



THE MAGIC OF TRUSTS: COURT MAKES FUNDS INVISIBLE TO CREDITORS

In *AB v FGH* [2022] WASC 244 the estranged daughter of the testator was left only \$25,000 and some jewellery out of an estate of \$6.5M+.

She applied to Court for further funds from the estate for her maintenance and advancement in life (i.e. a *Family Provision Act* claim).

Her financial position was precarious. It was the result of, amongst other things, a long-running (and yet-to-be resolved) Family Court proceeding against her former husband, which in legal fees and funding had left her with millions of dollars of debt.

The Court found that the daughter was entitled to more than was provided for her in the Will, and made orders for \$850,000 for her maintenance and advancement in life.

That is not the most interesting part.

If those funds were paid to the daughter directly, they would have been available to her creditors. In order to ensure the \$850,000 would not be available to be snatched up by her creditors (including in any possible future bankruptcy), the Court's orders created a discretionary trust under which the daughter was to be the primary beneficiary (with her children also as beneficiaries) of the \$850,000 provision.

By creating that trust, the funds were not accessible (at least directly) by the daughter's creditors, even if the daughter were to later become bankrupt.

In deciding to create the trust, the Court noted that:

- a. The Court will not ordinarily order provision (i.e. further funds out of the estate, in an inheritance claim) if the funds will merely go to the claimant's creditors, because that will not achieve the Act's object of providing for the claimant's maintenance and advancement in life;
- b. A grant of provision under the *Family Provision Act* grants a new right from the time of the Court's order. It does not alter or create a right that existed under the Will. Before the order was made by the Court, the claimant (daughter) had no right to any such further funds; and
- c. Provided it does not alter existing or vested entitlements, a Court may grant provision in a manner that quarantines the provision from the claimant's creditors, as it did in this case.



Our further observations are as follows:

1. If the daughter is eventually bankrupted, a bankruptcy trustee might consider whether it can attack the protective nature of the trust on the basis that it is a transfer to defeat creditors (s121 *Bankruptcy Act* 1996), either in its entirety (\$850,000) or at least as regards the original \$25,000 and jewellery left to the daughter under the Will if the same was subsumed into the Court's protective orders. A bankruptcy trustee may, however, have some significant hurdles to overcome, including whether the daughter can be said to have "transferred property" at all in circumstances where the right to the funds didn't exist prior to the Court's order, and where the Court might have refused to make any provision order at all if the funds were likely to be depleted by creditors without any substantial benefit to the daughter.
2. This decision might encourage insolvent claimants to make claims under the *Family Provision Act*, without fear that their claims would (as was previously the case) be unsuccessful simply because of their financial position.
3. This decision might also impact upon any third parties who provide services to claimants on the basis that they will be paid out of the proceeds of such a claim, or creditors who defer taking action against a claimant on that basis. There would seem to be a real possibility that successful litigation may result in the insolvent claimant still being left with no funds to pay for those services, and there is no guarantee that the trustee of any newly created trust will distribute funds to the claimant to pay the same.
4. The decision also highlights the benefit of using a testamentary trust when a potential beneficiary under a Will gets into financial difficulties. Wills should for that reason, and many others, be regularly reviewed.

For further information or assistance contact Murfett Legal on [+61 8 9388 3100](tel:+61893883100).

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