



Family Trusts in Matrimonial Property Disputes

Increased powers under the Family Law Act have enabled courts to extend their reach to ensure that property which otherwise might not be classified as part of the asset pool in Family Law property disputes, is not excluded by being “hidden” under a Family Trust arrangement.

What is a Family Trust?

In simple terms Family Trusts, also known as Discretionary Trusts, are tools for structuring property and asset ownership usually with a view to minimising tax by providing a choice of who receives the income and capital from them or to protect these assets from attack by creditors and other parties. The terms of the Family Trust will be stated in the Trust Deed created when the Trust is established and in any subsequent variations of this Deed and its creation will generally involve the following stakeholders:

1. The Settlor who establishes the Trust and then ceases to have any further active role in it;
2. The Trustee who has ownership of the Trust assets on behalf of the Trust’s beneficiaries and makes decisions about the Trust’s assets and activities;
3. The Beneficiaries who have a potential beneficial interest in the Trust assets; and
4. The Appointor or Guardian who is responsible for removing and appointing Trustees.

The Trustee will generally manage and invest the Trust assets for the benefit of the beneficiaries however the beneficiaries never have any present entitlement to receive distributions of the Trust income and capital. The decision on which of the Trust’s beneficiaries will receive these distributions and when they will receive them is always made solely at the discretion of the Trustee who therefore holds a significant controlling position in respect to the Trust assets.

Classifying Family Trust Assets in Property Disputes

Every Family Law property dispute broadly involves a four-step process being:

1. Identifying the assets and the liabilities of the relationship;
2. Identifying the financial and non-financial contributions of the parties to the relationship;
3. Assessing the needs of the parties both present and future; and
4. Considering whether any proposed division of the asset pool is fair to both parties in all circumstances.



In identifying the assets and liabilities of the relationship, assets held in a Family Trust will potentially be classified as either being:

- Property of the parties meaning that they are available for division between them;
- or alternatively a Financial Resource of the parties, meaning that although they are not available for division between the parties they will nonetheless be considered in assessing the future needs of the parties.

Family Trust Assets as Family Property

Section 4 of the Family Law Act 1975 defines “Property” as property to which one or both parties of the relationship are entitled to whether they actually possess that property, or if they don’t possess the property, that they have the right to do so.

Generally, for Family Trust assets to be considered as Property of the parties, one of the parties to the relationship must have a controlling position in the Trust such as being the Trustee, the Guardian or the Appointer. The Family Court in adjudicating cases involving Family Trusts has made a number of observations on the events and circumstances which will result in Family Trust assets being considered as Property including:

- That one of the parties of the relationship has sole power to appoint a Trustee;
- That the Trustee (if it is a company) is completely controlled by one of the parties;
- A party (or the company completely controlled by a party) is a beneficiary under the Trust; and
- That circumstances could arise where one of the parties receives the majority of the benefit under the Trust.

Family Trust Assets as a Financial Resource

If a court determines that Family Trust assets are not Property of the relationship because one of the parties of the relationship does not have a controlling position in the Trust, the Court may still find that the assets are a Financial Resource of the parties and should be taken into account when considering the future needs of each of the parties.

In essence a Financial Resource is an asset that a party cannot access immediately but will be able to access in the future. In respect to Family Trusts, this would equate to one of the parties to the relationship being the beneficiary under the Trust from which they may reasonably expect to obtain future distributions of Trust income and capital. If so, the court will take this into account when deciding on the percentage split between the parties of the other property owned by the parties that has been identified as being Property of the relationship.

Sham Trusts

If a Family Trust is created and assets are transferred to it specifically for the purpose of trying to defeat potential Family Court orders, then the court will more than likely deem the Trust to be a sham Trust. Under Section 106B of the Family Law Act, the Family Court has the power to set aside any Trust instruments that are found to be a sham and then include the assets held in the sham Trust in the asset pool available for distribution between the parties of the relationship.

While Family Trusts have proven to be effective tools to assist in tax minimisation or to protect assets from attack by potential creditors, they will not in themselves exclude the assets held in the Trust from being included in Family Law property disputes particularly when one of the parties of the relationship has a significant degree of control over the operation of the Trust and the distribution of its assets.



At Bateman Battersby we have a number of experienced Lawyers that specialise in Family Law matters including property disputes. If you want further information about your Family Law property entitlements or wish to discuss any Family Law issues, please contact [Oliver Hagan](#) or [Ken Gray](#) on (02) 4731 5899 or email us at familylaw@batemanbattersby.com.au.