to her superannuation entitlements, the court confirmed that these had to be treated as property pursuant to section 90XC of the *Family Law Act.*

This section was introduced into the *Family Law Act* to address the fact that, prior to the relevant amendments, "property" for the purpose of the FCA did not include contingent interests.

In particular, for family law purposes, an order can only be made where a party has a present or future interest in a particular item of property.

Superannuation is in the nature of an entitlement that a party may become entitled to an interest in the property in the future, provided that certain events occur and/or that certain disqualifying events do not occur in the meantime.

Therefore, but for section 90XC, superannuation entitlements would be a contingent interest and, in turn, potentially ignored for the purposes of family law property settlement proceedings.

Section 90XC specifically provides as follows (under the heading "Extended meanings of matrimonial cause and de facto financial cause"):

(1) A superannuation interest is to be treated as property for the purposes of paragraph (ca) of the definition of matrimonial cause in section 4.

(2) A superannuation interest is to be treated as property for the purposes of paragraph (c) of the definition of de facto financial cause in section 4.

Conclusion

While properly crafted trusts (including testamentary trusts) can withstand attack in family law proceedings, superannuation assets are at risk.