

# **THE HIGH COURT & THE SPRY CASE**

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**A seminar presented by Counsel of Gordon & Jackson's List**

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[2008] HCA 56 (3 December 2008)  
French CJ, Gummow, Hayne, Heydon and Kiefel JJ

Notes

*Dr Spry is referred to in this summary as "Spry". This means no disrespect, and is adopted as a convenient shorthand.*

*In the interests of brevity, the summary does not include the authorities referred to in the judgments. Therefore some passages which appear are not the words of the judges of the High Court, but passages from authorities to which they have referred with approval in their judgments. Although some passages from the judgments are set out verbatim, the summary is mostly in the nature of a paraphrase: if reference needs to be made to the precise language of the judgments, then the paragraph numbers indicate where to go to find this.*

*All references to section numbers are references to sections in the Family Law Act. Most of the relevant provisions from the Family Law Act are set out at the end of this summary.*

*References to "the Trust" are all references to the ICF Spry Trust.*

Extract of relevant legislation

- 4(1) "**property**" in relation to the parties to a marriage or either of them, means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion."
- (ca) "**matrimonial cause**" means proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings... arising out of the marital relationship... [and also] in relation to concurrent, pending or completed divorce... proceedings between those parties".
- 4(2) A reference in this Act, ... to a **party to a marriage** includes a reference to a person who was a party to a marriage that has been:
- (a) terminated by divorce (in Australia or elsewhere); or
- 79(1) In property settlement proceedings, the court may make such order as it considers appropriate:
- (a) in the case of proceedings **with respect to the property of the parties to the marriage or either of them** – altering the interests of the parties to the marriage in the property; or
- (b) ...
- including:
- (c) an order for a settlement of property in substitution for any interest in the property; and
- (d) an order requiring:
- (i) either or both of the parties to the marriage; or
- (ii)...
- to make, for the benefit of either or both of the parties to the marriage or a child of the marriage, such settlement or transfer of property as the court determines."
- 85A(1) The court may, in proceedings under this Act, make such order as the court considers just and equitable with respect to the application, for the benefit of all or any of the parties to, and the children of, the marriage, of the whole or part of **property dealt with by ante-nuptial or post-nuptial settlements made in relation to the marriage**.
- 106B(1) In proceedings under this Act, the court may set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction or in the interest of, a party, which is made or proposed to be made to defeat an existing or anticipated order in those proceedings; or which, irrespective of intention, is likely to defeat any such order.
- ...
- (3) The court must have regard to the interests of, and shall make any order proper for the protection of, a bona fide purchaser or other person interested."

### The fundamental question

The fundamental question raised in this case was whether, in the unusual facts of the particular case, the control of assets through a discretionary trust was to be regarded as "property" of either of the parties to the marriage for the purposes of s. 79 of the *Family Law Act*.

**79(1)** "In property settlement proceedings, the court may make such order as it considers appropriate:

(a) in the case of proceedings **with respect to the property of the parties to the marriage or either of them** – altering the interests of the parties to the marriage in the property;

**4(1)** "**property**" in relation to the parties to a marriage or either of them, means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion."

### Discretionary trust lexicon

- Appointor

#### Powers of appointment

- General powers
- Special powers
- Hybrid powers

- Trust powers
- Mere powers

- Exhaustive Trusts
- Non exhaustive Trusts

### Certainty - Sham Trusts

- Certainty of object - *Re Gulbenkin's Settlements*, [1970] AC 508; *McPhail v Doulton*, [1971] AC 424; trustee exercising a discretion to distribute is not necessarily obliged to survey the entire range of objects; discretionary trust will be sufficiently certain if the definition enables the trustee or the court to determine whether any candidate is or is not within the range of eligible objects. But there needs to be a formal class, or at least some common characteristic, (eg such relationship with a specific person, , employment, residence, etc.)so that the trustee can assess the task "in a business like way".

- List Certainty is not necessary; *Kinsela v Caldwell* (1975) 132 CLR 458; but note [12] in *Commissioner of State Revenue v Viewbank Properties Pty Ltd*, [2004] VSC 127, Nettle J; it is necessary that there be such a description of the beneficiaries as will enable them to be ascertained in the sense that eventually it will be possible to list them exhaustively.

- "Beneficiaries"
- "Objects"

### Heydon J's dictionary definition of a "discretionary trust"

"A trust under which the vesting of the whole or any part of the capital of the trust estate, or the whole or any part of the income from that capital, or both -

- (a) is required to be determined by a person either in respect of the identity of the beneficiaries, or the quantum of interest to be taken, or both, or
- (b) will occur if a discretion conferred under the trust is not exercised, or
- (c) has occurred, but under which the whole or any part of that capital or the whole or any part of that income, or both, will be divested from the person or persons in whom it is vested if a discretion conferred under the trust is exercised."

(Good definition, save that it fails to address questions of certainty)

## Chronology

- 21 Jun 68**    **Creation of the Trust**  
Creation by parol of the Trust. (There was a trust deed, but it was not executed, to avoid stamp duty.)  
The settlor and trustee was Dr Spry  
The Trust was a discretionary trust  
The objects included: Spry, his siblings, his and their issue, and the spouses of all of them. (Helen Spry was born in August 1956 and was nearly 12 years old at this time.)
- 29 Dec 78**    Spry married Helen Spry  
4 children of the marriage born between 1980 and 1987
- Oct 81**        **Terms of Trust recorded in written instrument**  
The Trust Deed was then signed and stamp duty was paid. Its terms included these:-
- #1    Spry was both settlor and trustee. He had power to appoint and remove trustees.
  - #2    "The settlor may at any time vary the terms of this trust, but not in such a manner as to increase in any way his rights under this trust to the beneficial enjoyment of the fund."
  - #3    The "fund" means the trust fund from time to time in existence.
  - #4    "beneficiaries" was defined as meaning all the issue of the father of the settlor, and all persons married to such issue.
  - #5    At any time this trust may be terminated if all the beneficiaries then alive and being sui juris unanimously so consent; and none of the fund shall in such event be paid to or applied for the settlor, but it shall be distributed equally amongst the male beneficiaries.
  - #6    "The trustee shall have the power from time to time, as he in his absolute discretion sees fit, to apply all or any part of the income and/or capital of the fund to or for all or any of the beneficiaries, either by making payments to or applications for the benefit of the beneficiary, or payments to a trust set up substantially for the benefit of such beneficiary ..."
  - #7    At the date of distribution the fund is to be divided amongst such of the beneficiaries as the trustee shall think fit, and, in default, shall be divided equally amongst all male beneficiaries, with the exception of the settlor.
  - #8    In the event of the failure of the trusts set out in clauses 6 and 7 the fund shall be held for charitable purposes ...
  - #9    "The trustee may from time to time invest or deal with the fund in any way as if it were his own absolute property, save that it shall be held beneficially by him on the trusts hereof."
- 4 Mar 83**    **First Variation of the Trust – Spry excluded himself as an object**  
(Deed executed by Spry and Mrs Spry)
- #1    Spry released the trustee from any loans made by him and acknowledged that no money was or remained owing to him by the trustee or in relation to the Trust fund. He acknowledged that he had "no rights to, or interest in, the trust fund or the income thereof".
  - #2    Spry released and abandoned all and any beneficial interest or rights which he might have as settlor under the Trust or in the Trust fund or its income. He confirmed that he ceased to be a beneficiary of the Trust, or a person to whom or for whose benefit all or any part of the Trust fund and income could be applied.
  - #3    Confirmed that the expression 'issue' included all descendants however remote; that appointments of any new trustee(s) could be revocable or irrevocable; that any variation of the Trust, to the extent to which it purported to confer any right or benefit upon the settlor, would be invalid; that no loans to the trustee by Mrs Spry or any other person were outstanding.
  - #5    Made a revocable appointment that, on his own death, or resignation as trustee, Mrs Spry would become the trustee; and upon her death or resignation then their eldest daughter would become the trustee.
  - #6    Otherwise confirmed the trusts recorded in the 1981 Trust Deed.

7 Dec 98 **Second Variation of Trust – excluded Spry and Mrs Spry as an object**

(Deed executed by Spry alone)

- after death or resignation of Spry as trustee, two eldest daughters would be the trustees.
  - if Spry ceased to be the trustee, then during his lifetime no payment, distribution, or application of income or capital could be made without his prior written consent.
  - The power to vary was further varied so that
    - (a) it could be exercised by Spry in writing during his life, or by his will, and
    - (b) any exercise of the power to vary could be either revocable or irrevocable (but unless expressly stated to be irrevocable, would be revocable).
- 4 Trust varied so that no power or discretion to pay or apply the capital could be exercised in favour of the settlor or Mrs Spry, and both were excluded absolutely and irrevocably from any interest, right or possibility in the capital of the fund. This variation was expressed to be irrevocable; and no future variation or amendment of this clause or which purported to confer any interest, right or possibility in the capital of the fund on the settlor or on Mrs Spry should be valid in any way.

In relation to the Second Variation

- Spry did not tell his wife that he had made this alteration.
- Its chief purpose was to permanently exclude Spry and Mrs Spry potential recipients of capital. Mrs Spry did remain a potential income beneficiary.
- Spry made the variation knowing his marriage was in trouble, that a Family Court order dealing with their property was likely, and with the intention of removing the Trust assets from the reach of the Family Court.

30 Oct 01 The Sprys separated and Mrs Spry later applied for dissolution of marriage

18 Jan 02 **Creation of the Children's Trusts**

- Spry established four new Children's Trusts, one in favour of each daughter.
- Spry was the trustee of each Children's Trust. The primary beneficiary of each was the relevant daughter and her children, grandchildren, sisters, nephews and nieces and their spouses.
- The trustees had a power from time to time in their absolute discretion to apply all or any part of the income and/or capital of the fund for the benefit of all or any of the beneficiaries, and income not so applied was to be accumulated.
- Spry and relevant daughter had power to amend provisions of the trust instrument.
- Spry was "excluded absolutely" from any interest or benefit in or from the fund.

18 Jan 02 **Appointment of the property of the Trust fund (\$3.5M) to the Children's Trusts**

As trustee of the Trust Spry executed a document which

- #1 confirmed that he had forgiven and released any amounts owed to him by the Trust, and that no money was owed by him to the Trust, or by the Trust to him.
- #2 declared that Mrs Spry was forgiven and released from all or any money owed by her to the Trust, and that money was owed by her to the Trust or by the Trust to her.
- #3 dealt with all of the income and capital of the Trust by appointing  $\frac{1}{4}$  to the Trustee of each of the Children's Trusts
- #4 varied the terms of the Trust to provide that from this date  $\frac{1}{4}$  of the income and capital of the trust fund was assigned to and held by each of the trustees of each of the Children's Trusts.

20 Jan 02 Spry transferred shares owned by him and worth c. \$500,000 to his four daughters.

Apr 02 Mrs Spry filed application in Family Court seeking

- lump sum maintenance and adjustment of property;
- orders that Spry pay to her  $\frac{1}{2}$  of the assets and resources held in their individual or joint names, the Trust, and the Children's Trusts.
- orders under s 106B setting aside
  - the Second Variation of Trust excluding her as a capital beneficiary
  - the deeds creating the Children's Trusts,
  - the distribution on 18 January 2002 of the capital of the Trust to the 4 Children's Trusts.

- 20 May 02 Spry appointed Kennon to be co-trustee with him of each of the Children's Trusts
- 17 Feb 03 Sprys' marriage dissolved by decree absolute of dissolution
- 30 Nov 05 Strickland J at first instance
- Held that the 1998 variation excluding Mrs Spry, and the transfer of the capital from the Trust to the Children's Trusts, were both made with the intention of removing the assets of the Trust from the reach of the Family Court, and that they were likely to have that effect; (so that s. 106B(1) would apply);
  - pursuant to s. 106B, set aside that variation and transfer of capital, (and the assignment of Spry's shares to the children);
  - (treating the property of the Trust and the shares as part of the asset pool of the parties), ordered Spry to pay nearly \$2.2M to Mrs Spry.
- 13 Jul 07 The Full Court, by a majority, dismissed appeals.  
**Warnick J** thought Spry could "reverse his election" to cease to be an object, and reinstate himself as an eligible object of the power to make distributions; the 1983 Variation could be cancelled, and Spry therefore had "property" within the meaning of s. 79, because as trustee he could appoint to himself  
**Bryant CJ** did not agree that Spry alone could reverse his election, but thought that the 1983 Variation could be cancelled by agreement between husband and wife.  
**Finn J** (diss) held that Spry could not withdraw the release made in the 1983 Variation, and that he had totally abandoned his rights under the Trust. Nothing would be achieved by setting aside the Second Variation of 1998 (removing Mrs Spry as a beneficiary) because under the terms of the Trust, after the divorce, she was not a "spouse" and, she was no longer an eligible object.
- 3 Dec 08 Judgment of the High Court

#### Lowest Common Denominator

- 1 It was appropriate to make orders under s. 106B setting aside the 1998 variation which removed Mrs Spry as an eligible recipient of capital, and setting aside the 2002 appropriation of the Trust assets to the four Children's Trusts.
- 2 The Family Court can make property orders as if the changes to property rights which occur as a result of the divorce have not yet occurred. That is, it was open to the judge to make orders after the divorce, and when Mrs Spry had ceased to be an object under the Trust, because in the light of s. 4(2) the reference in s. 79 to "the property of the parties to the marriage or either of them" includes a reference to a marriage terminated by divorce at a time before the court makes orders dealing with property.
- 3 After setting aside the 1998 variation and the 2002 dispositions), Mrs Spry was restored to the position that, (whilst the marriage still subsisted) she had a right to due administration of the Trust and the right to be considered as a potential beneficiary. Spry as trustee would have had the discretionary power to appoint to her the whole of the assets of the Trust.
- 4 The combination of these rights were property of the parties to the marriage, within the meaning of s. 79, and it was therefore open for the trial judge to make the original orders, treating the assets of the Trust as property of the parties to the marriage.
5. (Was this property the property of the husband, or of the wife? ... Don't go there!)

## Judgment of French CJ

### Spry's

- (a) legal ownership of the Trust assets, coupled with
  - (b) his power as trustee to appoint them to his spouse, and
  - (c) his wife's right to be considered;
- made the Trust assets "property of a party to the marriage".

The assets of the Trust were Spry's assets, both legally and beneficially; and as such they were vulnerable to adjustment pursuant to s. 79.

But where a person is a trustee, and the beneficiaries are not that person or his or her spouse or family, the property of that trust is not property for the purposes of s. 79. The distinguishing feature is apparently whether the property was acquired by the parties to the marriage in their own right.

- 48. As sole trustee Spry had the legal title to the assets of the Trust, and was the only person entitled in possession to them. His power as trustee to apply the income or capital of the Trust was not a species of property, but his legal title was.
- 49. Until the trustee had decided to make a distribution of capital or income to one of the objects, no-one had any equitable interest in the assets of the Trust. It is not necessary that, wherever assets are held on trust, there must be someone with beneficial ownership of them.
- 58. Prior to the First Variation in 1983, when Spry excluded himself as an object, he, as sole trustee, had absolute discretion to apply all or any part of the income or capital of the fund to himself as one of the eligible objects. The existence of that power is sufficient for the assets of the Trust to be properly regarded as his property, as a party to the marriage, for the purposes of s 79.  
But something less than that will also suffice for the trust fund can be regarded as his property for s. 79 purposes.
- 59. After having excluded himself as an object in 1983, Spry retained legal title to, and possession of, the Trust assets. The question was, did it this make them "property of the parties to the marriage" within the meaning of s 79?
- 62. French CJ held that the "relevant property", for s. 79 purposes, was
  - the Trust assets;
  - coupled with the trustee's power, (until she was removed as an eligible object in 1998) to appoint them to Mrs Spry; and
  - Mrs Spry's right to due consideration.

Thus, but for the exclusion of Mrs Spry by the 1998 variation, and the appointment of the Trust assets to the Children's Trusts, s 79 would have been applicable. Spry was the sole trustee of the Trust, the only person with any interest in the Trust assets, and the holder of a power, *inter alia*, to appoint them entirely to Mrs Spry.

- 64. The word "**property**" in s 79 is to be interpreted conformably with the purposes of the *Family Law Act*. It extends to the case of a non-exhaustive discretionary trust where, amongst many other possible applications of the Trust property, it could have been applied towards the maintenance or enrichment of Mrs Spry.
- 65. Where property is held under such a trust by a party to a marriage and the property has been acquired by or through the efforts of that party or the spouse, whether before or during the marriage, it does not necessarily lose its character as "property of the parties to the marriage" because the party has declared a trust of which he or she is trustee and can, under the terms of that trust, give the property away to other family or extended family members at his or her discretion.

66. For so long as Dr Spry retained the legal title to the Trust fund coupled with the power to appoint the whole of the fund to his wife, and her equitable right [continued to exist] it remained, property of the parties to the marriage for the purposes of the power conferred on the Family Court by s 79.  
The assets would have been unarguably property of the marriage if they had not been subjected to the Trust.
67. An exercise of the power under s 79 requiring the application of the assets of the Trust in whole or in part in favour of Mrs Spry would, prior to the 1998 variation, have been consistent with the proper exercise of Dr Spry's powers as trustee and would have involved no breach by him of his duty to the other beneficiaries.
69. These conclusions do not involve some general extension of s 79 which would require that it be hedged about with protective discretions of uncertain application to prevent its intrusion into trust arrangements affecting assets foreign or extraneous to those acquired by the parties to the marriage in their own right.  
So if the husband were trustee of a charitable trust or executor of the will of a friend or client the mere legal title to the assets of such trusts, because of their origins and character, could not be regarded as part of the husband's property as a party to the marriage within the meaning of the Family Law Act. Importantly, in such a trust there could be no power of appointment to his wife and no corresponding equitable right enjoyed by her. The question of a trust involving a combination of purposes and family and extraneous assets does not arise.  
(Cf the potential for the spouse or trustee appointing all of the trust assets to one party to the marriage per Gummow and Hayne JJ [126, 137]; and the "contributions of the parties to the marriage", per Kiefel J at [224]; as possible indications of limits which will protect genuinely independent trusts.)
70. The characterisation of the assets of the Trust, coupled with Dr Spry's power to appoint them to his wife and her equitable right to due consideration, as property of the parties to the marriage is supported by
- the origins of their greater part as property acquired during the marriage,
  - the absence of any equitable interest in them in any other party,
  - the absence of any obligation on Spry's part to apply all or any of the assets to any beneficiary and
  - the contingent character of the interests of those who might be entitled to take upon a default distribution at the distribution date.

#### The rights to due consideration and due administration as "property"

77. An object of a non-exhaustive discretionary trust who does not control the trustee directly or indirectly has a right to due consideration, and to due administration of the trust, which is difficult to value when that person has no present entitlement and may never have any entitlement to any part of the income or capital of the trust.
78. Agreed with Gummow and Hayne JJ that, until she was excluded in 1998, Mrs Spry's right to be considered, and her right to due administration of the Trust, was part of her property for the purposes of the Family Law Act.
79. Spry's power as trustee to apply assets or income of the Trust to Mrs Spry was able to be treated for the purposes of the Family Law Act as a species of property held by him as a party to the marriage, albeit subject to the fiduciary duty to consider all beneficiaries. This was so even though it might not be property according to the general law.
80. Mrs Spry's right to due consideration as an object of the Trust could be taken into account in determining whether it was just and equitable to make an order under s 79 on the basis that the assets of the Trust were property of the marriage.

81. Because the 1998 variation effectively terminated Mrs Spry's equitable right to be considered as a potential recipient of distributions of capital then, in the light of the trial judge's findings about the purpose of the variation, the order setting it aside was an appropriate exercise of power under s 106B.

**Note** that French CJ accepts the conclusions of Gummow and Hayne JJ, who held that the Trust property was property of Mrs Spry. Even though he had held that the coupling of the legal title, the power to distribute to the wife, and Mrs Spry's right to be considered, meant that they were Spry's assets.

### **Gummow and Hayne JJ.**

**For the purposes of s. 79, the Trust property was Mrs Spry's property, because of**

- (a) Mrs Spry's right to due administration;**
- (b) Spry's duty as trustee to consider how to exercise the power of distribution; and**
- (c) the fact that the power could have been exercised entirely in favour of the wife.**

89. The phrase in the definition of "matrimonial cause" in s. 4(1)(ca) "with respect to the property of the parties to the marriage or either of them" should be read in a fashion which advances rather than constrains the subject, scope and purpose of the legislation.
91. The intention of s 79 is to enable the court to take into account and assess all the property of the parties to a marriage, when asked by either of them to make an order altering the interests of the parties in property. The proper construction of the definition of "property" in s. 4 does not mean that the kind of property which the Court can deal with must be property to which a party is entitled in possession or in reversion. Rather, it shows that the court is not limited to dealing with property to which a part is entitled in possession.
92. The definition of "property" is not broad enough to extend to the assets held by the trustee of a discretionary trust simply because a party to the marriage is an object of that trust.
93. The power in s. 79(1) includes power to make orders altering the interests of the parties to the marriage in property, including an order for a settlement of property in substitution for any interest in the property; and it includes also an order requiring either or both parties to the marriage to make a settlement or transfer of property for the benefit of either or both of the parties, or a child of the marriage.
94. The effect of the definition in s 4(2) of "the parties to the marriage" extends to the case where the marriage is dissolved before the court makes its order in property proceedings, and therefore s. 79(1) applies to a person who was a party to a marriage which has been terminated by divorce at a time before the court makes its order under s 79(1).
95. Section 79(2) provides that the court shall not make an order altering property rights unless it is satisfied that it is just and equitable to do so. Section 79(4) requires the court to take into account the matters set out in subparagraphs (a)-(g). Paragraph 79(4)(e) refers to "the matters referred to in subsection 75(2) so far as they are relevant". Section 75(2)(b) refers to "the income, property and financial resources of each of the parties". The term "financial resources" is apt to include more than assets which answer the definition of "property".
98. Section 106B(1) empowers the court to set aside, or restrain the making of, an instrument or disposition by or on behalf of, or by the direction of, or in the interest of, a party, which is made or proposed to be made to defeat an existing or anticipated order; or which, irrespective of intention, is likely to defeat any such order. Subsection (3) requires the court to have regard to the interests of and to protect a bona fide purchaser or other person interested.

124. Agreed with Finn J that, while the 1983 Variation which excluded Spry as an object of the Trust remained in effect, the Trust assets could be treated as his property because of the "control" he exercised.  
They also agreed that the assets of the Children's Trusts should have been treated as a "financial resource" of the husband within the meaning of s 75(2)(b) so that an adjustment could be made in favour of the wife.
125. The wife was an eligible object of the Trust. She had a right in equity to due administration of the Trust. Her right was accompanied by a fiduciary duty on the part of the trustee to consider whether and in what way he should exercise the powers of distribution in paragraph 6.
126. The fact that Spry, having excluded himself, could not have conferred the same benefit on himself as he could on Mrs Spry indicated that he did not have property in the assets of the Trust. But the right of Mrs Spry to the due administration of the Trust was included in her property for the purposes of the Act. Spry's power to appoint the whole of the Trust property to Mrs Spry, coupled with her right to due administration of the Trust, meant that the Trust assets were property of the parties to the marriage
- 130 After s. 106B orders had been made it was open to treat the assets of the Trust "the property of the parties to the marriage or either of them".
131. Section 85A(1) was introduced in 1983 Act and states that the court may make such order as it considers just and equitable for the benefit of parties to the marriage or children with respect to the application of property dealt with by ante-nuptial or post-nuptial settlements made in relation to the marriage.
132. Whilst this may have been a response to apprehensions that under s. 79 the court could not deal directly with the unascertained interest that a spouse might have in a discretionary trust, it should not be read as confining the powers otherwise given by ss 79 and 80. In particular it does not prevent the court making an order that either permits or requires the application of an element of the property of one or other of the parties to a marriage in satisfaction of the order for payment.
- 137 The trial judge was wrong in deciding that Spry could have applied the whole or part of the Trust fund to or for his own benefit. But that was not relevant. The jurisdiction being exercised by the Family Court was jurisdiction over "proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them".

Once the 1998 Variation (excluding Mrs Spry) and the 2002 Appointment (appointing the entire Trust fund to the four Children's Trusts) were set aside by the s 106B orders, the property of the parties to the marriage or either of them was to be identified as including the right of the wife to due administration of the Trust, accompanied by the fiduciary duty of Spry, as trustee, to consider whether and in what way the power should be exercised.

And because, during the marriage, Spry could have appointed the whole of the Trust fund to Mrs Spry, the potential enjoyment of the whole of that fund was "property of the parties to the marriage or either of them".

- [141] Because he could have appointed to the wife, her potential enjoyment of the whole fund was the property of the parties, or either of them.

#### Heydon J (diss)

**"Property", for the purposes of section 79, contemplates legal and equitable interests recognized by the general law of property. The court does not have power to deal with the expectancy, or chose in equity, which a spouse may have in a discretionary trust".**

- 160-2 The object of a bare power of appointment has no proprietary interest in those assets, and has only a mere expectancy or hope that the power may be exercised in that object's favour. The object of a bare power of appointment cannot assign any "rights". Before a right or an interest

can be classified as property, or a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability. Assignability is not always an essential characteristic of a right of property, but in general a proprietary right must be capable in its nature of assumption by third parties. Thus Mrs Spry's rights an object of the Trust did not come within the definition of "property" in s 4(1) of the Act: "property to which she is... entitled, whether in possession or reversion."

165 This submission of the Family Court judges to parliament was correct: "Although the court has wide powers to deal with property under s 79, it can deal directly only with legal and equitable interests which a spouse holds in relation to property. The court cannot deal directly with the unascertained interest which a spouse may have in a discretionary trust".

175 The definition of "property" in s 4(1) contemplates interests in property either owned otherwise than as trustee, or owned as beneficial interests in a trust, so that those interests can be adjusted by orders made under s 79.

The definition does not contemplate entitlements as trustee. It does not extend to ownership of property by a trustee who is not entitled to any personal enjoyment of the trust property, and who cannot his or her own act become beneficially entitled to any trust property. If it did, the Family Court could make orders in respect of trust assets simply because a husband or wife who was trustee of the discretionary trust, even though the objects were not related to, and did not include, him or her, The Family Court cannot ignore the interests of third parties in the property, nor the existence of conditions or covenants that limit the rights of the party who owns it.

Further, just as s 79 does not permit the Family Court to ignore the existence of conditions and covenants affecting property which limit the rights of the party who owns the property; so too it cannot ignore the existence of trust obligations which limit the rights of a party who owns the property and holds the office of trustee.

176. After the 1983 Variation which excluded Spry as an object, he did not have any property in the Trust assets. His position, by reason of being both trustee and object, was not that of a person entitled in possession or reversion.

A general power of appointment is sometimes said to be "equivalent to property"; but it is not the same thing as ownership. The right to exercise a power is not property. A general power of appointment is not ownership even though the donee is "for all practical purposes in the position of beneficial owner of the property", because he has "a right of disposition which is in many respects the equivalent of property".

177. In any event, Spry's power was not a general power of appointment. It was only a power to appoint among a class of objects to which he belonged, not to anyone in the world. And he had no entitlement to any more than any other member of the class.

Section 85A(1) provides: "The court may, in proceedings under this Act, make such order as the court considers just and equitable with respect to the application, for the benefit of all or any of the parties to, and the children of, the marriage, of the whole or part of property dealt with by ante-nuptial or post-nuptial settlements made in relation to the marriage."

183 The Trust was created in 1968. It was not a post-nuptial settlement.

186. The Trust was not ante-nuptial made in relation to the marriage. For this it would require a nuptial character, to have been made in contemplation of the particular marriage in relation to which s 85A is to be invoked. The fact that there are persons who are not connected with the marriage to which the settlement is said to relate, who are "substantial potential beneficiaries", will prevent it from being ante-nuptial or post-nuptial. At the time of the trial, apart from the four children the objects included Spry's sister, her three children, and the daughter of Spry's deceased sister. The future objects would include any person married to those five people, and the issue of those marriages. In 1968 it was foreseeable that the beneficiaries would in due course be as numerous as they have turned out to be, and are likely to be in future.

However wide the words "made in relation to the marriage" in s 85A(1) may be, they cannot be stretched to establish the necessary relationship between the making of the Trust in 1968 and

the marriage in 1978. The relevant settlement must be made in relation to the marriage, not simply in relation to marriage.

187. This indicates that there was no point in setting aside the 1998 Variation and the 2002 Appointment as a means of giving Mrs Spry indirect access to the assets of the Trust: those assets were not "property" within the meaning of that word in s 79.

In view of the fact that this is a dissenting judgment, it is not necessary to deal with what was called the "financial resources" issue, in relation to which Finn J held that if the 2002 Instrument were not to be set aside, so that the assets of the Children's Trusts were not to be treated as property subject to s 79(1)(a) orders, those assets should have been treated as a financial resource of the husband, with the result that there would be some adjustment in favour of the wife by reason of s 75(2)(b) of the Act.

#### **Kiefel J**

**For s. 85A to apply, a settlement must have a quality that is sufficiently "nuptial". The question is, what degree of association between the settlement and the marriage is necessary? A specific future marriage is not necessary. This settlement, which had in mind the prospect of some future marriage, was sufficiently linked.**

209. It is apparent that s 85A was intended to give the Court power to deal with property which could not be the subject of an order under s 79, but which accorded with current conceptions of what was a "settlement" of property in matrimonial law.
210. A nuptial "settlement" of property does not equate with the term as conveyancers would understand it. The form that a settlement takes has not been regarded as of importance; rather it is necessary that it provide for the financial benefit of one or other of the spouses. It may imply some kind of continuing provision for them. Beyond these characteristics, no definition of a settlement is possible.
211. Necessarily the settlement must have the "essential character" of being nuptial. Marriage settlements were traditionally made upon a party to a forthcoming marriage. In recent times the word "settlement" has been applied to a wide variety of dealings with property. Any settlement by a party to a marriage making provision for their or their family's benefit may have the necessary "nuptial" element.
212. A narrow meaning should not be given to the term. the essential purpose of such provisions is to enable the Court to inquire into post-nuptial and ante-nuptial dispositions of property in favour of one or other or both of the parties to the marriage, which should be reconsidered because of the dissolution of the marriage.
215. Under English law, the settlor must have a particular marriage in mind, for the settlement to qualify as ante-nuptial.
216. Section 85A is different. The words "in relation to" clearly require some connexion between the settlement and the marriage which is the subject of the divorce proceedings, but s. 85A may require a less direct connection between a settlement and the marriage than is necessary under the English legislation. The question is, what is the degree of association between the settlement and the marriage which is necessary?
217. The expression "in relation to" is of wide and general import and should not be read down in the absence of some compelling reason for doing so.
224. The contributions of the parties to the marriage, direct or indirect, are central to the means by which the Court is to determine proceedings with respect to property. Reference to those contributions serves both to identify the property in question and to provide one means of assessment for the purpose of decision. Property which the Court is intended to deal with extends beyond property in which the parties have a legal interest. By the wide meaning given to the term "settlement" in this context, it is sought to give the Court power to deal with all

property held for the use and benefit of the parties to the marriage and which may represent an accumulation of their assets in the course of the marriage. The purpose of s 85A is to ensure that, since the previous arrangements for the property cannot continue, the property is applied equitably to the benefit of the parties, or the children. Whether a disposition or other settlement qualifies as an ante-nuptial (or post-nuptial) settlement made in relation to the marriage is informed by these purposes, rather than by reference to authorities dealing with statutes employing different language and having purposes which cannot be regarded as wholly the same.

225. Each of the features necessary to render the property of the Trust settled property within the purview of s 85A is present in this case.

"Settlement" is to be given a broad meaning consonant with the intention of s 85A to bring discretionary family trusts within the ambit of the Act.

"Property" is to be read as including those assets to which the parties have contributed throughout the course of their marriage and which are held for their use and benefit. The Trust assets constitute property, much of which was obtained by way of the parties' contributions to the marriage. The assets therefore attract the operation of s 85A.

227. Section 85A(1) is intended to have a wide operation, to property held for the benefit of the parties on a settlement and to which they have contributed. It is intended to apply to settlements whether they occur before or during marriage. The essential requirement of the section is that there be a sufficient association between the property the subject of a settlement and the marriage the subject of proceedings. It does not require that a settlement made prior to marriage be directed to the particular marriage at the point it is made. It is sufficient for the purposes of the section that the association of which it speaks ("made in relation to") be present when the Court comes to determine the application of the property settled under s 85A(1).

In the present case the Trust was used to hold property for the benefit of the parties to the marriage upon the terms of the Trust. It thereby acquired the nuptial element. Section 85A(1) applies.

231 The nuptial element can readily be seen by the contribution made by the parties to the marriage to the Trust and the holding of that property for their benefit. The fact that the other beneficiaries may have received some, undisclosed, distribution from the Trust at some point does not detract from its essential character.

\*\*\*\*\*

- In what circumstances is the property of a wholly discretionary trust property capable of being subjected to an order pursuant to section 79?
- Will amending a trust deed to remove both the husband and the wife as objects, have the effect of removing the assets of a discretionary trust from property capable of being subjected to an order pursuant to section 79?
- Does a divorce remove a spouse from a class of discretionary objects which is defined as persons "and their spouses"?

## **Background to Kennon v Spry**

**Ascot Investments v Harper** (1981) 148 CLR 337

354 **Property and obligations of third parties** not to be affected by Family Court  
High Court held that the Family Court does not have the power to make an order that would deprive a third party of an existing right, or impose on a third party a duty which the party would otherwise not be liable to perform.

Obviously, therefore, Family Court cannot order H to make a payment to W out of funds which he holds as trustee for the local cricket club.

However, High Court recognized two exceptions

- **shams**; and
- where the trust is the “**mere puppet**” or “**alter ego**” of a party.

**Ashton & Ashton** (1986) FLC 91-777; **Davidson & Davidson**; (1991) FLC 92-127

### **The position of the Appointor**

Power which the Appointor has is to remove and replace trustees.

This power is said to be a fiduciary power, and one which should be exercised in the interests of the trust estate as a whole. “Manipulation” of the trust by the exercise of this power might be a breach of the fiduciary duty owed by the Appointor.

Nevertheless, examination of the history of the administration of a Trust may show that a spouse has exercised the power to appoint a compliant trustee to the Trust; and that for the purposes of s. 79 this power may amount to de facto ownership of the property of the trust.

**Re Richstar Enterprises Pty Ltd; ASIC v Carey (No.6)**, (2006) 153 FCR 509

French J 233 ALR 481

### **Control of trustee may be akin to a proprietary interest in Trust assets**

At least by analogy it may be observed that a beneficiary who effectively controls the trustee of a discretionary trust may have what approaches a general power, and thus a proprietary interest in the income and corpus of the trust.

**Kelly & Kelly (No.2)** (1981) FLC 91-108.

**Control or potential control** of the trustee, with **beneficial entitlement or potential beneficial entitlement** under the trust, may suffice

Where a spouse

(a) is the trustee of a discretionary trust, or has the capacity to appoint himself as trustee; and

(b) is also a beneficiary, or who has the capacity to become a beneficiary;

the Family Court can treat the assets of the trust as if they were the spouse’s own property.

**Stephens & Stephens**, (2007) FLC 93-336; [2007] FamCA 680

### **Control of trustee, without beneficial entitlement, is not sufficient**

Bryant CJ, (Finn J, diss, wrote to the same effect)

158. Control of a trust in the absence of beneficial entitlement is insufficient to enable the Court to treat the assets of the trust as the assets of the party having such control.

### **Overview of the position up to and including *Stephens***

A person who is a trustee and a beneficiary can be treated as controlling the assets of the discretionary trust. The Family Court can under s. 79 treat the trust property as belonging to him or her and, in appropriate cases, make orders directly affecting the trust property.

Were it otherwise, it is obvious that a party could, by simply acquiring or placing assets in a discretionary family trust, effectively avoid an order being made which would enable the other party to share in the property owned by the trust.

Bryant CJ [55]

In the pursuit of justice and equity between parties, when their relationship has broken down and they are seeking a division of assets, the Court has been rightly cautious about permitting assets to be excluded from the definition of "property of the parties", simply because they are owned by a trust and not the parties themselves.

#### **What if the spouse deliberately excludes himself from control or beneficial entitlement?**

For example a deed is executed by which a spouse excludes himself as an object, by disclaiming any benefit, or by varying the terms of the Trust

**106B(1)** In proceedings under this Act, the court may set aside... the making of an instrument or disposition by or on behalf of, or by direction or in the interest of, a party, which is made... to defeat an existing or anticipated order in those proceedings or which, irrespective of intention, is likely to defeat any such order.

...

**106B(3)** The court must have regard to the interests of, and shall make any order proper for the protection of, a bona fide purchaser or other person interested.

#### ***Stephens & Stephens (supra)***

Bryant CJ, and Warnick JJ

A deed had been made removing the husband as an object of the discretionary trust.

**The issue was whether the husband could be lawfully reinstated as a beneficiary of the Trust, so that the Trust assets could then be treated as his property.**

1. A **deed of disclaimer of benefit** under discretionary trust may be irrevocable (unlike disclaimer of gift under a will, which can be withdrawn before it is acted upon).  
- Section 106B orders may not be of any effect.
2. However, in certain circumstances, a **deed may be cancelled** - by the parties to it, or by the obligee destroying the deed. A deed removing a spouse as an object may be inherently capable of being cancelled by the two parties in unison, thereby restoring the spouse as an object.  
- Section 106B orders may achieve the same result.

**Does treating the assets of the trust as property permit, or require, the trustee to deal with them in a way which amounts to a fraud on the power?**

A fraud on a power is an exercise of the power "for a purpose or with an intention beyond the scope of, or not justified by the instrument creating the power.

If so, should the Family Court refrain from making orders for that reason?

***Andco Nominees Pty Ltd v Lestato Pty Ltd***

Santow J, 10 May 1995

The Family Court had ordered inter alia Mr Davidson to pay an amount of \$700,000 to Mrs Davidson. She had considerable difficulty in enforcing that order and ultimately succeeded in having Andco Nominees Pty Ltd appointed as Trustee of a discretionary trust.

The previous Trustee attacked the appointment in the Supreme Court of New South Wales on the basis that to pay to the wife the \$700,000 would involve a breach or possible breach of a fiduciary duty owed by Andco.

Court was asked to find that the appointor had exercised her powers inappropriately by removing and replacing the trustee of a discretionary family trust with a new trustee which was likely to favour her over the estranged husband.

**Santow J** dismissed the application

On appeal, ***Thurlstane (Aust) Pty Ltd v Andco Nominees Pty Ltd***,  
[1997] NSWSC 517

**Meagher JA** in the New South Wales Court of Appeal said it was a little difficult to know what to make of the Family Court's findings that the Trust assets were, de facto, Mr Davidson's assets; and its assumption that it would be proper for \$700,000 to be paid from the trust assets in order to discharge the husband's obligations under the Family Court order.

Nevertheless, the appeal was dismissed

(Note that in *Spry*, Hayne and Gummow JJ at [132], and by implication French CJ, seem comfortable with the notion that the Family Court **can order** that Trust property, which is properly classified as property of the parties to the marriage, be paid or distributed to the appropriate spouse.

***Kennon v Spry*** [2008] JJ 56

The majority judgment upholds the use of s. 79 to treat as **property of the parties to the marriage, the rights** – ephemeral though they are – **of an object under a discretionary trust where the trust property is held by a spouse as trustee of that discretionary trust.**

Where

- 1** a spouse/trustee holds assets as trustee of a discretionary trust;
- 2** the other spouse is an object, **eligible to receive distributions** from the trust; and
- 3** as such, **the other spouse has a right to be considered** by the trustee exercising the discretion to make distributions, (the "right to due administration", or the "equitable cause of action");

then the property of the trust (or the potential enjoyment of the property by one of the parties to the marriage) can be treated as property of the parties to the marriage, and consequential orders can be made for the alteration of property rights.

**Protection against intrusion into the potential rights and entitlements of objects other than the husband and wife?**

**per French JJ**

- the property of the Trust needs to have been acquired by the parties to the marriage **in their own right**; (#69); **or**, it may suffice [it seems], if the property is acquired by the spouse/trustee **in substance** for or on behalf of the parties to the marriage, or their children; [but this is not dealt with expressly]
- **the absence of any equitable interest in any other party**, and the absence of any obligation on the trustee to apply the trust assets for any other party may be significant; (**but** if the trust is a discretionary trust there **can be no** equitable interest in any person until the trustee has decided to make a distribution; so this must be a loose reference to situations where the immediate family members can be seen to be intended as the principal beneficiaries of the Trust);
- it may suffice if the **"greater part"** (#70) of the Trust property has been acquired by [or for] the spouses during the marriage;
- the problem of a trust which is for the benefit of the parties to the marriage, but not closely confined to the family, was specifically avoided; "The question of a trust involving a combination of purposes and family and extraneous assets does not arise", (#69). (Or, at least, it did not arise in that case; but it certainly will in the future!)

**per Gummow and Hayne JJ**

- provided that the trustee could properly, within the terms of the Trust, have distributed the entire Trust assets to the relevant spouse, (see [126]), they do not address the problem of orders affecting other objects of the Trust.

**per Kiefel J**

- not dealing with this problem at all, but in the context of deciding whether a settlement has a sufficiently **"nuptial" quality** to come within s. 85A, she looked at
- the factual **"degree of association between the settlement and the marriage"** [216]; and
- the **"contributions of the parties to the marriage, direct or indirect"**; [224]; and
- whether the property is property to which the parties have "contributed throughout the course of their marriage and which are **held for their use and benefit**", [225].

These considerations, expressed in the context of s. 85A, might be useful guides in the future for deciding whether there is a sufficient association between the Trust and its property, and the parties to the marriage.

Note in *Simmons & Simmons*, [2008] FamCA 1088, 12 December 2008, Watt J dismissed an application for summary judgment by a defendant-trustee. He held [119] that there were facts that established a "relevant connection" between the trust assets and the husband (and his family business). Consistently with *Spry*, this was, at least arguably, sufficient to justify treating the assets of the trust as being property of the parties to the marriage.

## KENNON v. SPRY

THE JOURNEY TO THE HIGH COURT AND BACK, RUNNING BEFORE STRICKLAND,  
J.

AND THE FULL COURT.

John M. Salamanca  
August 2009

1. On 3 December, 2008, the High Court consisting of French CJ., Gummow J., Hayne J, Kiefel J. and Heydon J. handed down its important decision in *Kennon v. Spry*. The Court examined the primary question of what interests fall within the definition of property under the *Family Law Act*. In the course of its deliberations, the Court considered the application of s.106B of the *Family Law Act* to the facts of the case. Aside from Justice Kiefel and to a lesser degree Justice Heydon, the other members of the court, made only fleeting references to s.85A of the *Family Law Act*. The form of the trial Judge's order, which simply compelled the husband to pay a sum to the wife, and the impact of the dissolution of marriage which resulted in the wife being excluded as a potential beneficiary of the ICF Spry Trust ("Trust") were amongst some of the other issues under examination.

### THE TRIAL

2. On 30 November, 2005, the trial Judge, the Honourable Justice Strickland ordered, inter alia that:
  - (i) Pursuant to the provisions of s.106B of the Act the ICF Spry Trust Instrument of Variation dated 7 December, 1998 be set aside;
  - (ii) Pursuant to the provisions of s.106B of the Act the Instrument entitled The ICF Spry Trust dated 18 January, 2002 and the dispositions made pursuant thereto whereby inter alia, the husband forgave and released all amounts owing by him and the wife to the

trust and applied all of the income and capital of the trust fund to the funds of the parties' four children, be set aside;

(iii) On or before 28 February, 2006 the husband pay to the wife the sum of \$2,182,302.

3. There were further orders relating to the balance of the parties' assets including orders touching upon the assets of the children's trusts. His Honour found the nett assets available for division between husband and wife to be in the sum of \$9,818,144 and he effected a division of 52 and 48 percent in the husband's favour. This necessitated the said payment to the wife, after factoring in assets held by the wife in her sole name. In quantifying the said asset pool, his Honour took into account the full value of the assets of the Trust, having set aside the said dispositions. The wife in her amended application before the trial Judge, sought an order, inter alia, that the husband pay her a sum equivalent to 50 percent of the assets and resources held by the four trusts established by the husband for each of their four children ("the Children's Trusts").

#### **FINDINGS AT FIRST INSTANCE**

4. In arriving at his decision, the trial Judge made a number of crucial findings which are summarised in paragraphs 26 to 30 inclusive of the judgement of Chief Justice French in the High Court.

#### **THE 1983 DEED**

- a) As to the effect of the 1983 Deed, the trial Judge held:
- (i) That prior to the 18 January, 2002 dispositions the husband was able to benefit from the assets of the trust, whereby if the Court were to set aside the 1998 Instrument, the

Trust assets could be treated as his property. The husband could then be reinstated as a capital beneficiary subject to the terms of the Trust and the 1983 Deed;

- (ii) That nothing prevented the husband from revoking the 1983 Deed or clause 2 of the Deed, which he found not to be a variation of the terms of the Trust even though the husband purported to relinquish any interest in the income or the capital of the Trust;
- (iii) That by setting aside the Instruments and dispositions of 7 December, 1998, and 18 January, 2002 respectively, the Trust assets could be treated as the husband's property, even if clause 2 of the 1983 Deed remained, as the husband had sufficient control of the Trust;
- (iv) Alternatively, the husband's level of control over the assets of the trust meant that they could be treated as a "financial resource" however his Honour treated them as the husband's property.

### **THE 1998 INSTRUMENT**

b) The Trial Judge made the following findings as to the 1998 Instrument:

- (i) The husband did not tell the wife of the Instrument;
- (ii) Although the wife remained an income beneficiary, the primary affect was to attempt to irrevocably exclude the husband and the wife as capital beneficiaries;
- (iii) The husband effected the 1998 Instrument in the knowledge that his marriage was in trouble and that an order dealing with the assets of the trust was likely in the event of an application;
- (iv) Via the transaction, the husband considered that the Instrument would remove the assets of the Trust from the reach of the Family Court and he was thereby seeking to defeat an anticipated order for property settlement. Therefore the necessary elements of s.106B were satisfied and he was able to make an order setting the 1998 Instrument aside.

**THE CHILDREN'S TRUSTS AND THE 18 JANUARY, 2002 DISPOSITIONS**

- c) The trial Judge found the following as to the Children's Trusts and the 18 January, 2002 dispositions:
- (i) The crucial step being the transfer of the Trust assets to the Children's Trusts it was unnecessary for the wife to pursue an application seeking to set aside the Children's Trust;
  - (ii) The Trust assets of approximately \$3.5 million, included the nett proceeds of sale of the parties' former matrimonial home which had been purchased by the Trust in 1979;
  - (iii) The wife had not agreed to transfer the assets of the Trust to the Children's Trusts when the husband did so;
  - (iv) The husband was unable to adequately explain the necessity for the establishment of the Children's Trusts and the application of the said capital and income to those Trusts;
  - (v) The husband, without advising the wife, transferred some \$3,500,000 from the Trust to the Children's Trusts, at a time when objectively it could be clearly anticipated that an order would be made dealing with the parties' property, particularly as it was not long after their separation;
  - (vi) The Instruments were deemed to have been made to defeat an anticipated order in future proceedings and the husband was concerned that despite the 1998 variation the assets of the Trust might still have been within the reach of the Family Court.

**THE 20 JANUARY, 2002 DISPOSITIONS**

- d) As to the 20 January 2002 dispositions and the appointment of Mr Kennon as a joint trustee of the Children's Trusts, the trial Judge found that:

- (i) There was no agreement between the husband and the wife that the husband's personal assets would go to the children and that he would determine when they did so;
  - (ii) The husband was unable to adequately explain why the transfer of shares valued at \$500,000 had to occur at that time;
  - (iii) The husband intended to defeat a contemplated order when he entered into these transactions;
  - (iv) It was unnecessary to apply s.106B with respect to the transfer of shares as on the wife's case, her entitlement could be met if the assets of the trust were treated as the husband's property. The value of the shares was able to be notionally added back to the divisible pool of assets having regard to principles espoused in *Townsend*.
- e) The argument was advanced on behalf of the husband and the children to the effect that s.106B did not apply in circumstances where the parties had divorced and their divorce constituted a supervening event which defeated any anticipated orders. This argument, which was heavily pressed, failed. The elements of s.106B were found to be satisfied and it did not matter that there might have been a supervening event which could only affect the wife's ability to benefit from the capital and income of the trust, particularly as the trust assets could still be treated as the husband's property.

These findings were deemed insurmountable by the appellate Courts, albeit for different reasons.

#### **THE APPEAL TO THE FULL COURT OF THE FAMILY COURT**

5. (i) The appeals from the judgment of Strickland J. were dismissed by the Full Court of the Family Court of Australia consisting of Bryant CJ., Warnick J. and Finn J., who was the dissenter. The focus of attention was on the impact

of the 1983 deed on the issue of the husband's interest in the assets of the Trust.

- (ii) Both the Chief Justice and Justice Warnick dismissed the appeals, finding that the trial Judge was correct in setting aside the 1998 Instrument and the 18 January, 2002 dispositions. They concluded that the trial Judge was wrong in determining that the assets of the Trust could still be treated as the husband's property even if clause 2 of the 1983 Deed remained in place. Justice Warnick decided that the husband could reverse his election not to be considered in the exercise of the trustee's discretion notwithstanding the provisions of the 1983 deed. Chief Justice Bryant disagreed, however determined that it was open to the husband and the wife as parties to the 1983 deed to cancel it, thereby rendering the capacity of the husband, who controlled the assets of the discretionary Trust, to have income and/or capital distributed to him as a beneficiary.
- (iii) Justice Finn in dissenting from the majority view, determined that clause 2 of the 1983 deed constituted a total abandonment of all of the husband's rights and entitlements under the Trust and he could not restore them.
- (iv) She concluded that the setting aside of the 1998 Instrument and the 18 January, 2002 disposition afforded the wife no comfort as due to the provisions of the 1983 Instrument, the assets of the trust could not be regarded as the husband's property. In her view, the correct approach was to treat the assets of the Children's Trusts as the husband's financial resource and pursuant to s.75(2) factors an adjustment could be made in favour of the wife.

## **THE APPEAL TO THE HIGH COURT**

5. On appeal to the High Court, the husband and the Trustees of the Children's Trusts asserted that the 1983 Deed could not be revoked or cancelled and therefore could not be treated as the husband's property. Further, it was contended that the Trustee of the trust could not be compelled or empowered by the Family Court to add the husband as a beneficiary or otherwise confer upon him beneficial interests or rights.
6. The wife argued that the Trust, or property that was returned to it pursuant to s.106B orders should have been treated as property of the parties to the marriage or either of them, and that the power of variation within clause 2 of the 1983 Instrument was sufficiently wide to be lawfully exercised by the husband so that the beneficiaries within clause 4 could include all issue of the husband's father, irrespective of whether they had sought to relinquish any beneficial interest or rights under the Trust and to include all persons previously or presently married to such issue.
7. The Court also permitted the wife to amend her Notice of Contention to include reliance upon s.85A of the Act in addition to s.79 in order to grant the wife the relief that she sought. The Court gave the necessary procedural directions to enable the argument to be ventilated, however it did not progress very far.
8. Whilst considering the reasons for judgment of the High Court, it is important to note the following matters:
  - (i) According to the provisions of the Trust, the husband had the power to appoint and remove further trustees and he had the power to vary the Trust as "the settlor". Whilst the character of the Trust remained unchanged and the husband remained as trustee, there was no beneficial interest in possession in any of the objects of the Trust, including the husband;
  - (ii) The Trust fell within the class of a discretionary trust;

- (iii) The class of potential beneficiaries was open, extending to the spouses from time to time, the issue of the husband's father and further issue of that issue;
- (iv) As sole trustee of the Trust, the husband held the legal title and he was the only person entitled to the assets of the Trust. Unless the husband made a specific application of Trust capital income to one of the objects of the Trust, no object of the Trust held any equitable interest in its assets (per French CJ.).

### REASONING OF FRENCH, CJ.

9. According to the Chief Justice "*The question at the heart of the present appeal is whether Dr Spry, or his wife, or both of them had, prior to 1998, interests in or in relation to the assets of the Trust that could answer the description of "property of the parties to the marriage" in s. 79(1)*" (see paragraph 51 of the Judgment).
  
10. In his reasons for Judgment, the Chief Justice stressed that "property" is used in different ways in different statutory contexts. Further, he confirmed that the word "property" has traditionally been given a wide meaning, in the matrimonial context. He referred to the determination of the Full Court *In the Marriage of Duff* (1977) 15 ALR 476 at 484 where quoting Langdale MR in *Jones v. Skinner* (1983) 5 LJCH 87 at 90 he stated: "*property is the most comprehensive of all terms which can be used in as much as it is indicative and descriptive of every possible interest which party can have.*" Given the lack of any meaningful definition in the Family Law Act, it is clear that the concept is evolving and that jurisprudence shall continue to broaden it.
  
11. The Chief Justice in paragraph 57 refers to the Full Court decision of *Goodwin* (1990, 101 FLR, 386) which upheld the trial Judge's finding that "*the trust property was in reality the property of the husband in circumstances where he was the sole appointor and also a*

*beneficiary*” and in so doing reiterated the trite proposition that “*The question of whether property of the trust is in reality the property of the parties or one of them ... is a matter dependent upon the facts and circumstances of each particular case including the terms of the relevant trust deed.*”

12. The application of the aforesaid principles resulted in the totality of the value of the assets of the trust prior to the 2002 disposition, being included in the divisible pool. This prevailed in circumstances where the husband had the unequivocal power to determine the distribution of those assets to the wife as an object of the trust.
13. This decision was arrived at in the context of a finding that “*the true character*” of the Trust was a vehicle for “*Dr and Mrs Spry and their children*”. Further, it was found that the majority of the Trust assets had been contributed to and accumulated during the course of the parties’ marriage and included the proceeds of sale of the former matrimonial home. It is perhaps unsurprising in the circumstances of this case, that the judgement at first instance was affirmed by two subsequent appellate Courts. There was a distinction drawn between the husband’s position of control in this case as compared to where the objects of the Trusts were strangers to the entity and the person in control, such as for example in a charitable trust.
14. (i) The Chief Justice rejected the proposition that the husband could apply the trust asset to himself, having regard to the clause 2 of the 1983 Instrument. However, in paragraph 62 of his Judgment, the Chief Justice determined:  
*“that it is the trust assets, coupled with the trustee’s power prior to the 1998 instrument to appoint them to her [the wife] and her equitable right to due consideration that should be regarded as the relevant property”*  
and further:

- (ii) *“Dr Spry was the sole trustee of a discretionary family trust and the person with the only interest in those assets as well as the holder of the power, inter alia, to appoint them entirely to his wife.”* Therefore, upon setting aside the said transaction, **the Trust assets were equated to those of the husband**, and fell within the definition of property of the parties to the marriage, or either of them.

15. At paragraph 70, the Chief Justice clearly sets out the principle:

*“The characterisation of the assets of the trust, coupled with Dr Spry’s power to appoint them to his wife and her equitable right to due consideration, as property of the parties to the marriage is supported by particular factors. It is supported by his legal title to the assets, the origins of their greater part as property acquired during the marriage, the absence of any equitable interest in them in any other party, the absence of any obligation on his part to apply all or any of the assets to any beneficiary and the contingent character of the interest of those who might be entitled to take upon a default distribution at the distribution date.”*

#### **REASONING OF THE MAJORITY**

16. The Chief Justice, together with Justices Gummow and Hayne, are forthright in their determination that prior to the 1998 instrument, the wife’s right to due administration of the Trust fund was capable of being taken into account as part of the property of the wife as a party to the marriage. Further, their Honours were of the view that her equitable entitlement to due consideration in relation to the application of the income and capital of the Trust also came under the umbrella of property. This finding was pivotal to the ratification of the trial Judge’s decision. The Chief Justice however acknowledged that it was **difficult to value those rights**, however a valuation “might not be beyond the actuarial arts”.

17. In fact their Honours appear to go a little bit further when the Chief Justice concurs with the views of Justices Gummow and Hayne that prior to the 1998 Instrument, the husband's power as trustee to apply assets or income of the trust to the wife was able to be treated for the purposes of the *Family Law Act* as a species of property held by him as a party to the marriage, albeit subject to the fiduciary duty to considerable beneficiaries. This view prevailed even though they determined that the husband could not apply the assets or income for his own benefit.

18. As a result of the 1983 Instrument, the husband had been excluded as an object of the Trustee's discretionary power to distribute. One of the important issues to emerge in this case is that, partly as a result of the orders setting aside the 1998 Instrument and the 2002 dispositions, the wife remained an object of the Trust and that her equitable interest to due administration of the Trust deemed it sufficient for the assets of the Trust to fall within s.79(1) which states:

*"In property settlement proceedings, the Court may make such orders it considers appropriate:*

*(a) in the case of proceedings with respect to the property of the parties to the marriage, or either or them –  
altering the interests of the parties to the marriage in the property."*

19. By the application of s.4(2) of the Act the "*parties to the marriage*" includes the reference to a person who was a party to a marriage which has been terminated by divorce at the time before the Court makes its orders under s.79(1). Thus putting paid to the argument that the divorce constituted a supervening event whereby the wife became ineligible to be considered an object of the Trust.

20. In their conclusions at paragraphs 125 and 126 of the Judgment, Justices Gummow and Hayne point out that the wife was one of a class of objects of the discretionary power conferred upon the trustee of the Trust and she was one of a class of objects for division of the fund at the distribution date. As such, the wife had a right in equity to due administration of the Trust which was not dependent upon entitlement to any fixed or transmissible beneficial interest in the Trust fund. That right was *“included in her property for the purposes of the Act”*.

- i) Further, their Honours took the view that the wife’s right was accompanied at least, *“by the fiduciary duty of the husband to consider whether and in what way the power should be exercised but also that during the marriage, the power could have been exercised by appointing the whole of the trust assets to the wife”*. The fact that the husband could not have conferred the same benefit on himself, *“does not deny that part of the property of the parties to the marriage, within the meaning of the Act, was his power to appoint the whole of the property to his wife and her right to a due administration of the trust”*.

Therefore, according to Justices Gummow and Hayne, the sum total of the above **equated the property of the Trust to that of the wife**, and the Chief Justice agreed with that reasoning.

21. A Court in setting aside instruments or transactions, is bound to have regard to the rights of *“any other person interested”* (s.106B(3)). Whilst the majority appear at pains to point out that the above interest as described constitutes property for the purposes of the Act, and that such interests are in reality difficult to value, it seems that the Court has effectively ascribed a 100 percent value to the assets of the Trust and included it in the divisible pool as between the husband and wife. Whilst the Court was at pains to point out that the interests of the four children were taken into account, I have some discomfort in accepting the concept that the

four children of the marriage, who were clearly at some stage intended to benefit from the Trust, appear to have been totally shut out.

### THE REASONING OF HEYDON, J.

22. In his dissenting judgment, Justice Heydon concluded that the assets of the trust did not confer an entitlement upon the husband either in possession or reversion. At paragraph 175 of the Judgement, he states:

*“The definition of property in s.4(1) contemplates interests in property either owned otherwise than as trustee or owned as beneficial interests in a trust so that those interests can be adjusted by orders made under s.79. The definition does not contemplate entitlements as trustees.”*

23. His Honour went on to find that the bare power of appointment residing in a beneficiary does not create a beneficial interest in possession nor does it create a proprietary interest. Therefore, in his view, the wife’s rights as an object of the power were insufficient to bring it within the definition of property as contemplated by the Act. Given those findings, his Honour concluded that there was no point setting aside the instruments and dispositions referred to. His Honour relied heavily upon the ratio in *Ascot Investments Pty Ltd v. Harper* which, inter alia, stated that the Family Court cannot extinguish the rights or enlarge the obligations of third parties in the absence of clear and unambiguous language.

### THE S. 85A ARGUMENT

24. (i) Before turning to the issue of the s.85A argument, it is noteworthy that Justice Heydon, the only other judge apart from Justice Kiefel to give more than passing consideration to the wife’s application, denied her application for special leave to

cross-appeal. In his reasons, which are comprehensively canvassed in paragraphs [180] to [186] inclusive of the judgment, his Honour relied on long standing authority in refusing the application in circumstances where the s.85A issue was not raised at trial or in the Full Court of the Family Court.

- (ii) Furthermore, he concluded that on the facts of this case, the trust did not constitute an ante-nuptial or post-nuptial settlement. Unlike Justice Kiefel, his Honour determined that the trial Judge had found that there was one trust and not a series of trusts and that the settlement was not made in relation to the marriage as contemplated by the section. Further he was of the view that the fact that there are persons who are not connected with the marriage to which the settlement is said to relate, who are substantial, potential beneficiaries, prevented it being an ante-nuptial/post-nuptial settlement.

25. Chief Justice French did not find it necessary to consider whether s.85A of the *Family Law Act* applied, whilst Justices Gummow and Hayne concluded that s.85A didn't confine the Court's powers pursuant to s.79 and 80, of the Act, they decided that the section did not apply in the facts of this case.

The legislation provides:

- “s.85A(1) The court may, in proceedings under this Act, make such order as the court considers just and equitable with respect to the application, for the benefit of all or any of the parties to, and the children of, the marriage, of the whole or part of property dealt with by ante-nuptial or post-nuptial settlements made in relation to the marriage.
- (2) In considering what order (if any) should be made under subsection (1), the court shall take into account the matters referred to in subsection 79(4) so far as they are relevant.”

### THE REASONING OF JUSTICE KIEFEL

26. Her Honour Justice Keifel embarked on an analysis of prior legislation and jurisprudence culminating in the above enactment. She concurred with Justice Heydon that the husband's entitlement as trustee to possession of the trust property, could only on the facts of this case, be in his capacity as a trustee and not as a party to the marriage. After referring to the report of the Joint Select Committee on the *Family Law Act July 1980, Volume 1*, she determined that *"s.85A was directed to the use of discretionary family trusts and other structures used for holding assets acquired in the course of the marriage, for tax-related and other purposes and that it was intended to provide power to the court "deal with property which could not be the subject of an order under s.79, but which accorded with current conceptions of what was a settlement of property in that matrimonial law".* (see paragraph 209).

27. Her honour referred to the characteristics of a nuptial settlement as a:

*"disposition of property for the purposes of regulating the enjoyment of the settled property and it may provide for succession. It limits the alienation and transferability of the property. It cannot involve an absolute interest in property given that the statutory provision referred to give the Courts power to vary it. The form that the settlement takes has not been regarded as of importance rather it is necessary that it provide for the financial benefit for one or other of the spouses. It may imply some kind of continuing provision for them".*

She examined the authorities whereby a **liberal rather than a narrow meaning** is given to such a settlement. (see paragraphs 210 and 212).

28. Her Honour had no difficulty in overcoming the submission of the husband and the trustees of the trust and proceeded to determine the wife's application for leave, in her favour.

29. (i) Her Honour determined that s.85A is applicable in circumstances where settlements are made in relation to a marriage and not in relation to the marriage so long as there is a sufficient nexus and temporal relationship between the settlement and the marriage. Her Honour concluded that “*in relation to*” is of wide and general import and should not be read down in the absence of some compelling reason for doing so.
- (ii) She was fortified in her view, because the manner in which the trust assets were accumulated came within the categorisation of a nuptial settlement due in part to the fact that s.85A(2) require the parties’ contributions to be taken into account in determining whether the property is the subject of a nuptial settlement.

30. Her Honour’s reasoning is encapsulated in paragraph [225]:

*“Each of the features necessary to render the property of the trust settled property within the purview of s.85A is present in this case. In reaching this conclusion one must look to the individual words of the section in light of their context and purpose. “Settlement” is to be given a broad meaning consonant with the broad meaning of s.85A to bring discretionary family trusts within the ambit of the Act. “Property” is to be read as including those assets to which the parties have contributed throughout the course of their marriage and which are held for their use and benefit. The trust assets constitute property, much of which was obtained by way of the parties’ contributions to the marriage. The assets therefore attract the operation of s.85A. Further as shall become clear on each occasion that property was transferred to the trust, the parties “dealt with” their property, and effected settlements within the meaning of s.85A.”*

31. Her Honour went on to determine:

- (i) *“The essential requirement of the section is that there be a sufficient association between the property the subject of a settlement and a marriage the subject of the*

*proceedings ... it does not require that a settlement made prior to marriage be directed to the particular marriage at the point it is made.”* (see paragraph [227])

- (ii) *“There appears to be no reason why each disposition of property to the trust from the time of the parties’ marriage cannot be viewed as a separate trust created at that time, albeit on the terms of the trust.”* (see paragraph [229].
- (iii) *“The nuptial element can readily be seen by the contribution made by the parties to the marriage to the trust and the holding of that property for their benefit. The fact that some other beneficiaries may have received some undisclosed distribution from the trust at some point does not detract from its essential character.”* (see paragraph [231]).

32. Ultimately her Honour found that s.85A provided the Court with the appropriate mechanism to satisfy the payment of the sum ordered to the wife directly out of the trust and that *“the Court could make an order directly applying that property to her benefit. It did not need to have regard the status of either the wife or the husband as beneficiaries in order to do so.”* (see paragraph [234].

33. Given that her Honour was the lone voice with respect to s.85A and that her reasoning was contrary to that of Justice Haydon, it is unclear what impact her decision will have on this aspect of the law. Her Honour’s judgment, however, has focussed a high degree of interest on a particular section which in many instances can be used in aid of s.79 and which in more recent times seems to have not been invoked to a great extent, however could be something of a “sleeper”.

34. At the time of the printing, the Full Court is yet to hand down its decision in the appeal against the decision of Justice Coleman with respect to the enforcement proceedings. Further, we await the decision regarding the husband’s application seeking the

disqualification of Justice Strickland from determining the costs application of the original trial.

35. As I speak, actuaries are being retained to attempt to place a value on the interests of discretionary beneficiaries.

**36. POINTS TO PONDER**

1. The inclusion of the total value of the trust into the divisible matrimonial pool of assets.
2. The setting aside of the disposition in circumstances where there existed numerous objects of the power of appointment including the parties' four children.
  - 2A. The appellate Courts' justification of the original judgment on the basis there was a finding that the parties did not intend to benefit their children during their lifetime. How relevant is that where the discretion can be exercised subsequently in catering to changed circumstances?
  - 2B. Would the decision have been any different if there had been a finding the other way and, if so, what proportion of the trust assets (if any) would the Court have been likely to include in the divisible matrimonial pool of assets?
  - 2C. How does paragraph 1 above sit with the Chief Justice's conclusion that the entitlement of the objects of the discretionary power to due consideration and to the right to due administration of the trust are matters that are not easily capable of valuation?
3. Notwithstanding the wide ambit of s.106B even prior to this High Court decision, experience tells us, that on balance litigants are a little unwilling to seek to invoke the section. The cost consequences in most scenarios appear to militate against the use of s.106B.
4. The provisions of s.106B provide wide and effective mechanisms to claw back assets.

- 4B. What action do you take in circumstances where there appears to be a clear argument pursuant s.106B, yet there appears to be sufficient assets in the balance of the divisible matrimonial pool to compensate the innocent party.
5. In light of the decision, practitioners need to be even more careful in advising clients with respect to actions to be taken in the establishment or operation of trust vehicles. That is, how does Justice Kiefel's reasoning of the establishment of a series of trusts, impact upon the manner in which the controller deals with assets accumulated during the marriage?
6. In light of this High Court decision what advice would you give a client if they wanted to quarantine trust assets from the divisible matrimonial pool where they were genuinely seeking to provide for a relative or children from their current marriage or a prior marriage. Would you advise, inter alia, to;
- (a) attempt to exclude the husband and wife from any control of the trust;
  - (b) attempt to exclude husband and wife from the class of objects of the discretionary power to deal with trust assets/income.
  - (c) attempt to limit the use of trust income or assets at the request of either party to the marriage so as to limit the risk of such assets/income being labelled a financial resource.
7. How does the principle of conduct resulting in the wasting of assets sit with a s.106B application? Do you seek to invoke the section in an appropriate case, or take the less risky option of arguing waste according to Kowaliw's case?
8. How can the High Court decision in this case be reconciled with the power of the trustee to duly consider the exercise of his or her discretion in circumstances where the court dictated that the husband effectively exercise his discretion in favour of the wife solely, by

apportioning 100 percent of the trust assets to the divisible pool of assets? That is, how can the interests of other potential beneficiaries be considered if there is no trust fund left to exercise the discretion over?

9. What are the tax implications, if any, of the majority decision in this case given that the end result of the Court's decision is that the wife had an interest in the trust asset? Does it mean she may be liable for Capital Gains Tax or some other tax referable to the trust assets. Further regard needs to be had to taxation implications if Part VIII A of the Act is sought to be invoked.
10. As various papers which expound upon this decision make it clear, the statutory context in which property is defined is vital in determining its definition.
11. Consider the rationale of the majority of the High Court bench which included the totality of the trust assets as part of the divisible pool on the basis that the husband could have applied the whole of the trust assets for the benefit of the wife where "the potential enjoyment of the whole of the fund" was property of the parties to the marriage. Where does this place the issue of the husband as trustee properly discharging his power of due administration of the trust and the potential beneficiaries of that power.
12. Given the unusual features of the case whereby the husband had irrevocably excluded himself as an object of the discretionary power, which doesn't feature in most of the common garden variety discretionary trust scenarios that come across our desks, it's likely that this authority will not have significant application in our respective areas of practice. Further, given the High Court's wider interpretation of property and the majority's lack of attention to or reliance upon s.85A, it is difficult to envisage many cases being successfully argued pursuant

to s.85A given the application of s.106B and the other provisions of Part VIII *Family Law Act*.

13. If the reasoning of the majority in the High Court is correct, that the definition of property under the *Family Law Act* is wide enough to include the trustee's power to appoint and the right of the potential beneficiary to due administration, what does it mean, how is it property, and how do you value it? How can a Court structure a meaningful order, which is enforceable?
14. What are the capital gains consequences for someone in a similar position to the wife in this case, in circumstances where the husband is ordered to pay a sum in excess of \$2 million and the Court invites an application by him for payment to be made out of the trust property. If that should happen is roll over relief available to the wife or has a capital gains event occurred. Clearly, comprehensive financial advice is required in these circumstances.
15. On a practical level, a practitioner retained to act for one of the parties or the eligible objects of the discretionary power clearly needs to be particularly vigilant as to the respective rights and obligations residing in that person. Given the facts in this case, if you had been acting for one of the children of the parties, what evidence would you attempt to marshal to protect that equitable chose in action.
16. In the event that the parties are experiencing some disharmony within their marriage at what point is it "reasonably foreseeable" that proceedings may or may not be instituted by one party or another, and which would attract the application of 106B with respect to any transaction or disposition made at that point in time.

17. Consideration needs to be given to the actual form of the orders sought as one of the criticisms levelled at the Courts' decisions is that no actual relief was sought regarding the exercise of his power by the husband nor any relief regarding due administration of the trust.
18. It would appear that the general view amongst equity lawyers is that this High Court decision will have little application outside of the Family Law jurisdiction.

### CHRONOLOGY

21 June, 1968	Husband created a trust by parol known as The ICF Spry Trust of which he was the settlor, trustee and appointor. As settlor, the husband had a power to vary the terms of the Trust.
29 December, 1978	The husband married Helen Marie Spry and subsequently four daughters were born of their marriage between 1980 and 1987.
October, 1981	<p>The trust instrument is executed and stamped and reflected the terms of the parol trust.</p> <p>The instrument designated the husband as settlor and trustee and he had a power of appointment to add or remove a further trustee.</p> <p>Clause 2 of the instrument provided:</p> <p style="text-align: center;"><i>“The settlor may at any time vary the terms of this trust but not in such manner as to increase in any way his rights under this trust to the beneficial enjoyment of the fund.”</i></p> <p>Clause 4 of the instrument defined the beneficiaries as “all issue” of the husband’s father, and all persons married to such issue. Further the class extended to their further issue.</p> <p>Clause 6 of the instrument provided the trustee with an absolute discretion to apply the income and/or capital of the fund, or part thereof, for the benefit of any of the beneficiaries.</p> <p>Clause 7 provided for division of the fund at the date of distribution equally between such beneficiaries <i>“as the trustee thinks fit”</i> and in default, equally among all male beneficiaries save for the settlor.</p>

4 March, 1983	<p>The husband as settlor and trustee, executed with the wife a Deed under seal, entitled "The ICF Spry Trust".</p> <p>Pursuant to clause 1 and 2, the husband released the trustee from any loans advanced by him and acknowledged that he had "<i>no rights to or interest in the trust fund or the income thereof</i>".</p> <p>Further the husband confirmed that he ceased to be a beneficiary of the trust.</p> <p>The Deed further confirmed that no other person, including the wife, had any outstanding loan to the trustee and the husband appointed the wife to be the trustee on his death or resignation and their daughter Elizabeth upon the death or resignation of the wife, subject to the husband's revocable power of appointment as settlor.</p>
7 December, 1998	<p>The husband executed an Instrument of Variation, whereby he still retained control of the trust, however the instrument goes on to provide that the husband and the wife are irrevocably excluded from the receipt of any part of the capital of the trust. The wife remained within the class of income beneficiaries.</p>
30 October, 2001	<p>Husband and wife separated.</p>
18 January, 2002	<p>Husband established 4 separate trusts in identical terms, respectively naming each of the parties four children as primary beneficiaries. The husband appointed himself as the trustee, with the discretionary power to apply all or any part of the income and/or capital of the fund for the benefit of the stipulated beneficiaries.</p> <p>The husband was excluded absolutely from any interest or benefit in or from the fund.</p> <p>Further, by a further instrument executed on 18 January, 2002, the husband applied one-quarter of the income and capital of the ICF Spry Trust to the fund of each of the children's trusts.</p>
20 January, 2002	<p>The husband conveyed shares held by him beneficially to each of the parties' 4 children (valued at trial at a total of approximately \$430,000).</p>
April, 2002	<p>Wife filed application in the Family Court seeking orders for property settlement and maintenance and subsequently she filed a second amended application seeking, inter alia, orders pursuant to s.106B of the <i>Family Law Act</i> seeking to set aside the 1998 instrument, the instruments creating the children's trusts and the 18 January 2002 dispositions from the fund to the children's funds.</p>

20 May, 2002	The husband appointed Mr Kennon as a joint trustee with him of each of the children's trusts, operative from 1 July, 2002.
17 February, 2003	Upon the wife's application, Decree Nisi of Dissolution of Marriage of the parties became absolute. The dissolution caused the wife to be removed as a beneficiary of the trust.
30 October, 2003	Leave granted to the parties' three adult children to intervene and to be made parties' to the proceedings.
10 November, 2003	The parties' youngest child Penelope Spry was granted to leave to intervene in the proceedings through a next friend.
30 November, 2005	The Honourable Justice Strickland delivered judgment after a 5 day hearing in August, 2005. The trial Judge set aside the 1998 instrument and the 18 January, 2002 dispositions and ordered that the husband pay the wife the sum of \$2,182,302 on or before 28 February, 2006.
13 June, 2006	The husband in his personal capacity and with Mr Kennon as trustees of the children's trusts, appealed against the decision of the trial Judge.
13 July, 2007	The Full Court of the Family Court (Bryant CJ and Warnick J, with Finn J dissenting) dismissed the appeal and cross-appeal.
7 March, 2008	The husband in his personal capacity together with Mr Kennon as joint trustees of the children's trusts granted special leave to appeal.
3 December, 2008	Judgment of the Full Court of the High Court of Australia delivered.
1 February, 2009 to May, 2009	<p>Further applications and orders were made relating to enforcement of orders and the appeal to the Full Court of the Family Court was determined on the 8 May, 2009. The Court consisting of Justices May, Boland and O'Ryan are yet to deliver judgement.</p> <p>Wife starts a costs application pursuant to the trial judge's order, and the husband applied for Justice Strickland to disqualify himself from determining such application.</p> <p>The wife commenced these proceedings in 2002, and they continue.</p>

