



# Round Table Workshop Discussion Points

## Wednesday 16 September 2009

### Discretionary Trusts After Spry

1. Kennon v Spry - What is this decision authority for?
2. When are the assets of a discretionary trust “property” of the parties to a marriage for family law purposes?
3. When will the assets of a discretionary trust be considered “financial resources” available to one or other spouse for family law purposes?
4. Does Spry’s case have any application in relation to the rights of discretionary beneficiaries under trust law or generally?
5. When dealing with trust property that has not originated from the personal efforts of the spouses (ie inherited assets) what steps could be taken by the trustee of a discretionary trust to limit exposure to the family court?
6. Are self executing disqualification provisions in respect of the role of trustee and appointor effective?
7. If so, is it effective for other circumstances such as loss of legal capacity or insolvency?
8. Is the use of more than one trustee and appointor considered an advantage?
9. Does your view change if the additional party is an “independent person”?

### Discretionary Beneficiaries

10. What rights to information does a discretionary beneficiary have?
11. Are there any steps that the trustee can take (or terms included in the trust deed) to limit or restrict this right of access to information?
12. What does the right to due administration and the right to due consideration really mean?
13. Are the trustee’s duties and responsibilities towards discretionary beneficiaries altered in any way as a result of Spry’s case?

### Trust Resettlement

14. Is trust splitting still a possibility? Are there tax consequences?
15. In light of the ATO view in ATOID 2009/86, what is good practice in relation to trust splitting?
16. Do the issues of trust splitting apply to multi generational testamentary trusts?

## Excluding and Restricting Beneficiaries

17. If the trustee exercises a right to exclude a beneficiary from the class of discretionary beneficiaries, are there tax consequences?
18. Do self executing exclusion of beneficiary provisions that operate on marital breakdown or insolvency (for example) represent a sound strategy?
19. Can a discretionary beneficiary transfer his or her rights under the discretionary trust deed (whatever they may be) to his or her spouse pursuant to a family court order and if so, does this fit under a CGT rollover?

## Unpaid Present Entitlements

20. Is an unpaid present entitlement (UPE), often described as a beneficiary loan account by accountants, actually a loan?
21. If a UPE is not a loan, is there special wording to be used by the trustee in creating that UPE?
22. What are the trustee's duties and responsibilities regarding the investment of the UPE and is there an obligation to account? Does a constructive trust arise?
23. Should the UPE be converted to a loan? If so, what are the concerns and how should this be achieved?
24. Is the trustee in the firing line if the trustee follows practice statements regarding the making of financial year end trust distributions by 31 August rather than 30 June?

## Bamford's Case

25. In light of the confusion regarding the definition of income of a trust estate, and the Commissioner's willingness to apply the default distribution provisions of a trust deed, is it good practice to continue to include "default beneficiaries"?
26. Is it better to have default accumulation and why?
27. Can you remove default beneficiaries from an existing discretionary trust deed without tax consequences?
28. Should new discretionary trust deeds contain default beneficiaries? If so, what should the default distribution position be?
29. Does the decision in Bamford require a change of practice by trustees?
30. Does the trust distribution minute need to be changed and if so how?
31. Is there a need to amend trust deeds to take account of Bamford and if so are there tax consequences to be concerned with.
32. Does this decision impact on a trust lawyer's view of a "share or interest" in a trust estate whether for inter vivos trusts or testamentary trusts?