

# HIGH COURT OF AUSTRALIA

FRENCH CJ,  
GUMMOW, HAYNE, HEYDON AND KIEFEL JJ

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## Matter No M25/2008

EDWIN PHILIP KENNON AND IAN CHARLES  
FOWELL SPRY (IN THEIR CAPACITY AS THE  
TRUSTEES OF THE CATHARINE SPRY TRUST,  
THE CAROLINE SPRY TRUST AND THE  
PENELOPE SPRY TRUST) & ORS

APPELLANTS

AND

HELEN MARIE SPRY & ORS

RESPONDENTS

## Matter No M26/2008

IAN CHARLES FOWELL SPRY

APPELLANT

AND

EDWIN PHILIP KENNON AND IAN CHARLES  
FOWELL SPRY (IN THEIR CAPACITY AS  
TRUSTEES OF THE CATHARINE SPRY TRUST,  
THE CAROLINE SPRY TRUST AND THE  
PENELOPE SPRY TRUST) & ORS

RESPONDENTS

*Kennon v Spry*  
*Spry v Kennon*  
[2008] HCA 56  
3 December 2008  
M25/2008 & M26/2008

## ORDER

### Matter No M25/2008

1. *Appeal dismissed.*
2. *Appellants to pay the costs of the appeal of the first respondent.*



2.

3. *Application by first respondent for special leave to cross-appeal dismissed with no order as to costs.*

**Matter No M26/2008**

1. *Appeal dismissed.*
2. *Appellant to pay the costs of the appeal of the third respondent.*
3. *Application by third respondent for special leave to cross-appeal dismissed with no order as to costs.*

On appeal from the Family Court of Australia

**Representation**

**Matter No M25/2008**

D F Jackson QC with M C Hines for the appellants (instructed by the appellants)

J T Gleeson SC with P Kulevski for the first respondent (instructed by Kennedy Wisewoulds)

A J Myers QC with S Smith for the second respondent (instructed by Nedovic & Co)

I J Hardingham QC with M C Hines for the third to sixth respondents (instructed by Victor Ismailovic)

**Matter No M26/2008**

A J Myers QC with S Smith for the appellant (instructed by Nedovic & Co)

D F Jackson QC with M C Hines for the first and second respondents (instructed by the first and second respondents)

J T Gleeson SC with P Kulevski for the third respondent (instructed by Kennedy Wisewoulds)

I J Hardingham QC with M C Hines for the fourth to seventh respondents (instructed by Victor Ismailovic)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

**Kennon v Spry**

**Spry v Kennon**

Family law – Courts having jurisdiction in matrimonial causes – Powers – Jurisdiction under s 79(1) of *Family Law Act* 1975 (Cth) to make orders – "Proceedings with respect to the property of the parties to the marriage or either of them" – Definition of "property" of parties to marriage – Whether right of wife with respect to due administration of trust and discretionary power of husband to appoint whole of trust assets to wife constituted part of the property of the parties to the marriage.

Family law – Courts having jurisdiction in matrimonial causes – Powers – s 85A of *Family Law Act* 1975 (Cth) – Court's power to make orders respecting property the subject of "ante-nuptial or post-nuptial settlements made in relation to the marriage" – Whether contributions by parties to existing trust are post-nuptial settlements – Whether just and equitable – Interests of third parties.

Family law – Courts having jurisdiction in matrimonial causes – Powers – s 79(1) of *Family Law Act* 1975 (Cth) – Whether "parties to the marriage or either of them" includes reference to persons who were parties to marriage since dissolved before court makes an order – Power of court to proceed in property settlement "as if" changes to property rights otherwise brought about by anterior divorce had not yet occurred.

Family law – Divorce and other matrimonial causes – Division of assets – Trusts and trustees – Wife one of the class of objects of discretionary trust – Right in equity to due administration of trust – Whether existence of such a right depends on entitlement to any fixed and transmissible beneficial interest in trust fund.

Statutory construction – *Family Law Act* 1975 (Cth) – Policy regarding contributions to property – Relevance to provisions relating to orders with respect to settlement of property.

Statutory construction – *Family Law Act* 1975 (Cth) – s 85A – Purposes with respect to settlement – Degree of association ("made in relation to") between settlement of property and marriage.

Words and phrases – "ante-nuptial or post-nuptial settlements"; "made in relation to"; "parties to the marriage or either of them"; "property"; "with respect to the property of the parties to the marriage".

*Family Law Act* 1975 (Cth), Pt VIII, ss 4, 79, 80, 85A, 106B.



FRENCH CJ.

Introduction

1 Ian Charles Fowell Spry is a retired barrister and Queen's Counsel in the State of Victoria. He was born on 17 January 1940. In 1968 he created by parol a trust called the ICF Spry Trust of which he was settlor and trustee ("the Trust"). Its terms were reflected in an instrument made in October 1981 ("the 1981 Instrument"). The beneficiaries were himself and his siblings, his and their issue, and the spouses of all of them. On 29 December 1978 he married Helen Marie Spry who was born on 20 August 1956. There were four children of the marriage:

1. Elizabeth, born 23 September 1980.
2. Catharine, born 18 August 1982.
3. Caroline, born 25 October 1984.
4. Penelope, born 3 November 1987.

By a deed varying the Trust in 1983 ("the 1983 Deed"), Dr Spry excluded himself as a beneficiary. He appointed his wife to be trustee on his death or resignation and his daughter Elizabeth to succeed her upon her death or resignation.

2 In December 1998, at a time when his marriage was in difficulty, Dr Spry made a further variation to the Trust excluding himself and his wife as capital beneficiaries ("the 1998 Instrument"). On 30 October 2001 he and his wife separated. Subsequently she applied to dissolve the marriage. In January 2002 Dr Spry established trusts in favour of his four children ("the Children's Trusts") and applied to them one quarter each of all of the capital and income of the Trust ("the 18 January 2002 Dispositions"). On 20 January 2002 Dr Spry conveyed to the four children shares held by him beneficially ("the 20 January 2002 Dispositions"). On 20 May 2002 he appointed Mr Edwin Kennon as joint trustee with him of each of the Children's Trusts from 1 July 2002. The marriage was dissolved when the decree nisi became absolute on 17 February 2003.

3 In April 2002, Mrs Spry filed an application in the Family Court of Australia seeking orders for property settlement and maintenance. The application relevant to these proceedings was a second amended version of that application. In particular she sought orders under s 106B of the *Family Law Act* 1975 (Cth) ("the Family Law Act") setting aside the 1998 Instrument, the instruments creating the Children's Trusts and the 18 January 2002 Dispositions. She asked for an order that her husband pay her, inter alia, 50% of the assets and resources held in their individual or joint names, the Trust and the Children's Trusts.

4       Following procedural steps, which are not material for present purposes, Carter J made orders on 30 October 2003 granting leave to the three adult children, Elizabeth, Catharine and Caroline Spry, to intervene and be made parties to the proceeding. On 10 November 2003 Carter J also gave leave to Penelope Spry to intervene by a next friend.

5       After a hearing extending over five days in August 2005 in the Family Court at Melbourne, Strickland J delivered judgment on 30 November 2005. His Honour set aside the 1998 Instrument. He also set aside the 18 January 2002 Dispositions and ordered that on or before 28 February 2006 Dr Spry pay his wife the sum of \$2,182,302.

6       Dr Spry appealed against the decision. Dr Spry and Mr Kennon cross-appealed jointly in their capacities as trustees of the Catharine Spry Trust, the Caroline Spry Trust and the Penelope Spry Trust. Dr Spry cross-appealed jointly with his daughter Elizabeth in their capacity as trustees of the Elizabeth Spry Trust. On 13 July 2007 the Full Court of the Family Court (Bryant CJ and Warnick J, Finn J dissenting) dismissed the appeal and cross-appeal and ordered the appellant and cross-appellants jointly to pay Mrs Spry's costs of and incidental to the appeal and cross-appeal.

7       On 7 March 2008 special leave to appeal to this Court from the decision of the Full Court of the Family Court was granted to the joint trustees of the Children's Trusts in matter No M25 of 2008 and to Dr Spry in matter No M26 of 2008.

8       For the reasons that follow I would dismiss the appeals with costs in favour of Mrs Spry but not the other respondents. I would also dismiss Mrs Spry's applications for special leave to cross-appeal with no order as to costs. The relevant provisions of the Family Law Act are set out in the joint judgment of Gummow and Hayne JJ.

#### The Trust and the 1981 Instrument

9       The Trust was created on 21 June 1968. It was created by parol although Dr Spry had prepared a trust instrument. He did not execute the instrument then because of the stamp duty that would be applicable to it. It was eventually signed and stamped in October 1981. It was not in dispute that the 1981 Instrument was not a deed.

10       By cl 1 of the 1981 Instrument, Dr Spry designated himself as settlor and trustee. He could appoint any other person as an additional trustee and could remove any such person as he saw fit. Clause 2, which assumed importance in the argument, provided:



3.

"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."

The fund was defined in cl 3 as "the trust fund from time to time in existence".

11 The beneficiaries were defined in cl 4 as "all issue" of Dr Spry's father, Charles Chambers Fowell Spry, which of course included Dr Spry, and all persons married to such issue. The class would extend to their further issue and any persons married to them, as well as the Attorney-General as *parens patriae*. As at 30 May 2005, when Dr Spry swore his affidavit in the proceedings in the Family Court, the beneficiaries comprised his living sister and her children, the daughter of his deceased sister and his four daughters. This contraction of the class to exclude himself and his wife followed upon the 1983 Deed and the 1998 Instrument which are discussed below.

12 The "date of distribution" was defined in cl 4 as the earlier of 100 years from 21 June 1968 and 21 years after the death of the last survivor of all children alive at 21 June 1968 of three named persons (unrelated to the beneficiaries).

13 Clause 6 provided:

"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 in question or payments to a trust set up substantially for the benefit of such beneficiary; and income not from time to time lawfully paid or applied shall be accumulated."

14 Clause 7 provided for division of the fund at the date of distribution equally between such beneficiaries "as the trustee thinks fit" and, in default, equally among all male beneficiaries save for the settlor.

15 Clause 9 provided:

"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."

### The 1983 Deed

16 Dr Spry said that he suggested to his wife in 1983 that she become a trustee upon his death or resignation until one or more of the children was old enough to take over. On 4 March 1983, as settlor and trustee, he executed with

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his wife the 1983 Deed as a deed under seal. It was entitled "The ICF Spry Trust". It included provisions to the following effect:

1. Dr Spry as settlor of the Trust released the trustee from any loans advanced by him. He acknowledged that no amount was or remained owing to him by the trustee or in relation to the Trust fund and that he had "no rights to or interest in the trust fund or the income thereof" (cl 1).
2. He released and abandoned all and any beneficial interest or rights which he might as settlor have held under the Trust or in the Trust fund or income and confirmed that by reason thereof 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 thereof could be applied (cl 2).
3. Clause 3 provided:

"For the purpose of removing doubts it is confirmed and provided that the expression 'issue' used in the said instrument includes all descendents [sic] however remote, and not merely children; that appointments by the settlor of a trustee or trustees may be revocable or irrevocable; and that any variation of the trusts of the said instrument shall be invalid to the extent to which it purports to confer directly or indirectly any right or benefit upon the settlor."
4. The deed confirmed that no loans to the trustee by Mrs Spry or any other person were outstanding (cl 4).
5. Dr Spry, as settlor, appointed Mrs Spry to be the trustee on his death or resignation and their daughter Elizabeth upon the death or resignation of Mrs Spry, provided that the appointment was revocable by the settlor at any time (cl 5).
6. In all other respects the trusts of the 1981 Instrument were confirmed.

#### The 1998 Instrument

17 By an instrument of variation dated 7 December 1998 Dr Spry provided that, after his death or resignation as trustee, the trustees of the Trust would be his two eldest daughters, Elizabeth and Catharine, jointly. If he ceased to be trustee no payment or distribution or application of the income or capital of the fund or exercise of any powers under cl 6 or cl 7 of the 1981 Instrument could be made during his lifetime without his prior written consent.

18 The power of variation in cl 2 of the 1981 Instrument was itself varied as follows:

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"The power of variation set out in clause 2 of the trust instrument is hereby varied so that (a) it may be exercised by the settlor either in writing during his lifetime or by his will, and (b) any exercise of that power of variation may be either revocable or irrevocable (but unless expressly stated to be irrevocable any such exercise shall be revocable)."

19 Clause 4 excluded Dr Spry and his wife from the receipt of any part of the capital of the Trust:

"Clauses 6 and 7 and the other terms of the trust set out in the trust instrument are hereby varied so that no power or discretion to pay or apply the capital of the fund or any part thereof shall be exercised in favour of the settlor or Helen Marie Spry or in favour of any trust in which either of them has any interest, right or possibility, and the settlor and the said Helen Marie Spry are hereby excluded absolutely and irrevocably from all and any interests, rights and possibilities in the capital of the fund. The variation made by this clause 4 of this instrument of variation shall be irrevocable, and no future purported variation purporting to amend this clause 4 or purporting to confer any interest, right or possibility in the capital of the fund on the settlor on [sic] on the said Helen Marie Spry shall be valid in any way."

#### The Children's Trusts – 18 January 2002

20 On 18 January 2002, Dr Spry established four separate trusts in identical terms save for the name of each primary beneficiary. Each trust related to one of his four daughters. It is sufficient to refer to the terms of the Elizabeth Spry Trust. By the trust deed he appointed himself as trustee. On his death, he was to be succeeded by a person or persons specified in his will and, absent such specification, by Helen Spry. Elizabeth Spry was to become a trustee upon her attaining 32 years.

21 The beneficiaries were defined as the primary beneficiary, Elizabeth Spry, and her children, grandchildren, sisters, nephews and nieces and their spouses (cl 2). The trustees had a power of appointment 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 from time to time so applied was to be accumulated (cl 3). Dr Spry and Elizabeth were empowered to appoint or remove trustees from time to time (cl 1). They also had a power to amend any of the provisions of the trust instrument (cl 8). Dr Spry was "excluded absolutely" from any interest or benefit in or from the fund. Neither the fund nor any part thereof was to be paid or applied for his benefit in any way, or for the benefit of any company or trust in which he might have any beneficial interest or from which he might receive any benefit (cl 9).

22 The trust was amended on 20 May 2002 so that Edwin Philip Kennon, a solicitor, became a further trustee from 1 July 2002. The age at which Elizabeth Spry would become a further trustee was reduced to 25 years. On that basis she became a trustee on 23 September 2005. Mr Kennon has evidently not continued as a trustee of that trust although he continued as a joint trustee with Dr Spry of the other Children's Trusts.

#### The 18 January 2002 Dispositions

23 By a document executed on 18 January 2002 Dr Spry, as trustee of the Trust, confirmed that in his personal capacity he had forgiven and released all and any amounts owing to him by the Trust and that no amount was owing by him to the Trust or by the Trust to him (cl 1). He also declared that Mrs Spry was forgiven and released from all or any amounts owing by her to the Trust and that no amount was owing by her to the Trust or by the Trust to her (cl 2).

24 Clause 3 of the document provided that Dr Spry applied all of the income and capital of the Trust fund of the Trust:

"(i) by applying one-quarter thereof by assigning it hereby to the Trustees of the Elizabeth Spry Trust constituted on 18 January 2002 so as to be held by them from the execution hereof by them beneficially on the trusts of the Elizabeth Spry Trust".

By cl 4 he varied the terms of the Trust by providing that from the execution of the instrument:

"(i) one-quarter of the income and capital as at the execution hereof of the trust fund of that Trust is held for the Trustees of the Elizabeth Spry Trust (and is hereby assigned to them) to be held by them beneficially on the trusts of the Elizabeth Spry Trust".

Identical provisions were made in relation to each of the other Children's Trusts.

#### Further dispositions and appointment to the Children's Trusts

25 By the 20 January 2002 Dispositions, Dr Spry conveyed to his four children shares held by him beneficially. By an instrument of 20 May 2002 he appointed Mr Kennon as joint trustee with him of each of the Children's Trusts.

#### Judgment of the primary judge

26 The learned primary judge made extensive findings of fact and law. Key findings for present purposes are summarised in the following paragraphs. As to the effect of the 1983 Deed, his Honour held:

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1. Prior to the 18 January 2002 Dispositions Dr Spry was able to benefit from the assets of the Trust to an extent that, if the Family Court were to set aside the 1998 Instrument, the assets could be treated as his property. In that case, Dr Spry would then be reinstated as capital beneficiary subject to the terms of the Trust and the 1983 Deed.
2. There was nothing to prevent Dr Spry from revoking the 1983 Deed or just cl 2 of it. Clause 2 was not a variation of the terms of the Trust. Its revocation could not be invalidated by cl 3. Clause 3 was invalid to the extent it attempted to vary the power of variation. If cl 2 were a variation, Dr Spry was not thereby validly excluded as a beneficiary and remained a person to whom any part of the Trust fund and income could be applied.
3. Even if cl 2 of the 1983 Deed remained, Dr Spry sufficiently controlled the Trust such that once the instruments and dispositions of 7 December 1998 and 18 January 2002 were set aside its assets could be treated as his property.
4. In the alternative, Dr Spry's level of control over the assets of the Trust meant that they could be treated as "a financial resource".
5. Although his Honour regarded the Trust assets as "at the very least" able to be taken into account as a financial resource of Dr Spry, he proceeded on the basis of treating them as Dr Spry's property.

27 As to the 1998 Instrument, his Honour found, *inter alia*:

1. Dr Spry did not tell his wife of the instrument.
2. Its primary effect was to exclude Dr and Mrs Spry as capital beneficiaries and create a situation where that could not be changed.
3. Mrs Spry remained an income beneficiary.
4. Dr Spry made the 1998 Instrument knowing the marriage was in trouble and that an order dealing with the property of the parties, including the assets of the Trust, was likely. He wanted to remove the assets of the Trust from the reach of the Family Court and considered the instrument would achieve that result. He was looking to defeat an anticipated order for property settlement.
5. All the necessary elements of s 106B were satisfied in relation to the 1998 Instrument and it was open to make an order setting it aside.

28 As to the Children's Trusts and the 18 January 2002 Dispositions, his Honour found:

1. There was no need for Mrs Spry to pursue an application to set aside the Children's Trusts under s 106B. The crucial step was the transfer of assets to those trusts.
2. Dr Spry, as trustee of the Trust, applied one quarter of all of its income and capital to each of the Children's Trusts. As a result each of the Children's Trusts acquired assets to the value of approximately \$875,000 which included \$1,888,000, being net proceeds of the sale of a property at Mathoura Road, Toorak. That property had been purchased by the Trust in December 1979 for about \$152,000, then rented until occupied by the family from 1983.
3. There was no money owing by the Trust to either Dr Spry or his wife.
4. Dr Spry had not made an agreement with his wife that the assets of the Trust could be passed to the children when Dr Spry determined to do so.
5. Dr Spry did not adequately explain why it was necessary to set up the Children's Trusts and apply the capital and income of the Trust to them.
6. At a time not long after separation at which it could clearly be anticipated an order would be made dealing with the parties' property, Dr Spry determined, without informing Mrs Spry, that it was time to move approximately \$3,500,000 from the Trust and place it in the Children's Trusts. He was concerned that despite the 1998 variation the assets of the Trust might still have been within the reach of Mrs Spry and the Family Court.
7. The instruments were made to defeat an anticipated order in future proceedings.

29 Dr Spry and the children argued that s 106B was not applicable in respect of either the 1998 Instrument or the 18 January 2002 Dispositions as the divorce was a supervening event which defeated any anticipated orders. His Honour did not accept that submission. As long as the elements of s 106B were satisfied it did not matter that there might have been a supervening event to defeat the order. In any event the divorce could only affect Mrs Spry's ability to benefit from the capital and income of the Trust. The Trust assets could still be treated as Dr Spry's property. The instrument and dispositions were made with the intention of defeating an anticipated order and should not be allowed to stand.

30 In respect of the 20 January 2002 Dispositions and the appointment of Mr Kennon as joint trustee of the Children's Trusts, his Honour found:

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1. There was no agreement between Dr Spry and his wife, as claimed by Dr Spry, that his personal assets would go to the children and that he would determine when.
2. Dr Spry did not adequately explain why the transfer of shares (to the value of \$500,000) had to take place at that time.
3. Dr Spry intended to defeat a contemplated order at the time he entered into these transactions.
4. The wife's entitlement, on her case, would be met even if the disposition of the shares were not set aside, provided the assets of the Trust were treated as Dr Spry's property. Therefore this was a case where s 106B did not need to be applied to the disposition of the shares.
5. The current value of the shares should be notionally added to the pool of assets for distribution between the parties.
6. Mr Kennon's appointment as joint trustee of the Children's Trusts would only need to be set aside if the alternative position that the assets of the children had to be taken into account as a financial resource of Dr Spry were to apply.

31 His Honour rejected a contention that orders could be made under s 90AE in Pt VIIIAA of the Family Law Act. He then summarised the basis upon which he proposed to proceed as follows:

- "189.1.1 The instrument executed by the husband as settlor on 7 December 1998 should be set aside. The effect of this is that subject to the 1983 instrument the husband remains a capital and income beneficiary of the ICF Spry Trust.
- 189.1.2 The instrument executed by the husband as trustee on 18 January 2002 whereby the income and capital of the ICF Spry Trust was applied to the four children's trusts should be set aside. The effect of this is to return the capital and income of the children's trusts to the ICF Spry Trust.
- 189.1.3 The instrument executed by the husband on 20 January 2002 whereby he assigned to the four children shares held by him beneficially can be set aside to the extent of the assignment of those shares. The effect of this would be to return to the husband all of the shares save and except those which were the subject of the inheritance to the children from the husband's father. However, given that the assets of the Trust will be available for distribution between the parties there is

no need to in fact apply Section 106B, and these assets can be notionally added back to the pool of assets pursuant to the principles espoused in *TOWNSEND*."

32 His Honour considered the assets, liabilities and financial resources of Dr and Mrs Spry at the dates of their marriage and separation and at the date of the hearing. A schedule prepared by Dr Spry, reflecting agreements reached between the parties (subject to some points of difference with the wife), showed:

Wife's assets.....	\$ 2,530,466.80
Husband's assets .....	\$ 1,790,108.15
<b>Total assets .....</b>	<b>\$ 4,320,574.95</b>
<b>Assets held by wife as nominee for trusts.....</b>	<b>\$ 308,084.00</b>
Children's trusts .....	\$ 4,760,152.00
Deduction owing by trusts representing distributions of income to beneficiaries accrued but unpaid.....	\$ 114,000.00
<b>Total .....</b>	<b>\$ 4,646,152.00</b>
<b>Shares transferred by husband to children as at 28 July 2005 less inheritance from husband's father plus interest as calculated by husband .....</b>	<b>\$ 429,333.42</b>

33 His Honour found, after adding back the sum of \$114,000 referred to above, a net asset pool which amounted to a money equivalent of \$9,818,144.37<sup>1</sup>. He considered the respective contributions of Dr and Mrs Spry for the purposes of s 79(4) of the Family Law Act. They were assessed at 52%/48% in Dr Spry's favour. The effect was that the first 4% of the net asset pool would be treated as

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1 In their reasons for judgment on appeal, the Full Court of the Family Court noted that it was common ground between Dr and Mrs Spry that there had been a double counting of the value of the shares held by Mrs Spry as nominee, such that the value of the pool should be reduced to \$9,527,356. It was suggested that this matter be addressed by consent: *Stephens v Stephens* (2007) 212 FLR 362 at 386 [75] per Finn J, 429 [306] per Warnick J.



having been contributed by Dr Spry and the parties would be taken as entitled equally to the remaining 96%. His Honour did not alter the percentages after considering the factors prescribed in s 75(2). On this basis his Honour found Dr Spry entitled to net assets totalling \$5,105,435 and Mrs Spry to \$4,712,709.

Orders of the primary judge

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On 30 November 2005 his Honour ordered, inter alia:

- "2. That pursuant to the provisions of Section 106B of the Act the ICF Spry Trust Instrument of Variation dated 7 December 1998 be set aside.
3. That pursuant to the provisions of Section 106B of the Act the instrument entitled 'The ICF Spry Trust' dated 18 January 2002 and the dispositions made pursuant thereto whereby the husband:
  - 3.1 Forgave and released all amounts owing by him to the said Trust;
  - 3.2 Forgave and released all amounts owing by the wife to the said Trust; and
  - 3.3 Applied all of the income and capital of the trust fund of the said Trust;
    - 3.3.1 as to one quarter thereof to the Elizabeth Spry Trust;
    - 3.3.2 as to one quarter thereof to the Catharine Spry Trust;
    - 3.3.3 as to one quarter thereof to the Caroline Spry Trust;
    - 3.3.4 as to one quarter thereof to the Penelope Spry Trust;

be set aside.
4. That on or before 28 February 2006 the husband pay to the wife the sum of \$2,182,302.00."

Other orders were made relating to specific assets to be retained respectively by Mrs Spry and by Dr Spry and the division of paintings owned by them. Ancillary orders were also made. Mrs Spry was directed to transfer to the trustees of the Children's Trusts 14,600 shares in Westpac Banking Corporation held by her as nominee of the Trust together with dividends and interest.

The judgment of the Full Court

35           The Full Court, by majority (Bryant CJ and Warnick J, Finn J dissenting), dismissed the appeals from the judgment of Strickland J. Relevantly to the appeals to this Court, Warnick J, who wrote the principal majority judgment, came to the following conclusions:

1.     Dr Spry was able, notwithstanding the 1983 Deed, to reverse his election not to be considered in the exercise of the trustee's discretion. This would not involve a variation of the Trust. He would not so much be reinstating himself as a beneficiary as declaring himself again available as an object of the exercise of the trustee's discretion.
2.     The trial judge was wrong to conclude that even if cl 2 of the 1983 Deed remained in place, the assets of the Trust could be treated as Dr Spry's property.
3.     The trial judge did not err in setting aside the 1998 Instrument.
4.     The trial judge was not in error in setting aside the 18 January 2002 Dispositions.

In summary, Warnick J was of the view that the trial judge correctly:

- found that the release by Dr Spry in the 1983 Deed of his entitlements as a beneficiary of the Trust could be rescinded;
- set aside the 1998 Instrument and the 18 January 2002 Dispositions;
- found that the assets of the Trust could then be included in the pool of assets for division; and
- made orders that did not require of the husband any fraud on the powers that the husband could exercise in respect of the Trust.

36           Bryant CJ agreed with Warnick J save as to one point. She did not consider that Dr Spry could simply "reverse his election" under the 1983 Deed. However, it remained open to Dr Spry and his wife, as parties to the 1983 Deed, to cancel it. Her Honour held that once it was accepted that the effect of the 1983 Deed could be reversed, the case became one like any other where assets were held in a discretionary trust and the husband had control of them as trustee and was capable of having the capital and income distributed to him as a beneficiary.

37           Finn J dissented. Her Honour held that the release in cl 2 of the 1983 Deed could not be withdrawn. She rejected Mrs Spry's submission that Dr Spry

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could amend the Trust to reinstate himself as a beneficiary notwithstanding the 1983 Deed. The relevant words of cl 2 of the 1981 Instrument did not speak as at the date of the original settlement but referred to "this trust" as constituted from time to time. Moreover, cl 2 of the 1983 Deed effected a total abandonment of all Dr Spry's rights and entitlements under the Trust. To reinstate his rights would be contrary to the covenant he made as settlor in cl 2 of the 1983 Deed.

38 Her Honour disagreed with the trial judge's conclusion that even if the 1983 Deed remained in place the Trust assets could still be treated as the property of Dr Spry. Control of the Trust was not sufficient for that purpose. Earlier authorities in the Family Court, relied upon by the trial judge, involved a spouse who also had some capacity to benefit from the trust. Control alone, without the capacity to benefit from the assets of the Trust, was not sufficient to permit those assets to be treated as the property of Dr Spry. Her Honour was not prepared to entertain, at that late stage, submissions that Pt VIII A of the Family Law Act could be invoked.

39 Her Honour considered that if, after 1983, the Trust assets could not be regarded as the property of Dr Spry, there would be no point in making the orders under s 106B setting aside the 1998 Instrument and the 18 January 2002 Dispositions. Nor was there any utility in setting aside the 1998 Instrument insofar as it removed Mrs Spry as a capital beneficiary. Because of the divorce, she could no longer be a beneficiary.

40 Her Honour said<sup>2</sup>:

"The correct approach would have been for his Honour to treat the assets of the children's trust [sic] as a financial resource of the husband. This approach would have been available in light of earlier authorities, given the husband's control as trustee and the indirect benefits he had received from the trusts such as housing and payment of his children's educational expenses. Such an outcome would have necessitated some adjustment in favour of the wife on account of the s 75(2) matters."

#### The issues in the appeals

41 The notices of appeal raised the same issues. In summary, Dr Spry and the trustees of the Children's Trusts asserted:

1. The 1983 Deed could not be revoked or cancelled.
2. The Trust assets therefore could not be treated as Dr Spry's property.

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2 (2007) 212 FLR 362 at 400 [142].

3. The trustee of the Trust could not be compelled or empowered by the Family Court to add Dr Spry as a beneficiary or otherwise confer upon him beneficial interests or rights.

42 In Mrs Spry's notices of contention, she argued:

1. The assets of the Trust or property returned to it, pursuant to orders under s 106B, should have been treated as property of the parties to the marriage or either of them.
2. The power of variation within cl 2 of the 1981 Instrument was wide enough to be exercised lawfully within its terms or pursuant to orders authorised by the Family Law Act by the husband as settlor varying the terms of the Trust so that the beneficiaries within cl 4 would include all issue of Charles Chambers Fowell Spry irrespective of whether they had sought to release, disclaim or abandon any beneficial interest or rights under the Trust and all persons presently or previously married to such issue.

Amended notices of contention and applications for special leave to cross-appeal

43 In the course of oral submissions to this Court, counsel for Mrs Spry invoked s 85A as a basis for orders sought in the second amended application. Section 85A had not been raised in Mrs Spry's notices of contention. An amendment to those notices was required. To the extent that a new order was sought, in each matter an application was required for special leave to cross-appeal and a draft notice of cross-appeal to be filed. Directions were given to allow amended notices of contention to be filed and served together with applications for special leave to cross-appeal. Directions were also made as to written submissions.

44 In her amended notices of contention Mrs Spry asserted that the Full Court ought to have found that s 79 and/or s 85A of the Family Law Act enabled and permitted Dr Spry to deal with the assets of the Trust and the Children's Trusts so as to comply with all four of the orders made by Strickland J.

45 Draft notices of cross-appeal in both matters were also filed by Mrs Spry after the hearing along with submissions in support of the grant of special leave. The single ground stated in each draft notice was:

- "1. That s 79 and/or s 85A of the *Family Law Act* 1975 (Cth) ('the Act') authorise Dr Spry to appoint to Mrs Spry, or himself, monies from the ICF Spry trust, including realising the corpus or income of the ICF Spry trust, so as [to] provide for a just and equitable settlement

on Mrs Spry in respect of the settlements made in relation to the marriage, including varying the ICF Spry Trust if necessary."

### The Trust

46 Dr Spry created the Trust. He was the settlor. He so designated himself in cl 1 of the 1981 Instrument. He appointed himself as trustee. He assumed the power to appoint and remove further trustees. He did so, according to the terms of the 1981 Instrument, in his personal capacity. The power to vary the Trust he conferred upon himself personally as "the settlor". That power was not constrained by fiduciary duties<sup>3</sup>. It was, however, limited so as not to authorise an increase in his rights to the beneficial enjoyment of the fund. Under the terms of the Trust neither he nor any of the other "beneficiaries" had any rights to the beneficial enjoyment of the fund or any portion of it except upon his decision as trustee to apply all or any of it to himself or one or more of the other beneficiaries pursuant to cl 6. While the character of the Trust remained unchanged and Dr Spry remained as trustee there was, as counsel for Mrs Spry submitted, no beneficial interest in possession in any of the objects of the Trust including Dr Spry.

47 The Trust fell within the genus of "discretionary trust", a term which has "no fixed meaning and is used to describe particular features of certain express trusts"<sup>4</sup>. Absent an obligation on the part of the trustee to apply any of the income or capital of the Trust to any of the beneficiaries at any time it answered the description "purely discretionary"<sup>5</sup> or "non-exhaustive"<sup>6</sup>. The class of beneficiaries was "open". It extended to the spouses from time to time of the issue of Charles Chambers Fowell Spry and further issue of that issue, including persons unborn when the Trust was created, and their spouses from time to time.

48 As sole trustee of the Trust Dr Spry had the legal title. He was the only person entitled in possession to the assets. His power as trustee to apply the income or capital under the terms of the Trust was not a species of property according to the general law<sup>7</sup> but his legal title was.

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3 On the other hand a trustee exercising such a power would owe a fiduciary duty to the beneficiaries: *Lock v Westpac Banking Corporation* (1991) 25 NSWLR 593 at 609 per Waddell CJ in Eq.

4 *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 234 [8]; [1998] HCA 4.

5 *Federal Commissioner of Taxation v Vegners* (1989) 90 ALR 547 at 552.

6 Thomas and Hudson, *The Law of Trusts*, (2004) at 184.

7 *O'Grady v Wilmot* [1916] 2 AC 231 at 270.

49 Absent a specific application of Trust capital or income to one of the objects of the Trust, there was no equitable interest in its assets held by anyone. There did not need to be. In *Glenn v Federal Commissioner of Land Tax*<sup>8</sup> Griffith CJ declined to accept "the assumption that whenever the legal estate in land is vested in a trustee there must be some person other than the trustee entitled to it in equity"<sup>9</sup>. The Privy Council, in similar vein, pointed out in *Commissioner of Stamp Duties (Q) v Livingston*<sup>10</sup> that the law does not require for all purposes and at every moment in time, the separate existence of two different kinds of estate or interest in property, the legal and the equitable.

50 In *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)*<sup>11</sup> the Court described the observation of Griffith CJ in *Glenn* as "a prescient rejection of a 'dogma' that, where ownership is vested in a trustee, equitable ownership must necessarily be vested in someone else because it is an essential attribute of a trust that it confers upon individuals a complex of beneficial legal relations which may be called ownership"<sup>12</sup>.

51 Against that background it is necessary to consider the question at the heart of the present appeals, namely 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).

#### The assets of the Trust as property

52 The word "property" is used in different ways in different statutory contexts. There have been, for example, many cases in which the question has arisen whether and when the objects of a discretionary trust have "property" interests for the purpose of revenue legislation<sup>13</sup>.

53 Section 79(1) of the Family Law Act and the non-exhaustive definition of "property" in s 4(1) of the Act had their antecedent in s 86(1) of the *Matrimonial*

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8 (1915) 20 CLR 490; [1915] HCA 57.

9 (1915) 20 CLR 490 at 497.

10 (1964) 112 CLR 12 at 22; [1965] AC 694 at 712-713.

11 (2005) 224 CLR 98; [2005] HCA 53.

12 (2005) 224 CLR 98 at 112 [25].

13 See generally Hardingham and Baxt, *Discretionary Trusts*, 2nd ed (1984) at 134-141.

*Causes Act 1959* (Cth). The collocation "property to which the parties are, or either of them is, entitled (whether in possession or reversion)" can be traced back to its gendered ancestor in s 45 of the *Matrimonial Causes Act 1857* (UK) which applied to the property of an adulterous wife.

54 Section 79 confers a wide discretionary power to vary the legal interests in any property of the parties to a marriage or either of them and to make orders for a settlement of property in substitution for any interest in the property. It is subject to the limitation that it validly applies only with respect to a claim based on circumstances arising out of the marriage relationship<sup>14</sup>. The word "property", appearing in the section, construed by reference to its ancestry in matrimonial causes statutes, has been given a wide meaning. In 1977 the Full Court of the Family Court said<sup>15</sup>:

"The word has also been comprehensively defined in statutes both State and Imperial relating to married women's property. We do not propose to instance those definitions here, but in *Jones v Skinner*<sup>16</sup> Langdale MR said: 'Property is the most comprehensive of all terms which can be used inasmuch as it is indicative and descriptive of every possible interest which the party can have.' This is a definition which commends itself to us as being descriptive of the nature of the concept of 'property' to which it is intended that the Family Law Act 1975 should relate and over which the Family Court of Australia should have jurisdiction to intervene when disputes arise in relation to the property of spouses as between themselves or when the court is asked to exercise the powers conferred upon it under Pt VIII or its injunctive powers under s 114 so far as they are expressed to relate to a property of the party to a marriage."

55 In *Kelly (No 2)*<sup>17</sup> the Full Court of the Family Court did not think the word wide enough to cover the assets of a trust in which the relevant party to the marriage was neither settlor nor appointor nor beneficiary and over which he or she had no control<sup>18</sup>. The Court was concerned, inter alia, with the assets of a family company and family trust which were under the "de facto control" of the

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14 *Dougherty v Dougherty* (1987) 163 CLR 278 at 286 per Mason CJ, Wilson and Dawson JJ; [1987] HCA 33.

15 *In the Marriage of Duff* (1977) 15 ALR 476 at 484.

16 (1835) 5 LJ Ch 87 at 90.

17 *In the Marriage of Kelly (No 2)* (1981) 7 Fam LR 762.

18 (1981) 7 Fam LR 762 at 764, 768.

husband. The assets could be taken into consideration as a "financial resource" of the husband within the meaning of s 75(2)(b) of the Family Law Act. The trust assets, however, did not fall within the description of the "property" of the husband for the purposes of s 79 because "the husband could not assert any legal or equitable right in respect of them"<sup>19</sup>. That was a case in which the husband had neither a legal nor a beneficial interest.

56 In *Ashton*<sup>20</sup> a husband who had been the trustee of a family trust replaced himself as trustee with a company but continued as sole appointor. He was not a beneficiary but received income from the trust. It was conceded that he was "in full control of the assets of the trust"<sup>21</sup>. The evidence made clear that he applied the assets and income from them as he wished and for his own benefit<sup>22</sup>. The Full Court held that "[n]o person other than the husband has any real interest in the property or income of the trust except at the will of the husband"<sup>23</sup>. Special leave to appeal from that decision was refused by the High Court on 5 December 1986 (Gibbs CJ, Wilson and Brennan JJ)<sup>24</sup>.

57 Where the husband was not entitled to be a trustee but was sole appointor and also a beneficiary, the Full Court of the Family Court in *Goodwin* upheld a finding that "the trust property was, in reality, the property of the husband"<sup>25</sup> and in so doing applied as a statement of principle the perhaps unremarkable proposition that<sup>26</sup>:

"[T]he question whether the 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."

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19 (1981) 7 Fam LR 762 at 768.

20 *In the Marriage of Ashton* (1986) 11 Fam LR 457.

21 (1986) 11 Fam LR 457 at 461.

22 (1986) 11 Fam LR 457 at 461.

23 (1986) 11 Fam LR 457 at 462.

24 See also *In Marriage of Davidson (No 2)* (1990) 101 FLR 373 for a similar conclusion on a similar trust deed.

25 *In Marriage of Goodwin* (1990) 101 FLR 386 at 392.

26 (1990) 101 FLR 386 at 392.



In that case the husband had the sole power of appointment of the trustee which was a creature under his control and he was a beneficiary to whom the trustee could make payments exclusive of other beneficiaries as the husband saw fit<sup>27</sup>.

58        Although a settlor is taken to transfer to the trustee the property in respect of which he or she creates a trust, there may be retained a right to take a benefit under it. Prior to the 1983 Deed Dr Spry as sole trustee had the "absolute discretion" to apply all or any part of the income and/or capital of the fund to himself as one of the "beneficiaries". On the basis of that power, and consistently with authority including the decisions of the Full Court referred to above, the assets of the Trust would properly have been regarded as his property as a party to the marriage for the purposes of s 79. But the coexistence of the power together with Dr Spry's status as a beneficiary does not define a necessary condition of that conclusion.

59        By the 1983 Deed Dr Spry removed himself as a beneficiary of the Trust. In terms the 1983 Deed provided that he "releases and abandons all and any beneficial interest ... in the trust fund or income". This left him, however, in possession of the assets, with the legal title to them and to the income which they generated unless and until he should decide to apply any of the capital or income to any of the continuing beneficiaries. The question remains whether the Trust fund was part of the "property of the parties to the marriage" at that time within the meaning of s 79.

60        Counsel for Mrs Spry submitted that when the primary judge determined the proceedings the assets of the Trust were the property of a party to the marriage as Dr Spry was the only person entitled in possession to them. On that basis the Family Court had the power to make the order it did. No object in the Trust had any fixed or vested entitlement. Dr Spry was not obliged to distribute to anyone. The default distribution (cl 7) gave male beneficiaries other than Dr Spry no more than a contingent remainder. None had a vested interest subject to divestiture. The application of s 79, as a matter of construction, to the Trust assets was said to be supported by a number of considerations. Among these was the "true character" of the Trust as a vehicle for "Dr and Mrs Spry and their children".

61        In response, counsel for Dr Spry submitted that his legal title, absent any beneficial interest, did not justify treating the Trust property as his own. A policy question was said to be raised. It would be "inappropriate" for the Court to treat the assets of a trust as a trustee's property where the trustee had no interest under the trust. The Court was invited to consider the implications of Mrs Spry's submissions for the case of a trustee with no personal relationship to

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27 (1990) 101 FLR 386 at 392.

the beneficial objects of the trust. The Family Court, it was said, must take the property of a party to the marriage as it finds it. It cannot ignore the interests of third parties nor the existence of conditions or covenants limiting the rights of the party who owns the property. In this connection reference was made to *Ascot Investments Pty Ltd v Harper*<sup>28</sup>.

62 In my opinion the argument advanced on behalf of Mrs Spry should be accepted save that it is the Trust assets, coupled with the trustee's power, prior to the 1998 Instrument, to appoint them to her and her equitable right to due consideration, that should be regarded as the relevant property. It should be accepted that, in the unusual circumstances of this case and but for the 1998 Instrument and the 18 January 2002 Dispositions, s 79 would have had effective application to the Trust assets. 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 a power, inter alia, to appoint them entirely to his wife. This is perhaps not quite the same as the second argument advanced on behalf of Mrs Spry which is accepted by Gummow and Hayne JJ in their joint judgment. But the distinction may not amount to a difference. Even on the second argument the power of appointment and the right to due consideration, absent a legal estate upon which they can operate, are meaningless.

63 The terms "dry legal title" or "dry legal estate or interest" have sometimes been used to describe the legal estate in property held on trust<sup>29</sup>. The term describes a legal title divorced from any powers or duties. Under the general law such a title could not be treated as property of the trustee. But where a statute is involved the matter is one of interpretation. Even under the general law, where the legal title is associated with substantial powers or duties, the "dry" metaphor may not be appropriate<sup>30</sup>.

64 The word "property" in s 79 is to be read as part of the collocation "property of the parties to the marriage". It is to be read widely and conformably with the purposes of the Family Law Act. In the case of a non-exhaustive discretionary trust with an open class of beneficiaries, there is no obligation to apply the assets or income of the trust to anyone. Their application may serve a

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28 (1981) 148 CLR 337 at 354 per Gibbs J; [1981] HCA 1.

29 *Molloy v Federal Commissioner of Land Tax* (1937) 58 CLR 352 at 360; [1937] HCA 62; *Burke v Dawes* (1938) 59 CLR 1 at 21; [1938] HCA 6; *Perpetual Trustee Co Ltd v Commissioner of Stamp Duties (NSW)* (1941) 64 CLR 492 at 510; [1941] HCA 15; *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491 at 501.

30 *Minnesota v United States* 305 US 382 at 386 fn 1 (1939).

wide range of purposes. In the present case, prior to the 1998 Instrument those purposes could have included 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 his or her spouse, whether before or during the marriage, it does not, in my opinion, 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, it remained, in my opinion, 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 absent subjection 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 Instrument, 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.

68 As to the position of the other beneficiaries, it has long been accepted that in some circumstances the Family Court has power to make an order which will indirectly affect the position of a third party. That acceptance, which predated the enactment of Pt VIII A of the Family Law Act, is reflected in the judgment of Gibbs J in *Ascot Investments Pty Ltd v Harper*<sup>31</sup>. That case concerned the validity of an order in favour of a wife made by the Family Court requiring directors of a company not completely controlled by the husband to register a transfer of shares into her name. It is in that context that the passage relied upon by Dr Spry is to be understood<sup>32</sup>:

"Except in the case of shams, and companies that are mere puppets of a party to the marriage, the Family Court must take the property of a party to the marriage as it finds it. 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."

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31 (1981) 148 CLR 337 at 354.

32 (1981) 148 CLR 337 at 355 per Gibbs J.

The Articles of the company in that case gave to its directors a discretion to register or refuse to register a transfer of any shares in the company. The Family Court was found to have no power to direct them as to the manner in which their discretion should be exercised. Giving full effect to the generality of the passage quoted from the judgment of Gibbs J, the case does not stand against the proposition that s 79 would apply in the circumstances of this case where the only property interests are those of the trustee who is a party to the marriage, and where no other beneficiary has any legal or equitable interest apart from a right to due consideration and administration. That, of course, is a right which is a relevant consideration informing the exercise of the Court's discretion as is any indirect effect upon a third party's rights: *R v Dovey; Ex parte Ross*<sup>33</sup>.

69       The preceding conclusion does 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.

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 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 interests of those who might be entitled to take upon a default distribution at the distribution date.

71       I agree with Gummow and Hayne JJ that the conclusion reached by the primary judge, that Dr Spry could have applied the whole or part of the Trust assets to or for his own benefit, was inconclusive of the outcome. It is not necessary for me to express a view on whether the primary judge's finding in that respect was erroneous. The conclusion I have reached is independent of any

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33 (1979) 141 CLR 526 at 534 per Gibbs J, Barwick CJ and Mason J agreeing; [1979] HCA 14.

question whether Dr Spry could have reinstated himself at any time as a beneficiary of the Trust.

72 I agree also with Gummow and Hayne JJ that the reference in s 79 to "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 an order under that section. As their Honours point out, the Family Court, when it is just and equitable to do so, can make orders in property settlement proceedings as if changes to property rights otherwise effected by the divorce had not occurred.

73 In light of the trial judge's findings about the purposes of the 1998 Instrument and the 18 January 2002 Dispositions, the preceding conclusion is sufficient to support the trial judge's orders and the dismissal of these appeals. They are also supported by a consideration of Mrs Spry's equitable right to due consideration as an object of the Trust prior to the 1998 Instrument and, for the reasons enunciated by Gummow and Hayne JJ, by consideration of that right in conjunction with Dr Spry's power as trustee to apply the assets or income of the Trust to any of the beneficiaries in his discretion. It is desirable to say something further specifically about that.

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

74 Each of the beneficiaries had the right to compel the trustee to consider whether or not to make a distribution to him or her and a right to the proper administration of the Trust<sup>34</sup>. In *Gartside v Inland Revenue Commissioners*, Lord Wilberforce put it thus<sup>35</sup>:

"No doubt in a certain sense a beneficiary under a discretionary trust has an 'interest': the nature of it may, sufficiently for the purpose, be spelt out by saying that he has a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a court of equity. Certainly that is so, and when it is said that he has a right to have the trustees exercise their discretion 'fairly' or 'reasonably' or 'properly' that indicates clearly enough that some objective consideration (not stated explicitly in declaring the discretionary trust, but latent in it) must be applied by the trustees and that the right is more than a mere spes. But that does not mean that he has an interest which is capable of being taxed by reference to its extent in the trust fund's income: it may be a right, with some degree of concreteness or solidity, one which attracts the

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34 *Gartside v Inland Revenue Commissioners* [1968] AC 553 at 617.

35 [1968] AC 553 at 617-618; see also *Sainsbury v Inland Revenue Commissioners* [1970] Ch 712 at 725.

protection of a court of equity, yet it may still lack the necessary quality of definable extent which must exist before it can be taxed."

75 The rights to consideration and to due administration are in the nature of equitable choses in action. There has been considerable judicial discussion about the nature of a beneficiary's right to due administration in the case of the residuary legatee of an unadministered deceased estate and members of superannuation funds whose benefits have not vested. The residuary legatee has an equitable right<sup>36</sup>, "a chose in action, capable of being invoked for any purpose connected with the proper administration of [the] estate"<sup>37</sup>. Such a right has been treated as property for the purposes of the *Bankruptcy Act* 1966 (Cth)<sup>38</sup>. In the case of a residuary legatee the right to due administration is connected to a real expectancy of an interest in the property. The same is true for the members of a superannuation fund although vesting of a benefit may be many years in the future. However, the right to due administration taken by itself in relation to a superannuation fund was described by the Full Court of the Family Court in 1986, in a brief consideration of the question, as "an empty present right of no relevance"<sup>39</sup>.

76 In *Evans*<sup>40</sup> the majority in the Full Court of the Family Court found that consideration of the right to due administration of a superannuation fund offered "no solution as to how realistically to make practical orders under s 79 about that 'property' until it is in fact received"<sup>41</sup>. The case concerned a future entitlement to benefits from a superannuation fund. Nygh J drew the analogy between the unvested interest in a superannuation fund protected by a right of due administration and "the interest which a potential beneficiary has in the proper administration of a trust"<sup>42</sup>.

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36 *Livingston v Commissioner of Stamp Duties (Q)* (1960) 107 CLR 411 at 444 per Fullagar J; [1960] HCA 94.

37 *Commissioner of Stamp Duties (Q) v Livingston* (1964) 112 CLR 12 at 27; [1965] AC 694 at 717.

38 *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306 at 314.

39 *In the Marriage of Hauff* (1986) 10 Fam LR 1076 at 1081.

40 *In Marriage of Evans* (1991) 104 FLR 130.

41 (1991) 104 FLR 130 at 139.

42 (1991) 104 FLR 130 at 144.

77 The beneficiary 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 but it is difficult to value those rights when the beneficiary has no present entitlement and may never have any entitlement to any part of the income or capital of the trust.

78 Gummow and Hayne JJ, in their joint reasons, characterise Mrs Spry's right with respect to the due administration of the Trust as part of her property for the purposes of the Family Law Act. I respectfully agree with their Honours that prior to the 1998 Instrument the equitable right to due administration of the Trust fund could be taken into account as part of the property of Mrs Spry as a party to the marriage. So too could her equitable entitlement to due consideration in relation to the application of the income and capital. In so agreeing, however, I acknowledge, consistently with the observations of the Full Court in *Hauff* and *Evans*, that it is difficult to put a value on either of these rights though a valuation might not be beyond the actuarial arts in relation to the right to due consideration.

79 Dr Spry's power as trustee to apply assets or income of the Trust to Mrs Spry prior to the 1998 Instrument was, as pointed out by Gummow and Hayne JJ, 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 is so even though it may not be property according to the general law. So characterised for the purposes of the Family Law Act it had an attribute in common with the legal estate he had in the assets as trustee. He could not apply them for his own benefit but that did not take them out of the realm of property of a party to the marriage for the purposes of s 79. Insofar as Gummow and Hayne JJ rely upon the property comprised by Dr Spry's power as trustee and Mrs Spry's equitable rights prior to 1998, I agree that these property rights were capable of providing a basis for the orders which Strickland J made. I do so, as already indicated, by considering that power and the equitable rights, in conjunction with Dr Spry's legal title to the Trust assets, without which the power and the rights were meaningless.

80 Mrs Spry's right to due consideration as an object of the Trust could also 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. As noted in the preceding section the equitable entitlement of the children and other existing beneficiaries to due consideration could also be taken into account in making that judgment. There is no reason to suggest that his Honour did not do so appropriately.

### Conclusions

81 The assets of the Trust, coupled with Dr Spry's power to appoint them to his wife and her right to due consideration, were, until the 1998 Instrument, the property of the parties to the marriage for the purposes of s 79. The fact that

Dr Spry removed himself as a beneficiary by the 1983 Deed does not affect that conclusion. Because the 1998 Instrument effectively disposed of Mrs Spry's equitable right to be considered in the application of the Trust fund, and having regard to the trial judge's conclusions about the purpose of the instrument, the order setting it aside was an appropriate exercise of the Family Court's power under s 106B. Mrs Spry's equitable right could then be considered as part of the property of the parties to the marriage. The setting aside of the 18 January 2002 Dispositions was also appropriate. The ancillary order that Dr Spry pay his wife the sum of \$2,182,302 was appropriate for the reasons stated by Gummow and Hayne JJ in their joint judgment.

82           It is not necessary in the light of the preceding conclusions to consider whether s 85A has any application. I am, however, inclined to doubt that s 79 and s 85A have mutually exclusive areas of operation notwithstanding the concerns that led to the enactment of s 85A. I would dismiss the applications for special leave to cross-appeal but with no order as to the costs of those applications.

83           I would dismiss the appeals with costs in favour of Mrs Spry in each case. There should be no order for costs in favour of the other respondents.



- 84 GUMMOW AND HAYNE JJ. These appeals from a decision of the Full Court of the Family Court of Australia (Bryant CJ and Warnick J, Finn J dissenting)<sup>43</sup> were heard together. The Full Court dismissed an appeal and cross-appeal against orders made on 30 November 2005 by a judge of the Family Court (Strickland J) in litigation the parties to which, in addition to the former spouses, included their children and the trustees of certain trusts.

The matrimonial relationship and the course of the proceedings

- 85 The husband was born in 1940 and the wife in 1956. They married in 1978. At that time the husband was in practice at the Bar of Victoria and he was appointed Queen's Counsel in 1979. There were four children of the marriage, Elizabeth (born 1980), Catharine (born 1982), Caroline (born 1984) and Penelope (born 1987).

- 86 The husband retired from legal practice in 1998. After various matrimonial difficulties over several years, the parties separated on 30 October 2001 and the husband left the matrimonial home. In December 2002 the wife filed her divorce application in the Federal Magistrates Court of Australia. This was a "matrimonial cause" within the meaning of par (a)(i) of the definition of that term in s 4(1) of the *Family Law Act* 1975 (Cth) ("the Act") and jurisdiction to entertain it was conferred upon that Court by s 39(1A) and s 39(5AA) of the Act. A decree nisi was granted on 16 January 2003 and it became absolute on 17 February 2003.

- 87 Whilst the divorce proceedings were pending, on 19 April 2002 the wife applied to the Family Court for an order that the husband pay to her:

"by way of lump sum maintenance and property settlement such sum as the Court shall determine to be just and equitable".

The wife sought orders on the basis that the assets of the parties to the marriage be divided 60 per cent to the wife and 40 per cent to the husband.

- 88 The Family Court application was a "matrimonial cause" within the meaning of par (ca) of the definition of that term in s 4(1) of the Act, being "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". Jurisdiction with respect to the matrimonial cause was conferred upon the Family Court by s 39(1)(a) of the Act.

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43 Reported under the title *Stephens v Stephens* (2007) 212 FLR 362.

In many provisions of the Act reference is made to the "court"; in relation to any proceedings this means a court exercising jurisdiction in those proceedings by virtue of the Act, in particular, by one or more of the operations of s 39<sup>44</sup>.

"With respect to the property of the parties to the marriage"

89 The phrase in par (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. In particular, as statements by this Court<sup>45</sup> illustrate, the term "property" is not a term of art with one specific and precise meaning. It is always necessary to pay close attention to any statutory context in which the term is used<sup>46</sup>. In particular it is, of course, necessary to have regard to the subject matter, scope and purpose of the relevant statute.

90 The questions that arise in these matters raise a dispute about construction of the Act. That dispute is not resolved by considering only the ways in which the term "property" may be used in relation to trusts of the kinds described as "discretionary trusts". As Binnie J, writing for the Supreme Court of Canada, has recently said<sup>47</sup> (albeit in a different statutory context):

"The task is to interpret [the relevant statutes] in a purposeful way having regard 'to their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament'<sup>48</sup>."

And as Binnie J also said, because an interest (in that case, a fishing licence)<sup>49</sup>:

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44 See the definition of "court" in s 4(1).

45 These include *Yanner v Eaton* (1999) 201 CLR 351 at 365-367 [17]-[19], 388-389 [85]-[86]; [1999] HCA 53, 69; *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 577 [135]; [2004] HCA 56.

46 *Australian Securities and Investments Commission v Carey (No 6)* (2006) 153 FCR 509 at 518-519 [29]; *Saulnier v Royal Bank of Canada* 2008 SCC 58 at [16].

47 *Saulnier v Royal Bank of Canada* 2008 SCC 58 at [16].

48 Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed (2002) at 1.

49 *Saulnier* 2008 SCC 58 at [16].

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"may not qualify as 'property' for the general purposes of the common law does not mean that it is also excluded from the reach of the statutes. For particular purposes Parliament can and does create its own lexicon."

91 Section 4(1) of the Act provides:

"**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."

Shortly after the commencement of the Act, the Full Court in *In the Marriage of Duff*<sup>50</sup> considered that definition and said that an understanding of the term "property" in a comprehensive sense:

"commends itself to us as being descriptive of the nature of the concept of 'property' to which it is intended that [the Act] should relate and over which the Family Court of Australia should have jurisdiction to intervene when disputes arise in relation to the property of spouses as between themselves or when the court is asked to exercise the powers conferred upon it under Pt VIII or its injunctive powers under s 114 so far as they are expressed to relate to a property of the party to a marriage.

We are of the view that the intention of s 79 is to enable the court to take into account and assess all the property of the parties upon being asked by either of them to make an order altering the interests of the parties in the property. We are further of the view that when s 4 defines property as being 'property to which the parties are entitled whether in possession or reversion' the words 'whether in possession or reversion' are not intended to indicate that the kind of property with which this Act can deal must be property to which a party is entitled in possession or reversion but rather the phrase 'whether in possession or reversion' is, as a matter of grammar, an adverbial phrase which qualifies the word 'entitled'. The phrase means that the entitlement to the property may be either in possession or reversion, ie the phrase is descriptive of the entitlement and not of the property and it removes any fetter upon the court in dealing with property under this Act by limiting the nature of the entitlement thereto to entitlement in possession."

92 Subsequently, in *In the Marriage of Kelly (No 2)*<sup>51</sup>, the Full Court remarked that, nevertheless, what had been said in *Duff* as to the definition of

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50 (1977) 29 FLR 46 at 55-56.

51 (1981) 7 Fam LR 762 at 768.

"property" was not broad enough to cover the assets held by a family company or held by trustees of a discretionary trust. That may be accepted but, as will appear, will not be a sufficient answer to issues arising on these appeals.

Part VIII of the Act

93 Part VIII of the Act (ss 71-90) is headed "Property, spousal maintenance and maintenance agreements"<sup>52</sup>. The reference in the application by the wife to payment by way of property settlement of a sum determined to be just and equitable attracted the operation of s 79 of the Act. So far as material s 79(1) states:

"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."* (emphasis added)

94 The reference in s 79(1) to "the parties to the marriage" is given by s 4(2) an application in a situation where, as in the present case, the marriage is dissolved before the court makes its order in property settlement proceedings.

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52 With effect 17 December 2004, the *Family Law Amendment Act 2003* (Cth), Sched 6, supplemented Pt VIII by adding Pt VIIIAA (ss 90AA-90AK). The new Part is headed "Orders and injunctions binding third parties". No reliance was placed upon Pt VIIIAA in submissions to this Court.

The effect of s 4(2) is that the phrase in s 79(1) "the parties to the marriage" includes a reference 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 "[t]he court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order". The phrase "just and equitable" appears to have its origins in the principles of equity which were developed with respect to the dissolution of partnerships, where they remained general words which were not to be reduced to the sum of particular instances<sup>53</sup>. However, in considering what order if any should be made under s 79 in property settlement proceedings the court is obliged by s 79(4) to take into account various matters detailed in pars (a)-(g). In particular, par (a) requires the court to take into account "the financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them".

96       Paragraph (e) of s 79(4) directs consideration to "the matters referred to in subsection 75(2) so far as they are relevant"; par (b) of s 75(2) 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" to which reference has been made.

97       Section 81 enjoins the court, in proceedings under Pt VIII of the Act, including s 79, to "as far as practicable, make such orders as will finally determine the financial relationships between the parties to the marriage and avoid further proceedings between them". In exercising its powers under Pt VIII of the Act, the court is authorised, among the other matters spelled out in pars (b)-(l) of s 80(1), to "order payment of a lump sum, whether in one amount or by instalments" (s 80(1)(a)). Additional powers conferred by other paragraphs of s 80(1) are mentioned below.

98       Section 79 also is supplemented by s 106B. Section 106B appears in Pt XIII of the Act (ss 105-109B) which is headed "Enforcement of decrees". At all material times<sup>54</sup> s 106B(1) and (3) stated:

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53 *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 at 374-375 per Lord Wilberforce.

54 Section 106B was introduced by the *Family Law Amendment Act* 2000 (Cth) and was substantially amended by the *Family Law Amendment Act* 2005 (Cth),  
(Footnote continues on next page)

- "(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 orders of the primary judge

99 The orders of the primary judge which are principally in contention are orders numbered 2 and 3 and expressed to be made pursuant to s 106B ("the s 106B orders") and an order ("order 4") that on or before 28 February 2006 the husband pay the wife the sum of \$2,182,302. It will be noted that order 4 mandates no variation in the terms of any trust instrument.

100 On its face order 4 may appear not to mandate a "settlement" of property in substitution for any interest in the property of the parties to the marriage or either of them and so not to amount to an exercise of powers conferred by pars (c) and (d) of s 79(1). There was no order for a settlement in the conveyancing sense of a disposition by deed vesting property in trustees to be held for a succession of interests<sup>55</sup>. Rather, order 4 requires the payment of money by the husband but does not attach that obligation to any fund or other source of payment. In 1983 in *Mullane v Mullane* it was said that when s 79 refers to a settlement of property this is in a sense "which is closely related to the meaning which the expression bears in the law of real and personal property"<sup>56</sup>. But s 79 was extensively amended thereafter<sup>57</sup> and always had to be read with the

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Sched 1, items 20 and 21, but with no application to dispositions before 3 August 2005.

<sup>55</sup> *Brooks v Brooks* [1996] AC 375 at 391.

<sup>56</sup> (1983) 158 CLR 436 at 445; [1983] HCA 4.

<sup>57</sup> Particularly by the *Family Law Amendment Act* 1983 (Cth) ("the 1983 Act").

range of powers conferred by s 80(1). More recently, in *Brooks v Brooks*<sup>58</sup>, Lord Nicholls of Birkenhead emphasised that in English law "settlement" is not a term of art, with one specific precise meaning, and that its meaning depends upon the context, particularly any statutory context, in which it is used<sup>59</sup>. Accordingly, some further reference to legislative history is of assistance here.

101 A power with some similarities to s 79 had been included in s 86(1) of the *Matrimonial Causes Act* 1959 (Cth) ("the 1959 Act")<sup>60</sup>. Of that provision in *Smee v Smee*<sup>61</sup> Sugerman J said:

"The origins of legislation of the type of s 86(1) go back to s 45 of the original *Matrimonial Causes Act* 1857 (Eng), which gave the court power, when it pronounced a decree for divorce or judicial separation on the ground of the wife's adultery, to order such settlement of her property or of part thereof as it thought reasonable for the benefit of the innocent party and the children of the marriage. To this power to order a settlement of the wife's free property, s 5 of the *Matrimonial Causes Act* 1859 (Eng), added a power to vary existing ante-nuptial and post-nuptial settlements (cf [the 1959 Act], s 86(2))."

102 In *Sanders v Sanders*<sup>62</sup> Windeyer J said he agreed with what had been said by Sugerman J in this passage, but cautioned against the "colouring" of s 86 of

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58 [1996] AC 375 at 391-392. See also the remarks of Mason J in *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 344; [1982] HCA 69.

59 [1996] AC 375 at 391.

60 Section 86(1) and (2) read:

"(1) The court may, in proceedings under this Act, by order require the parties to the marriage, or either of them, to make, for the benefit of all or any of the parties to, and the children of, the marriage, such a settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case.

(2) 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 on the parties to the marriage, or either of them."

61 (1965) 7 FLR 321 at 325.

the 1959 Act by history. In particular, as Barwick CJ stressed in *Sanders*<sup>63</sup>, in the exercise of the powers conferred by the modern legislation there is no occasion for elements of punishment or deprivation of a party. However, what has been carried forward is what, with reference to *Dewar v Dewar*<sup>64</sup>, Windeyer J said<sup>65</sup> was the "very wide denotation" given in this context to the word "settlement". In *Dewar*<sup>66</sup> Dixon CJ, Kitto and Menzies JJ made reference to the empowering of 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 because of the dissolution of that marriage should be reconsidered and to empower the Court to make orders for what appears in the changed circumstances a just application of the property".

103 The primary judge also made orders (numbered 8 and 9 respectively) that each party "do all such acts and things and sign all such documents as may be necessary to give effect to the terms of this order", and that each party have "[l]iberty ... to apply as to consequential matters". Reservation of liberty to apply is directed to questions of machinery which may arise from the other orders which the court in question has made<sup>67</sup>. Orders 8 and 9 reflect provision made by s 80(1) of the Act, in particular by pars (d) and (k) which state that the court may:

"(d) order that any necessary deed or instrument be executed and that such documents of title be produced or such other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;

...

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62 (1967) 116 CLR 366 at 380; [1967] HCA 33.

63 (1967) 116 CLR 366 at 374-375.

64 (1960) 106 CLR 170; [1960] HCA 79.

65 (1967) 116 CLR 366 at 382.

66 (1960) 106 CLR 170 at 174. See also *Lansell v Lansell* (1964) 110 CLR 353 at 361-362 per Kitto J; [1964] HCA 42; and cf *In the Marriage of Knight* (1987) 90 FLR 313.

67 *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518 at 537 [58]; [2003] HCA 11; *Abigroup Ltd v Abignano* (1992) 39 FCR 74 at 88.



- (k) make any other order (whether or not of the same nature as those mentioned in the preceding paragraphs of this section), which it thinks it is necessary to make to do justice".

104 The s 106B orders made by the primary judge were expressed to "set aside" an instrument dated 7 December 1998 executed by the husband and identified as "the ICF Spry Trust Instrument of Variation" ("the 1998 Instrument"), and an instrument executed by the husband on 18 January 2002 ("the 2002 Instrument"), together with certain dispositions then made pursuant to that second instrument. These dispositions included the application of all of the income and capital of what was known as "the ICF Spry Trust" ("the Trust") as to one quarter to each of four trusts known as the Elizabeth Spry Trust, the Catharine Spry Trust, the Caroline Spry Trust and the Penelope Spry Trust ("the Children's Trusts").

105 Clause 3 of the 2002 Instrument declared that as trustee of the Trust the husband applied all of the income and capital of the Trust as it stood on 18 January 2002 by assigning one quarter to the trustees of each of the Children's Trusts. Each of these trusts for a child of the marriage thereby acquired assets of approximately \$875,000. Also in January 2002, the husband effectively assigned to the four children by declaration of trust some \$500,000 of his own assets. Each child derived an interest worth approximately \$125,000. That disposition was not set aside by the court for reasons given by the primary judge in a passage in his reasons which is set out below.

The reasons of the primary judge

106 With respect to the terms of s 106B(1), the primary judge found that, as to the 1998 Instrument, at the relevant time the husband "was looking to defeat an anticipated order for property settlement". His Honour also made adverse findings with respect to the steps taken in 2002, saying that the husband had been concerned that despite what he had done in December 1998 certain assets "may have still been within the reach of the wife and the Family Court".

107 The primary judge used the expressions "the Trust" and "the ICF Spry Trust" to identify a trust declared orally by the husband on 21 June 1968 with himself as trustee and subsequently reduced to writing by an instrument executed by him on 15 October 1981 ("the 1981 Instrument"). This had been followed by an instrument executed by the husband and the wife on 4 March 1983 ("the 1983 Instrument"). It will be necessary to make further reference to these instruments later in these reasons. However, it should be noted here that the primary judge accepted that the Trust had been established in 1968 well before the marriage. He found that the Trust (the assets of which included the family home at Toorak purchased in 1979) was maintained "to allow the parties to accumulate assets for the benefit of the family in the most tax effective way" and that the

1983 Instrument was designed to ensure that the Toorak property was not, for land tax purposes, aggregated with other properties owned personally by the husband.

108       The 1998 Instrument and the 2002 Instrument and accompanying dispositions, which together were the subject of the s 106B orders, had operated directly or indirectly upon or by reference to the state of affairs of the Trust which otherwise had been established and administered under the 1981 Instrument and the 1983 Instrument.

109       The primary judge proceeded upon the "guidelines" that the court first determine "the assets, liabilities and financial resources of the parties to the marriage", then consider "all relevant contributions of each of the parties", and "the prospective components of the claims of each of the parties", identify any "alteration" having regard to relevant s 75(2) factors and, finally, consider whether the proposed order was "just and equitable" (s 79(2)).

110       The primary judge under the heading "Conclusion" stated:

"The net assets of the parties should be divided 52 per cent/48 per cent in the husband's favour. As a result ... it is necessary to exercise the discretion to set aside the instrument and disposition[s] of 18 January 2002. The assets of the Trust need to be actually in the asset pool for division to allow the wife to receive her entitlement as the figures will shortly indicate."

111       Under the heading "Just and equitable", his Honour said that pursuant to s 79 an order could not be made unless the court was satisfied that in all the circumstances it was "just and equitable" to make the order. His Honour continued:

"The net asset pool comprises a monetary equivalent of \$9,818,144.37. Thus, the effect of my decision is that the husband is entitled to net assets to the value of \$5,105,435 (in round dollars) and the wife is entitled to net assets to the value of \$4,712,709 (in round dollars).

The wife has or has had the benefit of net assets totalling \$2,530,406.80 and the husband has or has had the benefit of net assets totalling \$1,790,108.15.

Thus, the husband will have to pay to the wife the sum of \$2,182,302 (in round dollars). *Where that will come from though is entirely up to the husband.* On the figures he has assets to the value of \$1,790,108.15 less \$57,727.15 being the amount he has paid for legal costs, but I have found that the *assets of the ICF Spry Trust can be treated*

*as his property once the relevant instruments and dispositions are set aside, and thus that is a source of funds for the husband. My orders though will not permit the husband to apply the assets that he assigned to the children because he himself successfully argued that the discretion to set aside that disposition should not be exercised where the husband has the ability to otherwise meet the order. That of course will not prevent the husband reaching some arrangement with the children about this given that I have still notionally added back these assets to the net asset pool of the parties.*

*The husband's position as a result of my proposed orders is therefore somewhat unclear given that it will depend on what he does in relation to the ICF Spry Trust and its assets. However, that is entirely a consequence of the husband's own actions in attempting to remove assets from the reach of the wife and the Family Court, and this cannot prejudice the position of the wife in any way. In any event, on the basis of the applicable figures the proposed orders leave the husband with substantial assets but, of course, with a large proportion of those assets being assets in the ICF Spry Trust. To repeat, it is entirely up to the husband what he then does about this."* (emphasis added)

112 The primary judge then turned to consider the impact his proposed orders would have on the children of the marriage. The effect of his Honour's reasoning is that it was neither unjust nor inequitable against the children that there be applied out of the augmented assets of the Trust the lump sum provided in order 4 for the benefit of the wife.

113 The primary judge said:

"The assets of [the Children's Trusts] will be returned to the ICF Spry Trust, and depending on what the husband does in response to the orders there may or may not be assets retained in that trust for the benefit of the children and the other beneficiaries. Further, although prima facie the children will still have the shares assigned to them by the husband, again the husband may choose to make other arrangements with them about that given that those assets have been notionally treated as the husband's property.

In these circumstances it might be tempting to feel some sympathy for the children, but when analysed that does not necessarily follow. There is simply no basis on which the children can complain about the effect of the orders that I propose. Prima facie they were the innocent victims of the husband's actions. The husband used them initially in his attempt to remove assets from the reach of the wife and the Family Court, and for that the children cannot be criticised, but it is sad that the children

have chosen to thereafter become involved in what is essentially a dispute between their parents. The husband's actions were to divert assets that the parties had accumulated for the benefit of the entire family, yet the children have sought in these proceedings to maintain the position created by the husband. That is unfortunate to say the least given that in reality the children have had the ability as much as the husband has had to prevent this dispute not only from occurring at all but certainly from reaching the heights that it has ...

The consequences of the children's attempts to in effect hold on to assets which they had no direct input in accumulating and which should still be under the control of their parents has been a bitterly fought and extremely costly court case, let alone the negative impact on the family and the relationships between the members of that family."

#### The appeals to this Court

114 The appellants in Appeal No M25 of 2008 are the trustees of the Children's Trusts, for whom Mr D F Jackson QC appeared. The appellant in Appeal No M26 of 2008 is the husband, for whom Mr A J Myers QC appeared. He largely adopted the submissions of Mr Jackson. The wife is a respondent in each appeal and was represented by Mr J T Gleeson SC. Dr I J Hardingham QC appeared for the children of the marriage; they are among the respondents to each appeal. He adopted, and supplemented, the submissions of Mr Jackson.

115 In this Court, as before the Full Court, the husband and other parties supporting his submissions contend to the effect that in the passages set out above the primary judge erred by acting upon a wrong principle or was guided or affected by extraneous or irrelevant matters<sup>68</sup>. In particular, it is said that his Honour erred by treating the assets of the Trust, supplemented by the setting aside of the dispositions in favour of the Children's Trusts, as part of the "asset pool". The reasoning is said to be flawed because it contains as a necessary step the erroneous proposition that the husband could in law apply the assets of the Trust to or for himself.

116 The falsity of that proposition may be accepted. But as will appear in these reasons that is not determinative of success in the appeals to this Court.

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68 See *House v The King* (1936) 55 CLR 499 at 504-505; [1936] HCA 40.

The 1981 Instrument and the 1983 Instrument

117 To assist an appreciation of the issues in the appeals to this Court, something more should be said respecting the terms of the 1981 Instrument and the 1983 Instrument, followed by further reference to the 1998 Instrument and the 2002 Instrument which were "set aside" by the s 106B orders.

118 First, as to the 1981 Instrument. This identified the husband as settlor and as the present trustee. He was empowered by cl 2 to vary the terms of the 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". The "beneficiaries" were identified in cl 4 as meaning all "issue" of the father of the settlor, "and all persons married to such issue". There is a question on the appeals as to whether, since her divorce became effective on 17 February 2003, the wife any longer answers that description. Clause 6 states:

"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 in question or payments to a trust set up substantially for the benefit of such beneficiary; and income not from time to time lawfully paid or applied shall be accumulated."

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 (cl 7).

119 Clause 3 of the 1983 Instrument provided that the "issue" identified in cl 4 of the 1981 Instrument included "all descendants however remote", and stated that any variation in the trusts of that instrument would be invalid to the extent that it purported to confer any right or benefit upon the husband. This supplemented the provision made in cl 2 of the 1983 Instrument as follows:

"The [husband as] settlor hereby releases and abandons all and any beneficial interest or rights held by him or which may hereafter be held by him under the trust instrument or under the said trust or in the trust fund or income thereof and confirms that by reason hereof he ceases 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 thereof may be applied."

It should be noted that the wife remained a beneficiary within the terms of cl 4 of the 1981 Instrument.

120           However, one consequence of cl 4 of the 1998 Instrument had been to remove any power or discretion under cl 6 of the 1981 Instrument to pay or apply the capital of the fund in favour of the husband or the wife or in favour of any trust in which either of them had any interest, right or possibility. Clause 3 of the 2002 Instrument had applied all of the capital and income of the trust fund by assigning a quarter to each of the Children's Trusts constituted on 18 January 2002 and cl 4 varied the terms of the Trust accordingly.

121           What then are the relevant consequences, particularly for the 1981 Instrument and the 1983 Instrument, of the s 106B orders which set aside what was done in 1998 and 2002?

122           In considering that question it should be appreciated that order 8 of those orders requires the husband (and other parties) to do all such acts and sign all documents as may be necessary to give effect to the terms of the s 106B orders and the lump sum provision in order 4, and order 9 confers liberty to each party to apply as to consequential matters.

123           Orders 8 and 9 illustrate the proposition that the grant of federal jurisdiction by s 39 of the Act carries with it the power to do all things necessary to determine conclusively the issue in controversy which attracts it<sup>69</sup>. This state of affairs is supplemented by the terms of s 81 of the Act to which reference has been made earlier in these reasons<sup>70</sup>. Further, relevant common law rights and duties which may otherwise subsist must accommodate compliance with orders made in the exercise of federal jurisdiction. In addition, any State law providing that the rights and liabilities of the parties to the litigation were to be other than as established by or pursuant to the orders of the Family Court would be inoperative by operation of s 109 of the Constitution; the State law would alter, impair or detract from the operation of s 39 of the Act defining the jurisdiction of the Family Court<sup>71</sup>.

124           In her dissenting reasons in the Full Court, Finn J rejected (with respect correctly) the submission that, given the 1983 Instrument remained in effect according to its terms, the assets of the Trust could be treated by the court as

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69 *Fencott v Muller* (1983) 152 CLR 570 at 608-609; [1983] HCA 12; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 293; [1983] HCA 36.

70 At [97].

71 See *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 186 [54]; [2000] HCA 62; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 406 [231]; [2005] HCA 44.

property of the husband for the purposes of s 79 by reason of the "control" he exercised. However, having rejected that submission her Honour then concluded that there could have been no point in making the s 106B orders and the assets of the Children's Trusts should not have been brought into the asset pool. Rather, 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) as applied by s 79(4)(e), and an adjustment then should have been made in favour of the wife. The effect of some of the submissions by the wife is to side-step the reasoning which commended itself to Finn J. Those submissions should be accepted.

### Conclusions

125 The wife was an eligible object of benefaction of the Trust. She was one of the class of "beneficiaries" identified in cl 4 of the 1981 Instrument. The use in that document of the term "beneficiaries" was inapt insofar as it suggested the existence of any vested beneficial interest in the assets held on the trust of the 1981 Instrument. Dr Hardingham correctly identified the wife as one of the class of objects of the discretionary power conferred upon the trustee by cl 6 of the 1981 Instrument. She also was one of the class of objects for division of the fund at the distribution date (cl 7). Furthermore, as an object of these powers the wife had a right in equity to due administration of the Trust<sup>72</sup>. The existence of such a right did not depend upon entitlement to any fixed and transmissible beneficial interest in the trust fund<sup>73</sup>. The right of the wife was accompanied at least by a fiduciary duty on the part of the trustee, the husband, to consider whether and in what way he should exercise the power conferred by cl 6<sup>74</sup>.

126 Reference was made earlier in these reasons to the comprehensive sense in which the term "property" is defined in s 4(1) of the Act<sup>75</sup>. And it will also be recalled that the "property" which may be the subject of orders under s 79(1) of the Act is "the property of *the parties* to the marriage *or either of them*" (emphasis added). The right of the wife with respect to the due administration of the Trust was included in her property for the purposes of the Act. The

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72 *Australian Securities and Investments Commission v Carey (No 6)* (2006) 153 FCR 509 at 519 [30].

73 *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98 at 110 [17]; [2005] HCA 53; *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at 729.

74 *In re Baden's Deed Trusts* [1971] AC 424 at 456 per Lord Wilberforce; cf *Kain v Hutton* [2008] NZSC 61 at [25].

75 See [91].

submissions by Mr Gleeson to this effect should be accepted. The submissions to the contrary by Mr Myers should not be accepted. And in considering what is the property of the *parties* to the marriage (as distinct from what might be identified as the property of the husband) it is important to recognise not only that the right of the wife 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. Observing that the husband could not have conferred the same benefit on himself as he could on his wife denies only that he had property in the assets of the Trust, it 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.

127 The further submission was made by counsel opposed to Mr Gleeson that by the time the primary judge made his orders on 30 November 2005 the parties were divorced and, as a result, the husband as trustee could not then treat the wife as one of the class of "beneficiaries" under the Trust and her property as identified above no longer existed for the purposes of the Act.

128 However, as indicated at an early stage in these reasons, by force of s 4(2) of the Act, the reference in provisions such as s 79 to "the parties to the marriage or either of them" includes a reference to the parties to a marriage terminated by divorce at a time before the court makes its order. Further, the detailed provisions in s 79 respecting adjournment of property settlement proceedings<sup>76</sup> assume that the parties to those proceedings may be parties to the pending divorce proceedings which are completed before the grant of relief in the property settlement proceedings.

129 In such circumstances, which apply in the present case, it is within the power of the court to proceed in the property settlement proceedings "as if"<sup>77</sup> changes to property rights otherwise brought about by the anterior divorce had not yet occurred; this is so, provided it otherwise is just and equitable to proceed in this manner. The order which is made in the property settlement proceedings speaks from the time it is made, but the considerations which govern its formulation are governed by reference to the kind of controversy to be quelled by

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76 Section 79(1B), (1C).

77 cf *Langley v Langley* (1892) 18 VLR 712 at 715, a decision under s 98 of the *Marriage Act 1890* (Vic) and *Dormer v Ward* [1901] P 20 at 33 and *Blood v Blood* [1902] P 78 at 82, cases under s 5 of the *Matrimonial Causes Act 1859* (UK). See also *Rayden's Practice and Law in the Divorce Division*, 2nd ed (1926) at 360-361.



the court – a matrimonial cause in the defined sense – and by the imperative indicated by s 81 of the Act – the final determination of financial relationships between the parties to the dissolved marriage and the avoidance of further proceedings between them.

130 In the circumstances of the present case, it was open to the primary judge to formulate his orders, as he did, on the basis that the "asset pool" comprised \$9,818,144.37 and included the assets of the Trust as supplemented by the operation of the s 106B orders. To proceed on that basis properly reflected what was "the property of the parties to the marriage or either of them" as if the changes to property rights otherwise brought about by the divorce of those parties had not yet occurred. To proceed on the basis propounded by the husband would confine attention to what was *his* property.

131 Some reference was made in argument to the significance to be attached to the presence of s 85A(1). This was introduced by the 1983 Act and states:

"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."

132 The provision appears to have been a legislative response in part to apprehensions that as s 79 stood the court could not "deal directly" with the unascertained interest which a spouse may have in a discretionary trust<sup>78</sup>. However that may be, s 85A should not be read as confining the powers otherwise given by ss 79 and 80 in any relevant respect. In particular, it should not be read as confining the power to make an order for payment of a money sum in a way that would preclude the making of 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.

133 Section 85A should be read as focused upon the variation of settlements of the kinds identified in the provision. No relevant implication of the kind considered in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia*<sup>79</sup> now arises. Of *Anthony Hordern* and the subsequent

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78 Australia, Parliament, *Family Law in Australia: Report of the Joint Select Committee on the Family Law Act*, July 1980, vol 1, §5.117.

79 (1932) 47 CLR 1 at 7, 20-21; [1932] HCA 9.

cases, it was said in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom*<sup>80</sup>:

"Anthony Hordern and the subsequent authorities have employed different terms to identify the relevant general principle of construction. These have included whether the two powers are the 'same power'<sup>81</sup>, or are with respect to the same subject matter<sup>82</sup>, or whether the general power encroaches upon the subject matter exhaustively governed by the special power<sup>83</sup>. However, what the cases reveal is that it must be possible to say that the statute in question confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to the restrictions in the former power. In all the cases considered above, the ambit of the restricted power was ostensibly wholly within the ambit of a power which itself was not expressly subject to restrictions."

134       The relationship between s 85A and the other provisions of Pt VIII of the Act is not of the character described in this passage.

135       The situation of the children of the marriage did not render it other than just and equitable to make the s 106B order with respect to the 2002 Instrument and application of the Trust fund between the Children's Trusts. The interests of no other third parties were involved in setting those transactions aside.

136       As already remarked in these reasons, order 4 in providing for payment by the husband of a lump sum to the wife does not earmark any particular asset of the husband and oblige him to apply it in satisfaction of that order. Nor was there any mandatory order of the nature considered in *Ascot Investments Pty Ltd v Harper*<sup>84</sup> which extinguished the rights or enlarged the obligations of third parties.

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80 (2006) 228 CLR 566 at 589 [59]; [2006] HCA 50.

81 *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7.

82 *R v Wallis* (1949) 78 CLR 529 at 550; [1949] HCA 30.

83 *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 678; [1979] HCA 26; *Refrigerated Express Lines (A/asia) Pty Ltd v Australian Meat and Live-Stock Corporation* (1980) 29 ALR 333 at 347.

84 (1981) 148 CLR 337 at 354; [1981] HCA 1.

137 The conclusion reached by the trial judge (erroneously) that the husband could have applied the whole or part of the Trust fund to or for *his* own benefit is inconclusive of the outcome. The jurisdiction being exercised by the Family Court was, as earlier indicated, jurisdiction over "proceedings between the parties to a marriage *with respect to the property of the parties to the marriage or either of them*"<sup>85</sup> (emphasis added). What matters in this case is that once the 1998 Instrument and the 2002 Instrument 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 the husband, as trustee, to consider whether and in what way the power should be exercised. And because, during the marriage, the husband could have appointed the whole of the Trust fund to the wife, the potential enjoyment of the *whole* of that fund was "property of the parties to the marriage or either of them". Furthermore, because the relevant power permitted appointment of the whole of the Trust fund to the wife absolutely, the value of that property was the value of the assets of the Trust. In deciding what orders should be made under ss 79 and 80 of the Act, the value of that property was properly taken into account. Wrongly attributing its value to the husband is irrelevant to the ultimate orders made.

138 If the husband wishes to satisfy his obligations to the wife under order 4 by recourse to the augmented assets of the Trust then it is open to him to approach the court for an appropriate order to assist him in doing so. By such an order the court would provide the machinery whereby the Trust was to be administered "as if" the wife had not ceased to be the spouse of the husband, and there was an application by the husband as trustee of a stipulated sum in favour of the wife in *pro tanto* discharge of his obligation to her under order 4. It would be for the court to determine whether, putting aside the interests of the children of the marriage for the reasons already given, it was just and equitable to make the order having regard to the interests of any third parties who may also fall within the defined class of "beneficiaries".

139 Whether or in what circumstances the wife may apply for orders of this nature need not be further considered here.

140 The result is that upon the basis explained above the challenged orders made by the Full Court are to be supported as a proper exercise of the powers conferred by the Act. The majority of the Full Court reached the correct result in dismissing the appeal and cross-appeal.

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85 Section 4(1) definition of "matrimonial cause", par (ca).

141 That conclusion makes it unnecessary to consider further (i) the submissions by Mr Gleeson in support of a remitter to consider the "financial resources" issue to which Finn J referred, and (ii) applications by the wife for special leave to cross-appeal against the orders of the Full Court and to rely upon a case supported by s 85A of the Act.

Orders

142 The applications for special leave to cross-appeal should be dismissed but with no order as to costs. The appeals should be dismissed. The matter of costs is for this Court and is not controlled by provisions respecting costs in the Act<sup>86</sup>. In each appeal the appellants should pay the costs of the wife and there should be no costs order in favour of the other respondents.

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**86** *De L v Director-General, NSW Department of Community Services [No 2]* (1997) 190 CLR 207 at 222-223; [1997] HCA 14.

143 HEYDON J. The background to these appeals is set out in the reasons for judgment of Gummow and Hayne JJ. It is convenient to adopt the abbreviations there employed.

The question in the appeals

144 The question in the appeals is whether the Family Court of Australia had power to make the orders it did under s 79(1) of the *Family Law Act* 1975 (Cth) ("the Act"). That depends on whether, in the language of s 79(1):

- (a) the proceedings were "proceedings with respect to the property of the parties to the marriage or either of them"; and
- (b) the orders could be described as "altering the interests of the parties to the marriage in the property".

Section 4(1) of the Act defines "property" thus:

"**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."

The proceedings before Strickland J

145 Strickland J treated the property of the ICF Spry Trust ("the Trust") as part of the asset pool of the parties. By par 4 of his Honour's orders, the husband was ordered to pay the wife \$2,182,302. That sum was significantly in excess of his net assets of \$1,732,381 (\$1,790,108.15 less \$57,727.15 for legal costs). Strickland J considered, however, that the husband's assets were not limited to \$1,732,381. He thought that the assets of the Trust could be "treated as his property" once the 1998 Instrument (excluding himself and the wife from having or obtaining any interest in capital) and the 2002 Instrument (setting up the Children's Trusts) were set aside. The setting aside of the 2002 Instrument caused the assets of the Trust to increase by \$4,760,152. Strickland J implicitly accepted that the order to pay \$2,182,302 would not be just and equitable to the husband unless the assets of the Trust could be "treated as his property". He appears to have concluded that the assets could be "treated as his property" for two reasons, which are not entirely consistent. The first reason was that Strickland J considered it was open to the husband to reinstate himself as a beneficiary of the Trust by revoking the 1983 Instrument or cl 2 of it. The second reason was that even though the husband was, after the 1983 Instrument, no longer a beneficiary of the Trust, his powers as trustee gave him sufficient "control" to cause the Trust property to be regarded as his own property.

The proceedings before the Full Court

146 The second of Strickland J's reasons was expressly disfavoured in the Full Court by both Bryant CJ and Finn J, and apparently also disfavoured by Warnick J. However, Strickland J's first reason, or a variant of it, was upheld by Warnick J who considered that the husband could "reverse his election". Bryant CJ, while disagreeing with Warnick J, advanced another reason: that the 1983 Instrument could be cancelled by agreement between husband and wife. Finn J disagreed with both Warnick J and Bryant CJ in these latter respects.

The position of the husband and the wife after the 1983 Instrument

147 The central issue is whether, even if the 1998 Instrument and the 2002 Instrument are set aside, it can be said for s 79(1) purposes that by 1983 either spouse had "property" in the assets of the Trust.

148 The 1983 Instrument was not set aside by the courts below. The wife has not attempted to have it set aside at any stage. It deprived the husband of any possibility of beneficial interest in the Trust. That left the wife as one of the "beneficiaries" of the Trust as defined in cl 4 of the Trust, being a person married to one of the issue of the husband's father. But she had no entitlement to any part of the income or capital before the "date of distribution" as defined in cl 4 or at the time when the Trust was terminated under cl 5. She could only receive income or capital if the husband, as trustee, decided to pay it, and that lay in "his absolute discretion": cl 6<sup>87</sup>. If the Trust were terminated before the date of distribution pursuant to cl 5, she had no entitlement: the fund was to be equally distributed amongst the male beneficiaries other than the husband<sup>88</sup>. At the date of distribution the fund was to be divided amongst such of the beneficiaries as the trustee thought fit – a class which included the wife – and, in default,

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87 See [13] above.

88 Clause 5 provides:

"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."

amongst the male beneficiaries other than the husband: cl 7<sup>89</sup>. Should cl 6 and cl 7 fail, the fund was to be held for charitable purposes<sup>90</sup>.

149 Under the Trust, the wife was the object of a bare fiduciary power of appointment. So was the husband. These are not propositions which the wife did or could contest. Indeed, she accepted them. From 1983 the husband ceased even to be an object of the power.

150 If in 1983 neither spouse had "property" in the assets of the Trust, it would not be necessary to engage in tasks which consumed the energies of the parties to a very large extent, namely to consider the correctness of Strickland J's reasons for concluding that the assets could be "treated as" the husband's property, or Warnick J's reason, or Bryant CJ's reason. If neither spouse had "property" in the assets, the proceedings could not have been proceedings with respect to the assets, and the parties would have no interests in the assets to be altered. The courts below did not examine this line of thought. Perhaps the parties did not invite them to. But in this Court it was raised.

The positive argument of the trustees and the husband, and the positive argument of the wife

151 The trustees and the husband to some extent advanced a positive argument that neither spouse had property in the assets of the Trust. That argument concentrated on the position of the spouses as objects of the trustee's power of appointment (as they both were before 1983, and as she was thereafter). The wife advanced a separate positive argument as her "primary fundamental submission". It concentrated not on the position of the spouses as objects of the trustee's power of appointment, but on the position of the husband as trustee coupled with the absence of any beneficial interest in any person. It is convenient to examine these arguments in turn.

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**89** Clause 7 provides:

"At the date of distribution the fund shall be divided amongst such of the beneficiaries as the trustee thinks fit and, in default, shall be divided amongst all male beneficiaries equally with the exception of the settlor."

**90** Clause 8 provides:

"In the event of the failure of the trusts set out in clauses 6 and 7 the fund shall be held for charitable purposes, that is, to be applied for scholarships for the sons of persons who have both been pupils of Melbourne Church of England Grammar School and also resident students of Trinity College, Parkville, Victoria."

The positive argument of the trustees and the husband summarised

152 Mr D F Jackson QC, who appeared for the trustees of the Children's Trusts, submitted that no-one was entitled in possession or reversion under the 1981 Instrument, but that the objects of the trustee's power of appointment merely had hopes or expectations coupled with a right of due administration of the Trust.

153 Mr A J Myers QC, who appeared for the husband, supported that submission. Although one of the orders sought by each of Mr Jackson and Mr Myers in their respective written submissions in chief was consistent with these submissions<sup>91</sup>, the submissions were put somewhat briefly, largely in answer to questions from the Court and only in oral address in reply.

154 Messrs Jackson and Myers did accept that a word like "property" is a word of very general and shifting meaning and that when used in a statute it takes its meaning from the context and objects of the statute. They contended that even if the wife's right of due administration of the Trust were assumed to be a right of property, it would not fall within s 79(1)(a) of the Act. That is because the "proceedings with respect to the property of the trustees or either of them" in this case were not proceedings with respect to the right of due administration. They were proceedings with respect to assets – land, shares and money – not proceedings with respect to the right to ensure that those assets were duly administered. That is, the wife had no proprietary right in "the assets in respect of which the right to due administration exists"; she only had a right to due administration, and that was not property the subject of the proceedings.

155 Mr Myers adopted a submission of the judges of the Family Court to a Joint Select Committee of the Parliament of the Commonwealth. The Committee's Report records the submission thus<sup>92</sup>:

"Although the court has wide powers to deal with property under s 79 it can deal directly only with legal and equitable interest [sic] 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".

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91 A declaration "that none of the assets of the ... Trust ... forms part of the property of either or both of Dr Spry and Mrs Spry for the purposes of sections 4, 75 or 79 of the [Act] or financial resources of either or both of Dr Spry and Mrs Spry for the purposes of sections 75 or 79".

92 Australia, Parliament, *Family Law in Australia: Report of the Joint Select Committee on the Family Law Act*, July 1980, vol 1 at 97 [5.117].



The attitude of the wife to the positive argument of the trustees and the husband

156 In *Gartside v Inland Revenue Commissioners*<sup>93</sup>, Lord Wilberforce (Lord Hodson concurring) held that the death of one of the objects of a bare power of appointment of income did not fall within the following words in s 43 of the *Finance Act* 1940 (UK): "an interest limited to cease on a death has been ... determined ... after becoming an interest in possession". In his opinion the objects had no "interest" because no single member of the class had any right to income, and, even if they were considered collectively, they had no right to income because the trustees could accumulate the whole of it<sup>94</sup>. The objects did not have "an interest in more than the broadest popular sense, *in the fund*."<sup>95</sup> Lord Reid (Lords Morris of Borth-y-Gest and Guest concurring) held that the object of a bare power of appointment did not have an "interest", and even if there were an "interest" it was not an "interest in possession". He said<sup>96</sup>:

"'In possession' must mean that your interest enables you to claim now whatever may be the subject of the interest. For instance, if it is the current income from a certain fund your claim may yield nothing if there is no income, but your claim is a valid claim, and if there is any income you are entitled to get it. But a right to require trustees to consider whether they will pay you something does not enable you to claim anything. If the trustees do decide to pay you something, you do not get it by reason of having the right to have your case considered: you get it only because the trustees have decided to give it to you."

157 The wife accepted the applicability to the Trust of what Lords Reid and Wilberforce said. She submitted, citing what their Lordships said<sup>97</sup>:

"No member of the nominated class of objects had a beneficial or proprietary interest in any of the corpus or income of the Trust. What any object had under the Trust was a mere expectancy; an expectation or hope that the trustee may exercise his discretion in his or her favour by the making of a gift".

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93 [1968] AC 553.

94 [1968] AC 553 at 617-618. See [74] above.

95 [1968] AC 553 at 618 (emphasis in original).

96 [1968] AC 553 at 607.

97 And also citing *Federal Commissioner of Taxation v Ramsden* (2005) 58 ATR 485 at 493-494 [35] to the same effect.

158 The wife thus accepted that "the objects had no interest in possession nor an immediate entitlement to income as it accrued, receiving a vested interest only when and to the extent the trustee, in exercising his discretion, distributed trust capital or income to them". For that proposition the wife relied on a statement in *Pearson v Inland Revenue Commissioners* by Viscount Dilhorne<sup>98</sup> that in the legislation there under consideration the words "'interest in possession' ... should be given their ordinary natural meaning which I take to be a present right of present enjoyment".

159 The wife, then, agreed with the contention of the trustees and the husband that she had no beneficial interest in possession arising out of her right to "be considered as a potential recipient of benefit by the [trustee] and a right to have [her] interest protected by a court of equity."<sup>99</sup> Members of the Court did raise with counsel for the wife the question whether her right to due administration meant that she was "entitled" to property. Counsel then said he wanted to put the matter on two levels or in two ways. The first way was his "primary fundamental submission"<sup>100</sup>. "The second way is that it *may be* that the wife's right to due administration of itself can be treated as a matter to which [she] is entitled in possession" (emphasis added). But, although alluded to once later, this was no more than a courteous acknowledgment of, or a forensically tactful gesture to, the idea advanced by members of the Court. Counsel for the wife never in fact put the "second way" in detail. Indeed, he never returned to the subject in any significant fashion. This course was not the result of oversight. It was taken because counsel for the wife did not wish to advance the "second way". He did not wish to advance it because the contrary of it was seen as a necessary step towards acceptance of his "primary fundamental submission". That primary submission was that if there were no owner in equity for an estate of freehold in possession, "the trustee is entitled to the whole estate in possession, both legal and equitable."<sup>101</sup> And counsel for the wife never put a submission that once the 1998 Instrument and the 2002 Instrument were set aside, the wife's potential enjoyment of the whole of the assets of the Trust (in the event that the trustee's power of appointment was exercised in her favour to that extent) was property of a party to the marriage. Any submission of that kind would have been equally damaging to the wife's primary argument. However, the case is not to be decided merely in accordance with the tactical manoeuvrings of the parties, or their

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98 [1981] AC 753 at 775; see also at 786 per Lord Keith of Kinkel.

99 *Gartside v Inland Revenue Commissioners* [1968] AC 553 at 617 per Lord Wilberforce (Lord Hodson concurring).

100 See above at [151] and below at [166]-[167].

101 *Glenn v Federal Commissioner of Land Tax* (1915) 20 CLR 490 at 497 per Griffith CJ; [1915] HCA 57.

agreement on particular legal outcomes. The wife's agreement with the positive argument of the trustees and the husband does not make it right. Is it right?

The positive argument of the trustees and the husband is correct

160

*The position of an object of a bare power.* The proposition asserted by Lords Reid and Wilberforce in *Gartside v Inland Revenue Commissioners*<sup>102</sup> was that the object of a bare power of appointment out of assets has no proprietary interest in those assets, but only has a mere expectancy or hope that one day the power will be exercised in that object's favour. In that case it was asserted in an estate duty context. It has been asserted many times and in many contexts. Thus a settlement of an "interest whether vested or contingent" does not capture a payment of money pursuant to a bare power of appointment<sup>103</sup>. The object of a bare power of appointment cannot assign the "rights" the object has<sup>104</sup>. An injunction restraining a defendant from removal of "assets" was not contravened by transactions causing the defendant to cease to be an object of a bare power of appointment<sup>105</sup>. The "interest" of the object of a bare power of appointment did not fall within the following definition of "property" in the *Corporations Act* 2001 (Cth):

"any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and includes a thing in action."<sup>106</sup>

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*The position of a residuary beneficiary of an unadministered estate compared.* It is true that the object of a bare power of appointment has "a right to be considered as a potential recipient of benefit by the trustees and a right to have

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**102** See [156] above.

**103** *In re Brooks' Settlement Trusts; Lloyds Bank Ltd v Tillard* [1939] Ch 993.

**104** *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at 726 [40]-[41], 729 [51] and 734 [66]. By analogy with the position in relation to expectancies (*In re Ellenborough, Towry Law v Burne* [1903] 1 Ch 697 at 700), assignment for value may be possible (*In re Coleman; Henry v Strong* (1888) 39 Ch D 443 at 447), although Thomas and Hudson, *The Law of Trusts*, (2004) at [7.34] questioned this unless the trust instrument expressly authorises the trustee to pay an assignee.

**105** *R & I Bank of Western Australia Ltd v Anchorage Investments Pty Ltd* (1993) 10 WAR 59 at 79-80.

**106** *Australian Securities and Investments Commission v Carey (No 6)* (2006) 153 FCR 509.

his interest protected by a court of equity."<sup>107</sup> But although the position of the object of a bare power of appointment is sometimes compared with that of a residuary beneficiary of an unadministered estate, it is very different. The right of a residuary beneficiary of an unadministered estate to have the estate duly administered<sup>108</sup> can be assigned<sup>109</sup> or devolve upon death<sup>110</sup>. The residuary beneficiary, while having no beneficial interest in any particular asset of the unadministered estate<sup>111</sup>, is correctly described as being entitled to the appropriate share of the residuary estate<sup>112</sup> and hence as having "property" within the meaning of a broad legislative definition of that expression<sup>113</sup>. None of these characteristics are shared by the object of a bare power of appointment. The object's position depends on the discretion of another. The position of the residuary beneficiary of an unadministered estate does not.

162 *Assignability.* In particular, it is of some significance that the object of a bare power of appointment is incapable of assigning the relevant rights<sup>114</sup>. In *National Provincial Bank Ltd v Ainsworth*, Lord Wilberforce said<sup>115</sup>:

"Before a right or an interest can be admitted into the category of property, or of 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."

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**107** *Gartside v Inland Revenue Commissioners* [1968] AC 553 at 617 per Lord Wilberforce (Lord Hodson concurring).

**108** *Commissioner of Stamp Duties (Q) v Livingston* (1964) 112 CLR 12; [1965] AC 694.

**109** *In re Leigh's Will Trusts* [1970] Ch 277.

**110** *In re Maye* [2008] 1 WLR 315 at 321 [16].

**111** *Commissioner of Stamp Duties (Q) v Livingston* (1964) 112 CLR 12; [1965] AC 694.

**112** *In re Maye* [2008] 1 WLR 315 at 321 [16].

**113** *In re Maye* [2008] 1 WLR 315 at 321-322 [17].

**114** *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at 726 [40]-[41], 729 [51] and 734 [66].

**115** [1965] AC 1175 at 1247-1248.

Of course, what "property" means depends on the context in which and the purpose for which the word is being used. But Lord Wilberforce's statement has been approved more than once in this Court<sup>116</sup>. And on one of those occasions Mason J said<sup>117</sup>:

"Assignability is not in all circumstances an essential characteristic of a right of property. By statute some forms of property are expressed to be inalienable. Nonetheless, it is generally correct to say, as Lord Wilberforce said, that a proprietary right must be 'capable *in its nature* of assumption by third parties'". (emphasis added)

That points against treating the rights of the wife, as an object of a bare power of appointment, as falling within the words of the definition of "property" in s 4(1) of the Act: "property to which [she] is ... entitled, whether in possession or reversion."

163

*Unreasonable results of extending "property"*. If the arguments of Mr Jackson and Mr Myers under consideration were to be rejected, it could only be because the definition of "property" was given an extended meaning. It would be an extended meaning which would lead to a wholly unreasonable result. For it would mean that if a discretionary trust existed under which a wife was among a class of objects of a bare power of appointment having thousands of members who had nothing to do with her family or the husband's family, the Family Court of Australia would have power to make a s 79(1)(a) order altering her "interests" in the assets of that discretionary trust favourably to her. It may be suggested that the absurdity can be overcome by postulating that the Court, properly exercising its discretion, would never do so if its order was adverse to the interests of objects other than the husband and the wife. That is to postulate a "discretion" which can only be exercised one way. A "discretion" which can only be exercised one way is not a discretion at all. The result that the Court has a "discretion" which it can only exercise one way is wholly unreasonable. It is an outcome which strongly suggests that there is in truth no power to consider exercising so empty a "discretion" because the wife's status as an object of the bare power of appointment is not within the definition of "property". "If giving an extended meaning to a word in an Act ... leads to a wholly unreasonable

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<sup>116</sup> *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342; [1982] HCA 69; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 165; [1992] HCA 45.

<sup>117</sup> *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342-343; approved in *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 165-166.

result, that is a very strong indication that the word was not intended to have that extended meaning."<sup>118</sup>

164 *The wrong property rights.* Even if, contrary to the reasoning employed above<sup>119</sup>, the wife's rights are "property" rights, they are not forms of property to which the proceedings were directed. The proceedings were directed to obtaining orders enabling the wife to gain access, directly or indirectly, to the assets of the Trust. In those assets she had no property. Ultimately, then, the question what "property" means must be understood in the context in which the word is used in the legislation containing it. In s 79(1)(a) of the Act the word "property" is used in the context of granting a power to make an order altering the interests of the parties, or one party, in the property. Where the enjoyment by the wife of the property of the Trust after the 1983 Instrument depended not on any decision by her, but on a decision to be made by the trustee in his "absolute discretion" – and the husband need not have remained either the trustee or her husband – there appears to be no work for s 79(1)(a) to do. The difficulty of altering anything which the wife had in a manner useful to the wife suggests that she had no "property" to be altered.

165 *What language would do?* It is possible to conceive of statutory language which could go as far as the wife's goals require. Thus s 163U(1) of the *Duties Act 1997* (NSW) provides:

"A person or a member of a class of persons in whose favour, by the terms of a discretionary trust, capital the subject of the trust may be applied:

- (a) in the event of the exercise of a power or discretion in favour of the person or class, or
- (b) in the event that a discretion conferred under the trust is not exercised,

is, for the purposes of this section, a *beneficiary* of the trust."

Section 163U(2) provides:

"A beneficiary of a discretionary trust is taken to own or to be otherwise entitled to the property the subject of the trust."

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**118** *Gartside v Inland Revenue Commissioners* [1968] AC 553 at 605 per Lord Reid (Lords Morris of Borth-y-Gest and Guest concurring).

**119** See [160]-[163] above.

The Dictionary defines "discretionary trust" as meaning:

"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."

Had the Act contained language of that kind, the wife would have been a "beneficiary". But no equivalent to that language appears in any relevant provision of the Act. The language actually employed in the Act is not apt to give the court power to make s 79 orders in relation to the assets of a "discretionary trust"<sup>120</sup> of the type illustrated by the Trust by reason merely of the right of objects of the power of appointment to enforce due administration and to be considered for favourable exercise of the power. Accordingly the submission made by the judges of the Family Court to Parliament was correct<sup>121</sup>. So are the arguments of Mr Jackson and Mr Myers.

#### The wife's primary submission

166 *Submission not put below.* Counsel who appeared for the wife in this Court did not appear in the courts below. Although the primary argument which he advanced in this Court was formulated, both in the notices of contention<sup>122</sup> and

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**120** The meaning of "discretionary trust" can be protean. In *Federal Commissioner of Taxation v Vegners* (1989) 90 ALR 547 at 552 Gummow J said that "the usage of the term ... is essentially descriptive rather than normative. The meaning of the term is primarily a matter of usage, not doctrine." This approach was adopted in *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 234 [8]; [1998] HCA 4. However, to describe the provisions contained in the Trust as a "discretionary trust" is a standard usage.

**121** See above at [155].

**122** In them the wife contended that the Full Court's judgment should be affirmed but on the ground that it "failed to decide ... that ... the assets in the Trust were  
(Footnote continues on next page)

in argument, in terms capable of being read as suggesting that it had been put to the Full Court, nothing in either the three judgments delivered in that Court or in Strickland J's judgment suggests that it was put in either court below. A perusal of those of the voluminous oral and written arguments of the parties in both courts which have been placed before this Court supports the view that it was not put. At trial the husband simply denied that the assets of the Trust were property of either party to the marriage since neither had a beneficial interest in them. The wife appeared simply to have assumed that s 79 was capable of being applied. The wife seems to have done so on the basis of the "control" theory relied upon by Strickland J. However, although the written submissions of the trustees and the husband in this Court gave the argument so little attention as to suggest that they did not recognise it, they did not contend that this Court could not entertain it. It is regrettable that this Court is deprived of the views of the courts below on the wife's primary submission, but in the present circumstances that is no bar to its being considered.

167           *Submission summarised.* In its simplest terms, the primary submission of the wife was as follows.

- (a) The husband was trustee of the Trust, with the powers of an absolute owner to invest or deal in the Trust property (cl 9).
- (b) Because the trustee's power of appointment under the Trust was a bare power of appointment only in relation to both income and capital, none of the objects of the power had any beneficial interest in possession or reversion. Nor did the classes which were to take in default of appointment in the event of the Trust being terminated under cl 5 or on the date of distribution under cl 7.
- (c) If the legal estate in property is vested in a trustee, and there is no person entitled to the property in equity, then in Griffith CJ's words in *Glenn v Federal Commissioner of Land Tax*, "the trustee is entitled to the whole estate in possession, both legal and equitable."<sup>123</sup>
- (d) Accordingly Strickland J had power to make the orders he did regardless of whether the husband was an object of the power of appointment or not.

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property, within the meaning of the law, to which the husband was owner and entitled in possession, with no other person having a vested interest in the corpus or income of the Trust".

**123** (1915) 20 CLR 490 at 497.



Rejection of the wife's primary submission

168        *Amplitude of orders.* These contentions were supplemented by arguments about the amplitude of the orders that may be made under s 79. Their potential amplitude may be conceded; but whether orders, however ample, can be made depends on whether there are interests of the parties in "property". The potential amplitude of the orders does not necessarily point to amplitude in the meaning of "property", and may point against it.

169        *Griffith CJ's qualification.* When considering what Griffith CJ said as a general matter, independently of any particular statutory context, it is necessary to note one additional thing which he said: "The essential element of an 'estate in possession' is ... that the owner of it has a present right of beneficial enjoyment"<sup>124</sup>. The expression "present right of beneficial enjoyment" is ambiguous. It can mean a right of personal enjoyment. Or it can mean enjoyment subject to a trust which narrows or negates any right of personal enjoyment. While in the example Griffith CJ was considering the trustee had "a present right of beneficial enjoyment", it would be a right qualified, perhaps severely, by the terms of the trust. For example, in the Trust under consideration in these appeals the husband had no right after 1983 to beneficial enjoyment in the sense of being able to take for himself any of the assets. His only right of beneficial enjoyment was to hold the assets and accumulate the income, so far as appointments were not made out of it, for the benefit of the objects of the power of appointment and for those who would take in default. Even before 1983 the husband had no right of beneficial enjoyment in the sense of personal enjoyment until he decided to make an appointment to himself – a decision not to be made without some consideration of whether or not appointments should be made to any other member of the class of objects<sup>125</sup>.

170        *Vested interests.* There is another aspect of the Trust to be borne in mind in considering the wife's argument. Clause 7 provides that at the date of distribution (which may be as late as 2068: cl 4) the fund shall be divided amongst such of the beneficiaries as the trustee thinks fit, and, in default, "shall be divided amongst all male beneficiaries equally with the exception of the settlor." At the time of the trial there were two male beneficiaries alive, namely two nephews of the husband, Andrew and Richard Gardner. They were then over 18. What, if any, is their interest in the assets of the Trust?

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<sup>124</sup> (1915) 20 CLR 490 at 498.

<sup>125</sup> See [156], [161] and [165] above.

171 *In re Brooks' Settlement Trusts; Lloyds Bank Ltd v Tillard*<sup>126</sup> is a case in which Farwell J considered a marriage settlement giving the income of the fund to the wife for life; directing that the fund be held in trust for such of her issue as she might by deed or will appoint; and providing that in default of appointment the fund be held in trust for all her children who being sons should attain the age of 21 years or being daughters should attain that age or marry in equal shares. One of her children, a son, executed a voluntary settlement whereby he assigned to trustees:

"all the part or share, parts or shares and other interest whether vested or contingent to which the settlor is now or may hereafter become entitled whether in default of appointment, or under any appointment hereafter to be made or on failure of any such appointment of and in the trust property ... subject to the wife's settlement".

The question was whether a sum of money which his mother applied to him pursuant to her power under the marriage settlement fell within the voluntary settlement. Farwell J held that it did not, because until the appointment was made, the son had no interest in the fund other than a vested interest in default of appointment<sup>127</sup>:

"[F]or the rest, he had nothing more than a mere expectancy, the hope that at some date his mother might think fit to exercise the power of appointment in his favour; but, until she did so choose, he had nothing other than his interest in default of appointment ... Apart from this he was not contingently entitled at all; he had no interest whatever in the fund until the appointment had been executed."

However, before reaching this conclusion, Farwell J said<sup>128</sup>:

"[I]n the case of a special power the property is vested in the persons who take in default of appointment, subject, of course, to any prior life interest, but liable to be divested at any time by a valid exercise of the power, and the effect of such an exercise of the power is to defeat wholly or pro tanto the interests which up to then were vested in the persons entitled in default of appointment and to create new estates in those persons in whose favour the appointment had been made."

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<sup>126</sup> [1939] Ch 993.

<sup>127</sup> [1939] Ch 993 at 997-998.

<sup>128</sup> [1939] Ch 993 at 997.

Farwell J quoted<sup>129</sup> the following passage from his own edition of *Farwell on Powers*:

"The exercise of a power of appointment divests (either wholly or partially according to the terms of the appointment) the estates limited in default of appointment and creates a new estate, and that, too, whether the property be real or personal."

One other passage from *Farwell on Powers* is relevant<sup>130</sup>:

"The existence of a power of appointment does not prevent the vesting of the property subject to the power in the persons entitled in default of appointment, until the power be exercised".

Further, Lord St Leonards was adamant that the interest of the class taking in default of appointment was not contingent, but vested<sup>131</sup>. The donee of the power in *In re Brooks' Settlement Trusts* was not, unlike the donee of the power in this case, a trustee, but that makes no difference<sup>132</sup>.

172       The husband's two nephews are not entitled in possession. Their interests are vested, but vested only in interest, not possession. Their position, though, highlights the fact that even if Griffith CJ's words are considered as a general or abstract proposition, under the Trust the entitlement of the trustee "to the whole estate in possession, both legal and equitable", is a highly qualified entitlement.

173       *The context of Griffith CJ's words.* But it is not satisfactory merely to consider Griffith CJ's words as a general or abstract proposition. The meaning of words in statutes, and the application of general equitable conceptions in relation to those words, must depend on the nature and context of the particular statute. Griffith CJ was seeking to determine whether the appellants in the case before the Court – the testator's three sons, among whom the testator's residuary estate was to be divided after a period in which the trust income was to be accumulated – were liable to pay land tax. Griffith CJ was considering the meaning of the word "owner" in the *Land Tax Assessment Act* 1910 (Cth). In particular he was considering the following words in the definition of "owner" in s 3: "every

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129 [1939] Ch 993 at 996-997, quoting from Farwell, *A Concise Treatise on Powers*, 3rd ed (1916) at 310-311.

130 Farwell, *A Concise Treatise on Powers*, 3rd ed (1916) at 310.

131 Sugden, *A Practical Treatise on Powers*, 8th ed (1861) at 453.

132 Thomas and Hudson, *The Law of Trusts*, (2004) at [7.28]-[7.29] (especially text accompanying notes 104 and 105).

person who ... whether at law or in equity ... is entitled to the land for any estate of freehold in possession". He considered that "estate in possession" in s 3 had the meaning which Butler's notes to the 10th edition of *Fearne on Contingent Remainders* gave it: "a right of present enjoyment"<sup>133</sup>. Griffith CJ said<sup>134</sup>:

"This is not only the natural, but the only just, interpretation that can be put on the words. For the tax is an annual tax, and the 'owner' of the land is the person who is in the present enjoyment of the fruits which presumably afford the fund from which it is to be paid."

174 *The present context.* Accepting the correctness of what Griffith CJ said, it does not follow from the fact that the trustee of the Trust in these appeals was entitled to the whole of the Trust assets, both legal and equitable, and hence to the present enjoyment of them, subject to his duties as trustee, that for the purposes of the definition of "property" in s 4(1) of the Act the assets comprised property to which he was entitled in possession or reversion. That is because the purpose of the definition is to enable the parts of the Act to which it relates to function. The interests of one spouse as trustee, even in circumstances giving that spouse entitlement to the whole of the assets in possession, are not "property" of the type contemplated by the Act. If they were, it would follow in divorce proceedings that the assets of the Trust could be disposed of to the wife at the expense of other members of the class of objects of the power of appointment. That class did not include only the wife and the children. It included the husband's two sisters, their spouses, and their children (of whom, by the time of the trial, there were four)<sup>135</sup>. The conclusion that a power of this kind exists, even if, as the wife submitted, the court would not as a matter of discretion exercise it adversely to third parties, is surprising. It is surprising that the court should even have to consider the exercise of discretion in those circumstances. It is so surprising that there must be a flaw in the reasoning that led to it. The flaw is the transposition of Griffith CJ's words from the context of the land tax legislation he was considering to s 4(1).

175 *Conclusion.* 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. The wife's submissions would enable a trustee who is not in law entitled to any personal enjoyment of the trust property, and who could never by his or her own act

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<sup>133</sup> (1915) 20 CLR 490 at 497, discussing Fearne, *An Essay on the Learning of Contingent Remainders and Executory Devises*, 10th ed (1844), vol 1 at 2, note (a).

<sup>134</sup> (1915) 20 CLR 490 at 497.

<sup>135</sup> See below at [186].

become entitled to any personal enjoyment of it, to be treated as though he or she were so entitled. The wife's submission would mean that if a husband (or a wife) were trustee of a discretionary trust having a bare power of appointment among persons who are not related to the trustee, and who did not include the trustee, the trustee would be, within the meaning of the definition of "property" in s 4(1), "entitled" to the assets, and the "interests" of the trustee reflected in that entitlement would be altered to the advantage of the other party to the marriage. In *Ascot Investments Pty Ltd v Harper*, Gibbs J said<sup>136</sup>:

"[I]t would be unreasonable to impute to the Parliament an intention to give power to the Family Court to extinguish the rights, and enlarge the obligations, of third parties, in the absence of clear and unambiguous words ...

Except in the case of shams, and companies that are mere puppets of a party to the marriage, the Family Court must take the property of a party to the marriage as it finds it. 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."<sup>137</sup>

Mr Jackson cited these statements. Counsel for the wife attempted to distinguish them, but not convincingly. The words used to define "property" in s 4(1) are not sufficiently "clear and unambiguous" to validate the wife's argument. 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.

#### A subsidiary argument advanced by the wife

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The wife drew attention to the fact that so long as the husband remained trustee he, being both trustee and one of the objects of the power of appointment, would be free lawfully to distribute income and capital to himself. This proposition was only true for the pre-1983 period, for after the 1983 Instrument (which was not set aside below and which the wife never asked to be set aside) the husband was no longer an object of the power of appointment. Even in the pre-1983 period, however, the husband did not have any property. His position, by reason of being both trustee and object, was not that of a person entitled in

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<sup>136</sup> (1981) 148 CLR 337 at 354-355 (Stephen, Aickin and Wilson JJ agreeing); [1981] HCA 1.

<sup>137</sup> There was no allegation of sham, and no employment of any puppet company, in the present case.

possession or reversion. A "general power of appointment" is sometimes said to be "equivalent to property"<sup>138</sup>, because it enables the donee of the power to appoint to any legal person or charitable purpose in the world, including the donee. That is true in the sense that if a general power is exercised in favour of the donee, the donee becomes owner. But a general power is not the same thing as ownership. Thus in *Ex parte Gilchrist; In re Armstrong*<sup>139</sup> Fry LJ said:

"No two ideas can well be more distinct the one from the other than those of 'property' and 'power' ... A 'power' is an individual personal capacity of the donee of the power to do something. That it may result in property becoming vested in him is immaterial; the general nature of the power does not make it property. The power of a person to appoint an estate to himself is ... no more his 'property' than the power to write a book or to sing a song. The exercise of any one of those three powers may result in property, but in no sense which the law recognises are they 'property.' In one sense no doubt they may be called the 'property' of the person in whom they are vested, because every special capacity of a person may be said to be his property; but they are not 'property' within the meaning of that word as used in law. Not only in law but in equity the distinction between 'power' and 'property' is perfectly familiar, and I am almost ashamed to deal with such an elementary proposition ...

That being so, have the Courts ever said that such powers are 'property?' If they have, it would be our duty to follow their decision. But no such imputation can with propriety be cast on the Courts of Law or Equity; they have always recognised the distinction between 'power' and 'property.'"

As Lord Sumner said, "the right to exercise a power is not property"<sup>140</sup>. Thus a covenant to settle after-acquired property does not catch any property over which the covenantor has a general power of appointment unless and until the power is exercised in favour of the covenantor<sup>141</sup>. Hence a general power of appointment is not ownership. It is truer to say that the donee of a general power of appointment is "*for all practical purposes* in the position of beneficial owner of

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**138** Thus in *Tatham v Huxtable* (1950) 81 CLR 639 at 646-647; [1950] HCA 56 Latham CJ quoted words to that effect from *Jarman on Wills*, 7th ed (1930), vol 1 at 458. See also the authorities referred to by Kitto J at 654, and *In re Beatty (decd)* [1990] 1 WLR 1503 at 1507; [1990] 3 All ER 844 at 847-848.

**139** (1886) 17 QBD 521 at 531-532.

**140** *O'Grady v Wilmot* [1916] 2 AC 231 at 270.

**141** *Tremayne v Rashleigh* [1908] 1 Ch 681.

the property"<sup>142</sup>, has "a right of disposition which is *in many respects* the equivalent of property"<sup>143</sup> and is "virtually the owner"<sup>144</sup>.

177 In any event, the husband'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 anyone in the world. And he had no entitlement to any more than any other member of the class.

Applications to amend notices of contention and for special leave to cross-appeal

178 *The applications.* The wife sought leave to amend her notices of contention. The contention she wished to advance was that ss 79 and 85A of the Act enabled and permitted the husband to deal with the assets of the Trust and the Children's Trusts so as to comply with par 4 of the orders made by Strickland J. She also sought special leave to cross-appeal with a view to this Court making new orders based on s 79 or s 85A or both.

179 *Section 79.* So far as these applications rest on a desire to invoke s 79, they are futile in view of the conclusion reached above that the assets of the Trust were not property in which the husband or the wife had interests.

180 *Section 85A: Suttor v Gundowda Pty Ltd.* So far as these applications rest on a desire to invoke s 85A<sup>145</sup>, they face the difficulty that s 85A was not relied on in the trial or in the Full Court. It was first raised by the wife in the course of oral argument before this Court. The wife argued that the nature of the orders she sought at trial was clearly brought to the attention of the other parties. That is true; but in the Second Amended Application for Final Orders which does this, while s 106B and Pt VIIIAA of the Act are referred to, s 85A is not. No order specifically depending on s 85A was applied for. This has some significance, because the application of s 85A depends on characterising the Trust as an

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142 *Tatham v Huxtable* (1950) 81 CLR 639 at 654 per Kitto J (emphasis added).

143 *Grey v Federal Commissioner of Taxation* (1939) 62 CLR 49 at 63 per Dixon J; [1939] HCA 14 (emphasis added).

144 *Muir or Williams v Muir* [1943] AC 468 at 483 per Lord Romer (emphasis added).

145 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."

ante-nuptial or post-nuptial settlement. That is a question arguably capable of having factual elements not investigated at trial. The wife submitted that it was "essentially" a question of construction. However, in seeking to answer it favourably, she did not rely only on the terms of the Trust, but also relied on evidence, including testimony. If she was right to rely on evidence – a proposition contested at least by the trustees – then it would have been open to the husband to have called evidence on the point.

181 The trustees and the husband contended that since no s 85A questions had been agitated at trial, they could not be agitated on appeal. They relied on the rule that "[w]here a point is not taken in the court below and evidence could have been given there which by any possibility could have prevented the point from succeeding, it cannot be taken afterwards."<sup>146</sup> Beyond a reference to the adducing of evidence as to the likely future needs of the possible beneficiaries under the Trust, the trustees and the husband did not specifically identify what the evidence would have been which by any possibility could have prevented any s 85A point from succeeding, but the wife's reliance on evidence dehors the terms of the Trust itself gives plausibility to what the other parties claimed.

182 There are other difficulties with these applications. In view of the fact that this judgment dissents from the orders proposed by the other members of the Court, it will be brief in dealing with the other difficulties.

183 *Post-nuptial settlement?* The Trust was not created in 1981. As the courts below found, it was created in 1968, when the husband prepared the document recording the terms of the Trust which he did not sign until 1981. Since the husband did not marry until 1978, the Trust was not post-nuptial (contrary to the wife's submission). It was made 10 years before the husband married. This difficulty cannot be overcome by treating each disposition of property to the trustee of the Trust after the marriage as the creation of a separate trust. To do so is artificial. And to do so is foreclosed by cl 3 of the Trust, which defines "the fund" as meaning "the trust fund from time to time in existence." There was one "Trust" on which various items of property were held as a mass, not several "trusts" in identical terms in each of which a series of individual items of property were held separately.

184 Further, there is a factual obstacle to accepting the multi-trust theory. Strickland J's mind was admittedly not focused on this precise issue because the parties had not raised it. But the language he used in making findings of fact is consistent only with the assets being transferred from time to time into one trust – the Trust – not a series of trusts. Thus he said:

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<sup>146</sup> *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438; [1950] HCA 35.



"A trust vehicle was used in order to accumulate and use the assets and the income, and ... this does not detract from the circumstance that the assets were the assets of the parties when they went into *the* Trust. Instead of accumulating those assets in their own names, a tax effective family trust was used with a view to benefiting the family." (emphasis added)

It was not submitted that this conclusion was wrong.

185 This point, incidentally, reinforces the view that the principles stated in *Suttor v Gundowda Pty Ltd*<sup>147</sup> do not permit s 85A issues to be considered at this stage. Ultimately the validity of the "multi-trust" theory would depend on the terms upon which the owners of the assets from time to time transferred them to the husband. There is a difference between transferring an asset to the husband as trustee of the Trust, and transferring an asset to the husband as trustee, to be held on a separate trust having the same terms as the Trust. It would be necessary to examine what was written and said when the transfers took place. It has not been shown that the evidence called in that respect is complete.

186 *Made in relation to the marriage?* But can the Trust be said to be ante-nuptial? For a settlement to be an ante-nuptial or post-nuptial settlement, it must have a nuptial character: it must have been "made in relation to the marriage". That is, it must have been made in contemplation of the particular marriage in relation to which s 85A is invoked<sup>148</sup>. There is nothing in the "recitals or substance"<sup>149</sup> of the Trust to suggest that it was. 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" prevents it being ante-nuptial or post-nuptial<sup>150</sup>. At the time of the trial, apart from the four children of the husband and wife, the beneficiaries included the husband's sister, her three children, and the daughter of the husband's deceased sister. The beneficiaries in future would include any person who married those five people, together with 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. Further, however wide the words "made in relation to the marriage" in s 85A(1) are, and their breadth can vary from statute to statute, 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.

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147 (1950) 81 CLR 418.

148 *Brooks v Brooks* [1996] AC 375 at 392.

149 *Joss v Joss* [1943] P 18 at 20 per Henn Collins J.

150 *In the Marriage of Knight* (1987) 90 FLR 313 at 318 per Nygh J.

Conclusion

187       The conclusions just arrived at indicate that there was no point in setting aside the 1998 Instrument and the 2002 Instrument as a means of giving the wife indirect access to the assets of the Trust: those assets were not "property" within the meaning of that word in s 79. That makes it unnecessary to consider the four bases on which Strickland J, Bryant CJ and Warnick J sought to defend Strickland J's orders. 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. Nor is it necessary to consider whether the matter should be remitted to the Full Court, and on what issues. There is also no point in considering whether, if the appeals were allowed, the wife should have to pay the costs of all the appellants, or only one set.

188       It is sufficient to indicate that the appeals should be allowed, the applications to amend the notices of contention should be dismissed, and the applications for special leave to cross-appeal should be dismissed.

189 KIEFEL J. The issues on these appeals concern the inclusion by the primary judge (Strickland J)<sup>151</sup> of the property of the ICF Spry Trust ("the Trust") in the "net asset pool" to which the parties to the marriage had contributed and the treatment of it as property available to Dr Spry ("the husband") to meet an order for payment of a sum of money to Mrs Spry ("the wife") in settlement of her claims to property consequent upon the parties' divorce.

190 The Trust was created in 1968. The parties were married in 1978. His Honour found that the husband made all the financial contributions to the Trust but the wife made indirect contributions to the Trust assets through her efforts in the marriage. His Honour did not make a finding as to the extent of the husband's contribution to the Trust prior to the marriage. The husband's evidence did not suggest that it was substantial. He said that only some small parcels of shares had been acquired by the Trust prior to the marriage. His Honour recorded the purchase of a house property by the Trust, after the marriage and in December 1979, from savings accumulated by the husband prior to the marriage. This subsequently became the matrimonial home. Additions later made to the Trust assets, mostly in the form of investments, were the product of the parties' direct and indirect contributions. His Honour found that the Trust was maintained to allow the parties to accumulate assets for the benefit of the family in the most tax-effective way.

191 The "net asset pool", to which the primary judge had regard in assessing the parties' contributions, included the Trust assets. His Honour found that the parties' contributions were 52 per cent by the husband and 48 per cent by the wife. The net result was that the husband was entitled to \$5,105,435 and the wife \$4,712,709. After taking account of the assets of which the wife had the benefit, the husband was ordered to pay the wife \$2,182,302<sup>152</sup>. Although his Honour said "[w]here that will come from though is entirely up to the husband", he clearly had in mind the Trust assets, which he considered could be treated as the property of the husband. His Honour had found that the Trust was at all times subject to the control of the husband.

192 The husband's evidence, that the Trust was created by him, orally, in June 1968, was not challenged and the primary judge accepted that it had occurred. On 15 October 1981 the husband executed an instrument of the Trust earlier declared. In it he appears as settlor and trustee. The description of "the

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151 The decision of the primary judge was not reported. The decision of the Full Court was reported, in altered form, under the name of *Stephens v Stephens* (2007) 212 FLR 362; [2007] FamCA 680.

152 The Full Court records an error in calculation which is not presently material: see *Stephens v Stephens* (2007) 212 FLR 362 at 429 [306] per Warnick J.

beneficiaries" included the husband and any future wife, for it referred to all the issue of his father and all persons married to such issue. The trustee had an absolute discretion to apply the capital and income of the Trust fund. By a deed executed on 4 March 1983 ("the 1983 Deed") it was said that the husband as settlor "releases and abandons" any beneficial interest or rights held by him under the Trust instrument or in the Trust fund and "confirms that by reason hereof he ceases 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 thereof may be applied" (cl 2). It further provided that "any variation of the trusts of the said instrument shall be invalid to the extent to which it purports to confer directly or indirectly any right or benefit upon the settlor" (cl 3). The purpose of the 1983 Deed, which both the husband and wife signed, was to prevent the Trust property being aggregated with other properties, held in the name of the husband, for land tax purposes. The wife remained a beneficiary as to capital and income.

193 On 7 December 1998 the husband executed an Instrument of Variation of the Trust which excluded both the husband and the wife from benefiting from a distribution of capital from the Trust. The instrument was said to be irrevocable. The husband's explanation as to the need for these changes was not accepted by the primary judge, who found that it was done without notice to the wife and when the marriage was already in difficulty. The parties separated on 30 October 2001. On 18 January 2002 the husband, again without notice to the wife, set up trusts for each of the four children of the marriage and on the same day executed a document providing for the forgiveness and release of all amounts owing to the husband and the wife by the Trust and applying one quarter of the income and capital of the Trust to each of the trusts set up for the children. At the time of these appeals, Mr Kennon was a trustee of three of those trusts.

194 The primary judge found that the husband's actions with respect to the distribution of the Trust property to the children and the steps he had taken in December 1998 were attempts to ensure that that property was beyond the reach of the wife and the Family Court. His Honour made orders setting aside the Instrument of Variation of 7 December 1998 and the dispositions made on 18 January 2002<sup>153</sup>. In doing so his Honour considered the position of the children, but observed that the assets had been accumulated by their parents. Contrary to the husband's assertion, it had not been their intention to benefit the children in their lifetime.

195 In the course of his reasons the primary judge considered the courses open with respect to the Trust property, on the basis that the property would be returned to the Trust. His Honour said that an order directing the trustee to distribute the assets of the Trust, or part of them, directly to the wife would be

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153 Pursuant to the *Family Law Act* 1975 (Cth), s 106B.

"just and equitable"<sup>154</sup>. His Honour considered treating them as a "financial resource" of the husband<sup>155</sup> but determined to proceed upon the basis that they be treated as the property of the husband and as available to meet an order for the settlement of property.

196 A Full Court of the Family Court dismissed the husband's appeal (Bryant CJ and Warnick J, Finn J dissenting)<sup>156</sup>. The majority did not consider that the orders setting aside the 1998 Instrument of Variation and the dispositions from the Trust were the result of a wrong exercise of discretion<sup>157</sup>. Attention then focussed upon whether it was possible for the husband to be re-established as a beneficiary, despite his release and renunciation in the 1983 Deed, in order that effect could be given to the primary judge's orders. Warnick J held that the husband was able to rescind the release<sup>158</sup>. Bryant CJ did not agree with this conclusion, but considered that it remained open to the husband and wife, as parties to the 1983 Deed, to cancel it<sup>159</sup>. In her dissent Finn J held that neither rescission nor variation of the 1983 Deed or of the Trust by the husband was possible so that he could be reinstated as a beneficiary. In her Honour's view the release contained in cl 2 of the 1983 Deed was effective upon execution and could not now be withdrawn<sup>160</sup>. The power of variation contained in the Trust instrument was referable to the Trust as constituted from time to time<sup>161</sup> and must therefore be applied to the situation which applied after the execution of the 1983 Deed. In these conclusions her Honour was correct, with respect. The Deed was effective in its terms. A later cancellation by the parties to the Deed could not alter the effectiveness of the release.

197 Finn J concluded that his Honour the primary judge was in error when he said, at one point, that there was nothing to prevent the husband from revoking

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154 See *Family Law Act 1975* (Cth), s 79(2).

155 *Family Law Act 1975* (Cth), s 75(2)(b).

156 *Stephens v Stephens* (2007) 212 FLR 362.

157 *Stephens v Stephens* (2007) 212 FLR 362 at 430 [313] per Warnick J, 366 [3] per Bryant CJ agreeing.

158 *Stephens v Stephens* (2007) 212 FLR 362 at 443 [371].

159 *Stephens v Stephens* (2007) 212 FLR 362 at 369 [27].

160 *Stephens v Stephens* (2007) 212 FLR 362 at 398 [128].

161 *Stephens v Stephens* (2007) 212 FLR 362 at 398-399 [131].

the 1983 Deed, or part of it<sup>162</sup>. But, as her Honour observed, that possibility was not integral to his Honour's reasoning. The approach which his Honour took, in determining to make the order for the payment of the monies to the wife, was to leave it to the husband to determine how to find the payment of the net amount, although his Honour clearly had in mind that the husband controlled the Trust. Finn J did not consider control, absent the potential for the husband to benefit from the Trust, to be a sufficient foundation for the order. Her Honour noted that no authority in that Court had gone that far<sup>163</sup>. It followed, in her Honour's view, that there was no utility to the orders made under s 106B of the *Family Law Act* 1975 (Cth) ("the Act"), setting aside the dispositions of the Trust property to the children's trusts<sup>164</sup>. In arriving at that view, her Honour expressed agreement with the submission that, because a divorce order had been made, the wife no longer qualified as a beneficiary<sup>165</sup>. It would follow that neither the husband nor the wife could receive any benefit from the Trust.

198 The wife applied to the Family Court ("the Court"), for orders by way of lump sum maintenance and property settlement, on 19 April 2002. While that application was pending, she filed an application for a divorce order in December 2002, in the Federal Magistrates Court. That Court granted a decree nisi on 16 January 2003, which became absolute on 17 February 2003.

199 The proceedings below were conducted upon the basis that the wife was disqualified as an object of the Trust, following upon the termination of the marriage and the loss of her status as a spouse, but prior to the determination of her claim to property. It may be inferred that the primary judge and the Full Court considered that the reference to "spouse" in the Trust instrument is intended to refer to persons having a marital relationship to the issue identified. If it be correct, the provisions of the Act, which do not postpone the making of a divorce order to the resolution of property claims<sup>166</sup>, may have a consequence with respect to some rights. This may have been unintended. Alternatively the timing of orders may have been a matter left to the parties.

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162 *Stephens v Stephens* (2007) 212 FLR 362 at 399 [135].

163 *Stephens v Stephens* (2007) 212 FLR 362 at 400 [137] referring to *Ashton and Ashton* [1986] FLC ¶91-777; *Stein and Stein* [1986] FLC ¶91-779; *In Marriage of Davidson (No 2)* (1990) 101 FLR 373; *In Marriage of Goodwin* (1990) 101 FLR 386; *Webster v Webster* [1998] FLC ¶92-832; *JEL and DDF (No 2)* [2001] FLC ¶93-083; *Milankov and Milankov* [2002] FLC ¶93-095.

164 *Stephens v Stephens* (2007) 212 FLR 362 at 400 [141].

165 *Stephens v Stephens* (2007) 212 FLR 362 at 400 [140].

166 Compare the *Matrimonial Causes Act* 1959 (Cth), s 68(4).

200 The primary judge made a number of orders with respect to the parties' property interests. The order with which these appeals are concerned was made under s 80(1)(a) of the Act, namely an order for payment by the husband of a lump sum. It is an order made by the Court in the exercise of its powers under Pt VIII of the Act. Those powers extend to orders for the maintenance of a party to the marriage (s 74(1)), and for the settlement of property in proceedings between the parties to the marriage with respect to the property of the parties to the marriage (s 79(1)).

201 Jurisdiction is given to the Court<sup>167</sup> and to the Federal Magistrates Court<sup>168</sup>, subject to Pt V of the Act, with respect to a "matrimonial cause". That term is defined in s 4(1) to include (a) proceedings between the parties to a marriage for a divorce order in relation to the marriage; (c) proceedings between those parties with respect to the maintenance of one of the parties; and (ca) proceedings between the parties with respect to the property of the parties to the marriage. The proceedings concerning property are relevantly those "(i) arising out of the marital relationship; (ii) in relation to concurrent, pending or completed divorce or validity of marriage proceedings between those parties".

202 It is evident from these provisions that the Court's powers are directed to persons and their property as "parties to the marriage" regardless of whether a divorce order has been made. The power of the Court is not affected by whether proceedings for a divorce order, "proceedings for principal relief"<sup>169</sup>, have been determined. The Act makes provision for adjournment of property settlement proceedings<sup>170</sup>, including where the Court is of the opinion that there may be a significant change in the financial circumstances of the parties. This may allow the Court to treat the parties as if they continued to be parties to the marriage for the purpose of finalising proceedings concerning property. But it may not prevent some legal effects flowing from the dissolution of the marriage. At least this will be so where the Court is unable itself to deal with property because the interests of a party to the marriage, or their ability to benefit from it, depend upon their status as a party to the marriage. The Act does not deem persons to remain parties to the marriage for all purposes relating to property interests.

203 Courts exercising matrimonial jurisdiction have for some time had the power with respect to property which was the subject of a settlement upon one or

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**167** *Family Law Act 1975* (Cth), s 39(1)(a).

**168** *Family Law Act 1975* (Cth), s 39(1A).

**169** *Family Law Act 1975* (Cth), s 4(1).

**170** *Family Law Act 1975* (Cth), s 79(5).

other of the parties to the marriage, or which made provision for the parties, to apply some or all of it to the benefit of a party to the marriage following upon the termination of the marriage. And the courts have been able to do so despite the loss of status of that party, where it appeared as a condition of the settlement. So long as a settlement remained in existence the courts, if necessary, would vary the condition. The need to do so would most commonly arise where the settlement made continuing provision for that party.

204 Section 5 of the *Matrimonial Causes Act* 1859 (UK) provided that, after a decree of nullity or dissolution of marriage, the court could inquire into the existence of ante-nuptial or post-nuptial settlements of property "made on the parties whose marriage is the subject of the decree" and make orders with respect to the application of the property settled. That provision has been maintained in successive legislation. In *Dormer v Ward*<sup>171</sup> a settlement was made in consideration of a marriage which was subsequently declared a nullity. The settlement was read as varied and extending to "parties whose marriage" was no marriage. The Court of Appeal held that it had power to vary the settlement so long as the settlement was in existence at the time of the decree<sup>172</sup>. That is to say, for the purpose of its inquiry into the settlement, the Court could have regard to a state of affairs which existed before the order was pronounced and vary it.

205 *Dormer v Ward* was followed in *Jacobs v Jacobs*<sup>173</sup>. There the settlement was of covenants to pay annuities to the wife after the husband's death, so long as she remained a widow. The parties were divorced at the time of the husband's death and the wife did not acquire the status of a widow. It was contended that the covenants terminated upon the husband's death. The Court of Appeal upheld the decision of the judge below which omitted the words "a widow" from the condition<sup>174</sup>. More recently, in *C v C (Ancillary Relief: Nuptial Settlement)*<sup>175</sup> it was held that where the husband and wife were removed as beneficiaries from a settlement prior to their divorce, orders of variation could be made<sup>176</sup>. The

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171 [1901] P 20.

172 *Dormer v Ward* [1901] P 20 at 33 per Vaughan Williams LJ.

173 [1943] P 7, which dealt with the corresponding provision in the *Supreme Court of Judicature (Consolidation) Act* 1925 (UK), s 192.

174 *Jacobs v Jacobs* [1943] P 7 at 11 per Goddard LJ, du Parc LJ agreeing.

175 [2004] Fam 141; affirmed on appeal in [2005] Fam 250.

176 Under the *Matrimonial Causes Act* 1973 (UK).



settlement was held to have continued in existence at the date of the orders, notwithstanding that the features which made it nuptial had been removed<sup>177</sup>.

206 In each of these cases the statute provided the court with the power to deal with property the subject of a nuptial settlement. The continuing status of a party to the marriage did not affect the exercise of that power. In the *Family Law Act* 1975 such a provision is found in s 85A, which provides:

- "(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.
- (3) A court cannot make an order under this section in respect of matters that are included in a financial agreement."

207 The section was introduced by the *Family Law Amendment Act* 1983 (Cth). Neither the Explanatory Memorandum nor the Second Reading Speech concerning that Act discuss the reason for its inclusion. The Explanatory Memorandum says that the provision which became s 85A is similar in terms to s 86(2) of the *Matrimonial Causes Act* 1959 (Cth). Section 86(2) was not in the same terms. It provided that the court could make such orders as it considers just and equitable with respect to the application for the benefit of the parties to and children of the marriage of property dealt with by ante-nuptial or post-nuptial settlements "on the parties to the marriage, or either of them". In this latter respect it followed the English provision. Section 85A refers to "settlements made in relation to the marriage".

208 It is not apparent why a provision in similar terms to s 86(2) of the 1959 Act did not appear in the Act of 1975 as passed. It may have been assumed that the reference to the "property of the parties to the marriage" in s 79(1), the interests in which the Court could alter, was wide enough to extend to settlements. But s 79 is limited by the definition in s 4(1) of "property", in relation to the parties to a marriage, as being property to which they are entitled in possession or reversion. In the present case the wife sought to rely upon the

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<sup>177</sup> *C v C (Ancillary Relief: Nuptial Settlement)* [2004] Fam 141 at 148 [24] per Wilson J; see also *Radziej v Radziej* [1967] 1 WLR 659; [1967] 1 All ER 944.

husband's entitlement as trustee to possession of the Trust property, but that would be in his capacity as trustee and not as a party to the marriage.

209 The Report of the Joint Select Committee on the Family Law Act<sup>178</sup>, which predated the 1983 amendment, discussed the need for powers to be given to the Court with respect to family trust or company arrangements. It followed upon the receipt of submissions, including submissions from the Family Court<sup>179</sup>. It is not difficult to infer that s 85A was directed to the use of discretionary family trusts and other structures used for holding assets acquired in the course of a marriage, for tax-related and other purposes. Vehicles such as these had been in common use for some time prior to 1983. 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<sup>180</sup>. It may have in common with such settlements a disposition of property for the purposes of regulating the enjoyment of the settled property and it may provide for succession<sup>181</sup>. It limits the alienation and transferability of the property<sup>182</sup>. It cannot involve an absolute interest in property, given that the statutory provisions referred to give the courts power to vary it<sup>183</sup>. 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<sup>184</sup>. It may imply some kind of continuing provision for them<sup>185</sup>. Beyond these characteristics, no definition of a settlement is possible.

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178 Australia, Parliament, *Family Law in Australia: Report of the Joint Select Committee on the Family Law Act*, July 1980, vol 1.

179 Australia, Parliament, *Family Law in Australia: Report of the Joint Select Committee on the Family Law Act*, July 1980, vol 1 at [5.117]-[5.123].

180 See *Brooks v Brooks* [1996] AC 375 at 391, 392 per Lord Nicholls of Birkenhead.

181 *Halsbury's Laws of England*, 3rd ed, vol 34 at 428.

182 *Micklethwait v Micklethwait* (1858) 4 CB (NS) 790 [140 ER 1302].

183 *Brooks v Brooks* [1996] AC 375 at 391.

184 *Prinsep v Prinsep* [1929] P 225 at 232 per Hill J.

185 *Brooks v Brooks* [1996] AC 375 at 391.

211 Necessarily the settlement spoken of must have the "essential character" of being nuptial<sup>186</sup>. In the past, settlements made in consideration of a marriage were commonly made by others, such as a member of the families concerned, upon one of the parties to the marriage. This may account for the language employed by the English provision which refers to a settlement "on the parties whose marriage is the subject of the decree"<sup>187</sup>. In more recent times a settlement has been applied to a wide variety of dealings with property by the parties to the marriage in making provision for their or their family's benefit. The provision respecting the parties and their family may provide a "nuptial" element.

212 Although the term "settlement" in this area of law may defy definition, much is to be gained from the context in which it appears and the statutory purpose. In *Brooks v Brooks*<sup>188</sup> the width of the meaning given to the term by the authorities was considered to accord with its statutory purpose, which is to provide the court with power to deal with the changed situation brought about by divorce, where it is desirable that the court have power to alter the terms of a settlement. This object does not suggest any narrow meaning should be given to the term<sup>189</sup>. The liberal meaning given to "settlement", having regard to the purposes of the legislation, has been stated on many occasions in English authority<sup>190</sup>. In *Dewar v Dewar*<sup>191</sup>, it was observed by Dixon CJ, Kitto and Menzies JJ that "the conception of 'settlement' had been carried to lengths which might seem a little surprising"<sup>192</sup>. But, their Honours said, "it must be borne in mind that the essential purpose of [the provision<sup>193</sup>] 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.

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**186** See *C v C (Ancillary Relief: Nuptial Settlement)* [2005] Fam 250 at 262-263 [44], 265 [53]; [2004] Fam 141 at 147 [20]-[22].

**187** *Matrimonial Causes Act* 1859 (UK), s 5.

**188** [1996] AC 375 at 392.

**189** *Brooks v Brooks* [1996] AC 375 at 392 per Lord Nicholls of Birkenhead.

**190** *Bosworthick v Bosworthick* [1927] P 64; *Prescott (formerly Fellowes) v Fellowes* [1958] P 260 at 281-282; *C v C (Ancillary Relief: Nuptial Settlement)* [2005] Fam 250 at 263-264 [46]-[47].

**191** (1960) 106 CLR 170; [1960] HCA 79.

**192** *Dewar v Dewar* (1960) 106 CLR 170 at 174.

**193** Section 9 of the *Matrimonial Causes Act* 1875 (Q) which is in terms similar to the English provision.

213 In *Dewar* a transfer of land into the names of a husband and wife as joint tenants was held to be a settlement to which the section referred. There were no trusts, no successive interests and no express limitations. It was considered sufficient that joint ownership was itself a fetter upon alienation and it involved survivorship. Their Honours said that the surrounding circumstances showed that the land was bought and the house was built as a future or continued provision for the husband and wife and that "joint ownership was adopted as the appropriate expression for the provision"<sup>194</sup>. On those facts, it was not to go too far to regard the transfer to joint ownership as a post-nuptial settlement<sup>195</sup>.

214 The case for the wife has not sought to rely upon the Court's power under s 85A of the Act until this point. The trustees submit that she should not be permitted to ventilate an issue not raised below. In addition to matters of policy, about the due administration of justice<sup>196</sup>, it is said that the wife should be held to the conduct of the proceedings below<sup>197</sup>, having regard to the position of the other parties, including her husband as trustee of the Trust and the children. In particular it is said that the other parties may have conducted their case on a different basis, or called other or additional evidence. It is further put that leave to amend the notices of contention, or special leave to cross-appeal, should be refused because the wife's reliance upon s 85A is misplaced. It is submitted that the Trust predated the marriage but it is neither an ante-nuptial nor a post-nuptial settlement and that s 85A can have no application. It is convenient first to consider this contention.

215 The point made by the trustees is that it is not sufficient that Dr Spry had in mind the prospect of his future marriage and children of that marriage, as he did, when he settled the Trust orally in 1968. Cases dealing with the English provisions have made it plain that the settlor must have in mind *the* marriage in

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**194** *Dewar* (1960) 106 CLR 170 at 174 per Dixon CJ, Kitto and Menzies JJ.

**195** *Dewar* (1960) 106 CLR 170 at 174.

**196** *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at 1608 [51] per Gleeson CJ, McHugh and Gummow JJ; 200 ALR 447 at 461; [2003] HCA 48.

**197** *Water Board v Moustakas* (1988) 180 CLR 491 at 497; [1988] HCA 12; *Owners "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 68 ALJR 311 at 313; 120 ALR 12 at 14; [1994] HCA 5, referred to in *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 415; [1994] HCA 54; *Suvaal v Cessnock City Council* (2003) 77 ALJR 1449 at 1467 [105]; 200 ALR 1 at 27; [2003] HCA 41; *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at 1608 [52]; 200 ALR 447 at 461.

question for the settlement to qualify as ante-nuptial<sup>198</sup>. In *Joss v Joss*<sup>199</sup> it was explained that a settlement made before the marriage, but not in relation to the particular marriage, is not within the section because the particular marriage must be a fact of which a settlor takes account in making the settlement<sup>200</sup>.

216 One of the differences between the English provisions and s 85A of the Act, as earlier noted, is that the former refer to settlements of property "made on the parties whose marriage is the subject of the decree", whereas s 85A provides power with respect to property dealt with by ante-nuptial settlements (or post-nuptial settlements) "made in relation to the marriage". These words<sup>201</sup> may require a less direct connection between a settlement and the marriage. It cannot be doubted that the connection required by "in relation to" must be as between the settlement and the particular marriage, that which is the subject of the divorce (or nullity) proceedings, for the purposes of s 85A. The Act has as its subject marriage and s 85A has application in proceedings under the Act<sup>202</sup>. That leaves the question of the degree of association which is necessary and its relevance to the question of the temporal relationship between settlement and marriage, which arises in the present case.

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<sup>203</sup>. As Toohey and Gummow JJ said in *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service*<sup>204</sup>, the words are prima facie broad and designed to catch things which have a sufficient nexus to the subject. The question of nexus is dependent upon statutory context. Amongst the examples

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**198** *Hargreaves v Hargreaves* [1926] P 42; *Melville v Melville and Woodward* [1930] P 159.

**199** [1943] P 18.

**200** *Joss v Joss* [1943] P 18 at 20 per Henn Collins J.

**201** Which did not appear in s 86(2) of the 1959 Act as earlier mentioned.

**202** See *Lansell v Lansell* (1964) 110 CLR 353 at 359, 361-362 per Kitto J, 367 per Taylor J (in connection with s 86(1) of the 1959 Act); [1964] HCA 42.

**203** See, for example, *Fountain v Alexander* (1982) 150 CLR 615 at 629 per Mason J; [1982] HCA 16; *Perlman v Perlman* (1984) 155 CLR 474 at 484 per Gibbs CJ, 489 per Mason J; [1984] HCA 4; *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 330, 331 per Toohey and Gummow JJ; [1995] HCA 36.

**204** (1995) 184 CLR 301 at 330-331.

given by their Honours was the consideration given by Gibbs CJ, in *Perlman v Perlman*, to the meaning of the words "in relation to" in the *Family Law Act* with reference to two sets of proceedings. His Honour said that they "import the existence of a connection or association between the two proceedings, or in other words that the proceedings in question must bear an appropriate relationship to completed proceedings of the requisite kind"<sup>205</sup>.

218 The process of construing s 85A, in order to determine its intended operation and the degree of connection necessary between settled property and the marriage, requires consideration of the language and purpose of the Act<sup>206</sup>. The process of construction should begin with examining the context of the provision in question<sup>207</sup>. "Context" includes the existing state of the law and the problem that the statute was intended to remedy<sup>208</sup>. It has earlier been observed that s 85A was intended to extend the Court's powers to property which did not fall within s 79, but which nevertheless fell within the conception of a nuptial settlement of property.

219 There is another feature of the Act introduced in 1975 which informs a reading of s 85A and which reflects the focus of the section as being on the property dealt with by the settlement. An important aspect of the Act, so far as concerns settlements of property, is that it requires the Court to make orders respecting property by reference to the contributions of the parties to the marriage to property which is accumulated in the course of the marriage. And as s 85A(2) shows, the relevance of the parties' contributions is not limited to "property" of the parties as strictly defined in s 4. This policy, which facilitates a distribution and settlement of property, was not present in the 1959 Act or in the English legislation.

220 Section 86(1) of the *Matrimonial Causes Act* 1959 (Cth) provided that the court could require a party to the marriage to make such a settlement of property to which they are entitled (in possession or reversion) as the court considers just and equitable in the circumstances of the case. Section 86(2) dealt with ante-nuptial and post-nuptial settlements, as earlier mentioned. "Settlement", in

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205 *Perlman v Perlman* (1984) 155 CLR 474 at 484.

206 *Dewar* (1960) 106 CLR 170; *Brooks v Brooks* [1996] AC 375; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28.

207 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ.

208 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; [1997] HCA 2.

s 86(1), had a wider meaning than in s 86(2). Toose, Watson and Benjafield<sup>209</sup> observed that the view which prevailed until 1965, was that the court's jurisdiction under s 86(1), to make an order that was just and equitable, was at large. This was partly arrested by the decision in *Smee v Smee*<sup>210</sup>, where Sugerman J explained that the purpose of s 86 was to provide for the settlement and adjustment of all matters arising out of the marital relationship; proprietary relationships "whether in relation to free property of the spouses or to settled property" were to be adjusted and dealt with<sup>211</sup>. The 1959 Act did not require the court to take account of the parties' contributions to property acquired during the marriage. However, in *Smee*, Sugerman J said that the "material consideration affecting the property itself would commonly be that the claiming spouse has assisted in its acquisition or accumulation, not necessarily by monetary contribution ... and not necessarily so as to give rise to a proprietary interest in the strict sense"<sup>212</sup>.

221 The Act passed in 1975 contains express and detailed provisions for the assessment of contribution to property in s 79(4)<sup>213</sup>. It requires the Court, in proceedings with respect to the settlement of property, to take into account the contributions, financial and otherwise, direct and indirect, which a party has made to the acquisition, conservation or improvement of the property<sup>214</sup>, amongst other matters. The Court is not to make an order altering the interests of the parties in their property unless satisfied that it is just and equitable to do so<sup>215</sup>.

222 More recent English legislation<sup>216</sup> introduced a reference to contributions by the parties to the welfare of the family as relevant to property proceedings<sup>217</sup>.

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**209** *Australian Divorce Law and Practice*, (1968) at 521 [761].

**210** (1965) 7 FLR 321.

**211** *Smee v Smee* (1965) 7 FLR 321 at 326.

**212** *Smee v Smee* (1965) 7 FLR 321 at 327.

**213** And see *Family Law Act* 1975 (Cth), s 75(2)(j) in connection with orders for maintenance.

**214** *Family Law Act* 1975 (Cth), s 79(4)(a), (b).

**215** *Family Law Act* 1975 (Cth), s 79(2).

**216** *Matrimonial Proceedings and Property Act* 1970 (UK), ss 4, 5; *Matrimonial Causes Act* 1973 (UK), ss 24, 25.

**217** *Matrimonial Proceedings and Property Act* 1970, s 5(1)(f); *Matrimonial Causes Act* 1973, s 25(1)(f).

It was thought to shift the emphasis from the previous concept of the maintenance of a spouse and children to the redistribution of assets<sup>218</sup>, but does not go so far as the Australian legislation in the latter's concentration upon the parties' contributions to property<sup>219</sup>.

223 Of particular importance for present purposes is the requirement that the Court consider the parties' contributions in exercising its power under s 85A(1). Section 85A(2) requires that the matters referred to in s 79(4) be taken into account "so far as they are relevant" in the Court's consideration as to what (if any) order should be made under sub-s (1). It must be taken as intended that the Court consider any contributions, direct or indirect, to the property the subject of a nuptial settlement.

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. 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 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

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218 *Wachtel v Wachtel* [1973] Fam 72 at 77 per Ormrod J.

219 And see Parkinson, "The Yardstick of Equality: Assessing Contributions in Australia and England", (2005) 19 *International Journal of Law, Policy and the Family* 163.



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. The Trust property represents contributions of the parties and is held on terms of a settlement. It is "property dealt with by ... settlements".

226 The settlement in this case may also be regarded as having the requisite nuptial element. The approach for which the trustees contend, which would deny the application of the section to the Trust as an ante-nuptial settlement, is one which has regard to the situation at the time the Trust was made. At that point it could not have been referable to *the* marriage. Such an approach is literal and emphasises the words "*ante-nuptial ... settlements*" and "*made in relation to the marriage*". It may assume importance where the settlor's intention is relevant, but no such issue arises here. It could hardly be said that the settlor's intentions here were unfulfilled. A preferable approach is one which gives effect to the purposes of the section. If necessary, particular words in the section should be adjusted to that end<sup>220</sup>.

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.

228 The submissions for the trustees would also deny that the property held by the Trust was settled after marriage, by viewing the original settlement of the Trust as the only one to which s 85A(1) can apply. It may be accepted that the Trust was the form adopted as the expression of the nature of the provision the parties intended for themselves<sup>221</sup>, but it does not reflect the continuous nature of the parties' contributions to the Trust throughout the marriage. An approach which recognises settlements of property made from time to time by the parties

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**220** *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [70] per McHugh, Gummow, Kirby and Hayne JJ.

**221** *Dewar* (1960) 106 CLR 170 at 174 per Dixon CJ, Kitto and Menzies JJ.

to the marriage is more consonant with the focus of the Act on the property which is the subject of a settlement and the contributions which the parties make to that property during the course of a marriage. Such an approach is therefore better able to give effect to the goals of the Act<sup>222</sup>. It facilitates both an identification of property the subject of contributions and a means of assessing that contribution, as earlier observed.

229 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<sup>223</sup>. It has been said that it is sufficient for the establishment of a trust that property is impressed with a trust obligation<sup>224</sup>. In any event the conception of a settlement in s 85A is substantially informed by statutory context and purposes.

230 In construing s 85A(1) it should be borne in mind that the property to which it refers will in many cases be property which reflects the contributions of the parties to the marriage, whether direct or indirect. A settlement coming within the section may take many forms so long as it has the essential characteristics earlier spoken of. The words "ante-nuptial or post-nuptial" should be taken to refer to all settlements made before or after marriage which have the connection of which the following words speak. The settlement must be associated with the marriage the subject of the proceedings. The necessary association will often be provided by the allocation of property into a trust or other fund and by the provision the settlement makes for the benefit of the parties to the marriage, or their children.

231 The trustees also placed reliance upon the description of the beneficiaries of the Trust, which extended beyond the husband and wife and the children of the marriage. By this means it was sought to deny the necessary nuptial element of the Trust. The husband's sisters and their issue also fell within the class of beneficiaries. The question of the impact of any order under s 85A upon those

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**222** *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [70] per McHugh, Gummow, Kirby and Hayne JJ.

**223** See *Atwill v Commissioner of Stamp Duties* (1970) 72 SR (NSW) 415 at 426 per Mason JA, reversed in *Atwill v Commissioner of Stamp Duties (NSW)* (1971) 125 CLR 203, but not on this point; [1971] HCA 63; reversed *Commissioner of Stamp Duties (NSW) v Atwill* (1972) 126 CLR 665; [1973] AC 558.

**224** *Baldwin v Commissioner of Inland Revenue* [1965] NZLR 1 at 6 per Macarthur J, referring to *Underhill's Law relating to Trusts and Trustees*, 11th ed (1959) at 3; applied in *Tucker v Commissioner of Inland Revenue* [1965] NZLR 1027 at 1030 per Woodhouse J.

persons may be put to one side for present purposes. So far as concerns the character of the Trust, their inclusion does not deny the nuptial element. Regard must be had to the circumstances pertaining to the Trust, for the purposes of s 85A. 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.

232 It is necessary at this point to return to the question of whether the wife should be permitted to place reliance upon s 85A for the first time on the final appeal. The rule, that this should not be permitted, is strictly applied unless the point sought to be raised is one of construction of law and the facts necessary have been established<sup>225</sup> or, as was said in *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council*<sup>226</sup>, where the point sought to be raised is about the legal characterisation of the facts established in the courts below. This would not be so if there was a discretion to be exercised in relation to these facts, and the primary judge had not had an opportunity of exercising that discretion<sup>227</sup>.

233 The question raised by s 85A is whether it is just and equitable for the Court to apply the settled property for the benefit of the parties to or the children of the marriage. In doing so the Court is required to take into account the matters referred to in s 79(4), so far as they are relevant<sup>228</sup>. In the present case the primary judge had undertaken that exercise, not only with respect to what might properly be called the property of the parties to the marriage, but also with respect to the Trust property. It is difficult to comprehend what further evidence the husband, the trustees and the children could have put forward in connection with the Trust, its property or the parties' contribution to it. The Trust, and the wife's claim to it, was central to the parties' cases.

234 The primary judge found that the wife should receive a sum of money, in addition to specific property, representing her contribution to the pool of assets which had been created by the endeavours of the husband and wife. The problem that faced his Honour was how the husband could meet that sum from the assets

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**225** *Water Board v Moustakas* (1988) 180 CLR 491 at 497-498 per Mason CJ, Wilson, Brennan and Dawson JJ.

**226** (2008) 82 ALJR 1505 at 1518 [66]; 249 ALR 602 at 617; [2008] HCA 48.

**227** *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438 per Latham CJ, Williams and Fullagar JJ; [1950] HCA 35.

**228** *Family Law Act* 1975 (Cth), s 85A(2).

at his disposal. His Honour's answer to that question was that it could, and should, come from the Trust property. His Honour found that the wife should be paid out of the Trust, but considered that that result could only be effected by the husband. That was not a correct view, having regard to s 85A(1). Action, on the part of the husband, was not necessary to appropriate so much of the Trust property as was necessary to meet the primary judge's order. The Court could make an order directly applying that property to her benefit. It did not need to have regard to the status of either the wife or the husband as beneficiaries in order to do so.

235 Section 85A(1) provided the power and the means by which the trial judge's findings and intention could be carried into effect. The question sought to be raised is one which does not depend upon the establishment of further facts. All that was involved in the exercise of the discretion in s 85A(1) had been dealt with by the primary judge, who had determined that the settled property, or part of it, should be applied to the benefit of the wife. The primary judge had taken into account the interests of the children in connection with the application of the Trust property, as s 85A(1) requires.

236 The position of the other beneficiaries under the Trust had not assumed importance in his Honour's reasons, no doubt because of the view he took of the true nature and purpose of the Trust<sup>229</sup>. It was submitted for the husband that it was not intended that the Court should make orders that would operate to the detriment of third parties. *Ascot Investments Pty Ltd v Harper*<sup>230</sup>, to which reference was made, was not concerned with a situation such as concerns the third parties in this case. It was there held that the Family Court had no power to order directors of a company to register shares, where the Memorandum and Articles of Association of the company enabled them to decline to do so, at least where the company was not controlled by the husband<sup>231</sup>. It was not doubted that the rights of third parties may be indirectly affected by orders of the Court<sup>232</sup>. It has long been accepted that third party interests could be altered by courts dealing with property the subject of a nuptial settlement<sup>233</sup>. Whether, and the

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**229** Part VIIIAA of the *Family Law Act* 1975 (Cth), which deals with orders binding third parties, did not apply to these proceedings.

**230** (1981) 148 CLR 337; [1981] HCA 1.

**231** *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337 at 343 per Barwick CJ, 354 per Gibbs J.

**232** *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337 at 343 per Barwick CJ, 354 per Gibbs J.

**233** *Blood v Blood* [1902] P 78.

extent to which, a court would alter such interests might depend upon the remoteness or uncertainty of those interests<sup>234</sup>. Here the interests of the other beneficiaries, in the due administration of the Trust, were always subject to the husband's control. The extent of that control, to the detriment of the third parties' interests, was shown by the attempted distribution of the entire Trust property to the children's trusts.

237 This litigation has been lengthy and costly, involving as it did parties in addition to those to the marriage. In the unusual circumstances of this case the wife should be permitted to rely upon s 85A. It may be inferred that a failure to do so at an earlier point was the result of a misapprehension about the applicability of the section, a misapprehension which may not be limited to the parties to these proceedings. The proper construction of the section, in order to explain its intended operation, is a matter of general importance. All that was outstanding in this case, and which s 85A resolves, was how effect could be given to the primary judge's orders. The only variation required to the orders made is that the sum to be paid to the wife be applied from the Trust property.

#### Orders

238 I would dismiss the appeals and grant special leave to cross-appeal in each matter on the ground that s 85A of the Act enabled the Court to deal with the Trust property. I would allow the cross-appeals; vary the orders of the primary judge by deleting the order numbered 4 and order in lieu that the wife be paid the sum of \$2,182,302 out of the assets of the ICF Spry Trust and that the husband do all such things as are necessary to effect that payment. In each appeal the appellants should pay the costs of the wife, including the costs of the cross-appeal. There should be no order for the costs of the other respondents.

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234 *Prinsep v Prinsep* [1929] P 225.