WHEN FAMILY LAW, FAMILY BUSINESS AND TRUSTS COLLIDE

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DISCRETIONARY TRUSTS

It is quite common in Family Law proceedings for a court to have to deal with a trust. Many family businesses are operated through a discretionary trust which can be used to distribute profits amongst members of the family in the most tax effective way. The difficulty with a family trust is that in effect the parties involved in the business have divested themselves of any beneficial interest in all or part of the business assets.

The beneficiaries under a trust do not own the property of the trust. The property is held by the trust itself that is a separate entity. In the context of family law matters then, strictly speaking, the property of the trust is not the property of the parties to the marriage or the relationship or either of them within the meaning of property under the Act. This does not however limit the ability of a Court exercising jurisdiction under the Act to deal with the property owned by a trust.

In this paper I deal with how courts exercising jurisdiction under the Family Law Act 1975 deal with discretionary trusts and the assets of those trusts. In doing so I will examine the following matters:

- The powers of a Court under the Family Law Act to adjust the interests of parties to a marriage or de facto relationship in property.
- What is considered to be property under the Act.
- How a Court adjusts property between parties to a marriage or de facto relationship?
- How the Courts deal with Discretionary Trusts
- Sham Trusts
- Trust Documents to obtain and inspect.

Principles of the Division of Property under Section 79 of the *Family Law Act* 1975

The *Family Law Act* 1975 ("the Act") confers jurisdiction on Courts to divide properties between parties to a marriage upon separation. Section 79(1) of the Act gives the Family Court the power to alter the interests of all of the parties in property. It provides as follows:

"In proceedings with respect to the property of the parties to a marriage…the Court may make such order as it considers appropriate altering the interests of the parties in the property, including an order for a settlement of property in substitution of any interest in the property and including an order requiring either or both of the parties to make, for the benefit of either or both of the parties or a child of the marriage, such settlement or transfer of property as the Court determines."

De facto Couples

On 1 March 2009 further changes were made to the Act[i]. Part VIIIAB into the Act and gives a Court exercising jurisdiction under the Act power over financial matters relating to de facto relationships. It applies to de facto relationships where the period or the total of the periods of the de facto relationship is at least two years or where there is a child of the de facto relationship or one party has made a significant financial contribution ot the relationship[ii]

Section 90SM(1) is in similar terms to Section 79(1) but applies to the breakdown of a de facto relationship. The new provisions apply to de facto partners (heterosexual and same sex). On that basis the principles of division of property under apply not only to married couples but to defacto partners[iii].

What is Property?

Property is defined in Section 4(1) of the Act as follows:

> ***"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 term property has been found by the Family Court to have an extremely wide meaning. In the matter of **Duff and Duff (1997)**[iv] the Full Court of the Family Court (quoting an old English authority) stated that:

> ***"Property is the most comprehensive of all terms which can be used in as much as it is indicative and descriptive of every possible interest which 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 as or which the Family Court of Australia should have jurisdiction to intervene…"***

The Full Court then went on to say[v]:

"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 where s4 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."

In the case of **Duff** itself a husband had appealed against an order of the Family Court where the trial judge had included shares held by each of the parties in the family company as being property. The Full Court said:

> *"…we are of the view that shares held by the husband and the wife in the proprietary company of which they are the sole shareholders is property within the meaning of the Family Law Act 1975."*

The Full Court also gave other examples[vi]:

> *"Property is that which belongs to a person exclusive of others and can be the subject of bargain and sale. It includes goodwill, trademarks, licences to use a patent, book debts, options to purchase, life policies and the rights under a contract."*

In the matter of Kennon v Spry [2008][vii] which I deal with in more detail later, French CJ in dealing with whether a trust is property said:

> *"The word "property" in s79 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 FLA"*[viii]

Other Examples of Property

Other examples of what the Family Court has found to be "property" under the definition in the Act include an option to purchase a property; an interest in a partnership; a claim in a proprietary fund held in a fixed trust; choses-in-action; a party's interest under a trust depending on the nature of the interest and the degree of control; a share in a public or private company; a vested interest in an estate; an option to purchase and the vested bankrupt property in relation to a bankrupt.[ix]

Superannuation

The ***Family Law Legislation Amendment (Superannuation) Act*** **2001** also amended the Act to allow a Court to be able to deal with and make orders with regard to superannuation and in particular the splitting of superannuation. Up until 2001 this had been a very difficult area for the Court to deal with as superannuation did not constitute property and the Courts had difficulty in dealing with it. This changed after the Act was amended. So quite clearly the Act confers jurisdiction to deal with superannuation entitlements. Section 90MC of the Act provides that "a superannuation interest is to be treated as property."

In dealing with property a Court will look at all of the property of the parties whether that be in the joint names of the parties or in the individual names of the parties. A Court will look at the legal and equitable interests in property of both parties. They will also look at the property of the parties regardless of when it was acquired ie before the marriage, during the marriage or after separation. For example, if one party to the marriage owned a property prior to the marriage and still owns that property at the time of settlement that

property will be taken into account. If a party acquires an asset after the date of separation then that asset will be taken into account in determining the pool of assets.

Factors the Court Takes Into Account in Considering What Orders Should Be Made Under Section 79

Section 79(4) of the Act sets out a number of factors that are to be taken into account in considering what orders should be made with respect to any property of the parties to a marriage or either of them. The Section enables the Family Court to adjust property aspects of the relationship between the parties in a fairly broad equitable way. The Court is given very wide discretionary powers to alter the interests of the parties in any property owned by one or both of them in order to achieve a result which is just and equitable. The sets of factors set out in Section 79(4) of the Act can be broadly categorised under two different headings being "contributions" and what I will call parties "current and future needs and means".

Contribution Factors

The first set of factors can be described as contribution factors. These are set out in Section 79(4)(a), (b) and (c) of the Act. Those factors are as follows:

(a) The financial contributions made directly or indirectly…to the acquisition, conservation and improvement of any of the property of the parties to the marriage…;

(b) The contribution (other than a financial contribution) made directly or indirectly to the acquisition, conservation or improvement of any of the property of the parties of the marriage..;

(c) The contributions made by a party to the marriage to the welfare of the family including any contribution made in the capacity of homemaker or parent.

Once the Court has determined what constitutes the property of the parties then the next step is to look at the above factors. Those factors require a retrospective look at the various contributions both of a financial and non-financial nature that each party has made to the marriage based on the three provisions above. They include both financial and non-financial contributions together with any contributions made by either of the parties as homemaker or parent.

Parties Current and Future Needs and Means

The second set of factors under Section 79(4) (or Section 90SM(3) in de facto matters) can be generally described as factors relating to the current and future means and needs of the parties. Section 79(4)(e) is the main current and future needs and means provision, which incorporates the factors set out in Section 75(2) of the Act which relate to the maintenance of the parties. To a lesser extent Section 79(d), (e), (f) and (g) also require the Court to take into account the future means and needs of the parties. Those factors provide as follows:

(d) The effect of any proposed order upon the earning capacity of either party to the marriage;

(e) The matters referred to in sub Section 75(2) so far as they are relevant;

(f) Any other order made under this Act effecting a party to the marriage or child of the marriage; and

(g) Any child support under the *Child Support (Assessment) Act* 1989 that a party of the marriage has provided, or is to provide, for a child of the marriage.

The provisions allow a Court to take into account the factors such as respective earning capacities of the parties and their respective financial resources. These factors allow a Court to make adjustments in the alteration of property between the parties regardless of the contributions made by each of the parties to the property. A glance at the factors taken into account by Section 75(2) shows the broad factors a Court can take into account. Section 75(2) provides as follows:

(a) The age and state of health of each of the parties;

(b) The income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;

(c) Whether either party has the care or control of the child of the marriage who has not attained the age of 18 years;

(d) Commitments of each of the parties that are necessary to enable the party to support:

    (i) himself or herself;

    (ii) A child or another person that the party has a duty to maintain.

(e) The responsibilities of either party to support any other person;

(f) Subject to sub Section (3) the eligibility of either party for a pension, allowance or benefit…;

(g) Where parties have separated or the marriage has been dissolved a standard of living that in all of the circumstances is reasonable;

(h) The extent to which the payment of maintenance to any party whose maintenance is under consideration would increase the earning capacity of that party by

enabling that party to undertake a course of education or training or establish himself or herself in a business or otherwise to obtain adequate income;

(ha) The effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant;

(j) The extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party;

(k) The duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration;

(l) The need to protect the party who wishes to continue that parties' role as parent;

(m) If either party is cohabiting with another person – the financial circumstances relating to the cohabitation;

(n) The terms of any order made or proposed to be made under Section 79 in relation to:

(i) The property of the party;

(ii) Vested bankruptcy property in relation to a bankrupt party; and

(naa) The terms of any order or declaration made, or proposed to be made under Part VIIIAB in relation to:

(i) A party to the marriage; or

(ii) A person who is a party to a defacto relationship with a party to the marriage; or

(iii) The property of a person covered by paragraph (i) and of a person covered by sub paragraph (ii) or either of them; or

(iv) Vested bankruptcy property in relation to a person covered by sub paragraphs (i) and (ii)

(na) Any child support under the *Child Support Assessment Act* 1989 that a party to a marriage has provided, is to provide or might be liable to provide in the future for a child of the marriage; and

(o) Any fact or circumstance which in the opinion of the Court, the justice of the case requires to be taken into account; and

(p) The terms of any Financial Agreement that is binding on the parties to the marriage; and

(q) The terms of any Part VIIIAB Financial Agreement that is binding on a party to the marriage.

Section 75(2) gives a Court the power to make a further adjustment to the property settlement between the parties after having assessed contributions by applying the contribution factors set out in the Act. The primary role of Section 75(2) factors in a property settlement is one of adjustment. On that basis the Court can use Section 75(2) adjustments in a mix of the following:

- Adjustment of capital in recognition of a loss of earning capacity and the likelihood of reaching a position to obtain gainful employment.
- Provision of capital where there are child care and other similar considerations.
- Capital to fill an expectation about a particular standard of living.
- An adjustment for disparity and financial resources.[x]

The approach a court should take in dealing with the above factors was summarised by the Full Court in the matter of Ferraro (1993) with the Full Court at page 617 stating as follows:

"A now well established line of authority in this Court indicates that the approach normally to be taken in the exercise of the discretion in Section 79 proceedings. That approach is firstly to ascertain the property of the parties at the time of the hearing then to consider the 'contributions' of the parties within paragraphs (a) to (c) of Section 79(4) of the Act and then to consider what matters in paragraph (d) to (g) and especially paragraph (e) which takes up by reference the provisions of Section 75(2) which are generally referred to as the Section 75(2) factors."

Just and Equitable

There is then a fourth step in the process. After a Court has determined the first three steps set out above the fourth step is set out in Section 79(2) of the Act which provides that the Court:

"Shall not make an order under this Section unless it is satisfied that, in all of the circumstances, it is just and equitable to make the order."

Section 79(2) of the Act confers a great deal of discretion upon a trial judge dealing with an adjustment of property interests between parties pursuant to Section 79 of the Act.

The Full Court in the matter of Hickey and Hickey (2003)[xi] considered this fourth step (page 78,386):

"The case law reveals that there is a preferred approach to the determination of an application brought pursuant to the provisions of Section 79. That approach involves four interrelated steps. Firstly, the Court should make findings as to the identity and value of the property, liabilities and financial resources of the parties at the date of the hearing. Secondly, the Court should identify and assess the contributions of the parties within the meaning of Sections 79(4)(a), (b) and (c) and determine the contribution based entitlements of the parties expressed as a percentage of the net value of the property of the parties. Thirdly, the Court should identify and assess the relevant matters referred to in Sections 79(4)(d), (e), (f) and (g) ('the other factors') including because of Section 79(4)(e) the matters referred to in Section 75(2) so far as they are relevant and determine the adjustment (if any) that should be made to the contribution based entitlements of the parties established at step 2. Fourthly, the Court should consider the effect of those findings and determination and resolve what order is just and equitable in all of the circumstances of the case."

STANFORD AND STANFORD [2012][xii]

In dealing with s79 and in particular s79(2) the High Court stated :

"First, it is necessary to begin consideration of whether it is just and equitable to make a property settlement order by identifying, according to ordinary common law and equitable principles, the existing legal and equitable interests of the parties in the property……The question posed by s79(2) is thus whether, having regard to those existing interests, the court is satisfied that it is just and equitable to make a property settlement order"[xiii]

TRUSTS

Discretionary Trusts can pose problems for court dealing with property matters pursuant to the Family Law Act 1975. The Trust is a separate entity. The beneficiaries under a trust do not own the property of the trust. The property is owned by the trust itself being a separate entity. In the context of family law matters then, strictly speaking, the property of the trust is not the property of the parties to the marriage or the relationship or either of them within the meaning of property under the Act. This does not however limit the ability of a Court exercising jurisdiction under the Act to deal with the property owned by a trust. The question to be answered in a matter involving a Discretionary Trust is whether the Trust or the assets of the Trust come under the definition of property for the purposes of section 79 of the Act.

Who is in control of the Trust?

The first thing that should be looked at is the trust deed. The trust deed will set out details such as:

- Who is the settler of the trust (person who creates the trust)?
- Who is the trustee?
- Who are the beneficiaries?
- Who is the appointer (person who has power to appoint and remove the trustee)?
- Who is the guardian (again has control over the activities of the trustee).

The deed will also deal with the powers of the trustee, powers of the appointer and/or the guardian. It will have set out details in relation to the distribution of income, power to vary the trust deed and other such matters.

The appointer of the trust has the power to remove the trustee at any time and to appoint a new one. The power to remove a trustee and replace a trustee with another has regularly been regarded as indicating that the trust is entirely under the control of the person with that power of appointment. In a situation where one of the parties to a marriage has effective control of the trust then the Family Court has substantial powers to affect the assets and activities of the trust.[xiv]

The other documents relating to a trust that need to be examined are the financial statements and financial returns of the trust. These will show the income and capital of the trust; how the income and or capital have been distributed to the beneficiaries; the expenditure for the trust and the assets and liabilities of the trust.

THE CASE LAW

There are a number of cases in which the Family Court and the Full Court of the Family Court have dealt with the issue of Discretionary Trusts in property proceedings.

IN THE MARRIAGE OF KELLY (No 2) (1979)[xv]

In that case the parties were married in 1950. In 1954, the husband acquired some 3,000 acres of the partnership land for a nominal price. In 1969, a company was formed. The shareholders were the wife and the family accountant with the remaining shares being held by the wife, the accountant and the husband's brother as trustees for the Boorpool settlement. The Boorpool settlement was a discretionary family trust created at the same time as the company. The eventual beneficiaries were the three children of the marriage. The trustees were identical with the company's directors (i.e. the wife, the accountant and the husband's brother). The husband was not a beneficiary, settlor or appointor under the trust. The trust fund consisted of shares in the company and dividends. In1969, the

company purchased from the husband 1,550 acres of his original 3,000 acres. The remainder of the 3,000 acres remained in the husband's name. Subsequently, the company purchased a nearby property which the husband managed. The husband leased back 1,550 acres he had sold to the company[xvi].

The Full Court remarked that, nevertheless, what had been said in *Duff* as to the definition of "property" was not broad enough to cover the assets held by a family company or held by trustees of a discretionary trust.[xvii] In that case the he 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. 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 husband. The assets could be taken into consideration as a "financial resource" of the husband within the meaning of s75(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 s79 because "the husband could not assert any legal or equitable right in respect of them". That was a case in which the husband had neither a legal nor a beneficial interest[xviii].

ASHTON AND ASHTON (1986)[xix]

The husband and wife were married in 1974. In 1977 a family trust was created with the husband and his cousin appointed co-trustees of the trust. In 1980 the husband removed himself as trustee and appointed as trustee a company in which he and the wife were directors and shareholders. In 1982 the husband removed that company as trustee and appointed a second company as trustee in which the husband and his cousin were shareholders. The cousin held his share on trust for the husband. The husband had full control of the assets of the trust. In 1978, the husband, as trustee of the trust, purchased a farming and grazing property for the sum of $428,470. The wife contributed $25,000 which was approximately 6% of the purchase price. The property was sold in 1981 for the sum of $1,269,050. The parties separated on 1 January 1982 and the wife received $105,000. The wife commenced proceedings in the Family Court for a property settlement and lump sum maintenance.

The trial Judge assessed the wife's contribution under sec. 79(4) of the Family Law Act 1975 as 25% of the value of the sale price of the property. The husband was ordered to pay the wife the sum of $275,000 and to appoint himself trustee of the family trust and cause the trust to pay the lump sum to the wife.

The husband and wife appealed. The husband sought orders that the wife's application for property settlement and lump sum maintenance be dismissed and that the wife surrender any claim that she had in respect of the family trust. The wife sought by way of property settlement the sum of $500,000 out of the moneys held in the trust.

The husband argued that he did not own property worth $275,000 and that the property of the trust was not his property. He also argued that the trust deed precluded him from appointing himself as trustee and that the trial Judge had erred in calculating the wife's contributions under sec. 79 of the Family Law Act 1975 as 25% of the trust.
In Ashton the husband had the power of appointment under the trust deed and had been the trustee of the family trust but replaced himself as trustee with a company but continued as sole appointor. He was not a beneficiary but received income from the trust. He conceded that he was in full control of the assets of the trust.[xx]

The Full Court held that no person other than the husband has any real interest in the property or income of the trust except at the will of the husband The Court held that the powers and discretions that the husband had in his position as appointer of the trust amounted to de facto ownership of the property of the trust as no person other than the husband had any real interest in the property or income except at his Will. The Full Court upheld the trial judge's orders in the matter that the husband should appoint himself as trustee so as to make a payment to the wife and found that he did not require him to deal with any property which was not his own or infringe any rights of the third party[xxi].

In his judgment Strauss J (with whom Ellis and Emery JJJ agreed) stated[xxii]:

> *"It was conceded throughout that the husband was in full control of the assets of*

the trust, and the evidence made it clear that he was applying them and income from them as he wished and for his own benefit. Having regard to the admissions made during the hearing, there are good grounds for saying that the trust is no more than the husband's alter ego. However, even on the construction of the trust deed in the light of the relevant facts, it would seem that the husband has power to appoint himself as trustee. It is apparent that by the deed the husband was, in fact, appointed trustee and that he acted as such in accordance with the terms of the deed. In my opinion, in all the circumstances, the proper construction of the deed is that the husband himself can be both appointor and trustee, but that other persons cannot hold both offices. It may be that the husband cannot become a named beneficiary under the deed, but, in my view, the fact that he is not one of the named beneficiaries does not preclude him in practice from receiving the full benefit of the settlement. As has been seen, para. (8) and (11), setting out the names of beneficiaries, include a company in which, for instance, a child or other relative of the husband may have a shareholding, or a trust in which a child or other relative of the husband may have an interest. There is nothing to prevent the husband from holding the overwhelming majority of the shares in such a company or from having the greater interest in such a trust. Furthermore, as long as the distribution is made to the company or the trust, the husband can get the full benefit of such a distribution.

In the result, having regard to the powers and discretion which the husband has, and having regard to what has in fact taken place, for the purposes of sec. 79, the husband's power of appointment, and all the attributes it carries with it, amounts to de facto ownership of the property of the trust. His Honour's order that he should appoint himself trustee so as to make a requisite payment was not contrary to the trust deed on its proper construction, nor did it require the husband to deal with property which was not his own.

The Full Court went on to refer to Ascot Investments Pty. Ltd. v. Harper and Harper …… and said[xxiii]:

" the question was whether orders of the Family Court could affect the rights which a company had. A trust is, of course, a very different entity from a company. A company is a separate legal person. A trust, on the other hand, is not a separate

legal person. The legal owner of the trust property is the trustee and the beneficiaries are the equitable owners of the trust property. The powers which the husband has in the Ashton Family Settlement give him control of the trust either as trustee or through a trustee which is his creature, and at the same time he is able to apply all the income and property of the trust for his own benefit. In my opinion, in a family situation such as the one here, this Court is not bound by formalities designed to obtain advantages and protection for the husband who stands in reality in the position of the owner. He has de facto legal and beneficial ownership. In Ascot Investments Pty. Ltd. v. Harper and Harper (supra) Gibbs J. said at p. 76,061:

``The position is, I think, different if the alleged rights, powers or privileges of the third party are only a sham and have been brought into being, in appearance rather than reality, as a device to assist one party to evade his or her obligations under the Act. Sham transactions may always be disregarded. Similarly, if a company is completely controlled by one party to a marriage, so that in reality an order against the company is an order against the party, the fact that in form the order appears to affect the rights of the company may not necessarily invalidate it.

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.''

No person other than the husband has any real interest in the property or income of the trust except at the will of the husband"

GOODWIN & GOODWIN ALPE (1991)[xxiv]

The parties were married in October 1983 and separated in June 1987. The husband was found by the trial Judge to have assets of almost $3m while the wife had assets of $117,000. The trial Judge found, however, that the wife made only a very small contribution over the short period of the marriage to the acquisition, conservation and

improvement of the husband's assets and an insignificant contribution to his resources. His Honour concluded that the wife should receive 10% of the husband's assets, namely $300,000.

The husband argued that the amount given to the wife was excessive given the shortness of the marriage and his Honour's findings as to contribution, and that the wife should receive only $100,000. **The husband also argued that the trial Judge was in error as to the manner in which he treated the assets of a trust whose beneficiaries were the husband and wife and various other members of the family.** The husband submitted that the assets, which totalled just over $2m, should have been treated as a resource in which he had only a partial interest and not as his property. The trial Judge had found that the assets of the trust were in fact assets of the husband; no one other than the husband had any real interest in the property or income of the trust, except at the will of the husband.

The husband also argued that the real basis for his Honour's finding lay in the fact that the husband had a power of appointment of a trustee. He said that this power should be regarded as a fiduciary power to be exercised for the benefit of the trust and not for any particular beneficiary.[xxv]

The husband had the sole power of appointment of the trustee which was under his control and he was a beneficiary to whom the trustee could make payments exclusive of other beneficiaries as the husband saw fit. The husband was not entitled to be a trustee but was sole appointor and also a beneficiary, the Full Court upheld a finding that the trust property was, in reality, the property of the husband.

The Full Court said as follows[xxvi]:

> *"If those statements of principle are applied to the facts of this case we have no doubt that his Honour was entitled to find that the trust property was, in reality,*

the property of the husband in the present 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 exclusively of other beneficiaries as the husband saw fit. If further evidence was needed that the husband controlled both the Trustee and the trust for his own purposes, it is to be found in the fact of the removal of the wife and her son as beneficiaries of the trust following the separation. This evidence confirms both the power of the husband and the fact that the Trustee acted as his creature. We consider that his Honour rightly disregarded the fact that the Trustee had made distributions to relatives of the husband other than himself. It is not without significance that these distributions were made following the separation and, in any event, it is apparent from the husband's evidence that, whether these distributions were made or not, lay entirely within his control."

DAVIDSON AND DAVIDSON (1991)[xxvii]

This was an appeal by the husband against Family Court orders for property settlement. The parties were married in 1940. After they separated in 1985 the marriage was dissolved in 1989. Early in the marriage the husband had become managing director of a company, Thurlstane, and by 1961 he had acquired a substantial shareholding in that company. In 1977 a trust known as the MAVK Trust was set up by deed in which the husband was named as appointor and the wife's brother D was named as settlor. The trustee was a company known as MAVK Pty Ltd in which the wife and the husband had equal shares. In May 1978 the husband purported to transfer to the MAVK Trust all but one of his shares in Thurlstane. In March 1989 the husband pursuant to his power of appointment under the trust deed removed MAVK Pty Ltd as trustee and appointed in its place Lestato Pty Ltd, a company in which the shareholders were the husband and the company secretary.

The trial Judge found that the husband had complete control of this company and that it was to be regarded in essence as the husband's alter ego. His Honour also found that the trust was the creature of the husband within the full meaning and effect of Ashton's case ((1986) FLC ¶91-777) and Stein's case ((1986) FLC ¶91-779)[xxviii].

On appeal the Full Court held that the husband had the power of appointment of the trustee and was excluded as being a beneficiary under the trust. Nevertheless the Family Court in that case held that the power of appointment gave the husband complete control of the trust. The Full Court (Simpson, Murray and Nygh JJ) referred to the decision of Strauss J in Ashton and said[xxix]:

> *"We adopt the words of Strauss J. when dealing with the Ashton Family Settlement deed, that no person other than the husband has any real interest in the property or income of the M.A.V.K. Trust except at the will of the husband, and that therefore he has the de facto ownership of the trust property. We are of this view notwithstanding the existence of a valid trust. The reality of the matter is that the husband can lawfully benefit directly any of the potential beneficiaries at any time or, indirectly, himself. As to the tax consequences, it appears to us that the Commissioner of Taxation could only impose tax if he avoided the trust. It is implicit in the findings of the learned trial judge that the trust is not a sham. This is our view also. His Honour therefore quite properly, did not take any possible tax consequences into account".*

HARRIS & HARRIS (1991)[xxx]

The parties married in July 1965 and separated in May 1989. There were three children of the marriage. During the marriage the wife was engaged for the most part as homemaker and parent. When in 1979 the husband started a business which was conducted as a partnership of himself and the wife, the wife continued for the most part to be engaged in the home although she did assist in some of the business operations if asked to do so. In 1982 a family trust was formed which purchased the business from the partnership. The superannuation fund was established soon afterwards.

The trial Judge found that the assets of the parties at the date of the hearing included the respective amounts standing to the credit of the parties in the superannuation fund and the value of the assets of the family trust[xxxi].

The Full Court *(*Ellis, Strauss and Lindenmayer JJ) considered the terms of the Trust Deed in the matter and said as follows[xxxii]:

> *In order to determine the nature of the interest of a party under a trust deed, it is necessary to consider the trust deed in the light of the relevant factual circumstances. For present purposes and having regard to some of the arguments, it suffices to say that neither the directors of the operating company, nor the operating company as such, have any beneficial interest in the trust property. As was pointed out in Ashton, a trust as such is not a legal person, although the trustee itself must be a legal person. The trust deed here is in one of the usual forms. It provides for an appointor who has the power to remove any trustee and to appoint another trustee or additional trustees. In the present case, the appointor is the husband. The trust deed also provides for a guardian who, again, is the husband. For practical purposes as regards disposition of trust property or trust income the trustee is under the complete control of the guardian. The trustee with the consent of the guardian has power to pay all the income and all the capital of the trust fund to the husband. There is only one exception to this and that is that income which has been set aside for a beneficiary or which is held on trust for a specified beneficiary ceases to form part of the trust fund. Allocated income which has not been paid to the beneficiary is thereafter held on a separate trust for that beneficiary."*
>
> In this particular the Full Court stated that[xxxiii]:
>
> "the husband had the fullest power of disposition over the property and the income of the trust, including the power to cause to have distributed to himself all its income and all its corpus. If he should choose to do so, no person could complain of any breach of trust. If the trustee were to be unwilling to carry out his

wishes, he could replace the trustee with another company which was in his effective control or any other person who would do his bidding. *The very object of the Trust, as appearing from the instrument, was to put the husband, his appointor and guardian into the position of complete and unfettered control just as if he were the owner of the property. This arrangement was not a sham. It was a genuine transaction intended to bring about the legitimate income tax advantage and may have had other commercial motives.*"

In conclusion the court said[xxxiv]:

In our opinion, the husband's interest as a beneficiary under the Trust in combination with his rights and powers as appointor and guardian place him, for the purpose of section 79 of the Family Law Act into the position of an owner of property which property is constituted by his interest and his rights and powers under the Trust. This property is properly evaluated as equivalent to the value of the assets of the Trust. Under s 79 the court may make orders altering the interests of the parties in this property. If necessary, the court may require the husband to exercise his rights and powers under the Trust Deed so as to bring about a settlement of property out of the corpus or income of the Trust for the benefit of the wife."

JEL and DDF (2001)[xxxv]

The parties had assets worth $42,993,630.00. Most of the pool of assets which constituted that net worth were in various trusts. The husband and the wife were sole directors and equal shareholders in each of the trustee companies. The Court found that in their capacity as directors and shareholders the husband and wife may:

"Vote to distribute any or all of the income and/or capital of the trust to the husband and/or the wife in their absolute discretion. The husband as the appointer of the family

trust, or the husband and the wife as the sole directors and equal shareholders (in the trustee companies), may appoint the husband and/or the wife as trustees of the respective trusts, thereby enabling a distribution of any or all of the income and/or capital of the trust to the husband and the wife.

The second beneficiaries, including the children and the tertiary beneficiaries, have no income or capital rights save at the absolute discretion of the husband and wife.

In my view, the Court is able to make orders which the wife seeks even if the facts do not reveal that the corporate structure of the trusts involves shams or are mere puppets of one or other of the parties…This conclusion depends on a large part on the analysis of the trustee to which I have referred in the historical dealings of the trust property and income."[xxxvi]

KENNON AND SPRY (2008)[xxxvii]

Dr Ian Spry, a retired Victorian barrister, married Helen Spry in 1978. They had four daughters, now in their twenties. In 1968, Dr Spry created the ICF Spry Trust with himself and his siblings, their spouses and their children as beneficiaries. He was the sole trustee. In 1983, he excluded himself as a beneficiary for land tax reasons. In 1998, when his marriage was in difficulty, Dr Spry further varied the trust to exclude himself and his wife as capital beneficiaries. The Sprys separated in October 2001. In January 2002, Dr Spry divided the income and capital of the trust between four trusts he set up for his

daughters. Mrs Spry filed for divorce in the Federal Magistrates Court in December 2002. The divorce was finalised in February 2003.

In April 2002, Mrs Spry applied to the Family Court for orders for property settlement and maintenance. In 2005 Justice Strickland found that contributions to the couple's assets, including trust assets, were 52 per cent by Dr Spry and 48 per cent by Mrs Spry, and that Dr Spry was entitled to $5,105,435 and Mrs Spry $4,712,709. Taking account of assets Mrs Spry already had, Justice Strickland ordered Dr Spry to pay her $2,182,302. Justice Strickland found that the steps taken with respect to the ICF Spry Trust in 1998 and 2002 were designed to keep property away from his wife and the Family Court. Under section 106B of the Act, he set aside the 1998 variation and the 2002 dispositions of assets. Dr Spry appealed. He and Edwin Kennon cross-appealed in their capacity as joint trustees of three daughters' trusts. Dr Spry and his daughter Elizabeth cross-appealed in their capacity as joint trustees of the Elizabeth Spry Trust. The Full Court of the Family Court, by majority, dismissed the appeal and cross-appeals.

THE HIGH COURT

Dr Spry and the joint trustees of the children's trusts appealed to the High Court against both dismissals. The Court, by a 4-1 majority, dismissed the appeals and upheld Justice Strickland's order for Dr Spry to pay Mrs Spry $2,182,302. The appellants were ordered to pay Mrs Spry's costs. Dr Spry and the children argued that the assets of the trust were not part of the asset pool to be considered in making property orders. Three Justices held that without the 1998 variation and the 2002 dispositions, Mrs Spry would have had a right due administration of the trust and to due consideration as a beneficiary. Dr Spry

would have had a power to appoint to her the whole of the assets of the trust. The Court held that these rights were property of the parties to the marriage. It held that the Family Court could make orders in property settlement proceedings as if changes to property rights brought about by the divorce had not yet occurred. The High Court held that it was open to Justice Strickland to make the orders he did on the basis that the asset pool comprised $9,818,144. One Justice supported Justice Strickland's orders by reference to section 85A of the Act providing for variation of post-nuptial property settlements[xxxviii].

The Chief Justice held that the question at the heart of the appeals was whether the husband or his wife 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 Section 79.[xxxix] As to the word **property** his Honour said[xl]:

> "*The word "property" in s79 is to be read as part of the collocation "property of the parties to the marriage". It is read widely and comfortably with the purposes of the Family Law Act. In the case of a non –exclusive discretionary trust with an open class of beneficiaries, there is no obligation to apply assets or income of the trust to anyone. Their application may serve a 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"*

The Chief Justice went on to say:

> *"For so long as the husband retained a legal right 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 s79 The assets would have been unarguably property of the marriage absent subjection to the Trust.

An exercise of the power under s79 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."[xli]

French CJ then went on to say:

"The characterisation of the assets of the trust, coupled with the husband's power to appoint them to his wife and her equitable right in 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."[xlii]

Justices Gummow and Hayne also went on to say:

"What matters in this case is that once the 1998 instrument and the 2002 instrument were set aside by Section 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 the 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."[xliii]

In her judgment Justice Keifel took a different approach to dealing with the trust and used Section 85A(1) of the Act. Justice Keifel said in her judgment:

"*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*[xliv]*."*

"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 s79(4), so far as they are relevant.

Section 85A(1) provided the power and the means by which the trial judge's

findings and intention could be carried into effect. …..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. 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. ……It has long been accepted that third party interests could be altered by courts dealing with property the subject of a nuptial settlement. Whether, and the extent to which, a court would alter such interests might depend upon the remoteness or uncertainty of those interests. 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"[xlv]

RECENT CASES

HARRIS & HARRIS [2011][xlvi]

The Facts of this case are[xlvii] that the Trust was established in July 1978, with the husband's father being the first appointor until his death on 21 August 1995. On his death, his widow (the husband's mother) became and continues to be the appointor.

The "beneficiaries" of the Trust are: the husband's father (now deceased); the husband's mother; the children of the husband's father (being the husband and his sister, B); "the lineal issue" of the husband's father; and "other persons and classes of persons (if any) referred to in the Schedule (of the Trust Deed) ... and referred to as 'Other Beneficiaries'". According to Mr R's evidence, there are no specific persons or class of beneficiaries recorded in the Schedule which was available to him……notwithstanding that the wife "does not appear to be recorded, either specifically or within a class of beneficiary, as a beneficiary of the trust ... [she] received distributions of income from [the Trust] as if she was a beneficiary, for a number of years".

The original trustee of the Trust was a company Harris Nominees Pty Ltd; the directors of that company were or are:

the husband's father: 20 July 1978 to 22 August 1995;

the husband's mother: 20 July 1978 to 13 June 2003;

the husband: 22 August 1995 to the present;

the husband's sister, B: 22 August 1995 to 6 May 2003; and

the wife: 13 June 2003 to the present.

Thus the current directors of Harris Nominees Pty Ltd are the husband and the wife. The original Secretary of that company was the husband's father. Following his death it was the husband's mother until 13 June 2003, when the husband became and remains the Secretary…..Following the death of [the husband's father] on 21 August 2005 [sic] [the husband's mother] arranged a share restructure by the creation of additional shares totalling 100 shares and allocated them as follows:-

(i) [herself] 98 shares;

(ii) [the husband's sister, B] 1 share;

(iii) [the husband] 1 share.

Accordingly, since 21 August 2005 [sic], the Husband has been a Shareholder of [Harris Nominees Pty Ltd]. The Wife has not been a Shareholder.

The Full Court considered Spry's case and found in relation to the Trust that[xlviii]:

"*In seeking to uphold his Honour's decision to include the assets of the Trust in the assets of the husband, Counsel for the wife has sought to rely on the observations of French CJ in Kennon v Spry …that the term "property" when used in s79 of the Act should be given a wide meaning. However in that decision French CJ also said:*

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.

In the present case and on the basis of the material before us the husband appears to be no more than such a beneficiary of such a trust. He is not the appointor of the Trust nor does he hold any position in the current trustee company. On the

assumption that by the use of the word "directly", the Chief Justice was referring to the strict legal position, it therefore cannot be said that the husband "directly" controls the current trustee. Nor could it be said that he "directly" controlled the previous trustee.

On the assumption that the reference by the Chief Justice to "indirect" control of a discretionary trust by a beneficiary was a reference to a "puppet" situation, in the sense that the person with legal control of the trust is a puppet of the beneficiary, that could be the situation in the present case. In the sense, that is, of the mother (who is the appointor of the Trust, and one of the three directors of the trustee company holding two shares in that company with each of the other two directors holding one share each) being the puppet of the husband. This, as was made clear by Counsel's oral submissions to us, has always been the wife's case.

The difficulty, however, for the wife on this appeal is to be able to point to any evidence which would support a finding that the husband's mother is his puppet, and that it is through her, or perhaps otherwise, that he exercises de facto control of the trustee company and of the Trust."

For a consideration of other more recent cases see:

- **Pittman & Pittman (2010) FLC 93-430**
- **Harris & Harris [2011] FamCAFc 245**
- **Lovine & connor [2012] FamCA 168**
- **Morton & Morton [2012] FamCA 30**
- **Dillion & Dillion [2012] FamCA 319**

The above cases beginning with Ashton right through to Spry establish that were one party to a marriage (or a de facto relationship) is effectively in control of the assets of a trust then the Court has wide ranging powers to deal with the assets of the trust.

In such situations a Court can restrain or direct a party to a marriage (or to a de facto relationship) personally in their capacity as appointer or guardian or director of a trustee company by using its injunctive powers under Section 114 of the Family Law Act.

In **Re: Dovey: Ex Parte Ross (1979)**[xlix] the husband sought to use his power and voting rights as a shareholder and director of a family company to evict the wife from the matrimonial home which was owned by the company or to sell it from under her. In that case the High Court held that it was legitimate to exercise the Family Court's powers under Section 114 of the Act to restrain him from doing so.

Where a party is not in control of the Trust

Where a party to a marriage or (a defacto relationship) is not in control of the trust a Court has significant difficulty in dealing with it. The Family Court has very limited jurisdiction in relation to third parties. The Family Court does not have the power to deprive the third party of an existing right, impose a duty on a third party which that party would not otherwise be liable to perform; defeat or prejudice the rights or power of third parties or order a third party to do something which it is not legally bound to do. This applies regardless of whether third parties are strangers to the marriage or have some relationship with one of the parties to the marriage.

The High Court decision of **Ascot Investments Pty Ltd v Harper and Harper (1981)**[l] found that the Family Court did not have the power to deprive a third party of an existing right or impose a duty that that party would not otherwise be liable to perform. Gibb J at pages 76,061-76,062 said that there was an exception to that rule and that was as follows:

> *"The position is, I think, different if the alleged rights, powers or privileges of the third party are only a sham and have been brought into being, in appearance rather than reality, as a device to assist one party to evade his or her obligations under the Act. Sham transactions may always be disregarded. Similarly, if a company is completely controlled by one party to a marriage, so that in reality an order against the company is an order against the party, the fact that in form the order appears to effect the rights of the company may not necessarily invalidate it except in the case of shams and companies that are mere puppets of a third party to the marriage, the Family Court must take the property of the party to the marriage as it finds it…"*[li]

There are a number of exceptions to that however and they include the following:

- If it can be established that one of the parties to the marriage actually has **defacto control under the trust entity**;
- If it can be shown that the trust is a **sham**;
- If it can be shown that the trust is in reality an **alter ego** of a party to the marriage;
- If it can be shown that those controlling the trust are merely **puppets** of the party to the marriage.[lii]

TRUSTS AS A SHAM

The Federal Court case of ***Sharrment Pty Ltd v Official Trustee*** **(1988)[liii] 18 FCR 449,** dealt with what constitutes a "sham" trust. In that case the Full Court of the Federal Court of Australia said as follows:

> *"A "sham" is therefore, for the purposes of Australian law, something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true, but something made in imitation of something else or made to appear to be something, which it is not. It is something which is false or deceptive."*[liv]

The Court then went on to set out factors that must be considered before a transaction can be characterized as a 'sham'.

WILSON & WILSON (1994)[lv]

In this case Moss J summarized that case and other authorities and set out the following propositions requiring careful consideration before a transaction can be characterised as a ``sham"[lvi]:

a) *"Before a transaction can be so characterized, it is necessary to find both a common intention among participants to the transaction and a disjunction between the appearance and reality of the transaction – the question is: Did the parties who entered into the ostensible transaction mean it to be a façade, concealing their real intentions? – Were the acts done or documents executed by the parties which are intended by them to give to third parties or to the Court the appearance of creating between the parties' legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create?*
b) *It does not establish that a transaction is 'a sham' simply to show that it involved a round robin of cheques, even when no party has funds to meet the cheques, or that the transaction contained artificial elements or that it was done for an ulterior purpose;*
c) *Where the transaction were between parties who were not 'at arm's*

length' the fact that there may be an absence of a commercial basis for the arrangement it does not mean that the arrangements were not genuine;

d) *To draw an inference form the surrounding circumstances that a particular transaction is a 'sham' is to reach a strong finding and one which cannot be made if another inference is at least equally open."*

See also:

- ***O'Chee & Anor v O'Chee*** **(2006) FLC ¶93**
- ***Equuscorp Pty Ltd v Glengallan Investments Pty Ltd*** **(2004) 211 ALR 101**
- **Keach & Keach and Ors [2011] FamCA 192**
- **Kyriakos and Kyriakos [2013] FCCA 1249**

Is it Property or a Financial Resource?

If the Family Court finds that one of the parties is in effective control of the trust then they can use their powers to, in effect, treat the property of a trust as property of the marriage. Nevertheless, despite the issue of the control the Family Court can still take into account the assets of the trust by treating them as a financial resource of one of the parties to the marriage. In such a case the Family Court will not have the power to actually deal or adjust those assets in the trust but can deal with the property outside of the trust and take into account the interest that the other party would have in the trust. The non-trust assets would therefore be distributed on that basis.

See Pittmann & Pittman (2010) FLC 93-430

PART VIIIIAA – ORDERS AND INJUNCTIONS BINDING THIRD PARTIES

In December 2004 the Family Law Act 1975 was amended to give courts exercising power under the Act the power to alter the rights and interests of third parties in proceedings relating to property matters. The amendments introduced Part VIIIAA to the

Act. As a result a court now has significant powers to make orders in relation to third parties which may in certain circumstances be used in matters involving Discretionary Trusts.

S90AA of the Act sets out the objectives of the amendments as being to:
"..allow the court in relation to the property of a party to a marriage to:

a) *Make an order under section 79 or 114; or*
b) *Grant an injunction under section 114;*

that is directed to, or alters the rights, liabilities or property interests of a third party"

Section 90 AE of the Act relates to a Court making an order under section 79 binding a third party. It provides that in proceedings under section 79, the court may make any of the following orders:

a) *An order directed to a creditor of the parties to the marriage to substitute one party for both parties in relation to the debt owed to the creditor;*
b) *An order directed to a creditor of one party to a marriage to substitute the other party, or both parties, to the marriage for that party in relation to the debt owed by the creditor;*
c) *An order directed to a creditor of the parties to the marriage that the parties be liable for a different proportion of the debt owed to the creditor than the proportion the parties are liable to before the order is made;*
d) *An order directed to a director of a company or to a company to register a transfer of shares from one party to the marriage to the other party.*

Subsection 2 provides that *the court may make any other order that:*

a) *Directs a third party to do a thing in relation to the property of a party to the marriage; or*
b) *Alters the rights, liabilities or property interests of a third party in relation to the marriage.*

Under the Act a ***third party*** is defined in the Act as *"a person who is not a party to the marriage"*.
Section 90AB provides a definition of *marriage* and *third parties*. Marriage is taken to include void marriages. *A* ***third party*** *is defined very broadly to include individuals*

including friends or relatives of the parties to the marriage, businesses, and financial institutions. Some third parties may already be a party to the proceedings(paragraph 141 of Explanatory Memorandum of Family Law Amendment Bill).

Safeguards

On the face of it the section gives a court wide ranging powers in section 90AE (1) and (2). The section goes on to provide for safeguards to be exercised when using those powers. The safeguards are set out in section 90AE (3) and also in section 90AF(3). Those safeguards provide that a court may only make an order under the section if:

- The making of the order is reasonably necessary or reasonably appropriate and
- If the order concerns a debt of a party to the marriage, it is not foreseeable at the time that the order is made, that to make the order would result in the debt not being paid in full and
- The third party has been accorded procedural fairness in relation to the making of the order; and
- The court is satisfied that in all of the circumstances it is just and equitable to make the order.
- The court is satisfied that the order takes into account the matters mentioned in subsection (4) which (in summary) are as follows:
    - The taxation effect of the order
    - The social security effect
    - The third party's administrative costs
    - The capacity of a party to pay the debt (if it concerns a debt)
    - The economic, legal or other capacity of the third party to comply
    - Any other matter raised by the third party (after grant of procedural fairness).

Injunctions Binding on a Third Party

Section 90AF provides for a court to make an order or injunction under section 114 binding a third party and provides a court may:

a) Make an order restraining a person from repossessing property of a party to a marriage; or
b) Grant an injunction restraining a person from commencing legal proceedings against a party to a marriage.

Subsection (2) allows court to make an order or an injunction that:

a) Directs a third party to do a thing in relation to the property of a party to the marriage; or
b) Alters the rights, liabilities or property interests of a third party in relation to the marriage.

Section 90AF (3) provides similar safeguards for the granting of injunctions against third parties which are similar to section 90AE (3)

TRUST BUSTING – Important Documents to inspect

When you are involved in a Family Law matter involving a Discretionary Trust the most important documents to examine to determine whether the Trust or the assets of the Trust will form part of the "Property Pool" are:

1. The Trust Deed (including any variations of the deed);
2. The Financial Statements and Financial Returns of the Trust.

The trust deed will set out details of the settler of the trust, the trustee, the beneficiaries, the appointer and the guardian. The deed will also deal with the powers of the trustee, powers of the appointer and/or the guardian. It will have set out details in relation to the distribution of income, power to vary the trust deed and other such matters.

The financial statements and financial returns of the trust must be examined. These will show the income and capital of the trust; how the income and or capital have been distributed to the beneficiaries over a number of years; the expenditure for the trust and the assets and liabilities of the trust.

Inspecting the Trust Deed and the Financial Statements of the Trust will enable you to at least form a preliminary view in relation to the Trust and whether one of the parties to the relationship have sufficient control of the trust. On that basis Discovery and Disclosure will become very important in matters which involve a Discretionary Trust in trying to show that one party is in effect in control of the trust and the assets and income of the Trust.

Jim Mellas

Victorian Bar

28 October 2016

References

[i] The *Family Law Amendment (Defacto Financial Matters and Other Measures) Act* 2008
[ii] Section 90SB Family Law Act 1975
[iii] Applies to all states except Western Australia who have not referred their powers to the Commonwelath.
[iv] Duff and Duff (1997) FLC 90-257
[v] Duff at para 55-56
[vi] Ibid
[vii] Kennon v Spry [2008] HCA 56
[viii] Kennon v Spry [2008] at p 64
[ix] Broun and Fowler, Australian Law and Practice CCH pp 36110
[x] Bourke S, Property and Superannuation, An Update, 9th National Family Law Conference Handbook pp 19 and 20
[xi] Hickey and Hickey (2003) FLC 93-143
[xii] Stanford and Standford [2012] HCA 52
[xiii] Ibid at para 37
[xiv] Kennedy I, Family Trusts, Family Law Masterclass BLEC 1996
[xv] In the Marriage of Kelly No. 2(1981) Fam LR 762 at 768
[xvi] In the Marriage of Kelly, supra at CCH Headnote
[xvii] Kennon v Spry [2008] HCA 56 at para 55 (French CJ refers to and comments on the case)
[xviii] Ibid
[xix] Ashton and Ashton [1986] FLC 91 - 777
[xx] Ashton, supra (Facts of case from CCH Headnote)
[xxi] Ashton supra
[xxii] Ashton, supra at 75653
[xxiii] Ashton, supra at 76061

[xxiv]Goodwin and Goodwin Alpe (1991) FLC 91 - 197
[xxv] Goodwin, supra (Facts of case from CCH Headnote)
[xxvi] Ibid at p78,273
[xxvii] Davidson and Davidson (1991) FLC 92 - 197
[xxviii] Davidson, supra at 78359 (Facts of case from CCH Headnote)
[xxix] Davidson, supra at 78366
[xxx] Harris and Harris(1991) 15 Fam LR 26
[xxxi] Harris, supra (Facts of case from CCH Headnote)
[xxxii] Harris, supra 78706
[xxxiii] Harris, supra 78706
[xxxiv] Harris, supra 78708
[xxxv] JEL and DDF (2001) FLC 93 - 075
[xxxvi] JEL and DDF 91991) supra at 93-075
[xxxvii] Kennon and Spry [2008] HCA 56
[xxxviii] Kennon and Spry (2008) High Court Summaries
[xxxix] Broun and Fowler, Austrlalian Family Law and Practice CCH at p 36,110
[xl] Kennon and Spry (2008) at paras 66 and 67
[xli] Ibid at paras 66 and 67
[xlii] Ibid at para 70
[xliii] Ibid
[xliv] ibid at para 227
[xlv] Ibid at paras 233 to 237
[xlvi] Harris & Harris [2011] Fam CAFC 245

[xlvii]Harris, supra at paras 18 - 24
[xlviii] Harris, supra, paras 64 - 69
[xlix] Re:Dovey; Ex Parte Ross (1979) FLC 90-616
[l] Ascot Investments Pty Ltd v Harper (1981) FLC 91,000
[li]Ibid
[lii]Kennedy,opcit
[liii] *Sharrment Pty Ltd v Official Trustee* (1988) 18 FCR 449
[liv liv] Ibid at 454.
[lv] Wilson & Wilson (1994) FLC 498
[lvi] ibid at 81188