FAMILY Flyer

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THIS ISSUE -

'CLOSE-UP' EDITION

If you have separated and have a Court Order for parenting arrangements in place, you may wonder – is it important that I encourage the children to spend time with the other parent? And what happens if I don't encourage contact? Find out in this edition's 'Close-up' – ['Does Contact Need to be Encouraged?']

USEFUL FACTS ON CHILD SUPPORT – PART 1

If you have recently separated and are earning extra income to support your changed circumstances, but are finding it difficult to meet Child Support payments – we suggest you get legal advice. The extra income (such as income earned from overtime or a second job) may be excluded from your CS assessment and it is not necessary to go through the formal change of assessment process to achieve it.

The Child Support Act provides that a parent can apply to have post-separation income excluded as long as the following CSA requirements are met:

- You need to show that it is post-separation income and you did not earn that income before separation;
- The income would not have been earned in the ordinary course of your existing employment;
- Separation occurred less than 3 years ago (as the income can only be excluded for 3 years after separation).

If the application is successful, the excluded amount can be no more than 30% of your adjusted taxable income.

WHAT IS A TRUST?

'Discretionary Trusts' are largely creatures of the Accounting world, but they commonly surface in Family Law property settlements. In the context of Family Law, the role of Trusts is widely misunderstood. Spouses often believe that the assets a Trust holds can be excluded from the property settlement. This is usually not the case. The Court can include anything owned by either of the parties in a property settlement, including any Trusts. It is ultimately a question of 'control'.

So what is a Trust?

A Trust is a relationship where a person (The Trustee) is under an obligation to hold property for the benefit of the other persons (the Beneficiaries). The type of Trust common to Family Law is a 'discretionary Trust', often known as a Family Trust.

This Trust is established by a payment amount known as a 'settlement sum' which is paid to a Trustee (or Trustees) who hold the sum in Trust in accordance with what is agreed upon in a Trust Deed, for the benefit of the Beneficiaries.

The Trustees own the assets, but the income and capital from the assets are distributed to the Beneficiaries. So often parents create Trusts to hold property 'on trust' for their children – the Trust can operate for up to 80 years.

What is a Trust Deed and how can I get one?

A Trust Deed is a legal document and should be prepared and advised upon by a professional (accountant or solicitor). It sets out the rules on how the Trust will operate. These rules can outline the parties involved and the rights and obligations of those parties and how to change the Deed. All parties must abide by the rules set out in the Trust Deed.

AVOIDANT BEHAVIOUR CORRECTED

What happens when a spouse disposes of all the cash assets and then also tries to disclaim an inheritance entitlement?

In a recent case the Husband disposed of sale proceeds of the house in an unusual way, leaving no property available for distribution. The only opportunity for property settlement left for the Wife was the Husband's disclaimed inheritance. Could the Court Order the Husband to withdraw the disclaimer?

The Facts:

- The Husband, aged 58 and Wife, aged 45 were married for 19 years and had one child, aged 14.
- Their house was sold for $395,000 (less the agent fee), of which the Wife had received nothing.
- The Court had previously Ordered the Husband to provide the Wife with full details relating to the disposal of the sale proceeds and any donations the Husband had made to any charity in the previous 12 months.
- The Husband had previously told the Court that he had lent $400,000 to his sister because she needed the money. His sister however said that he had forwarded to her a cheque for $400,000 to hold on his behalf, which she returned to him at a later date.
- The Husband then said he had donated the $400,000 his sister had held for him by direct donation, claiming he had bought 400 stamped envelopes and put random amounts of money in each, after being advised by 3 priests that this would be a good idea. The Husband claimed "he ought to remove temptation and greed from both of us".
- The Husband's Mother had left her estate of $250,000 to three beneficiaries, one of which was the Husband. The Husband had disclaimed his interest in the estate however, claiming that he did so on the basis that his brother would challenge the Will because the Husband had been away for 20 years and had not made any contributions to the Mother's wellbeing.
- When the Husband was asked for bank statements for his shares, he said he had made paper mache out of them.

Court Found:

- For 6 months the Husband had impliedly accepted his interest in the deceased estate and he had only disclaimed his interest at the time the Wife began Court proceedings.

Court Order:

- The Husband withdraw his disclaimer of interest in his Mother's estate.

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