Asset protection and family law: Structuring trusts to provide maximum protection

PRESENTED AT TEN’S CPD ESSENTIALS: ESTATE PLANNING
Introduction

Discretionary trusts have long been used by families to arrange their financial affairs. It would be fair to say that the use of discretionary trusts has been widespread mainly due to the asset protection and tax minimisation advantages provided by such a trust. This paper will focus on the asset protection provided by a discretionary trust and a discussion of whether that asset protection has been eroded by a line of authority originating in the Family Court of Australia and in particular the High Court decision of Kennon v Spry.

There has been some strong criticism levelled at the majority decisions of French CJ, Gummow and Hayne JJ of High Court. Lee Aitken warned that the decision ‘has cast doubt on the conventional long-term view that the beneficiary of a discretionary trust does not enjoy a proprietary interest in any of the assets of the trust, or in the trust funds as a whole.’ He further states that ‘Constantly denaturing the purity of the trust concept will eventually leave it useless.’ Despite his criticism he does conclude that the decision ‘...could be read down as an eccentric view on the width of “property” as a term under the Family Law Act – but of course, actuary advised of the decision would have to regard something which was formerly the merest speck as having a real, although incalculable value’.

In my opinion the High Court’s decision in Kennon v Spry is unremarkable and again in my opinion its application is limited, for the time being, to the definition of ‘property’ under the Family Law Act. However the lessons learnt by Dr Spry should be lessons learnt by us all. We should be taking whatever steps we can to ensure that our clients’ wealth when being transferred to their children is protected as best we can from the increasing reach of the Family Court.

In this paper we will look at the High Court decision in Kennon v Spry, identify the types of arrangements to avoid to ensure clients do not end up with the same result as Dr Spry if possible and then discuss how we structure trusts to ensure the best possible asset protection from a family breakdown.

Gartside v Inland Revenue Commissioners [1968] AC 553

Gartside v IRC is a House of Lords case which provided us with the traditional view beneficiaries under a discretionary trust:

- are not beneficiaries in the true sense, only potential beneficiaries;
- are only a class of persons who are objects of a power to appoint income and/or capital to members of the class;
- do not have a proprietary legal or equitable interest in the trust fund;
- may insist on the proper administration of the trust.

This view has been confirmed in Australian cases including Lygon Nominees Pty Ltd v Commissioner of State Revenue (2005) 60 ATR 135 per Hollingworth J at 58.

“Neither the right to due administration of the trust nor the fiduciary obligations owed by the trustee is capable of making the object of a power of appointment into a ‘beneficial owner’ of the subject matter of the trust. The right of an object to take legal proceedings to prevent a disposal of income or capital by the trustee to persons outside the designated object does not involve the assertion of a proprietary right by the object and does not require the conclusion that the object has a proprietary interest in particular assets within the fund or is a ‘beneficial owner’ of such assets.”

Has this view changed?

KENNON V SPRY [2008] HCA 56

The Facts

- In 1968 Dr Ian Spry QC created a trust, the ICF Spry Trust, by parol of which he was the settler and trustee.
- In 1978 Dr Spry married Mrs Helen Spry and they had four daughters together.
- In 1979 the ICF Spry Trust purchased a house for $152,000. The trust purchased the house with cash which had been accumulated prior to the marriage.
- In 1981 the terms of the ICF Spry Trust were reduced to writing and under the trust deed the beneficiaries were Dr Spry, his siblings and all of their spouses and issue.
- In 1983 Dr and Helen Spry moved into the ICF Spry Trusts house and they lived there until 1994.
- In 1983 the terms of the ICF Spry Trust were varied by deed (1983 deed) to exclude Dr Spry as a beneficiary and appoint his wife, Helen, to be trustee on his death or resignation and their daughter Elizabeth to succeed as trustee upon Helen’s death or resignation. These appointments were revocable by Dr Spry, as settler, at any time.
- In 1989 the ICF Spry Trust sold shares and those proceeds were applied to purchase Westpac shares which were registered in the name of Helen Spry as nominee for the Trust.
- By sometime in 1998 the marriage of Dr Spry and Helen Spry was having difficulties.
- In December 1998 Dr Spry further varied the ICF Spry Trust by deed (1998 deed) which revoked the appointment of Helen as the successor trustee and instead appointed their two eldest daughters Elizabeth and Catherine jointly. The 1998 deed also provided that:
  - if Dr Spry ceased to be trustee no payment or distribution or application of the income or capital of the trust fund could be made during his lifetime without his prior written consent;
  - the power of variation could only be exercised by the settler during his lifetime or by his Will and that any exercise of the power of variation could be revocable or irrevocable, and
  - Dr Spry and Helen Marie Spry were irrevocably excluded absolutely from all and any interest, rights and possibilities in the capital of the fund.
- In October 2001 Dr and Helen Spry separated and Helen Spry subsequently applied to dissolve the marriage.
- In December 2001 Dr Spry removed his superannuation funds of approximately $117,000 without the knowledge or consent of Helen.
- In 2001 Dr Spry, again without the knowledge of Helen, sold a house for $1.4 million, which Dr Spry had purchased in his name prior to marriage in 1973 for $65,000. The ICF Spry Trust sold the former Spry family home for $1.23 million.
- On 18 January 2002 Dr Spry established four separate trusts in identical terms save for the primary beneficiary. His four daughters were the primary beneficiaries, one of each trust. Dr Spry was the trustee of each trust and the beneficiaries of these trusts were the

1. [2008] 251 ALR 257; 40 Fam LR 1; [2008] HCA 56; BC200810608
2. Lee Aitken, Associate Professor, Faculty of Law, University of Hong Kong, ‘Mudding the waters further – Kennon v Spry: ownership, control and the discretionary trust’ [2009] 32 Australian Bar Review 173
primary beneficiary and her children, grandchildren, sisters, nephew, nieces and all their spouses. In May 2002 the trust was amended so that Mr Edwin Kennon, solicitor became a joint trustee of each trust. Dr Spry and Helen Spry were not beneficiaries of these trusts.

• Within two days of the four daughters trusts being established Dr Spry, as trustee of the ICF Spry Trust, firstly forgave and released himself and Helen Spry from all amounts owed by them to the trust and confirmed that neither of them owed money to the trust nor the trust owed money to them. Secondly applied all the income and capital of the ICF Spry Trust to the four daughters’ trusts in equal shares.

• In addition Dr Spry transferred shares which were held by him beneficially equally to the four daughters’ trusts.

• In April 2002 Helen Spry applied to the Family Court of Australia for property settlement orders in particular she sought orders under section 106B of the Family Law Act setting aside the 1998 deed, the deeds creating the daughters four trusts and the January 2002 dispositions to the daughters trusts and that Dr Spry pay her 50% of the assets and resources held in their individual or joint names, the ICF Spry Trust and the daughter’s trusts.

• Strickland J heard the matter in August 2005 and delivered judgement on 30 November 2005 [2005] FamCA 1181. The orders made by Strickland J included that the 1998 deed be set aside and the January 2002 dispositions to the daughters trusts be set aside and finally Dr Spry pay his wife the sum of $2,182,302 on or before 28 February 2006.

• Dr Spry appealed against the decision and his appeal was dismissed by the Full Court of the Family Court on 13 July 2007 (Bryant CJ and Warnick J, Finn J dissenting) Stephens v Stephens (2007) 38 Fam LR 149; 212 FLR 362; [2007] FamCA 680.

• On 7 March 2008 special leave to appeal to the High Court was granted. The High Court dismissed the appeal (French CJ, Gummow J, Hayne J, Kiefel J and Heydon J dissenting).

The principal issue for the High Court to decide upon was whether the assets of the ICF Spry Trust were property of the parties to the marriage for the purposes of section 79 of the Family Law Act.

French CJ

His Honour said that the word ‘property’ in section 79 is to be read widely and conformably with the purposes of the Family Law Act.3 The Chief Justice considered the position prior to the 1983 deed and decided that prior to the 1983 deed the ICF Spry Trust assets would, in line with previous authorities such as Kelly4, Ashton5 and Goodwin6 have been considered as Dr Spry’s property as he was the sole trustee, with absolute discretion to appoint trust property, including to himself as a beneficiary.7

The Chief Justice dismissed the appeal and identified the relevant property as “the Trusts assets, coupled with the trustee’s power, prior to the 1998 Instrument, to appoint them to [the wife] and her equitable right to due consideration...”8

His Honour added:

“Where property is held under such a trust by a party to a marriage and the property has been acquired by or through the efforts of that party or his or her spouse, whether before or during the marriage, it does not, in my opinion, necessarily lose its character as ‘property of the parties to the marriage’ because the party has declared a trust, of which he or she is trustee and can, under the terms of that trust, give the property away to other family or extended family members at his or her discretion.

For so long as Dr Spry retained the legal title to the Trust and her equitable right, it remained ..... property of the parties to the marriage for the purposes of the power conferred on the Family Court by s79. The assets would have been unarguably property of the marriage absent subjection to the Trust.”

Gummow and Hayne JJ

His Honours agreed with the Chief Justice that the term ‘property’ was to be broadly read and in a fashion which advances the purpose of the Family Law Act. Their Honours went on to say that “the term “property” is not a term of art with one specific and precise meaning [and it is, of course, necessary to have regard to the subject matter, scope and purpose of the relevant statute”,10

His Honours agreed that the 1998 and 2002 deeds of variation were properly set aside under section 106B and their Honours decided that the assets of the ICF Spry Trust were property of the parties to the marriage because of the following:

• The wife, as a beneficiary, had a right to due administration of the trust;
• The husband, as trustee, had a fiduciary duty to consider whether and in what way the power of appointment should be exercised; and
• During the marriage the husband could have appointed the whole of the trust fund to the wife.11

It was interesting to me and their Honours also observed that the order was not against Dr Spry in his capacity as trustee and did not require him to take any action as trustee, instead left it open to him to satisfy his obligation to his estranged wife, as he choose.12

Kiefel J

Her Honour dismissed the appeal but dissented in relation to the cross appeals and in doing so dealt thoroughly with the wife’s application under section 85A of the Family Law Act 1975. It is beyond the scope of this paper to deal in detail with the section 85A arguments.

Heydon J

A strong dissenting judgement. His Honour preferred the approach that “no-one was entitled in possession or reversion...[to the trust property] but that the objects of the trustees power of appointment merely had hopes or expectations coupled with a right of due administration...”13 and that “even if the wife’s right of due administration of the Trust were assumed to be a right of property, it would not fall within s 79(1)(a) of the Act.” Because the “proceedings with respect to the property of the trustees or either of them” were not proceedings with respect to the right of due administration but are proceedings concerned with assets, that is land, shares and money.

4 In Marriage of Kelly (No 2) (1981) 7 FamLR 762
5 In Marriage of Ashton (1986) 11 FamLR 407
6 In Marriage of Goodwin (1990) 101 FLR 386
7 Kennon v Spry (2008) 238 CLR 366, 389
8 Ibid 390
9 Ibid 391
10 Ibid 397
11 Ibid 411
12 Ibid 411
13 Ibid 414
His Honour stated that if this argument be rejected it would give an unacceptable extended meaning to the term property which "would lead to a wholly unreasonable result .... if a discretionary trust existed under which a wife was among a class of objects of a bare power of appointment having thousands of members who had nothing to do with her family or the husband’s family, the Family Court of Australia would have power to make a s 79[1](a) order altering her ‘interests’ in the assets of that discretionary trust favourably to her. It may be suggested that the absurdity can be overcome by postulating that the Court, properly exercising its discretion, would never do so if its order was adverse to the interests of objects other than the husband and the wife. That is to postulate a ‘discretion’ which can only be exercised one way. A ‘discretion’ which can only be exercised one way is not a discretion at all."14

In rejecting the second argument put forward by the wife that Dr Spry as trustee had bare power of appointment and as non of the other beneficiaries had any interest in the assets of the trust fund then as trustee Dr Spry was entitled to the whole trust fund in possession Heydon J said:

"The interests of one spouse as trustee, even in circumstances giving that spouse entitlement to the whole of the assets in possession, are not ‘property’ of the type contemplated by the Act. If they were, it would follow in divorce proceedings that the assets of the Trust could be disposed of to the wife at the expense of other members of the class of objects of the power of appointment.”15

My difficulty with Heydon J’s argument is that it fails to deal with the effect of the combination of the wife’s right to due administration as a beneficiary and the husband’s rights as trustee, it only deals with the limitations of these interests separately.

The Lessons from Kennon v Spry – what not to do

Firstly always remember the Family Court has a very long arm.

‘Property’ pursuant to the Family Law Act 1975 is broadly defined at section 4(1) as: "property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion.”

In addition to a broad definition of property’ the Family Law Act 1975 allows orders to be made against third parties (although this was not the case in Kennon v Spry) and at section 106B provides the court with power to “set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction or in the interest of, a party, which is made or proposed to be made to defeat an existing or anticipated order in those proceedings or which, irrespective of intention, is likely to defeat any such order.”

Due to broad definition of property and other extensive powers the use of a beneficiary controlled discretionary trust is not sufficient to remove assets from the long arm of the Family Court. A party to a marriage simply cannot accumulate assets prior to or during a marriage which can effectively be quarantine from a decision of the Family Court, which is exactly what Dr Spry attempted.

Patrick Parkinson made the following relevant observations regarding family discretionary trusts and family law:

“When the family is intact, the fact that family assets and income are subject to a discretionary trust may be a matter of consequence only to the family accountant, the Australian Taxation Office and perhaps other third parties in the event of a bankruptcy. If the husband and wife separate, the legal form by which the assets are held and managed takes on an entirely different significance.....Where the trust is in law as well as in practice under the control of a party to the marriage and was established only for the immediate family – the husband, wife and children – no difficulty is likely to be encountered in dealing with it as property of the husband or wife or both of which is available for distribution under the Family Law Act 1975 [Cth].”16

The ‘entirely different significance’ which is referred to by Patrick Parkinson I believe is the significance of the source of assets for the Family Court rather than their legal form.. If assets were accumulated from the efforts of the husband and/or wife prior to or during marriage then regardless of the legal form of those assets the Family Court will have little difficulty in dealing with those assets as property of the husband or wife or both.

Establishing a discretionary trust prior to marriage does not safe guard the assets of the trust and I am of the view that Dr Spry knew this and thus when the marriage was in trouble he attempted to put the assets out of the reach of the Court by removing he and his wife as beneficiaries of the trust and disposing of the trust assets to more ‘independent’ trusts.

I reiterate the Family Court has a very long arm, however I believe Spry’s case is good law but limited in application to the Family Law jurisdiction.

When might the decision in Kennon v Spry not apply?

In the event the origin of the assets are not a result of the efforts of the husband and wife and the assets are quarantined in a trust structure which ensures that as between the husband and wife they do not hold both control and ability to benefit.

In any property settlement proceedings the best we can hope to achieve is a position where the trust fund is considered as a “financial resource” of a party to the marriage instead of property of the marriage.

“Financial resource” is not defined in the Family Law Act 1975. However in the case Kelly (No.2)17 the Family Court held that a financial resource is “a stock or reserve over which a party has sufficient control as a matter of fact to draw upon when necessary towards supplying some financial want or deficiency.”

In this case the husband was a director of the trustee company along with two others [his brother and accountant] and he was not a beneficiary or the appointor of the trust. The Full Family Court found that the husband had control of the trustee company despite there being other directors. The control was established by consideration of the day to day operation of the trust and in particular where the trust funds went. The husband received benefits from the trust in the form of discounted rent and distributions to the wife which were applied to the families

14 Ibid 419
15 Ibid 425
16 Patrick Parkinson, Professor of Law, University of Sydney and Special Counsel Watts McCray, Family trusts and third parties under the Family Law Act 1975 (2012) 26 Australian Journal of Family Law 6
17 Kelly and Kelly No.2 [1981] FCA
living expenses.

The benefit of having a trust declared as a financial resource is that the Court is only empowered to make orders to adjust the ‘property’ of the parties to the marriage. The Court does not have power to make orders against assets found to be a ‘financial resource’. This principal will apply regardless of the nature or value of the financial resource however if one of the parties to the marriage has an interest in a financial resource the Court will take this into consideration in determining how the property of the parties is to be divided between them. Meaning that the party with the financial resource could receive a smaller proportion of the property of the marriage and it could be a significantly smaller proportion dependent upon the size of the matrimonial asset pool and the relevant financial resource.

**Testamentary Trusts**

It is important to note that inheritance by way of absolute gift to an individual is likely to be considered ‘property’ of a party to the marriage, although the inheritance would certainly warrant an adjustment for such an individual contribution to the matrimonial assets. The inheritance would nevertheless be available to the Family Court to make orders against.

A testamentary trust is not a silver bullet which protects an inheritance from any future Family Court application should one of the beneficiaries suffer a relationship breakdown. However given some serious consideration a testamentary trust can be structured to best protect all the intended beneficiaries with the ultimate aim that the trust would be considered a financial resource of the party and not property.

Firstly we have in our favour that the source of the assets of the testamentary trust are not from the efforts of the either of the husband or wife, the funds will be from a deceased estate.

It is common for a testamentary trust to be established for the benefit of each of the deceased children and their respective families. Generally each child would be trustee, appointor and primary beneficiary of their own testamentary trust. The beneficiaries may or may not include spouses. This is not a good structure from a family law asset protection perspective. Remembering in Spry’s case that it was the combination of the power to appoint [control] held by Dr Spry and right to due administration as a beneficiary held by Helen Spry which ultimately meant that the ICF Spry Trust was ‘property’ of the parties to the marriage.

The following are a couple of strategies which can be implemented in the drafting of the Will to separate control from the potential to benefit:

1. The at risk person, typically each child of the Will-maker, is in control either jointly or solely but is excluded as a beneficiary together with their spouse. This has the effect of separating the control from any ability to benefit from trust funds. Structure the testamentary trust with the primary beneficiaries as the grandchildren of the deceased not the children and leave the children of the deceased in control. It is important to ensure the structure supports the intention and may help to have the intentions clearly expressed in a memorandum of wishes. This may help to ensure the testamentary trust is out of the reach of the Family Court if one of the children of the deceased and then consideration needs to go into the succession of control upon the death of the children as if it reverts to the grandchildren there will be no protection for any of the grandchildren who experience a family breakdown as they will have the combination of control and the right to due administration.

2. Alternatively you could adopt the opposite strategy to the above. That is you ensure control of the testamentary trust at both trustee and appointor level is held by a complete independent, not a puppet of the primary beneficiary, an independent such as the Public Trustee or a private Trustee Company. Control of the trust being held by a complete independent you can then either have all children as primary beneficiaries or you could earmark one trust for each child and their respective families without the risk of combining the control and potential to benefit. The obvious problem with this is that the intended beneficiaries have lost control of the trust assets.

When drafting a succession plan which seeks to avoid the assets of the trust ever being available for distribution of the Family Court we are between a rock and hard place and ultimately you cannot control what you want to protect. This is a difficult concept for clients and may limit the client’s ability to get the best tax outcome so at some point the client will need to decide what is more important.

**Inter vivos trust established by at risk persons parents**

In this circumstance it is important to maintain a separation and not create a nexus between the at-risk child and the parents trust. Obviously once we get to talking about succession of the parents trust we have similar structuring issues as the testamentary trusts discussed above and this type of planning should certainly take place and the parents so their estate planning.

During the lifetime of the parents how do we ensure that the parents family trust assets are not going to be affected by the family breakdown of one of their children and particularly where that child works for the family business owned by the family trust.

**Kennon v Spry** requires there to be a nexus between the assets in the relevant family trust and the parties to marriage. In **Kennon v Spry** the assets owned by the family trust were accumulated by the efforts of the parties to the marriage, prior to and during the marriage and that was a sufficient nexus.

The reality of maintaining such a separation is often problematic given the nature of and typical reasons for establishing a family discretionary trust in the first place. The children, typically, once they are tax payers in their own right will be used to distribute income and minimise the overall tax position of the family and the trust may loan the children money for larger items such as cars and houses. These types of connections to a parent’s discretionary family trust can certainly create a sufficient nexus as was demonstrated in the case **Simmons v Simmons** [2008] FamCA 1088. This decision was an application for summary dismissal and therefore is not a full consideration of all matters.

---

The wife had sought orders against L Pty Ltd as trustee of the F Trust requiring payment of part of distributions to the husband to be made to the wife and this decision is an application by L Pty Ltd as trustee of the F Trust for summary dismissal of the wife's application.

The F Trust was established by the husband's father and owned the family business. All the members of the husband's family were members of the general class of beneficiaries. The husband was a director of L Pty Ltd but had resigned in accordance with family governance agreement that required three out of six directors to be family members and for those family members to rotate to allow all members to have the opportunity to be involved.

The husband received regular income distributions from the trust and a salary for his work in the family business. There was complex and established family governance in place, including a family council and constitution. The family council made recommendations to the trustee regarding the management of the business.

The husband had made a large loan to the trust on favourable terms including being interest free and long term.

The Court considered that the application for summary dismissal could only succeed if the wife's application was doomed to fail.

L Pty Ltd argued the husband's case was distinguishable from Kennon v Spry because the husband had no control over the F Trust and the assets of the F Trust were accumulated through the efforts of the husband's father and not the husband and wife. L Pty Ltd was unsuccessful in its application for summary dismissal as the Court decided that the loan made by the husband represented a sufficient nexus between the husband and the trust and arguably the loan gave the husband a proprietary interest in the trust.

**Trusts in which third party business party has joint control**

It would not be common to have independent business partners running a business in a family trust structure. It would be far more common that the business is owned by a company or unit trust and the business partners each hold their shares or units in their own family discretionary trust.

The Family Court would not have much difficulty in finding that the business interests of a party to the marriage, regardless of the legal form in which they were structured was ‘property’ of the parties to the marriage if the elements of control, right to due administration as a beneficiary and nexus to the parties to the marriage were all present.

Whilst joint control with a third party is helpful to have in your armoury in arguing against the principles in *Kennon v Spry* I would suggest that it is probably not going to be enough as the Family Court will continue to look beyond the legal form and instead look at the facts and history in each case.

### Drafting Trusts for Maximum Protection

#### Control Issues

The premise is simple, do not control what you wish to protect. However the reality is much more difficult.

Based on the principles in *Kennon v Spry* when structuring a trust consideration must be given to the following:

1. Regardless of structure is there going to be a nexus between the trust assets and the parties to the marriage? If so then rather than spending time and money trying to engineer a result which the Family Court, we know will disregard, perhaps a binding financial agreement is a better option. By all means still have a trust which properly structured will still provide asset protection generally and for bankruptcy purposes and will also provide the desired tax flexibility.

2. Make the intention of the trust clear, starting with the name. If the intention of the trust is to benefit the grandchildren of the Will-maker then name the trust clearly to support that intention. If the trust is intended for a specified purpose, for example, to provide funds for the education of children or grandchildren of the Will-maker again name the trust to support than intention and not simply the 'Jones Family Testamentary Trust'. Have a supporting memorandum of wishes or family constitution setting out clearly the intended beneficiaries and purpose of the trust fund. It will be critically in the defence of any Family Court application that not only is the purpose of the structure clear but that the trust’s assets and income have been applied for the intended beneficiaries and for the intended purposes.

3. Separating control of the trust from the potential beneficiaries of the trust. Using a professional trustee is an option however it maybe undesirable or impractical to have someone outside the family group manage the family’s wealth. If possible have the members of the family who control the trust be excluded as beneficiaries from the outset, you will have a strongest argument if this type of structure is established from the beginning rather than making changes when it could argued that the relationship breakdown was imminent.

4. Appointing two or more appointors of the trust with at least one of those appointor independent from any at-risk individual and deal with how the appointors must act, be it jointly or severally. The obvious options for independent appointors are the client’s advisers, lawyers and accountants which can be problematic if the independent person is acting at the behest of the at-risk individual. You risk the ‘alter-ego or sham’ arguments.

5. Structuring the trustee control. If individual trustees again consider appointing two or more trustees with at least one of those independent from any at-risk individual. A corporate trustee should include independent shareholders and directors. It is critical that the independents are truly independent and not acting at the behest of the at-risk individual. The independent must not only act in accordance with their duties as a director and understand the liability that comes with being a director but also in accordance with the fiduciary obligations of the office of trustee, which is making decisions in good faith for the benefit of the beneficiaries.

6. Rather than automatically inserting
the standard broad classes of beneficiaries give thought to the intended beneficiaries and whether it is practical to exclude any at-risk individuals. If the parties to the marriage are not and have never been beneficiaries of the trust it is difficult to see how the trust could be brought in as ‘property’ of the parties to the marriage, however excluding the at-risk individuals as beneficiaries is not going to be practical in many circumstances.

7. Building into the deed clauses which trigger the automatic removal of an individual trustee or appointor if they suffer a relationship breakdown. These types of provisions can be helpful particularly where the individual has control but is not a beneficiary in which case the removal is consistent with intended purpose of the trust. Be caution using these types of defensive clauses they will not defeat the principles in *Kennon v Spry* and there may be scope for a section 106B application in relation to the operation of such a clause to remove the party to the marriage as a trustee or appointor.

At the end of the day structuring trusts to provide protection from a potential Family Court application is about creating distance between the party to the marriage and the control and benefit of the trust assets. At one end of the spectrum we have the party to the marriage as the primary beneficiary of a beneficiary controlled trust and at the opposite end of the spectrum we have a professional trustee company as trustee with the power to replace itself and the party to the marriage as a mere discretionary beneficiary.

**Binding Financial Agreements**

It is true that we can provide endless options in the drafting and structuring of trusts which provide layers of protection however there is no better protection than a binding financial agreement. It would therefore be remiss of me not to briefly deal with Binding Financial Agreements (BFAs) and commend to you the benefits of BFAs to provide certainty to clients in transferring wealth to the next generation.

BFAs are a creation of the Family Law Act 1975 and allow parties to enter into an agreement which deals with how their assets are to be divided if a relationship breakdown occurs and effectively allows the parties to contract out of the jurisdiction of the Family Court. The Family Court can only set aside a BFA in limited circumstances.

BFAs can be entered into by the parties to a marriage or defacto relationship (except in Western Australia and South Australia where state based legislation applies to defacto relationships) before the relationship; during a marriage but before separation; during a marriage but after separation; and after divorce or breakdown of a defacto relationship. From a succession law perspective it is useful that BFAs are flexible and can deal with particular assets or interests of the parties to the relationship. So you can have a BFA which deals only with the family trust which runs the family business and each of the children’s spouses sign up, or a BFA which deals only with the inheritance which is expected to be received by one of the parties to the relationship.

BFAs provide certainty for the parties and are definitely worth consideration but are not without problems.

**Conclusion**

Succession lawyers and Family lawyers have a great opportunity to assist clients in ensuring as far as possible that this unprecedented transfer of intergeneration wealth which is occurring and will continue for the next decade or so does not end in the loss of inherited wealth through family breakdown.

Succession lawyers have a great opportunity in the preparation of testamentary trusts to quarantine family wealth and protect it from a family breakdown of any of the intended beneficiaries and Family lawyers have a great opportunity to use binding financial agreements to give certainty to families to ensure that family assets are not lost through the family breakdown of the children.

Trusts will remain an important structure for family wealth accumulation and operation of businesses. By careful consideration in the structuring of trusts and the appropriate use of binding financial agreements we can still provide certainty for clients.

The contents of this paper are not intended to be a complete statement of the law on any subject and should not be used as a substitute for legal advice in specific fact situations. HopgoodGanim cannot accept any liability or responsibility for loss occurring as a result of anyone acting or refraining from acting in reliance on any material contained in this paper.
Contact

Laura Hanrahan
Senior Associate

P +61 7 3024 0416
E l.hanrahan@hopgoodganim.com.au

About HopgoodGanim Lawyers

HopgoodGanim Lawyers is a full service commercial law firm. Our firm has 42 partners and more than 270 staff. We operate nationally and internationally with a focus on Asia from our two key locations of Brisbane and Perth.

We offer highly skilled and agile legal teams across key sectors and areas of practice. In all of our areas of speciality, our lawyers are recognised by legal publications as leaders in their fields.

The service we provide to our clients is second to none. We deliver a consistently high level of client service and our commitment to this was recognised when HopgoodGanim was named the Best Law Firm in Australia ($50m - $200m revenue category) at the 2015 Financial Review Client Choice Awards. We were also named the Best Professional Services Firm in Australia ($50m - $200m revenue) in the same year and the Best Queensland Professional Services Firm in 2016.

Legal Areas of Practice

CORPORATE AND COMMERCIAL LAW
- Banking and Finance
- Capital Markets and M&A
- Commercial Property
- Corporate and Commercial Advisory
- Competition and Trade Practices
- Construction
- Employment
- Health and Safety
- Information Technology and Data Protection
- Insurance
- Insolvency
- Intellectual Property
- Litigation and Dispute Resolution
- Manufactured Homes
- Native Title
- Planning and Environment
- Resources and Energy
- Taxation

PERSONAL AND FAMILY LAW
- Estate Planning
- Estate Litigation
- Family and Relationship Law
- Taxation

Industry Sector Focus
- Agribusiness and Food
- Banking and Financial Services
- Government
- Hospitality, Entertainment, Sport
- Private Enterprise
- Real Estate
- Resources, Energy, Projects
- Technology, Media, Communications

“They’re prompt, have real expertise, offer practical advice and are cost conscious.”
(an anonymous Client Choice Awards survey respondent, 2015)