



## The Independent Advice Provisions of the Property Relationships Act

It is increasingly popular for couples to enter into written agreements in which they “contract out” of the Property (Relationships) Act 1976 (“the Act”) at the start of a new relationship’. Likewise, upon separation, it is commonplace for the terms of property division to be recorded in writing in order to protect each partner from future claims to property in their possession.

Before either of these agreements are signed, the provisions of section 21F of the Act must be complied with. Section 21F states that an agreement is void unless it complies with certain requirements, which are:

- (a) The agreement must be in writing and signed by both parties
- (b) Each party to the agreement must have independent legal advice before signing the agreement
- (c) The signature of each party to the agreement must be witnessed by a lawyer;
- (d) The lawyer who witnesses the signature of a party must certify that, before that party signed the agreement, the lawyer explained to that party the effect and implications of the agreement.

The requirement for each party to be independently advised is often questioned by clients who have come to a reasonable agreement with their former or current spouse or partner and simply wish to have it “drawn up” by a solicitor. People are often frustrated by the depth of information which is requested by their solicitor and the issues explored which appear to be unrelated to what each party is seeking to achieve.

The key words in section 21F are that the lawyer must certify that they explained to their client the “effect and implications of the agreement.” The obligations on lawyers when providing these certificates are high, and lawyers must ensure that all relevant information is obtained and their client has been fully advised prior to signing. This process involves gathering a complete history from the client, including the nature of their relationship, when it began, when assets were obtained, what contributions were made by the non owning partner, and all other relevant background. Particularly in separation situations, evidence of each asset must be obtained which will allow the lawyer to form a complete picture of the asset pool and classify whether an asset should be considered to be relationship property or separate property. Once the information is gathered, each solicitor must advise their client as to the effects of the agreement they wish to sign, and this advice must include what potential claims could be made, what that person’s position under the Act would be if the agreement was not signed and whether the agreement benefits or disadvantages them. It is only once these processes are completed that a solicitor can provide the certification required on the agreement itself. Through the entire process each party must be separately legally represented.

Once an agreement is signed it is very difficult to have it overturned and to do this would undoubtedly require litigation in the Family Court. It is for this reason that it is better to follow all the appropriate procedures the first time, as frustrating as that may be!

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For more information, please contact one of our offices.

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## TRUSTS - THE PAPERWORK IS CRUCIAL

Trusts are a popular choice for people who are concerned about protecting their assets for themselves and for their children. However, the formation of a trust by the execution of a trust deed and transfer of assets to the trust is only the start. A successful trust is one that is regularly monitored by the trustees and where there is a clear paper trail evidencing the ongoing administration of the trust by the trustees.

### Why the need for paperwork?

If the trust is not properly administered, there is a risk that it may be seen to have either "lapsed" or that it is simply a "sham". This usually occurs where the assets which form part of the trust fund are treated by the trustees as if they are their own personal property held for their own benefit rather than assets held by them for the benefit of the beneficiaries of the trust. Given that trustees are frequently both trustees and beneficiaries of the trust, it is all the more important that a clear distinction exists in the minds of the trustees regarding assets which are held by them personally and those which belong to the trust.

### Essential paperwork

The administration of a trust will depend very much on the nature of the assets which make up the trust fund. A trust fund that consists of the family home in which the beneficiaries reside will not require the trustees to do a great deal for so long as that situation continues. If there is a debt owing by the trust to the settlors of the trust (i.e. the persons who originally set up the trust and transferred assets to it) then the debt should be gifted by the settlors in annual increments of \$27,000.00 (for each settlor) until the entire debt has been forgiven. We can monitor this for you and complete the annual gifting documents.

In addition to gifting, trustees should meet at least once a year to review the trust fund and the manner in which the trust fund has been applied for the benefit of the beneficiaries. There may be no need for the trustees to make any decisions but the important point is that:-

- The trustees have turned their minds to their duties and responsibilities; and
- A trustee resolution records how those duties have been discharged over the previous 12 month period.

**In the case of trusts that hold income producing assets (such as investment properties and shares), the matters which trustees should attend to include:**

- Regularly reviewing the performance of investments
- Preparing and filing a tax return
- Ensuring that the trustees meet at least annually and possibly more frequently, depending on the nature of the investments which they are monitoring
- Ensuring that any new investments and/or transactions that the trust may enter into are properly documented and supported by appropriate resolutions
- If the trust receives income then a separate trust bank account must be opened and the income channelled through that.

Minutes of trustees' meetings should be kept and particular care taken to record decisions taken concerning investment of trust funds and distributions to the beneficiaries.

### Conclusion

The advantages of keeping the paperwork for your trust up to date cannot be overstated. A trust which is properly administered will provide a much greater degree of protection than one which is effectively dormant because the trustees have not turned their minds to their duties and responsibilities under the terms of the trust deed.

If you have any doubts as to whether your trust is being properly maintained, please phone us.

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