accountantsdaily

‘Read the deed’ heuristic matters; particularly to the Family Court

24 April 2024 by Matthew Burgess, 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 entirely to the wife.

An intervening 'trust split' (after separation and before the property settlement orders of the court) instigated by the husband that saw 4 sub-trusts created and 25 per cent of the assets of the original trust held for the primary benefit of each of the 4 children of the marriage was effectively unwound by the court 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.

Similarly, numerous cases have also confirmed that simply ignoring the terms of a trust deed, or wider commercial law, will invariably ensure the Family Court ignores purported restructures - and where appropriate impose other sanctions.

The decision in *Krupin & Krupin (No 2)* [2024] FedCFamC1F 56 provides a stark reminder in this regard.

Relevantly, in relation to how the Family Court approaches issues concerning trusts, there were 2 key aspects in this case.

First, in relation to the trustee company of the trust, the husband and wife were each directors and shareholders of the company.

Without the knowledge or consent of the wife, the husband unilaterally removed her as a director and transferred her shareholding. In ignoring these steps the court confirmed:

1. while the husband was the appointor of the trust, this role only created the power to appoint and remove trustees.

3. The appointor power did not extend to a right to remove directors of the corporate trustee without the knowledge and consent of the director, unless there was such a provision in the constitution (or articles of association) of the company - a highly improbable position, and one that the lawyers for the husband certainly did not seek to argue.

4. Similarly the purported share transfer was without any legal foundation and without any notice to the wife and was described as 'a matter of the gravest concern to this Court ... (given) section 140(2) of the Evidence Act 1999 (Cth) (it was) dishonest conduct of the highest order' (see *Briginshaw v Briginshaw*(1938) 60 CLR 336), that appeared to amount to fraud under the Criminal Code. The Court determined to refer this aspect of the matter to the appropriate authorities for consideration as to whether criminal charges should be laid against the husband, and confirmed it was duty bound to do so, without giving anyone an opportunity to be heard on the decision (see *Simpson v Hodges* [2007] NSWSC 1230),

Second, the wife was also a named primary beneficiary under the trust deed. While the court was not provided any helpful submissions on this aspect, it was held to be clear that the wife was purportedly removed as a beneficiary with no notice. This was despite the trust deed not creating any specific power for the removal of a beneficiary (in contrast, there was the ability for the husband, as a primary beneficiary, to appoint tertiary beneficiaries).

The court confirmed:

(a) The relationship between a trustee and a beneficiary is a fiduciary one, and a 'person who occupies a fiduciary position may not use that position to gain a profit or advantage for himself, nor may he obtain a benefit by entering into a transaction in conflict with his fiduciary duty, without the informed consent of the person to whom he owes the duty' - and these principles are inflexible (see (*Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 and *Phipps v Boardman* [1967] 2 A.C. 46).

(b) In particular, a trustee must not act in such a way that a conflict arises between their own interests and their duties as a trustee. Having gained (apparent) control of the trustee company, the husband here acted with vindictiveness in removing or purporting to remove the wife as a beneficiary. A step taken in the advancement of the husband's own interests at the expense of one of the beneficiaries, namely the wife.

(c) Given under the terms of the trust deed there was no specific power granted to the trustee to remove a beneficiary, the only way that could be done legally was through the execution of a deed of variation.

(d) There was no deed of variation in evidence before the court, and the husband offered no evidence to prove that his conduct in removing the wife as a beneficiary was lawful.

(e) Therefore, the husband had no authority to remove the wife as a beneficiary in the manner attempted.

(f) Ultimately the purported removal of the wife as a beneficiary created a clear conflict of duty and interest for the husband; and further evidenced his dishonest conduct.