

To trust or not to trust: in family law

By Giles Stapleton

The assets of a trust will only be the property of a party to a marriage, if that party has the level of control of a ‘puppet master’ and a lawful right to enjoy the benefit of them. If those criteria are not satisfied, the assets will be excluded from the joint balance sheet for ‘contributions’ analysis but may be a financial resource of that party in the balancing act of what is ‘just and equitable’.

Justice Rees’ decision in *Harris & Dewell & Harris* [2016] FamCA 938 and the Full Court’s decision in the appeal from that decision [*Harris & Dewell & Harris* [2018] FamCAFC 94 (Strickland, Murphy and Johnson JJ)], show that trust can be placed in the courts to reach a thoroughly considered and well-reasoned conclusion about whether assets of a trust are property of a party to the marriage.

That doesn’t necessarily mean that the principled-conclusion will seem ‘right’: especially when the husband conceded in *Harris* that he had exercised control over the trust, had engaged in dealings on its behalf, had directed agents on its behalf, had the benefit of the use of assets of it as security for his personal borrowings and accepted there had been an intermingling of his funds with funds of the trust.

The husband had the ‘run of the trust’ and Justice Rees was satisfied he had treated it as if it were his own since 2002, about eight years before separation.

One might think that would bring the assets within the scope of the husband’s ‘property’ for the purposes of analysing what the ‘just and equitable’ outcome between the parties would be but that wasn’t the case because he did not have a ‘lawful right to benefit from the assets of the trust’. In other words, he was not a legal or beneficial owner of the units in the unit trust.

After those trust assets were excluded from the pool of assets, Justice Rees found the husband’s contribution to the pool to be 65 per cent and the wife’s 35 per cent.

That outcome might be thought a worryingly narrow view of the underlying reality of



the husband’s conduct and control. It might be so narrow as to create a clear opportunity for those looking for one. However, it was upheld by the Full Court based on principles established by the High Court (*Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337 and *Kennon v Spry* (2008) 238 CLR 366 and the Full Court (*Ashton & Ashton* (1986) FLC 91-777 and *Davidson & Davidson* (1991) FLC 92-197).

The Full Court referred to Gibbs J’s judgment in *Ascot* in which his Honour said ‘there is nothing in the words of the sections [in the Act] that suggests that the Family Court is intended to have power to defeat or prejudice the rights of third parties, or nullify the powers, of third parties, or to require them to perform duties which they were not previously liable to perform’.

At [67], the Full Court confirmed the principle established by earlier authorities that property of a trust can be property of a party when the evidence establishes that the ‘person or entity in whom the trust deed vests effective control is the ‘puppet’ or ‘creature’ of that party’: [67]. But, the Full Court also said, control itself is not sufficient. What is required is a ‘a lawful right to some benefit from the assets of the trust’ in the party to the marriage [the puppet master].

Justice Rees and the Full Court also relied on a conclusion to that effect in the decision of Finn J in *Stephens & Stephens* (2007) FLC 93-336.

However, the Act does give the court an additional ‘approach’ under which equity and justice might anyway be achieved with

respect to assets of a trust. That is to find the assets to be a ‘financial resource’ of the party through s 75(2) of the Act [spouse maintenance considerations] which is imported into the property considerations by s 79(4) of the Act.

In this case Justice Rees decided the trust assets were not ‘property’ of the husband but were a ‘financial resource’. That, and other relevant ‘future needs’ factors, caused her Honour to find the wife entitled to a further 17.5 per cent of the assets. In the final outcome, the wife’s interest of 35 per cent increased to 52.5 per cent of the \$16.7 million pool.

The Full Court upheld Justice Rees’ decision, dismissing the husband’s appeal and wife’s cross-appeal. The husband’s unsuccessful special leave application was based on a different issue.

So, the principle established in *Ascot* and developed in *Stephens* and upheld in *Harris* is now confirmed as the law. It might be a ‘principle’ that could be perceived as excessively narrow.

While it may incline cynics towards forward planning and to re-arrange their ‘trust’ affairs, the structure of the Family Law Act and the broad scope of the discretion possessed by the court will continue to limit the effect of the conduct of a party to a marriage that attempts to gain an unfair advantage.

Trust can be placed in the courts to act within their power and exercise their discretion to conclude what is ultimately ‘just and equitable’.