

Who has control? Unit Trusts in Family Law

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The Family Court of Australia and Federal Circuit Court of Australia can make orders altering the property interests of parties to a marriage or de facto relationship pursuant to section 79 of the Family Law Act 1975 (Cth). One of more complex issues can be the consideration of constitutes “property” for the purposes of dividing the assets and liabilities of the parties.

Property is defined in section 4(1) of the Family Law Act 1975 (Cth) as “property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion”. The Court’s power to alter property interests includes all property, regardless of when or how it was acquired and in whose name it is owned (Farmer & Bramley (2000) FLC 93-060). In the recent case of Harris & Dewell and Anor [2018] FamCAFC94, the husband owned units in a Unit Trust along with his 99 year old father.

The units were held by the father (67%) and husband (33%). The Director of the corporate trustee was a solicitor who acted on the husband’s instructions.

The husband sought to exclude those units from the asset pool on the basis that he did not have the ultimate control over the vesting of the Trust property. The wife argued that units should be included in the asset pool as the husband had “effective” control.

The Full Court held that the units were not “property” and control itself was not sufficient. The husband did not have powers vested in him to some lawful right to benefit from the assets of the trust. Whilst the corporate trustee was likely to do as instructed by the husband, the corporate trustee did not have ultimate control over the vesting of the trust property.

“Control is not sufficient of itself. What is required is control over a person or entity who, by reason of the powers contained in the trust deed can obtain, or effect the obtaining of, a beneficial interest in the property of the trust...”

Our solicitors at Coote Family Lawyers have experience in complex financial arrangements and can assist you with the division of your property quickly and efficiently.



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