

KENNON V. SPRY – THE HIGH COURT AND DISCRETIONARY FAMILY TRUSTS

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Discretionary family trusts are not uncommon. Whether created for some tax benefit, or to avoid other imposts on transfer or disposition, these trusts often play an important role in the asset management of a family.

Generally speaking, the trustee holds the legal title of certain property and has an absolute discretion to apply the income or capital of that property to the beneficiaries of the trust. Usually, trusts of these kinds are created and regulated by a written trust deed, which specifies the names of the trustee(s), the beneficiaries and the powers and obligations arising from the trust. Importantly, a beneficiary has the right to ensure the trustee properly administers the trust in accordance with the trust deed.

In *Kennon v. Spry* [2008] HCA 56, the High Court grappled with a number of questions involving these trusts for the purpose of property settlement pursuant to section 79 of the *Family Law Act 1975*:

- Is the property of a wholly discretionary trust property capable of being subject to an order pursuant to section 79?
- By amending a trust deed to remove both the husband and the wife as beneficiaries, did that have the effect of removing the property of the trust from property capable of being subject to an order pursuant to section 79?
- By settling new trusts in favour of children, did this constitute a 'settlement' to be taken into account pursuant to section 85A of the *Family Law Act 1975*.
- Does a divorce automatically remove a spouse from a class of trust beneficiaries which is defined as "person X and their spouse etc."?

Whilst a general proposition may be extrapolated from the case, the High Court (French CJ, Keifel, Gummow and Hayne JJ: Heydon J dissenting) has not made things either easier or clearer.

French CJ held that the property of the trust, as well as the beneficiaries' right to due administration of the trust, are property for the purposes of section 79. His Honour then went on to say that a person embroiled in section 79 proceedings who was a discretionary trustee of property, the character of the trust being such that the trustee clearly only had a mere legal

title (such as a trustee of a charitable trust or executor of a friend's will) then that trust property would not be property for the purposes of section 79. How the difference might be properly defined in any given case will no doubt be a creature for future litigation.

Gummow, Hayne and Keifel JJ held that the property was the right to due administration of the trust and that where due administration of the trust included the power to distribute the entirety of the trust property to either spouse as beneficiary, then the value of that right constituted the value of the trust property.

Heydon J (in dissent) held that property for the purposes of section 79 only contemplates property held other than by trust, or owned as a beneficial interest in a trust, following cases which defined property and the powers inherent in trustees. A beneficial interest in a trust would not include the right to due administration of a wholly discretionary trust.

Following, if the purpose to remove as trustee or beneficiaries the spouses in a section 79 matter has the effect of removing that property from the purposes of section 79, and therefore to defeat an order, then it follows that the Court can set aside those dispositions (amendments) pursuant to section 106B.

In terms of section 85A, Keifel J held that for a settlement to have the quality necessary to be taken into account, it must be sufficiently 'nuptial', that is, relating to the parties. A unilateral disposition to children may not have that necessary quality.

An interesting point, however, arises regarding the submission concerning divorce. The Court heard that because the primary judge had made orders after the parties had divorced, and that the wife was no longer a spouse (and therefore no longer a beneficiary) whatever property rights there may have been automatically expired. Gummow and Hayne JJ held that by the very workings of section 79, and section 4(2), the Court could treat the parties as if property rights brought about by an anterior divorce had not occurred, provided it is just and equitable to do so. However, a trust deed which specifically defines a spouse as a spouse of an intact marriage, or in some other format such as, say, a separation having the effect of delimiting or defeating the spouse's rights pursuant to the trust, then it may be that, upon separation, the separated spouse ceases to be a beneficiary (and therefore ceases to have any right to due administration of the trust).

The difficulty that engenders is that, even if such a statement in the trust deed does not fall foul of the Court's powers pursuant to section 106B, what can be made of French CJ's judgment that the trust property per se is property for the purposes of section 79, not just due administration?

In the circumstances, there must be careful examination of subsisting trust deeds and care in the creation of new trust deeds. New species of discretionary trusts may also emerge, subject of course to their effect on tax obligations. Certainly, whilst it may be convenient in some section 79 cases where there is a wholly discretionary trust with a spouse as trustee and spouses as beneficiaries to include the trust property in the pool, that, I suspect may not always be the case.

For further information on this topic, please contact our [Family Law team](#).