



Family Law

- Issues for Accountants

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The field of Family Law seems to be constantly changing, with new legislation and regulations as well as important Court decisions that impact on the interpretation of the law for future cases.

As an accountant or finance professional many of these issues will affect the way in which you handle some of your own client's finances.

This Coleman & Greig newsletter highlights the most recent High Court decision in relation to trusts in a family law matter as well as providing an overview of binding financial agreements and the changes to the way in which de facto relationships are treated.

If you have any questions regarding how these issues affect your clients' financial situation, please call. We would be happy to discuss these issues in more detail.

>>High Court confirms the Family Court's broad powers in relation to Trusts



On 3 December 2008 the High Court delivered Judgment in the matter of *Kenyon v. Spry*. The High Court upheld decisions of the Family Court (both at first instance and on appeal), to include assets which had been held in a family discretionary trust as property of the parties to the marriage.

In 1968, 10 years before the couple in question married, the husband created an oral discretionary trust known as the ICF Spry Trust of which he was the settlor and trustee.

The couple married in 1978 and in 1981 the terms of the oral trust were reflected in a Deed of Trust. The Trust Deed recorded the beneficiaries as being the husband and his siblings, his and their issue and the spouses of all of them.

>>High Court confirms the Family Court's broad powers in relation to Trusts cont.

In 1983 the husband varied the terms of the Trust Deed so as to exclude himself as a beneficiary. In 1998, when the marriage was in difficulty, the husband made a further variation to the terms of the Trust, excluding himself and his wife as capital beneficiaries.

The parties separated in 2001. In early 2002, less than 3 months after the separation, the husband established trusts for the benefit of each of his four children and transferred to each of these trusts one-quarter of the capital and income of the ICF Spry Trust.

In April 2002 the wife filed an application for property settlement in the Family Court. She sought orders setting aside various transactions concerning the trusts, that her husband pay her one-half of the value of their combined assets and financial resources, including the assets of the ICF Spry Trust and the trusts created for the benefit of the children.

The trial judge found that when the husband made the 1998 amendment to the Trust Deed and the 2002 dispositions to the various children's trusts, he did so for the purpose of defeating an anticipated order under the Family Law Act by putting the assets of the ICF Spry Trust beyond the reach of the Family Court.

The trial judge then included the assets of the ICF Spry Trust as part of the property of the parties for the purposes of their property settlement on the basis that the husband was entitled to distribute the assets of the Trust to himself. In so doing the trial judge overlooked the 1983 variation to the Trust Deed which excluded the husband as a beneficiary.

The High Court upheld the trial judge's orders which had been confirmed by the Full Court of the Family Court. They did so on the basis that once the 1998 variation of the Trust Deed

and the 2002 distribution of the Trust funds were set aside, the property of the parties to the marriage included the right of the wife to due administration of the Trust accompanied by the fiduciary duty of the husband, as trustee, to consider whether and in what way the power should be exercised. It was open to the husband to distribute the whole of the Trust funds to the wife. Therefore the value of the whole of the Trust funds should be included as part of the property and financial resources of the parties for division between them by way of property settlement pursuant to Section 79 of the Family Law Act.

The High Court also indicated that in determining whether property of a trust can be construed as being property of the parties or either of them, it is important to consider the nature of the trust and the source and purpose of the accumulation of the assets of the trust. Where the property in the trust is the product of contributions by the parties and the trust is a vehicle through which they provide for themselves and their family, it is appropriate to treat the assets of the trust as the property of the parties to the marriage.

The High Court distinguished a family discretionary trust from a bona fide trust such as a charitable trust or a trust created under a Will.

The decision of the High Court emphasises the broad powers of the Family Court in relation to trusts and endorses the approach that has been taken by the Family Court in the past to look behind formal trust structures and to have regard instead to the practical reality of the family's financial circumstances.

>>De Facto Amendments now in force



The amendments to the Family Law Act which bring property and maintenance issues between separated de facto

partners under the provisions of that Act came into effect on 1 March 2009. These amendments cover parties to same sex relationships in the same way as they cover relationships between parties of the opposite sex.

The amendments apply only if the de facto relationship broke down on or after 1 March 2009, unless the parties choose to "opt in". Parties to a de facto relationship will now be in essentially the same position as parties to a marriage when it comes to the division of their property and the issue of spouse maintenance. Superannuation splitting is also now available for former de facto partners.

The amendments do not currently apply in South Australia and Western Australia as these States have not yet referred the relevant powers to the Commonwealth.

>>Amendments to Provisions regarding Binding Financial Agreements

The Family Court has adopted a strict approach to the provisions of the Family Law Act concerning binding financial agreements.

In a number of cases heard by the Family Court, financial agreements between couples have been found not to be binding because they did not meet the technical requirements of the Act.

Following submissions made on behalf of the legal profession to the Attorney-General,

amendments to the relevant provisions are proposed but have not yet been enacted. The terms of the amendments are subject to ongoing discussions. In the meantime, it is important to ensure that parties contemplating entering into a binding financial agreement obtain legal advice from an experienced practitioner who will ensure the formal requirements as they currently stand are met. This is essential when protecting assets for the future.

For further information on any Family Law issues contact:



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