



THE TAX INSTITUTE

# FAMILY LAW, TAX AND FAMILY BREAKDOWN PART 3

Case Study – Keach & Keach and Ors  
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## 1 ISSUES TO BE CONSIDERED

**FAMILY LAW - PROPERTY** – Trust– where the husband is a potential beneficiary of a trust – whether the assets of the trust should be included in the asset pool – whether the trust is a “sham” and the husband is the true owner of the assets of the trust.

## 2 INTRODUCTION

This case involved a determination of competing applications between a husband and wife for property settlement, spousal maintenance and child support.

One of the many factors Strickland J was asked to rule on, and that which is relevant to this discussion, was whether the assets of a discretionary family trust (the “Junior Trust”) – which was established and controlled by the father of the husband well before the marriage of the husband and wife - was to be included in the divisible pool of assets (under s 79(4)) or as a financial resources (under s 75(2)).

The main asset of the Junior Trust (which the wife relies upon in her evidence) was a residential property [the “M property”] in which the husband, the wife and their children lived for approximately 3 ½ years prior to separation.

The wife alleged that the Trust structure, and the nature of the husband’s interest in it as a potential beneficiary, was a “sham” designed to keep the property “from the reach of the Family Court”. She alleged that even if the legal interest of the M property vested in the Trustee, “it is an artifice inconsistent with the reality established by the evidence – that is, that the husband is in reality entitled to the property of the Trust, including the [M property].”

The husband and the second respondent (the Trustee of the Junior Trust) denied the Junior Trust was a sham and as a consequence argued there was no basis to include any of the assets held by the trust in the asset pool.

In his Reasons for Judgement, His Honour Strickland J provided a detailed “recitation of the law” on the various definitions of what constitutes a “sham”.

Essentially, his Honour found there must be a common intention of the parties (in the case of a discretionary trust, the trustee and or settlor) to the document, act or instrument *not to create the legal rights and obligations which they appear to create*.

## 3 THE JUNIOR TRUST – SHAM OR NO SHAM

### 3.1.1 Background

The husband was born in 1968, and 42 years of age at the time of trial. The wife was born 1977 and 33 years at the time of trial.

They were married in 1999, had two children and separated in 2005.

In 1985, when the husband was just 17 years of age, the husband’s father, Mr Keach Senior, established four trusts in the names of each of his children, namely the **Mr Keach (Junior) Trust (“the Junior Trust”)**, the K Keach Trust, the S Keach Trust and the W Keach Trust (“the children’s trusts”).

Each trust was created by a separate trust deed. The beneficiaries and residuary beneficiaries named in the Schedule to the Junior Trust deed were the husband, his sister K Keach, brothers S Keach and W Keach.

Over the course of the following 20 or so years, other beneficiaries (including Keach family entities established and controlled by Mr Keach Senior) were added to that class of beneficiaries, and distributions were made from time to time.

Also over the course of the next 20 or so years, the trustee for the Junior Trust acquired and disposed of various assets including, in the main, a residential property (“the M property”) which was purchased for \$920,000 in October 1998 by Keach Nominees Pty Ltd, as trustee of the Junior Trust.

The M property was rented out until July 2002, when the husband and wife moved in. They payed somewhere between \$800 - \$960 per week (according to their evidence) in rent for the M property. During the time they lived there, they also undertook extensive renovations and maintenance of the property.

Between September 2002 and the time of separation the husband drew numerous cheques on the Junior Trust’s account in payment of his Visa account for expenses incurred in relation to the M property.

When the parties separated in December 2005, the wife moved out (with the children) and lived with her parents for some months before renting a property from her brother. The husband asserted, that in February 2006, he received a Notice to vacate the M property, which he did, and he too moved into a rental property.

On 2 February 2006, the husband commenced proceedings in the Family Court for parenting orders. The wife subsequently filed for orders in relation to property settlement, spousal maintenance and child support. Upon the Application to the Court made by the wife on September 2008, J Pty Ltd, the trustee of the Junior Trust was joined to the proceedings as second respondent.

The trial began in September 2009.

### 3.1.2 The Main Trial issue

In the property settlement trial, the primary issue in dispute as referred by Strickland J was

*“... whether the asset pool should comprise the assets of the Junior Trust, including in particular the house property at M. The wife says that it should on the basis that the Junior Trust, and the nature of the husband’s interest as contended for by each of the husband and the second respondent, are a ‘sham’.” [at 133].*

*“The husband and the second respondent deny that there is a sham and contend that there is no basis for including any of the assets of the Junior Trust in the asset pool.” [at 136]*

By way of submissions made by counsel, the wife contended that

*“...the evidence discloses that the reality of the conduct of the affairs of the Trust and, in particular, the acquisition, maintenance and improvement of the property at [M] (“**the M property**”)), is substantially different from that which the Husband and Second Respondent say the documents establish and would have the Court accept.*

*Despite the vesting of the legal interest in the [M property] in the Trustee, the Wife contends that the evidence discloses that such property was purchased by and for the Husband and Wife and was intended to benefit each of them.”*

And

*“... in so far as the Junior Trust provides for persons other than [sic] the husband to benefit from the capital held within the trust it is a sham. The trust amounts to a piece of machinery for serving the purpose of enabling the husband to enjoy the benefit of the capital and in particular, the home purchased by the trustee and to do so to the exclusion of others but within a structure designed to keep that capital from the reach of the Family Court of Australia, in the event that any spouse of the husband was to bring proceedings against him for property settlement. The*

*primary role this served by the naming of the husband's siblings as beneficiaries is one of camouflage."* [at 172]

### 3.2 What is a Sham

In his judgement, His Honour examined various judicial descriptions of a "sham", notably that of *Diplock LJ in Snook v London and West Riding Investments Ltd [1967] All ER 518 at 528*, whereby His Lordship stated:

*"...for acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating."*

In *Sharrment Pty Ltd v The Official Trustee in Bankruptcy (1988) 82 ALR 530 Lockhart J at 537* said a "sham" for the purposes of Australian law is:

*"...something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true, but something made in imitation of something else or made to appear to be something which it is not. It is something which is false or deceptive."*

His Honour Strickland J also relied heavily on the findings of Kirby J in the recent High Court case of *Raftland Pty Ltd as Trustee of the Raftland Trust v Commissioner of Taxation [2008] HCA 21; (2008) 246 ALR 406*:

*"The key to a finding of sham is the demonstration, by evidence or available inference, of a disparity between the transaction evidenced in the documentation (and related conduct of the parties) and the reality disclosed elsewhere in the evidence. Where, for example, the evidence shows a discordance between the parties' legal rights or obligations as described in the documents and the actual intentions which those parties are shown to have had as to their legal rights and obligations, a conclusion of sham will be warranted."*

*The test as to the parties' intentions is subjective. **In essence, the parties must have intended to create rights and obligations different from those described in their documents. Such documents must have been intended to mislead third parties in respect of such rights and obligations.***

*To justify a conclusion that documents constitute a sham, the requisite intention to mislead must be a common intention of the parties. An exception may exist where the acts and*

*documents reflect a transaction divisible into separate parts, such that a transaction is a sham as to part only of the transaction.*

*Neither the complexity nor the artificiality of a transaction, nor any circularity evident in it, nor the apparent lack of commercial or economic sense will of themselves, alone or in combination, necessarily warrant a conclusion that a transaction constitutes a sham. Nor does a departure by the parties from the terms of their original agreement necessarily indicate that they never intended that agreement to be effective and binding according to its tenor. Nevertheless, a sham can develop over time if there is a departure from the original agreement and the parties knowingly do nothing to alter the provisions of their documents as a consequence.” [at 147]*

The test for Strickland J in effect was to compare the evidence of intention in the trust instrument, against the evidence of real intention of the parties.

At this stage it is worthy to note that:

*“...the wife’s senior counsel confirmed that the wife was not seeking a finding that there is a sham in relation to the control of the Junior Trust, it being conceded that at all relevant times the husband’s father controlled the Trust.*

*... It was the wife’s case that here the issue was whether by the time of the trial, or at least by the time of separation, “the terms of the trust did not reflect the true nature of the arrangement between the trustee and the husband”, and “who may benefit from the capital of the trust was knowingly departed from”.*

Consequently, according to Strickland J

*“...given that the husband’s father caused the establishment of the Trust and thereafter he controlled it, it is the intention of the husband’s father that is the relevant intention.” [at 172.12 - 174]*

### 3.3 The Evidence

The evidence and available inferences relied upon by the wife to support the existence of a sham included the following:

- In 1985, Mr [Keach] Senior caused the establishment of four trusts, each named after one of his four children. He was instrumental in their establishment, it having occurred at his request and on his instruction
- The children of Mr [Keach] Senior are identified as the beneficiaries and residuary beneficiaries in each trust

- The terms of the four trusts are identical save that the order of the naming of the beneficiaries in each Schedule differs with the children after whom the trust is named (“the nominee beneficiary”) being the first mentioned beneficiary in the Schedule to the trust.
- Each trust is a discretionary trust both as to income and capital
- The trusts were established in order to provide a structure whereby property could be held for the benefit of Mr [Keach Senior’s] children. Spouses of his children are omitted from the description of beneficiaries and that omission was a deliberate decision.
- Although Mr [Keach] Senior first avoided the suggestion that those trusts were established in this particular form in order to shield assets from future claims by spouses of his children in the event of separation, he subsequently agreed that one of his motivating factors in establishing the children’s trusts was to keep the property within those trusts as far away from the Family Court as possible.

In order to establish the requisite intention, Strickland J relied primarily on the affidavit evidence of the husband and in particular that of Mr Keach Senior (the husband’s father) who was also cross-examined during the trial. Of his evidence His Honour said:

*“The husband’s father was generally an impressive witness. He was forthright and clear in his evidence in relation to the Junior Trust and its assets, including in particular the M property. There was no dispute that he controlled the four trusts, including the Junior Trust. He established them for investment purposes and he was the source of all of their assets, commencing with his shares in NN Ltd. He made no bones about it being his intention to keep the assets in the “family” and to ensure that his four children benefited through the trusts. He deliberately excluded the spouses of his children from the range of possible beneficiaries when establishing the trusts in 1985. He also conceded that a prime motivating factor since 1985 has been to “keep the property within the trusts as far away from the reach of the Family Court of Australia as possible”. [at 160]*

And at [172.21] His Honour concluded:

*“The facts of the matter are that the husband’s father established the Junior Trust, he was the sole source of the assets, at all times he gave any necessary legal instructions to the Trust’s solicitors, the accounts of the Trust were managed by an accountant under the direction of the husband’s father, the husband’s father settled the accounts each year, at all times he managed and controlled the Trust, any assistance he received in that regard from the husband was always under his direction, as was any use by the husband of the trust cheque book, the husband’s father determined what assets the Trust would hold and acquire, he attended the auction and bid for the M property (I reject the suggestion by the wife that the husband did this), he arranged the finances for the purchase by the Trust of the property, he arranged the*

*refinancing for the property through the Commonwealth Bank of Australia, and all expenses of the property were paid by the Trust. Further, any personal expenditure through the trust cheque account was debited to the husband's loan account". [at 172.2]*

*"It is also noteworthy that not all allocations/distributions of the income of the Trust were made to the husband. The wife's senior counsel suggested that the evidence of this is incomplete, and it was not possible to determine the full extent of the allocations/distributions. However, I do not accept that submission. There is ample evidence to demonstrate the pattern of allocations/distributions and they certainly were not all to the husband. Indeed, it was the opposite. There were only four allocations/distributions of income to him over a period of 23 years". [at 172.22]*

*"I also find that the wife was under no illusion as to the ownership of the property". [at 172.23]*

## 4 SUMMARY OF EVENTS

Date	Event
1968	The husband was born in 1968 and was 42 years old at the date of trial.
21 Dec1973	The Senior Trust was settled with Keach Nominees Pty Ltd as the trustee. The husband is a potential beneficiary of the trust.
1977	The wife was born in 1977 and was 33 years old at the date of trial.
15 Nov 1983	<p>The husband's father, Mr Keach Senior, established four trusts in the names of each of his children, namely the <b>Mr Keach (Junior) Trust ("the Junior Trust")</b>, the <b>K Keach Trust</b>, the <b>S Keach Trust</b> and the <b>W Keach Trust ("the children's trusts")</b>. Each trust was created by a separate trust deed. K Nominees was appointed the trustee of all four of the children's trusts.</p> <p>Clause 1(c) of the deed for the Junior Trust defines the beneficiaries of the trust as:</p> <ul style="list-style-type: none"> <li>(i) The persons named or otherwise qualifying to be included in a class of persons (if any) referred to in the Schedule and issue of any such person and any charity or unincorporated association named in the Schedule.</li> <li>(ii) Any such person, persons or company (including the Trustee of any other trust) as the Principal shall by notice in writing to the Trustee before the vesting day appoint to be beneficiaries for the purpose of this Deed ...</li> </ul> <p><b>The beneficiaries and residuary beneficiaries named in the Schedule to the deed were the husband, his sister K Keach, brothers S Keach and W Keach.</b></p> <p>Clause 2 (a) of the deed provided:</p> <p><i>"Until the Vesting Day the Trustee may pay or apply the whole or any part of the income of the Trust Fund for or towards the maintenance, education, advancement or benefit of all or such one or more of the Beneficiaries [sic] to the exclusion of the other or others of them and in such shares as the Trustee in its absolute discretion may by Deed or by oral declaration recorded in the minutes of the Trustee determine provided however that any income not so paid or applied may by</i></p>

*declaration recorded in the minutes of the Trustee made on or before the last day of each financial year be deemed to have been paid or applied for the maintenance, education, advancement, or benefit of such of the Beneficiaries and in such proportions as the Trustee may by notice in writing declare and in such event the Trustee shall credit such proportions of such income to the account of the respective Beneficiaries in the Books of Accounts of the Trustee and shall hold the same absolutely on behalf of each such Beneficiary”.*

19 Sept 1986 N Limited was incorporated. N Ltd is a publicly listed company effectively controlled by the husband’s father. N Ltd owns a number of hotels, including Hotel 1, Hotel 2, Hotel 3 and Hotel 4.

30 June 1988 The Senior Trust was appointed to the class of potential beneficiaries of the Junior Trust. The Senior Trust was also appointed as a potential beneficiary of the three other children’s trusts.

29 June 1990 O Pty Ltd was appointed to the class of potential beneficiaries of the Junior Trust. The husband’s father and step-mother were the sole directors and shareholders of this company.

1994 The husband purchased a unit at W (“the W property”) with his sister K Keach for \$310,000, with the husband and K Keach each borrowing \$155,000 from their father to facilitate the purchase. The husband and K Keach initially resided in the property together.

8 June 1995 **Keach Nominees Pty Ltd ACN ... was incorporated.** Mr Keach Senior, his wife Ms F Keach and Mr Keach Senior’s four children (including the husband) were named as directors of the company. Mr Keach Senior held five issued shares and his wife and each of the four children held one share each

9 June 1995 The husband was appointed as a director of Keach Nominees Pty Ltd.

March 1996 The husband and his sister sold the jointly owned unit at W for \$430,000. The husband says he received approximately \$215,000 from the sale. He says he did not repay his father at this time but rather advanced the funds to the Junior Trust. The husband says over the years he has received repayments of this loan, and that it was completely discharged by the time of trial. The husband says he drew down on the monies loaned to the Junior Trust to meet his legal fees, spousal maintenance commitments and living expenses.

30 June 1997 For the financial year ended 30 June 1997 distributions were made from each of the children's trusts to O Pty Ltd.

30 June 1998 For the financial year ended 30 June 1998 distributions were made from the Junior Trust to W Keach.

12 August 1998 **Keach Nominees Pty Ltd was appointed as the trustee of the Junior Trust.** On 25 August 1998 Keach Nominees Pty Ltd was also appointed as the trustee of the other three children's trusts and the Senior Trust.

28 Sept 1998 The trust deed of the Junior Trust was amended as follows:

- Covenant 25 of the deed which gave the Trustee the power by deed to release and revoke any power/s conferred on the Trustee and allowed the Trustee to vary or amend any of the trusts or provisions contained in the Deed, upon conditions, was revoked.
- Covenant 8(xiii) was amended to give the Trustee the power to give any guarantee of or undertaking for the "payment or repayment of money or debts ... of any person" or the "performance of any existing or future duties, undertakings, obligations or liabilities incurred or which may at any future time be incurred by any person" and to give any mortgage, charge or other security over the trust fund or any asset forming part of the Trust fund.
- Covenant 9 was amended with respect to the trustee's power to appoint a person as the representative of the trustee to do acts in connection with the trustee's powers.
- Finally, covenant 29 was inserted providing an indemnity to the trustee and an entitlement to reimbursement for money expended and debts incurred in the administration of the trust, provided the trustee has acted in good faith.

16 Oct 1998 A property at **M ("the M property") was purchased by Keach Nominees Pty Ltd, as trustee of the Junior Trust, for \$920,000.** The purchase was in part facilitated by way of a mortgage to the ANZ Bank. The property was rented out until July 2002, when the husband and wife commenced residing in this property.

30 June 1999 For the financial year ended 30 June 1999 the husband was allocated \$44,014 from the Junior Trust.

11 Nov 1999 **The husband's father was appointed the Principal of the Junior Trust.** The husband's father was also appointed as Principal of the other three children's trusts at this time.

1999	The parties marry.
30 June 2000	For the financial year ended 30 June 2000 the husband was allocated \$40,150 from the Junior Trust.
22 June 2001	J Pty Ltd ACN xxx xxx xxx was appointed a beneficiary of the Junior Trust. The husband's father and step-mother were the directors and only shareholders of J Pty Ltd.
30 June 2001	For the financial year ended 30 June 2001 the husband was allocated \$27,164 from the Senior Trust. A distribution was also made from each of the children's trusts, including the Junior Trust, to J Pty Ltd.
3 July 2001	The ANZ loan facility in the name of Keach Nominees Pty Ltd on behalf of the Junior Trust in the amount of \$636,137 was discharged. A loan was obtained from the Commonwealth Bank by Keach Nominees Pty Ltd guaranteed by the husband and his father.
2 Nov 2001	Four companies, namely Company 1, Company 2, Company 3 and Company 4 were incorporated. One beneficial share in each of the companies was held by Keach Nominees Pty Ltd. The husband's father was the sole director of each the companies at the time of incorporation. Company 1, Company 2, Company 3 and Company 4 each hold shares in N Ltd.
3 Nov 2001	J Pty Ltd issued one share to each of Company 1, Company 2, Company 3 and Company 4.
30 June 2002	For the financial year ended 30 June 2002 the husband was allocated/received a distribution of \$43,459 from the Senior Trust.
17 April 2002	The husband was appointed a director of Company 1, the husband's sister K Keach was appointed a director of Company 2, the husband's brother W Keach was appointed a director of Company 3 and the husband's brother S Keach was appointed a director of Company 4.
22 June 2002	Company 1 was appointed as a beneficiary of the Junior Trust. Also on this date, Company 2 was appointed as a beneficiary of the K Keach Trust, Company 4 was appointed as a beneficiary of the S Keach Trust and Company 3 was appointed as a beneficiary of the W Keach Trust.

30 June 2002 For the financial year ended 30 June 2002 all distributions from the Junior Trust were made to Company 1. These distributions were in the amount of \$65,301.

July 2002 **The parties commenced residing in the M property, paying \$800 (as asserted by the husband) or \$960 (as asserted by the wife) per week rent.** The parties had commenced to undertake renovations to the property following the vacation of the property by the previous tenants.

Sept 2002 to July 2005 **Between September 2002 and the time of separation the husband drew numerous cheques on the Junior Trust's account in payment of his Visa account for expenses incurred in relation to the M property and for other expenses.**

2002/2003 In the 2002/2003 financial year the husband is recorded as lending \$264,167 to the Junior Trust.

20 June 2003 The husband was allocated \$24,628 from the Junior Trust.

Nov 2003 The parties' son T was born.

30 June 2004 For the financial year ended 30 June 2004 no allocations/distributions were made from the Junior Trust.

2003/2004 At the end of the 2003/2004 financial year the wife says that the husband gave her a handwritten bill for the wife's share of the invoices and accounts referable to the M property.

May 2005 The parties' daughter R was born.

9 June 2005 The husband was appointed a director of Keach Nominees Pty Ltd.

30 June 2005 For the financial year ended 30 June 2005 the husband was allocated \$18,601 from the Junior Trust.

August 2005 The wife says the husband again gave her a handwritten "bill" for her share of the invoices and accounts referable to the M property. The wife says the husband requested payment on the basis that she carried on the business of V Pty Ltd from the property.

27 Dec 2005. **The parties separated.** Following separation the wife and the children lived with the wife's parents for approximately 6 to 8 weeks.

Jan 2006 TT Pty Ltd purchased a 25 per cent interest in I Pty Ltd for \$20,000, borrowing the funds from Keach Nominees Pty Ltd.

2 Feb 2006 **The husband filed an Application in the Family Court.**

Feb 2006 The wife and children commenced to reside in rental accommodation at H Street, Sydney Suburb 2. The wife's rent was paid by her father.

15 Feb 2006 The husband asserts on 15 February 2006 he received a Notice to vacate the M property. The husband thereafter commenced to reside in a property owned by N Ltd at M in Sydney.

30 June 2006 For the financial year ended 30 June 2006, distributions for each of the children's trusts were made only to the beneficiary whose name is borne by the respective trust, save that all distributions from the Junior Trust were made to the Senior Trust (\$22,541.78).

19 Dec 2006 Keach Nominees Pty Ltd retired as Trustee of the Senior Trust and J Pty Ltd was appointed as the Trustee.

9 Feb 2007 The husband was removed, according to the husband without notice, as a director of Company 1.

8 Mar 2007 **Keach Nominees Pty Ltd retired as Trustee of the Junior Trust. J Pty Ltd was appointed as Trustee of the Trust.**

9 Mar 2007 The share in Company 1 was transferred to J Pty Ltd as trustee of the Junior Trust.

16 Mar 2007 **The parties' divorce became final.**

13 April 2007      **The husband's brothers W Keach and S Keach were issued one ordinary share each in J Pty Ltd.**

7 June 2007      The accountants for the husband's father and the Junior Trust wrote to the husband advising that he owed his father \$177,385.14 and the Junior Trust owed him \$222,425.14.

30 June 2007      For the financial year ended 30 June 2007 distributions for each of the children's trusts were made only to the beneficiary whose name was borne by the respective trust, save that all distributions from the Junior Trust were made to the Senior Trust (\$109,061.43).

30 June 2008      For the financial year ended 30 June 2008 distributions for each of the children's trusts were made only to the beneficiary whose name was borne by the respective trust (or a company in which only the beneficiary whose name is borne by the respective trust has an interest), save that all distributions from the Junior Trust were made to the Senior Trust.

2 Sept 2008      **The wife filed an Amended Response to an Application for Final Orders amending the orders she sought with respect to both parenting and property settlement issues and joining J Pty Ltd (as trustee of the Junior Trust) as the second respondent to the proceedings.**

21 Sept 2009      **The trial commenced before Strickland J.**