



PROTECTING TRUST ASSETS IN CASE OF A DIVORCE

I am often asked what steps can be taken in Family Trusts, and also Testamentary Trusts, to ensure that in the case of divorce, the former spouse cannot get their hands on the family's assets.

More and more often, parents establish trusts in their wills, or set up family trusts during their lifetime with the intention that the assets should remain 'in the family' and should not be exposed to attack in the case of divorce.

This issue arises because the Family Law Act gives the Court a wide discretion and power to deal with the property of the parties to the marriage. It is the primary concern of families wanting to protect the family property whilst at the same time benefitting their children and grandchildren.

In a recent High Court decision (**Spry v Kennon**) the Court considered a family trust which had been established by Dr Spry, well before the marriage, in circumstances where the marriage finally collapsed some thirty years later.

In creating the family trust, Dr Spry was the Settlor and he had made himself the sole trustee as well as a beneficiary. He had the power to appoint others as additional trustees and he could remove them as he saw fit. **He had total control.**

The core question was whether the trust property could be regarded as 'property of the parties to the marriage', and therefore exposed for the purpose of the Family Law Act.

It is clear from this and earlier cases that the power of appointment of the trustee and overall control of the trust property, is of vital importance in deciding whether the trust property is open to attack. It is on the basis of this power to control that the Court is likely to reach the conclusion that the underlying assets of the trust should be regarded as the

property of the controlling party and is therefore exposed to an order under the Family Law Act.

Generally this applies to property acquired by or through the efforts of a party to the marriage, whether before or during the marriage. However, the Court cannot ignore the interests of outside parties. If the property is genuinely from an external source (such as a testamentary trust bequest) this would be an important factor in determining whether or not the property is exposed under the Family Law Act, or should be excluded.

In Dr Spry's case the underlying assets of the trust were not extraneous and, coupled with Dr Spry's power, the assets were treated as property of the parties to the marriage for the purpose of the Family Law Act.

There is a real tension between the desire of the family to exercise control over trust property (to ensure that the wishes of the Settlor or the Testator are properly carried out) and the need to ensure that this control does not defeat the purpose of keeping the Trust property in the family, and out of the reach of the in-laws in the case of a marriage breakdown. Whilst the overall discretion of the Court cannot be absolutely excluded, it is reasonable to conclude that:

- * If the ultimate control of the Trust is outside the hands of the relevant parties; **and**
- * If the property is extraneous to the marriage (which may well be the case where there is a testamentary bequest),

then there is a strong argument that the property is not exposed to the powers of the Court under Section 79 of the Family Law Act.

**Regards,
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