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RELATIONSHIP SPLIT AND TRUST BUSTING

Since the introduction of asset testing in 1993 the growth in the setting up of Family Trusts to own assets in New Zealand has been huge.

But What Happens When the Relationship Breaks Up?

In most situations the Trust itself will be structured in a way that both partners in the relationship have equal rights and powers.

However, that is not always the case. What happens in the situation where one partner holds the power of appointment in the Trust and accumulates assets throughout the relationship. The partner or spouse who has no powers has actively assisted the Trust to maintain and grow its wealth. The question then has to be asked 'what are the rights of that spouse or partner who does not hold any powers in the eventuality of the relationship coming to an end'?

Sham Trusts

Traditionally lawyers have sought orders in the Family Court to have the Trust structure declared a sham. Especially where the partner in the relationship has had total control over the operation of the Trust without reference to any of the other Trustees. Previously, the Family Court has shown a willingness to declare the structure a sham and therefore treat the assets as relationship property to be vested equally between the parties.

Sham Trusts—Is This Remedy Now Difficult?

Two recent decisions in the Courts now indicate that having a Trust structure declared a sham is going to be extremely difficult and will probably only be available in very rare circumstances. The recent decision of the New Zealand Court of Appeal in *OA v Wilson* [2008] 3 NZLR 45 states that a Trust will only be a sham if a claimant can show that the Trustees have a common intention that the

Trust will not be a genuine entity (i.e. a sham). This will be extremely difficult for an applicant to prove. The Judgment states that where one Trustee has arranged the affairs of the Trust without consultation with the others, has failed to keep Trust Minutes, has intermingled personal and Trust assets, has used the Trust cheque book as his own personal bank account, are irrelevant. Unless you can show that all Trustees intended the Trust structure to be a sham, then there will be no sham and therefore no remedy to bust the Trust.

Family Court Jurisdiction

Another interesting decision from the Wellington High Court is *F v W* (3 August 2009) where it was held that the Family Court has no jurisdiction to declare a Trust a sham in any event. The Court held that the Family Court's jurisdiction is limited to its powers set out in the Property Relationships Act 1976 and that the Family Court has no inherent jurisdiction to grant such a remedy. This means filing separate, and therefore additional, proceedings in the High Court which is expensive.

Is the Trust Structure Paramount?

In a recent Court of Appeal decision of *Harrison v Harrison* (10 March 2009) the Court of Appeal said that when Family Trust structures were set up they were to be respected and such structures were binding, and it wasn't really open to the Courts to look behind them to assist parties just because they have separated.

Conclusion

So you can see from these decisions that the Family Trust structures set up to protect assets in the eventuality of a relationship split, are going to be very difficult to challenge legally.

- The next newsletter covers the topic of mediation—by Eugene Collins