

PROTECT ASSETS FROM A FAMILY LAW PROPERTY SETTLEMENT

In Family Law Property settlement proceedings all assets and liabilities of each party, are combined to form the matrimonial property pool. Business interests regardless of structure are included in the definition of “property” under the Family Law Act 1975 and will part of this asset pool. Therefore, there is no way of lawfully protecting assets from a Family Law Property Settlement claim by having assets sitting in a company structure which shares you own.



Trust structures

Typically, an asset acquired under a trust is also regarded as “property” under the Family Law Act 1975 and that interest will form part of the available asset pool. Even if not strictly a property, then it is a financial resource which is a critical consideration in the context of family law property settlement.

In the well known case of Kennon vs Spry wherein the Court allowed the assets of the family trust to be included as part of the available pool for distribution between the spouse parties because the judge decided that

“there are facts in this case which establish a connection between The trust assets and the husband”.

For a trust asset not to be considered as “property” available for distribution in a Family Law Property Settlement the trust must:

1. Be set up initially with no control over it by the spouse party.
2. Ensure the distributions by that trust cannot bring about a suggestion that there is a pattern of distribution to that party.
3. Not be setup with the intention to defeat claims. Therefore, the time it was set up and the justification for it are keys considerations.

Binding Financial Agreements

The only effective way to protect your assets from a Family Law property Settlement is to enter into a Binding Financial Agreement with your partner. Binding Financial Agreements can be entered into at any time before, during and after marriage.

By such an agreement, the spouse parties clearly define what is to occur to their assets in the event of separation. In essence a properly prepared agreement ousts the jurisdiction of the Family Court that is, the Court is not able to distribute the assets of the parties, if there is in place a proper Binding Financial Agreement clearly explaining what is to occur.

For a Binding Financial Agreement to be effective, solicitors must provide certificates that the agreements were explained to their clients as to the effect and both the advantages and the disadvantages of entering into such an agreement.

Matters that should be considered when drafting a Binding Financial Agreement

It is our experience that many Binding Financial Agreements are drafted addressing what happens to the property owned by the parties only. This can mean that you may still have legal proceedings to deal with other matters. We recommend that you consider these additional matters when instructing your lawyer in drafting a binding financial agreement.

1. Superannuation

Agreement can be reached as to splitting superannuation or allowing a party to retain their super in its entirety.

2. Child maintenance

Agreement can be reached as to the amount of child maintenance that would be payable or whether no claim for child maintenance will be made.

3. Spousal maintenance

Agreement can be reached as to the amount of spousal maintenance that would be payable or whether no claim for spousal maintenance will be made.

4. Transfer or sale of property

Agreement can be reached regarding what happens to certain property in the event of separation. This may be of importance to Real Estate that has been within a family for a period.

We understand Family Law and business. We know what should be included in a Binding Financial Agreement so that your assets are truly protected in the event of the breakdown of a marriage or defacto relationship.

Depending on the complexity of the Binding Financial Agreement we charge from \$3,300 to draft a Binding Financial Agreement, and to provide the necessary certificate.

For further advice or to book an appointment please ring CK Lawyers on 9687 6000.