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Can I trust 'my' Trust if my relationship breaks down?

By Tara Grant - 14 Jul 2020

It is generally well understood that if your relationship comes to an end your relationship property must be shared 50/50 pursuant to the Property (Relationships) Act 1976 (**PRA**). But, some people believe that if they transfer their assets to a Trust, then those assets will be protected. This is rarely true.

There are a number of provisions available under the PRA and at common law, which would allow a Trust owned home, for example, to be included in the pool for division. Particularly where the house was transferred to a Trust when the couple were already in a relationship (even if at the time the couple were only boyfriend and girlfriend / girlfriend and girlfriend / boyfriend and boyfriend or whatever applies). If contributions have been made from relationship property to the family trust, or contributions from the other party whether financial or non-financial, or if the Trust has provided benefit to the parties in some manner during their relationship, then the trust assets can be fair game.

Put simply, you cannot rely upon a Trust to provide protection of trust assets from relationship property claims, in all cases. There are plenty of grey areas and grey areas can provide ample opportunity for litigation.

The key to protecting your personal and trust assets is to enter into a section 21 PRA agreement. This allows a couple to contract out of the PRA and bring certainty around issues of property sharing and division. The terms of a section 21 agreement should include what will happen in the event of separation but also explore what will happen if one party dies.

Where a trust is involved, there is an inevitable overlap. As part of the section 21 PRA agreement negotiation, trustees might be asked to make provision for a surviving partner to remain in occupation of Trust property for such period as a couple agree is fair and reasonable, taking into account the circumstances and needs of other beneficiaries of the Trust.

A section 21 agreement can be entered into by those in a marriage, civil union or de-facto relationship or two persons contemplating entering into such a relationship. Ideally, a couple will enter into an agreement in the early stages of their relationship, before acquiring rights under the PRA but that is not strictly necessary and in many cases we prepare agreements for those who are already in a qualifying relationship.

When considering the appropriate time to raise the possibility of entering in to a section 21 agreement, it is important to understand that a de-facto relationship will begin at the point in which (generally speaking) you and your partner begin living together. Rights under the PRA then crystallise after three years or earlier if a partner has made contributions to your separate property or to trust property. So, don't leave it until the last minute!

Our team are experts in the areas of relationship property and trust law. We would be delighted to talk you through the section 21 process and advise on your overall trust structure and estate plan. We know these matters go hand in hand and how important it is to get these things right - for all involved - so that you and your partner can enjoy the romance without the shadow of the PRA.

If you would like to know more or require assistance please contact [Andrew Skinner](#).

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