

Law North Partners
The Meridian, 93 Kerikeri Road • Private Bag 1001, Kerikeri • Ph: 09-407 7099 • Fax: 09-407 7095
E-mail: info@lawnorth.co.nz • www.LawNorth.co.nz

Welcome to the first issue of *Trust eSpeaking* for 2008. We hope you find the articles of interest. If you would like to talk further about any topic in this newsletter or about trusts in general, then please do not hesitate to contact us.

Transfer of Assets to Trusts

- Can protect them from creditors

Separation

- The benefits of keeping your family trust on separation

One or Two Trusts

- Tailor your trust to your own situation

Warning: 31 March 2008 is fast approaching. If your trust has a balance date of 31 March then we recommend supplying your trust's accountant with all the information required to enable preparation of financial accounts for your trust as soon as possible after 31 March. This is particularly helpful in the event that your trust intends distributing income to beneficiaries prior to 30 September 2008.

*If you require any further information on any of the topics covered in Trust eSpeaking, then don't hesitate to contact us.
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Transfer of Assets to Trusts - Can protect them from creditors

One of the benefits of a trust is the ability to protect assets in the event of a business failure and/or bankruptcy. This involves the transfer of assets to a trust at fair market value and, in most instances, also requires the undertaking of a forgiveness of debt programme to eliminate the debt that would otherwise be owed by the trust to the person/s transferring assets to it.

Regal Castings Limited v Lightbody¹

A recent Court of Appeal case examined a scenario in which assets were transferred to a trust which ultimately resulted in a creditor being unable to obtain redress. The case particularly considered the ability of the creditor to overturn the transfer of the assets to the trust.

Mr and Mrs Lightbody were directors and shareholders of Capro III Limited (Capro), a manufacturing jeweler. Regal Castings Limited (Regal) supplied Capro with raw materials. Mr Lightbody provided a personal guarantee to Regal in support of the monies owing from time to time to Regal by Capro.

In November 1998, Mr and Mrs Lightbody sold their home to their family trust for \$230,000. This amount was advanced to the trust by Mr and Mrs Lightbody, and the resulting debt was forgiven over the next four years. By December 2002 the debt owing by the trust to Mr and Mrs Lightbody had been fully forgiven.

In 2003 Capro was placed in voluntary liquidation and in December 2004 Mr Lightbody was bankrupted. At that time Capro owed Regal approximately \$160,000. As Regal could not obtain repayment of the amount owed by Capro from either Capro or Mr Lightbody, Regal sought to overturn the 1998 transfer by Mr and Mrs Lightbody of their home to the trust. They alleged, under s60 of the Property Law Act 1952 that the transfer was fraudulent. Section 60 permits the setting aside of a transfer of property in circumstances where a transfer is made with the intention to defraud a creditor.

The High Court and then the Court of Appeal have upheld the transfer. Both courts rejected Regal's application to set aside the transfer on the basis of the transfer being fraudulent. In coming to this decision the Court of Appeal placed considerable weight on the fact that the Lightbodys did not immediately take advantage of the transfer of the home into the trust. The transfer took place in November 1998 and Capro was not put into liquidation until April 2003, approximately four and a half years later. The case is, however, being appealed to the Supreme Court.

Summary

This case does demonstrate the effectiveness of a trust to protect family assets - in some circumstances. However, it also reminds us that the transfer of assets may not be safe in all situations, especially if it can be proved that the transfer of assets was originally undertaken to defraud creditors. It also emphasises the need to ensure that your trust is efficiently administered and, in particular, to make sure that gifting is undertaken regularly so that settlor loans are eliminated as soon as possible.

¹ Regal Castings Limited v GM & GN Lightbody & Another, CA234/05, 7 September 2007

Separation

- The benefits of keeping your family trust on separation

The stress of separation seems to result in many people forgetting, or not realising, that they can preserve the benefits of the family trust that cost them so much to establish. They tend to overlook that many of the reasons for which they set the trust up will still be relevant in their new lives.

When a couple separate it is not necessary for them to dismantle their family trust and attempt to reclaim the assets they put into it in order to divide those assets between them. If they are co-operative and thoughtful, they can often work with the trustees to ensure that a trust structure is maintained and the benefit of the assets, rather than the assets themselves, are divided equally between them.

Resettle the trust

If the trust documents allow, it is often possible to resettle a trust into two new trusts. Each person creates a new trust which receives half the assets of the old trust; the old trust is then wound up.

An alternative is that one person creates a new trust to take half the assets of the old trust, and is then removed as a beneficiary and trustee of the old trust. This leaves the old trust and the remaining half of the assets for the other person.

Retaining the benefits

Restructuring the old trust can allow the couple to move on to their separate lives while still retaining many of the benefits that the trust was established to achieve. These benefits could range from protection against creditors in case of business failure or bankruptcy; asset planning for their old age; and to ensure that their assets are passed on intact to their children in due course.

Taking a new trust, or restructured old trust, into their new lives is also very likely to give each person relationship property protection with any future partner. As half their assets are already held in trust, those assets are almost certainly protected against any claim from a future partner.

People re-partnering need to bear in mind that a de facto relationship only needs to be for three years, or shorter if there is a child living with you or there are other special circumstances. Indeed you do not actually need to be living together to be found to be in a de facto relationship. If a second relationship is not successful, having your assets already protected is vital at a time when you are likely to be vulnerable and, being a bit older, less able to just start again if you lose half your remaining assets.

Gifting programme

Establishing a new trust from the ashes of your family trust allows you to retain the benefit of the gifting programme previously undertaken, and paid for, when you first put assets in your original trust. Neglecting to retain your half of the original trust assets in a trust structure means you could have to start your gifting programme again from scratch. A new gifting programme could take many years to complete and your potential protection is reduced, as well as costing more money.

If you are in the process of separating, or contemplating separation, you may want to consider retaining the benefits of your family trust. Do talk with us before making any decisions about dismantling your family trust – it may not be the right move for either of you.

One or Two Trusts

- Tailor your trust to your own situation

When establishing a family trust, settlors should consider whether a single joint trust or two parallel trusts would be more beneficial for their particular family situation.

With a single joint trust all assets go into one pool over which the partners share particular powers. Parallel trusts involve each person transferring a half share of their assets into their own trust over which only they have specified powers.

The decision as to which trust structure is appropriate generally comes down to weighing up the advantages and disadvantages of each in relation to each settlor's assets and liabilities.

Parallel Trusts	Single Joint Trust
Couples entering into a new marriage, de facto relationship or civil union may have existing assets that they wish to protect. They may also wish to provide for children from previous relationships for whom their current partner doesn't wish to provide.	Some people may find that parallel trusts are unnecessarily complex for their particular situation. A single joint trust is cheaper to set up and has lower administrative and accounting costs.
If the couple buys new property it can be kept separate, each retains half of the new assets under their own trust.	The cost of transferring property into a single joint trust is lower than transferring it into two trusts.
If either person receives an inheritance and wishes to protect it in the event of separation from being divided in half, parallel trusts structure can provide that protection.	Most people want inheritances to follow bloodlines. Most single joint trusts provide for the assets of the trust to be divided equally on separation which would defeat this option.
Unlike a joint trust, the parallel trusts structure, in the event of separation, means that the ownership of most of the valuable assets is already divided equally between the partners' trusts. Each partner can simply be removed from the other's trust. The trust structure would remain unchanged, avoiding possible delays associated with resettling the assets and potential tax consequences related with resettling income-producing assets.	If a couple separates with a joint trust in place, steps must be taken to separate the trust assets. This may result in possible delays associated with resettling the assets and may also give rise to tax consequences related with resettling income-producing assets.
If one partner dies the surviving spouse may have further children. Parallel trusts ensure that the assets owned by the deceased partner's trust at their death are protected for the benefit of the deceased partner's children.	The surviving partner could choose to provide for a new partner and children from a new relationship from the assets of the trust.
At present there is no estate duty. If a future government reintroduces an estate duty (in its previous form, a 40% tax on estates worth more than a government-set threshold) the parallel trust structure would be easier to modify.	On reintroduction of estate duty, it would not necessarily be in the form that previously existed so any trust structure could be affected.

Trust structures need to cater for the changing dynamics and needs of modern families. By evaluating whether one trust or two parallel trusts are better for your family situation, you will ensure that your assets are safeguarded in the best possible way.