



## Dealing with Testamentary Trusts during family law property settlement

**Date: Wednesday March 31, 2021**

After a relationship breaks down, leading to separation, an application is often made to a court for a property settlement. At this time, each party must make full and frank disclosure of his or her property, assets, liabilities and financial resources. There are many common assets (real estate, vehicles, bank accounts etc) but there are some more uncommon “financial resources”; like an interest in a Testamentary Trust which also need to be disclosed during negotiations.

One reason for including a Testamentary Trust in a Will is to reduce the ability of assets being subject to divestment or direct orders in Family Court proceedings. Persons who are concerned about a child’s partner seeking access to family assets are advised to include such a provision in their Will.

Only when all of the information required by your duty of disclosure is provided, will the court be able to make a proper division of the assets and future income requirements.

### Definitions

“*Property*” is generally easy to understand and identify as being real estate, bank accounts, shares or similar investments, household furniture, jewellery, personal chattels, vehicles, boats, business or partnership interests and superannuation.

“*Financial resource*” is not defined in the Act. It is a possible existing or future financial benefit to one party.

### When a party has interests in a trust

A financial resource can include the interest of a party in a trust; whether it is a unit trust, a discretionary trust, or a testamentary trust.

These are a resource which can or may generate income, or where there is a reasonable expectation that income will be paid to a party from that trust. This is the case even if that person has no control over the trust; that is, the party is not the trustee, or a director or shareholder of a corporate trustee. They may simply be a beneficiary.

## The level of control over the trust is crucial

The court may look to see what control the person has in respect of the trust. It may ascertain whether the party is a trustee (sole or joint with others), a director or shareholder of the trustee company or the Appointor with power to remove the trustee and appoint other trustees.

If it is determined that the party has significant control of the trust and is amenable to directions of the court, the trust assets are regarded as property of the party and are capable of division during property settlement. The interest in the trust would be treated as part of the “pool of assets” of the couple which can be subject to court orders.

If a party does not control the trust, then the trust assets and income would be regarded only as a “financial resource” of the party. The court is then likely to take into account the fact that a party will have potential benefits from the trust when dividing the asset pool but not make direct orders affecting the trust assets.

## Penalties for failure to disclose

A failure to disclose an interest in a trust as a financial resource may result in penalties and also the setting aside of any court order on the application of the other party.

The lawyer for a party will be looking for information about whether the appropriate party has ever received any benefit from a family or testamentary trust.

## Get help

If you have an interest in a trust and you've recently separated or divorced, it is important to obtain experienced and early legal advice as to how that interest will affect any property settlement.

## Contact Daenke Lawyers

08 7477 8440

[reception@daenkelawyers.com.au](mailto:reception@daenkelawyers.com.au)

---

*This blog is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.*