

Family Law Practitioners Association

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Trusts – What You Should Know

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WHY ARE WE HERE?

[AND WHERE IS THE WINE] ?

- When are the assets / future income of a trust vulnerable to a property or maintenance claim under the FLA?
- How do you attack/defend trust assets from claim?
- How do you value an 'interest' in a trust?
- Case law – we promise it will be interesting
- Tricks of the trade

CASE STUDY

- The Steven Henry Ian Terence Emblem Trust (aka The S.H.I.T.E Trust)
- Discretionary Trust set up in 1970 in Brisbane by Dr Emblem
- She had 3 x daughters
- Trustee holds shares in a private company, that owns in turn a large commercial factory premise [\$50m] and the trust produces income from rent of \$3m a year

- S.H.I.T.E Pty Ltd is trustee
- On mother's death, her 3 shares in corporate trustee went 1 share to each daughter
- The current directors of S.H.I.T.E Pty Ltd are the wife and her 2 sisters
- The wife and her 2 sisters together hold the power of appointment, which must be exercised by unanimous written agreement between them

- Whilst the power of appointment must be exercised unanimously, within the existing trustee (S.H.I.T.E Pty Ltd), the wife can be overborne
- The Constitution of S.H.I.T.E Pty Ltd provides that each of the sisters holds 1 share, and it is 1 share 1 vote

- Youngest daughter, Jenny, been happily married 15 years.
- Unfortunately been married a total of 25 years.
- Each year since the mother died, the S.H.I.T.E trust distributed income equally to each daughter ie: \$1m a year
- Made loans to the 3 daughters equally.

- Jenny and her husband, Frank, separate after 25 years.
- Have a house at Red Hill worth \$1,500,000 and little else in their name.
- Frank not worked last 5 years but capable of employment (but why would you when Jenny getting \$1m/year from Trust?)
- Jenny and her sisters very close, do everything together, make decisions together

- Jenny's position

\$1.5M house - property

Eligible beneficiary of trust – financial resource only

OFFER - Frank can have \$1m and bugger off

- Frank's position

House – is property at \$1.5m

The Trust – says Jenny has a $1/3^{\text{rd}}$ share and it's a quasi-partnership 'property' interest on Balance Sheet worth \$16.5m

OFFER – give me \$8m and I will happily bugger off

PROPERTY OR FINANCIAL RESOURCE – WHY IS IT IMPORTANT TO FRANK AND JENNY

- s79 and s90SM alteration of property interests
- Spouse maintenance claims – *Hall v Hall* [2016] HCA 23
- Can future income be property – *Marlowe v Marlowe- Dawson*
- Treating a discretionary trust as akin to a quasi partnership or unit trust – *Ingles & Ingles* [2019] FamCA 33

Control v Ownership

- Is the trust an alter ego or puppet
- Is it a sham
- Who controls the trustee
- Who has power to appoint the trustee –
Takada & Takada [2012] FMCAfam

WHAT DOCUMENTS IS FRANK AFTER ?

- Trust deed
- Deeds of amendment
- Minutes of trustees
- Loan ledgers
- Financial Statements
- Tax Returns
- Letter of Wishes – *Read v Chang*

WHAT DOCUMENTS CAN YOU SEEK?

- Pre-action procedures [para 5] – remember those ?
- FLR - 13.04
- FCCR – what can you ask for and what order could you seek under FCC Act for disclosure
- What obligation does a Trustee have ?

STARTING PROCEEDINGS

- Who do you join as a party and who is a necessary party
- What orders do you seek and being careful what you wish for
- Identification of the orders you seek in the context of a subpoena argument
- Disclosure and third parties

WHO DOES FRANK SUBPOENA – AND FOR WHAT

- Apparent relevance - what is “on the cards”
- *MacDowell & Williams* [2012]
- *Kelton & Brady* [2017]

FRANK HAS A CREATIVE / MISCHIEVOUS ACCOUNTANT AND LAWYER

The legal argument Part 1 : it is property

- Is the S.H.I.T.E trust to be treated as a unit trust?

Then value on NTA backing basis as to a one-third interest with some discount for lack of control

Legal argument Part 2

- Is Jenny conducting a quasi – partnership with her 2 sisters?

Then value on the same basis

Legal argument – part 3

- Due to the 10 years of equal distributions and loans, Jenny should be regarded as having control over the disposition of $1/3^{\text{rd}}$ of annual income and capital
- Not mere prospective income nor mere expectation
- Can this income stream be given a discounted present day capitalised value based on Jenny's life expectancy, that is "*property*" ?

Legal argument 4 - if all else fails

- If Jenny has no interest in the trust that is “property”, what else might Frank seek ?
- Spouse Maintenance ? But he can work ...
- What about an order under s79, using ss80 and 114, that requires Jenny to give him 50% of any future net after tax amount, she gets from the trust – for life

Refer:

- *Hall* [2016] HCA 23
- *Marlowe-Dawson & Dawson (No 2)* [2014]
FamCA 599

So, by some miracle Frank wins, and it is “property,” how does he get it ?

- What orders have we been seeking?
- Who are the parties to the case?
- Ability to cause third parties to give effect to judgment [s79 and s90AE]

Other random and miscellaneous thoughts if we have not run out of time...

- S106B - application to set aside trust if a sham, or arguments regarding trust assets being held on resulting or constructive trust for the parties to the marriage
- Discretionary trusts and enforcing BFAs / pre nups many years down the track
- Transfers of assets in specie from a trust to a non spouse under a FLA order [*Sandini's* case in Full Federal Court]
- Control alone is not sufficient, but sometimes it doesn't matter [*Harris & Dewell*]

- Third party lawyers – what to do and not to do
Common interest privilege