A TRUSTEE'S LOT IS NOT A HAPPY ONE

Discretionary trusts and self-managed superannuation funds

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Introduction

Discretionary trusts and self-managed superannuation funds are common vehicles for the conduct of the financial affairs of families. This afternoon I will seek to highlight some of the problems that the trustee of a family entity may encounter. This will involve, at the outset, a review of the duties of the trustee, particularly in the context of a discretionary trust, and the circumstances in which a trustee can be removed. I will then discuss the ramifications of the High Court's recent decision in *Kennon v Spry*,[2] as to the circumstances in which assets of a discretionary trust may be brought into the divisible property pool for family property adjustment proceedings, and also casts light on when a trust may be a nuptial settlement within s 85A. Finally, I will conclude by discussing some risks for trustees of self-managed superannuation funds, in the context of the use of superannuation fund assets for personal benefit.

The nature of trusts

A trust is a personal obligation binding on the legal owner of property, and annexed to that property, to deal with for the benefit of the beneficiaries. Unlike a company, a trust – including a discretionary trust – is not a separate legal entity. In law, a trustee is not recognised as having an additional or qualified legal personality.[3] This means that the trustee of a trading trust is personally liable to creditors, and can be sued and bankrupted (or, if a

1 The author wishes to acknowledge the contribution of his tipstaff, Ms Kathryn Neilson, to the preparation of this paper.

2 (2008) 238 CLR 306.

3 *Re Graham, Pitt & Bennett* (1891) 9 NZLR 617, 619; *Glennon v Federal Commissioner of Taxation* (1972) 127 CLR 503, 511-2; *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, 367-8.

company, wound up).[4] Although trusts are often spoken of as if they are separate legal entities, this is misconceived. Accounting practice has contributed to this misguided view. As Young CJ in Eq has said:[5]

> There does not appear to have been any proper analysis on the plaintiffs' side as to what one is really doing when one takes property in the name of X as trustee for Y. I note commercially it is done very often, and accounting firms evidently recommend it. But when one is dealing with a significant amount of property one has to deal with these questions as matters of law and not as matters of accounting practice.

However, a trustee can contract with a third party on the basis that personal liability is limited or excluded, but clear words are necessary.[6]

Although the trustee is personally liable to third parties, a trustee is ordinarily entitled to be indemnified out of the trust assets in respect of such liabilities, and – in the case of a fixed trust – to be indemnified by the beneficiaries.

The nature of a discretionary trust

Most family trusts are discretionary trusts. Typically, the 'appointor', who has power to appoint and remove the trustee, is 'normally the person who has the greatest immediate interest in the affairs of the trust'[7] and is usually either the husband or (much less commonly) the wife, while the trustee may be the husband, the wife, a trustee company in which the husband, wife or both have a controlling interest in the company, or 'an individual such as an accountant or relative who may in other ways be beholden to the person with ultimate control over the trust'.[8] The beneficiaries are typically the spouse, children, grandchildren and remoter issue of the appointor, and the trustee has a discretion to distribute income each year, and capital on the vesting date, to such one or more of the beneficiaries as he or she pleases. Usually, there is also a discretion to accelerate the vesting date in respect of the whole or part of the trust fund, and power to amend the trusts.

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4 *Re Johnson* (1880) 15 Ch D 548, 552; *Vacuum Oil Company Pty Ltd v Wiltshire* (1945) 72 CLR 319, 324.
5 *Provident Capital Ltd v Zone Developments Pty Ltd* (2001) 10 BPR 19,133, [49].
6 *Parsons v Spooner* (1846) 67 ER 845; *Muir v City of Glasgow Bank* (1879) 4 App Cas 337, 355; *Gordon v Campbell* (1842) 1 Bell App 428; *Lumsden v Buchanan* (1865) 4 Macq 950; *Muir v City of Glasgow Bank* (1879) 4 App Cas 337; *Re Anderson* (1927) 27 SR(NSW) 296.
7 The Hon Justice Peter Nygh and Andrew Cotter-Moroz 'The Law of Trusts in the Family Court' (1992) 6 *Australian Journal of Family Law* 4, 5.
8 Ibid.

A ‘discretionary trust’ is a trust coupled with a special power of appointment: the beneficiaries are not determined at the moment of creation of the trust – either as to identity or quantum of interest – and the choice of beneficiary, or determination of the extent of his or her interest, or both, is left to the trustee to decide.[9] In *FCT v Vegners*,[10] Gummow J wrote:

> There was some discussion by counsel of the term ‘discretionary trust’ and related terms. A fixed trust is used to describe a species of express trust where all the beneficiaries are ascertainable and their beneficial interest are fixed, there being no discretion in the trustee or any other person to vary the group of beneficiaries or the quantum of their interests. The expression ‘discretionary trust’ is used to identify another species of express trust, one where the entitlement of beneficiaries to income, or to corpus, or both, is not immediately ascertainable. Rather, the beneficiaries are selected from a nominated class by the trustee or some other person and this power may be exercisable once or from time to time. The power of selection is a special or hybrid power; a power exercisable in favour of any person including the donee of the power would be a general power and thus would be tantamount to ownership of the property concerned, whilst the objects of a special power would be limited to some class, and the objects of a hybrid power would be such that the donee might appoint to anyone except designated classes or groups.

Thus, a discretionary trust does not have beneficiaries in the traditional sense, whose interests together aggregate the beneficial ownership of the trust property. Instead, there is a class of persons, usually described in wide terms, who are the objects of a power to appoint either income or corpus or both to selected members of the class. The members of the class are *objects of a power*, rather than *beneficiaries* in the strict sense. They do not have a proprietary legal or equitable interest in the trust fund.[11] They have no *beneficial* interest in the trust property, and they are not persons for whose benefit the trust property is held by the trustee; at the highest they are members of a class of persons for the benefit of some one or more of whom the trustee may in due course hold property if it so determines. At best, they are *potential* beneficiaries, not beneficiaries. In terms accepted by French CJ in *Spry*, no object of such a trust has any fixed or vested entitlement, and the trustee is not obliged to distribute to anyone; the default distribution gives the default beneficiary no more than a contingent remainder.[12] And in the words of Gummow and Hayne JJ in the same case, the

9 *Jacob’s Law of Trusts in Australia*, 5th ed, 736 [2916].
10 (1989) 90 ALR 547, 551-2.
11 *Re Smith* [1928] Ch 915; *Gartside v IRC* [1968] AC 553; *Jacob’s Law of Trusts in Australia*, 5th ed, 649 [2315].
12 *Kennon v Spry* (2008) 238 CLR 306 [60], [62].

word ‘beneficiary’ is inapt insofar as it suggests the existence of any beneficial interest; such a person is ‘an eligible object’ of the trust.[13]

Discretionary trusts offer many attractions: they allow families to accumulate assets and to then distribute capital and income in a manner that allows taxation consequences to be minimised; they permit distribution of capital and income at the discretion of the trustee according to need or whim; and they offer a measure of protection from creditors (and spouses) in the event of adversity. However, despite the extensive discretions typically conferred on trustees of family discretionary trusts, they are nonetheless trustees, and not absolute owners. As a member of the family will often hold the position of trustee, it is important that he or she understands the duties that the law imposes on trustees, as fiduciaries, in respect of trust property and administration of the trust. Even though they may consider trust property to be ‘their’ property, that this is not the case and that special duties and responsibilities must be fulfilled. While child beneficiaries may be kept in ignorance while a parent manages a trust, ostensibly created for the benefit of the children, for years, subsequent discovery of a history of breaches of trust and use of its assets for the benefit of the parent not infrequently produces bitter litigation. We will consider first the general duties of trustees, then some special duties of self-managed superannuation funds (SMSF) trustees, and finally some aspects of particular significance to discretionary trustees.

The general duties of trustees

The duties of a trustee are exacting, and no less so in the family context. Duties of trustees are covered by the (NSW) *Trustee Act* 1925 (and equivalent legislation in other jurisdictions) and case law. I will summarise some of the important duties.[14]

Duty to become acquainted with the terms of the trust

A trustee must first become thoroughly acquainted with the terms of the trust and all documents and deeds relating to or affecting the trust property.[15] Purported exercises of a

13 *Kennon v Spry* (2008) 238 CLR 306 [125].
14 For a more comprehensive review, see Heydon & Leeming, *Jacobs’ Law of trusts in Australia*, 7th edn, chapters 17 – 19, to which the author is indebted for much of the below summary.
15 *Hallows v Lloyd* (1888) 39 Ch D 686, 691.

power of appointment made without reference to and knowledge of the terms of the trust are liable to be declared invalid.[16]

Duty to obey the terms of the trust and to act with reasonable care

A trustee must strictly adhere to and carry out the terms of the trust,[17] and must discharge their duties to the standard of what an ordinary prudent person of business would do in managing similar affairs in the interests of another.[18] This is perhaps the most important duty.[19] If trustees are directed to realise assets and invest the proceeds but fail to do so with consequent loss to the trust estate, they will be liable for the loss, as they will if trust property depreciates after they should have but failed to sell it.[20] But if they have no power of sale, they must not sell.[21]

Duty to keep and render accounts

Trustees are required to keep appropriate, accurate and up to date records, which beneficiaries can call on for production and inspection.[22] The trust records and documents that beneficiaries are entitled to inspect include the trust's financial accounts and profit and loss statements.[23] Although the question has been the subject of some controversy, eligible beneficiaries of discretionary trusts have been held entitled to inspect the trust accounts.[24] Trustees have the statutory power to have the trust accounts audited by an accountant.[25]

Duty to Invest

Trustees must act in the best interests of the trust, and this normally includes acting in the beneficiaries' best financial interests.[26] Generally, equity imposes a duty on the trustee to invest the trust funds.[27] Statute confers trustees with a general power to invest the trust funds in any form of investment, and to vary any investment, except so far as the trust deed

16 *Turner v Turner* [1984] Ch 100.
17 *Mendelssohn v Centrepoint Community Growth Trust* [1999] 2 NZLR 88, 95.
18 *Austin v Austin* (1906) 3 CLR 516, 525.
19 *Cowan v Scargill* [1985] 1 Ch 270, 288; *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, [32].
20 *Fry v Fry* (1859) 54 ER 56.
21 *Johnson v Baber* (1845) 50 ER 91.
22 *Re Whitehouse* [1982] Qd R 196; *Strauss v Wykes* [1916] VLR 200.
23 *Re Londonderry's Settlement; Peat v Walsh* [1965] Ch 918, 936-8.
24 *Avanes v Marshall* (2007) 68 NSWLR 595; *Spellson v George* (1987) 11 NSWLR 300; cf *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709.
25 (NSW) *Trustee Act* 1925 s 51(1).
26 *Cowan v Scargill* [1985] Ch 270, 286-7.
27 *Wharton v Masterman* [1895] AC 186, 197.

expressly otherwise provides.[28] In exercising the power of investment, the trustee must 'exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons.'[29] A still higher standard applies to trustees whose profession, business or employment is or includes acting as trustee;[30] however, this is unlikely to apply in the case of family trusts, where a family member acts as trustee. The trustee must exercise the power of investment in accordance with the terms of the trust deed[31] and must review the performance of trust investments at least annually.[32] A trustee may obtain and consider independent and impartial advice reasonably required for the investment or management of the trust funds[33] and pay the reasonable costs of obtaining this advice out of the trust fund.[34] Section 14C(1) of the *Trustee Act* includes a list of non-exhaustive factors that the trustee may take into account when exercising the power of investment, including the purposes of the trust and the needs and circumstances of the beneficiaries,[35] the nature of and risk associated with the existing trust investments,[36] the effect of the proposed investment for the tax liability of the trust,[37] the potential and timing for income return[38] and the risk of loss or depreciation.[39]

Duty to Administer the Trust Personally

Trustees must give their personal attention to the administration of the trust and must ensure that the terms of the trust are being carried out.[40] Delegation may, however, be permitted by statute[41] or the trust instrument.

Duty to Avoid Conflict and Duty Not to Profit

As trustees are fiduciaries, they are bound by the duties that bind all fiduciaries that forbid profiting from their office.[42] They are, however, entitled to remuneration if this is authorised by the trust deed[43] or awarded by the court.

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28 (NSW) *Trustee Act* 1925 s 14.
29 (NSW) *Trustee Act* 1925 s 14A(2)(b).
30 (NSW) *Trustee Act* 1925 s 14A(2)(a).
31 (NSW) *Trustee Act* 1925 s 14A(3).
32 (NSW) *Trustee Act* 1925 s 14A(4).
33 (NSW) *Trustee Act* 1925 s 14C(2)(a).
34 (NSW) *Trustee Act* 1925 s 14C(2)(b).
35 (NSW) *Trustee Act* 1925 s 14C(1)(a).
36 (NSW) *Trustee Act* 1925 s 14C(1)(c).
37 (NSW) *Trustee Act* 1925 s 14C(1)(l).
38 (NSW) *Trustee Act* 1925 s 14C(1)(g).
39 (NSW) *Trustee Act* 1925 s 14C(1)(e).
40 *Re Flower & Metropolitan Board of Works* (1884) 27 Ch D 592.
41 (NSW) *Trustee Act* 1925 s 64.

Duty to Act Impartially Between the Beneficiaries

This duty is perhaps more relevant where there are different types of beneficiaries, for example, where there is a life interest in property together with any income bestowed on one beneficiary with the remaining beneficial interest (the capital) going to a beneficiary in remainder. In a case such as this, the trustee has a duty to avoid actions which benefit one class of beneficiaries at the expense of other classes.[44] It does not mean that the trustee of a discretionary trust must treat all potential beneficiaries equally.

Right to Seek Judicial Advice

Trustees have a right to seek advice and direction from the court in respect of management or administration of trust property or in respect of interpretation of the trust deed.[45] If the trustee acts in accordance with the direction of court, they are deemed to have fulfilled their duties in respect of the subject matter of the application.[46] Trustees should be encouraged to seek judicial advice in the event of doubt or if they have concerns about how to properly administer trust property.

Relief from liability for breach of trust

The court has the power to relieve trustees from liability for breach of trust where the trustee has acted honestly, reasonably and ought fairly to be excused for breach of trust,[47] but this judicial absolution is not easily secured.

Additional duties of trustees of Self Managed Superannuation Funds (SMSF)

I turn now to the special responsibilities of trustees of self-managed superannuation funds. As has been observed, '[t]he wealth of individuals is increasingly to be found in superannuation'[48] and this wealth is increasingly held in self-managed superannuation funds due to 'people seeking greater control over their superannuation money, together with greater

42 *Re Whitehead* [1958] VR 143.
43 *Princess Anne of Hesse v Field* [1963] NSWR 998.
44 *Re Campbell* [1973] 2 NSWLR 146.
45 s 63(1) *Trustee Act* and *Re Permanent Trustee Australia Ltd* (1994) 33 NSWLR 547.
46 (NSW) *Trustee Act* 1925 s 63(2); *Re Grose* [1949] SASR 55.
47 (NSW) *Trustee Act* 1925 s 85.
48 Joan Roberts, 'Self-Managed Superannuation Funds – Control and Protection' (2008) 43 *Taxation in Australia* 237.

flexibility for choosing and timing investments and benefit.'[49] Section 17A(1) of the (Cth) *Superannuation Industry (Supervision) Act* 1993 sets out the basic requirements which must be fulfilled to establish a self-managed superannuation fund which include requirements that the fund have fewer than five members, that each trustee is a member of the fund, that each member of the fund is a trustee (or a director of the body corporate that is the trustee), that no member of the fund is an employee of another member of the fund, and no trustee of the fund receives any remuneration for the services he or she performs as trustee. The number of self-managed superannuation funds has been dramatically rising, with 406,000 being registered with the Australian Tax Office in March 2009, compared with 187,000 in October 1999.[50] A trustee of an SMSF has extensive duties arising from the trust deed and/or rules of the fund, the law of trusts, the provisions of the SIS Act and regulations, and other legislative requirements including the *Income Tax Acts*, the *Corporations Act*, the *Trustee Acts*, and, of course, the *Family Law Act*. Breaches of these duties can result in civil and criminal penalties, as well as loss of complying fund status (with significant taxation consequences). It is therefore essential that individuals who are trustees of self-managed superannuation funds are fully conversant with the duties required of them as trustees and also any regulatory and reporting obligations imposed by superannuation law.

I will, however, restrict my discussion in this instance to the rules relating to use of superannuation fund property for the personal benefit of the trustees, and the acquisition of assets from members.

The *Superannuation Industry (Supervision) Act* requires that the trustees of superannuation funds ensure that the fund is maintained solely for at least one of the 'core purposes' set out in the Act.[51] A fund may also be maintained for an 'ancillary purposes' in conjunction with a 'core purpose', however a fund cannot be maintained solely for an ancillary purpose.[52] Core purposes include provision of benefits for each fund member upon that member's retirement,[53] the provision of benefits for each fund member on or after the member's attainment of an age not less than the age specified in the regulations[54] (currently 65 years of age)[55] or the provision of death benefits to the legal personal representative and/or to the

49 Stuart Jones, *Australian Superannuation Handbook 2009-10* (2009) 81.
50 Ibid.
51 (Cth) *Superannuation Industry (Supervision) Act* 1993 s 62(1).
52 (Cth) *Superannuation Industry (Supervision) Act* 1993 s 62(1)(b).
53 (Cth) *Superannuation Industry (Supervision) Act* 1993 s 62(1)(a)(i).
54 (Cth) *Superannuation Industry (Supervision) Act* 1993 s 62(1)(a)(ii).
55 (Cth) *Superannuation Industry (Supervision) Regulations* 1994 reg 13.18.

dependents of the member if the death occurred before retirement or the member reaching the age of 65.[56] Ancillary purposes include benefits for each member on or after termination of employment,[57] provision of benefits for each member on or after the member's temporary or permanent cessation of work due to physical or mental ill-health,[58] the provision of 'reversionary' benefits to the legal personal representatives and/or dependents of a member who dies after retirement or after attaining the age of 65,[59] and any additional ancillary purposes that APRA approves in writing.[60] These provisions warrant close attention from trustees: as Jones states, 'trustees should always ask themselves whether the overriding purpose of an investment or activity is consistent with the government's policy objectives, ie the provision of member benefits in retirement.'[61]

Self Managed Superannuation Fund Ruling 2008/2 provides many useful examples of where a superannuation fund's investment causes additional benefits to be conferred on fund members and when such benefits may be permissible under the sole purpose test. One such example is where a superannuation fund invests in holiday apartments which are owned and managed by a widely held trust and where the investment is pooled and allocated to investors on a pro-rata basis. All investors may stay at the holiday apartments for normal market rates but may be able to upgrade their accommodation if availability exists. Two members of a self-managed superannuation fund which has invested in holiday apartments stay at the holiday apartments and have their accommodation upgraded. This would not breach the sole purpose rules as the benefit provided to the fund members, the upgraded accommodation, was only *incidental* to the fund's investment in the holiday apartments.[62] Another example is where the trustees of two self-managed superannuation funds cause the fund to invest in shares in a golf club. Membership rights attach to those shares and the trustees of each superannuation fund assign the membership rights to the trustees of the other superannuation fund. The investment is only predicted to have minimal return, however the trustees continue with the investment as they wish to have access to the golf club and the membership rights. The ruling concludes that the self-managed superannuation fund was being maintained for a purpose other than a core purpose under s 62(1)(a).[63] Finally, the ruling explores the

56 (Cth) *Superannuation Industry (Supervision) Act* 1993 s 62(1)(a)(iii).
57 (Cth) *Superannuation Industry (Supervision) Act* 1993 s 62(1)(b)(i).
58 (Cth) *Superannuation Industry (Supervision) Act* 1993 s 62(1)(b)(ii).
59 (Cth) *Superannuation Industry (Supervision) Act* 1993 s 62(1)(b)(iii)-(iv).
60 (Cth) *Superannuation Industry (Supervision) Act* 1993 s 62(1)(b)(v).
61 Jones, above n 49, 12.
62 *Self Managed Superannuation Funds Ruling* 2008/2 [23]-[29].
63 Ibid [46]-[51].

appropriateness of superannuation fund investment in artwork, where such artwork is displayed in the residence of a member of the fund, even in the circumstances where the member pays a reasonable rental fee. The ruling states that this fact scenario would suggest a contravention of the sole purpose test as the artwork is being provided for the use and enjoyment of the member rather than an investment purpose.[64]

These example illustrate that there are many 'muddy' areas involved in managing the investments of self-managed superannuation funds. Legal advisers to trustees of self-managed superannuation funds should thoroughly explain the investment rules to trustees, encourage trustees to exercise caution and, if necessary, to seek professional legal, financial or accounting advice.

Similarly, trustees of an SMSF are prohibited from acquiring assets from a member or a 'related party', other than listed securities acquired at market value, 'business real property' acquired at market value, or an 'in-house asset' that does not result in more than 5% of the fund's assets being in-house assets. In-house assets include loans to or investments in a 'related party' of the fund, investments in 'related trusts' of the fund, and assets subject to lease with a 'related party' of the fund.

Duty of trustees in respect of discretionary powers

Trustees have a fiduciary obligation at least to consider whether, and in what way, to exercise their discretionary powers of appointment.[65] Specifically, trustees of discretionary trusts who hold bare powers of appointment have three duties to fulfil. First, they must consider periodically whether or not to exercise the power. Secondly, to consider the range of objects the power may be exercised in favour of, and thirdly to consider the appropriateness of exercise the power in respect of the individual beneficiaries.[66] In *Lutheran Church of Australia South Australia District Inc v Farmers Co-operative Executives and Trustees Limited*,[67] Windeyer J said (at 561):

> A discretionary power, given to a trustee as such, to act or not to act in a specified manner imposes a duty on the trustee at least consider the matter and decide

64 Ibid [56]-[61].
65 *Re Smith* [1928] Ch 915; *Gartside v IRC* [1968] AC 553; *Sainsbury v IRC* [1970] Ch 712, 715; *Jacob's Law of Trusts in Australia*, 5th ed, 649 [2315]; *McPhail v Doulton* [1971] ACV 424, 456 (Lord Wilberforce); *Kennon v Spry* (2008) 83 ALJR 145, [77], [78] (French CJ), [125] (Gummow and Hayne JJ)].
66 *Re Hay's Settlement Trust* [1981] 3 All ER 786, 792.
67 (1970) 121 CLR 628.

deliberately whether to exercise the power. Lord Reid recently said, in *Re Gulbenkian's Settlement* [1970] AC 508 at 518:

> 'A settlor or testator who entrusts a power to his trustees must be reliant on them in their fiduciary capacity so that they cannot simply put aside the power and refuse to consider whether it ought in their judgment be exercised.'

If it is a mere power, the Court cannot dictate to the trustees whether it should be exercised or not exercised. That discretion is committed to them. But, even in that case, the Court is not entirely unconcerned; for it trustees having a purely discretionary power refuse to consider whether and now they will exercise their discretion, then the Court will remove them and substitute new trustees – who will have the same discretion but who, it is hoped, will not be recalcitrant. That would not be a usurpation by the Court of the discretion given to trustees. It would be merely a means of accomplishes its exercise one way or another by dutiful trustees: *Inland Revenue Commissioners v Portway Colleges Trust* [1955] Ch 20 at 35.

In *Re Hay's Settlement Trusts* [1981] 3 All ER 786, Sir Robert Megarry VC said (at 792):

That brings me to the second point, namely, the extent of the fiduciary obligations of trustees who have a mere power vested in them, and how far the Court exercises control over them in relation to that power. In the case of a trust, of course, the trustee is bound to execute it, and if he does not, the Court will see its execution. A mere power is very different. Normally the trustee is not bound to exercise it, and the Court will not compel him to do so. That, however, does not mean that he can simply fold his hands and ignore it, for normally he must from time to time consider whether or not to exercise the power, and the Court may direct him to do this. So where he does exercise the power, he must, of course (as in the case of all trusts and powers) confine himself to what is authorised, and not go beyond it. But that is not the only restriction. Whereas a person who is not in the fiduciary position is free to exercise the power in any way that he wishes, unhampered by any fiduciary duties, a trustee to whom, as such, a power is given is bound by the duties of his office in exercising that power to do so in a responsible manner according to its purpose. It is not enough for him to refrain from acting capriciously; he must do more. He must 'make such a survey of the range of objects or possible beneficiaries' as will enable him to carry out his fiduciary duty. He must find out 'the permissible area of selection and then consider responsibly, in individual cases, whether a contemplated beneficiary was within the power and whether, in relation to the possible claimants, a particular grant was appropriate': per Lord Wilberforce in *Re Baden (No 1)* [1970] 2 All ER 228 at 240, 247, [1971] AC 424 at 449, 457.

I pause there. The summary of the law that I have set out above is taken from a variety of sources, principally *Re Gestetner (deceased)* [1953] 1 All ER 1150, [1953] Ch 672, *Re Gulbenkian's Settlement* [1968] 3 All ER 785 at 787, 592–594, [1970] AC 508 at 518, 524–525 and *Re Baden (No 1)* [1970] 2 All ER 228 at 246, [1971] AC 424 at 456.

Later, his Lordship continued (at 793):

If I am right in these views, the duties of a trustee which are specific to a mere power seem to be threefold. Apart from the obvious duty of obeying the trust instrument, and in particular of making no appointment that is not authorised by it, the trustee must, first, consider periodically whether or not he should exercise the power; second,

> consider the range of objects; and third, consider the appropriateness of individual appointments.
>
> In *Re Gestetner's Settlement* [1953] Ch 672, Harman J said (at 688), of a discretionary power of distribution, that the trustees were bound 'to consider at all times during which the trust is to continue whether or no to distribute any and if so what part of the fund, and, if so, to whom they should distribute it.'

McGarvie J in *Karger v Paul* [1984] VR 161, described the obligation in the following terms (at 164):

> I regard it as an inherent requirement of the exercise of any discretion that it be given real and genuine consideration. To borrow a phrase from passage quoted in *Partridge v The Equity Trustees Executors and Agency Co Ltd* (1947) 75 CLR 149, at p 164, there must be the 'exercise of an active discretion'. It has been held that when the occasion for the exercise of a discretionary power has arisen, trustees, while not bound to exercise the discretion, are bound to consider whether it ought in their judgment to be exercised: *Klug v Klug* [1918] 2 Ch 67; *In re Gulbenkian's Settlement* [1970] AC 508 at p 518. I think that it goes without saying that they must give real and genuine consideration. It seems to me that it is in this sense only that the Court can examine whether the trustees gave 'proper' consideration to the exercise of the discretion.

The trustee's discretion must be exercised with honesty and with a consideration of the issues[68] and options available and determining the best course of action.[69] However, if trustees give real and genuine consideration to the exercise of such discretions, their decisions can be impugned only on very limited grounds. Trustees are not bound to give reasons for their decisions in relation to the administration of the trust and distribution of trust property.[70]

As the High Court said in *Attorney General (Cth) v Breckler* (1999) 197 CLR 83 (at [7]), approving a statement of Northrop J at first instance and subsequently adopted by Heerey J in *Wilkinson v Clerical Administrative and Related Employees Superannuation Pty Ltd* (1998) 79 FCR 469 (at 480):

> Where a trustee exercises a discretion, it may be impugned on a number of different bases such as that it was exercised in bad faith, arbitrarily, capriciously [*In re Pauling's Settlement Trust* [1964] Ch 303 at 333], wantonly, irresponsibly [*Lutheran Church of Australia South Australia District Inc v Farmers Co-operative Executives and Trustees Limited* (1970) 121 CLR 628 at 639], mischievously or irrelevantly to any sensible expectation of the settlor [*In re Manisty's Settlement* [1974] Ch 17], or without giving a real or genuine consideration to the exercise of the discretion [*Karger v Paul* [1984] VR 161, which incudes a survey of the authorities]. The exercise of a discretion by trustees cannot of course be impugned upon the basis that

68 *Parkes Management Ltd v Perpetual Trustees Co Ltd* (1977) 3 ACLR 303, 311.
69 *Re Baden's Trust Deeds; McPhail v Doulton* [1971] AC 424, 449.
70 *Wilson v Law Debenture Trust Corporation PLC* [1995] 2 All ER 337; *Re Londonderry's Settlement; Peat v Walsh* [1965] Ch 918.

> their decision was unfair or unreasonable [see *Dundee General Hospital's Board of Management v Walker* [1952] 1 All ER 896] or unwise [*Gisborne v Gisborne* (1877) 2 App Cas 300 at 307].

Indeed, where a discretion is expressed to be absolute (or uncontrolled), not only can its exercise not be impugned on the ground that the trustee's decision was unfair, unreasonable or unwise; additionally, bad faith may have to be shown [*Attorney General (Cth) v Breckler* (1999) 197 CLR 83, [7]].

Trustees can discuss with beneficiaries the reasons for and against exercising their discretion in a particular way, but are free to act in any way in respect of which they have previously expressed reservations or objections without being at risk of being held to have acted against their judgment.[71]

A refusal by trustees, for no corrupt motive, to exercise a purely discretionary power is no reason for removing them. In *Lee v Young*, under a marriage settlement the trustees had power, with the consent of the husband and wife or their survivor, to vary the securities by selling the settled stock and investing it in land, including leaseholds. The husband died, and the wife remarried; she and her second husband, desirous of increasing her income under the settlement, asked the trustees to exercise their discretion to invest part of the trust fund in purchasing certain leaseholds; although one of the trustees was content to do so, the other refused. The wife and her second husband brought proceedings for removal and replacement of the trustees. Knight-Bruce V-C dismissed their application. Having pointed out that while such investment might increase the income of the plaintiffs during the second husband's life, it would diminish the available capital upon his death, his Lordship continued:

> One of these trustees, whether he has given a perfectly good reason or not – whether he has given every reason that he might or not – has thought fit to object to the proposed investment. I cannot say that he has not a right to object, or that there do not exist reasons which may justify him in objecting; and when I see that the language of the power has nothing in it imperative, that it does not contain any expression to the effect that the trustees are 'required' to exercise it, and that there are other powers in this settlement which leave less to the discretion of the trustees than this clause, I am of opinion that this is a discretionary power; that the discretion has not been corruptly exercised; and that it has been exercised, whether for perfectly good reasons or not, whether for reasons that wholly appear or not, in a manner which the Court cannot say is improper, or upon unreasonable grounds. I therefore cannot interfere.

71 *Fraser v Murdoch* (1881) 6 App Cas 855.

Removal of trustees

The court of equity has inherent jurisdiction to remove trustees and appoint others in their place, in order to ensure that trusts are property executed. In *Letterstedt v Broers*,[72] Lord Blackburn, speaking for the Judicial Committee, said (emphasis added):

> Story (*Equity Jurisprudence*) says, s. 1289, 'But in cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. *But the acts or omissions must be such as to endanger the trust property or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity*.'
>
> It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the Court might consider that in awarding costs, yet *if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed*. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.
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> The reason why there is so little to be found in the books on this subject is probably that suggested by Mr. Davey in his argument. As soon as all questions of character are as far settled as the nature of the case admits, *if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts*, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground, he refused to do so, it seems to their Lordships that the Court might think it proper to remove him; but cases involving the necessity of deciding this, if they ever arise, do so without getting reported.
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> …
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> In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries.

In *Re Wrightson* [1908] 1 Ch 789, Warrington J said (at 803):

> You must find something which induces the Court to think either that the trust property will not be safe, or that the trust will not be properly executed in the interests of the beneficiaries.

72 (1884) 9 App Cas 371, 385-7.

Those cases were considered by P W Street CJ in Eq (as he then was) in *Guazzini v Pateson*[73]. His Honour observed:

> In considering the interests of the beneficiaries, I have to consider the interests of all, not those of the plaintiff only, and I have to ask myself whether the facts disclosed in the case establish that it is for the welfare of the trust estate as a whole that the trustees should be removed.

The principles were described by Dixon J in *Miller v Cameron*[74] as follows (emphasis added):

> The jurisdiction to remove a trustee is exercised with a view to the interests of the beneficiaries, to the security of the trust property, and to an efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred upon the trustee. *In deciding to remove a trustee the court forms a judgment based upon considerations, possibly large in number and varied in character, which combine to show that the welfare of the beneficiaries is opposed to his continued occupation of the office*. Such a judgment must be largely discretionary. *A trustee is not to be removed unless circumstances exist which afford sound ground upon which the jurisdiction may be exercised.*

The first relevant consideration that emerges from the above cases is the 'the welfare of the beneficiaries'. Indeed, in *Miller v Cameron*, Latham CJ (at 575) and Starke J (at 579) considered the welfare of the beneficiaries to be 'the dominant consideration' and 'the only guide' respectively. However, that was said in the context of a trust in which, although the trustee had significant discretionary powers, all the beneficiaries were identified and were parties seeking his removal. In the context of discretionary trusts, where no beneficiary has a vested interest but only a right to due administration, the formulation of Street CJ in Eq in *Guazzini v Pateson*, that in each case it is ultimately a matter of what is best 'for the welfare for the trust estate as a whole', is of more assistance. The essential issue in that context is whether the due and proper administration of the trust is opposed to the trustee's remaining in office. In this respect, regard must be had not only to the interests of the plaintiffs, but to those of all the potential beneficiaries. Moreover, in the context of discretionary trusts, some consideration is to be given to the confidence reposed by the settlor in the selected trustees to exercise appropriately the discretions vested in them.

The second consideration that emerges is that a trustee is not lightly to be removed. Insofar as it might be implicit in Lord Blackburn's observations in *Letterstedt v Broers*, that the suit having been brought the trustees should have resigned, or in any event should be removed on

73 (1918) 18 SR(NSW) 275 (at 292-4).
74 (1936) 54 CLR 572, 580-1.

the basis that their continuance would be detrimental to the execution of the trusts, that overstates the position. Removal is not inevitable, just because some or even all of the beneficiaries wish it.[75] The court will not remove a trustee for the mere caprice of a beneficiary or without reasonable cause.[76] Friction or hostility between the trustee and the beneficiaries is not of itself a reason for the removal of the trustee,[77] although where the hostility is grounded on the mode in which the trust has been administered, or has been caused wholly or partially by substantial overcharges against the trust estate, it is not to be disregarded.[78]

Discretionary trusts and property:

The eligible object or potential beneficiary of a discretionary trust is not entirely without rights in respect of the trust and trustees: while they do not have a proprietary interest in the trust assets they have, in words of Wilberforce LJ, 'a right to be considered as a potential beneficiary and a right to have his [or her] interests protected by a court of equity';[79] that is, a right in equity to due administration of the trust; and the trustees have a corresponding fiduciary obligation at least to consider whether, and in what way, to exercise their discretionary powers of appointment.[80]

But, without more, the only property that a trustee has in the assets of a discretionary trust is the bare legal title, which is of no practical value; and the only property that a potential beneficiary has is the right of due administration which – although it is property, in the sense that it is a *chose in action* – is also of no practical realisable value. This means that, without more, the interests of a trustee or potential beneficiary in a discretionary trust, although they might be within the wide definition of 'property', are of little practical worth when it comes to matrimonial property adjustment: they do not equate to an interest in the trust assets – although the ability of an appointor to procure a distribution will often be taken into account, pursuant to s 79(4), as a 'financial resource' within the s 75(2) considerations.

75 *Guazzini v Pateson* (1918) SR(NSW) 275, 294; *Re Brock Bank* [1948] Ch 206.
76 *O'Keeffe v Calthorpe* (1739) 1 Atk 17, 26 ER 12.
77 *Lee v Young* (1843) 2 Y&C Ch Cas 532, 63 ER 238; *Forster v Davies* (1861) 4 De G F & J 133, 45 ER 1134; *Re Henderson* [1940] Ch 764, [1940] 3 All ER 295.
78 *Letterstedt v Broers*, 389.
79 *Gartside v Inland Revenue Commissioners* [1968] AC 553, 617.
80 *Re Smith*; *Sainsbury v IRC* [1970] Ch 712, 715; *Jacob's Law of Trusts in Australia*, 5th ed, 649 [2315]; *McPhail v Doulton* [1971] AC 424, 456 (Lord Wilberforce); *Kennon v Spry*, [77], [78] (French CJ), [125] (Gummow and Hayne JJ).

For these reasons, it has been supposed that - apart from special circumstances referred to in cases such as *Ashton* and *Goodwin* – the 'family discretionary trust [was] effective as a shield against, or at least … [a] hamper, [to] the estranged spouse'.[81] To what extent is this still the case?

Kennon v Spry

In 1968, the husband settled by parole a discretionary trust, called the ICF Spry Trust, of which he was both trustee and settlor. In order to avoid stamp duty liability, he did not execute a trust deed until October 1981. The eligible beneficiaries were the husband, any spouse of the husband, and the husband's issue; his siblings, their spouses and their issue; should those beneficiaries not take, there was provision for charitable purposes. The original trust instrument relevantly provided that:-

1. The trustee shall be the Husband (called 'the Settlor') and any other person or persons as he may from time to time appoint. The Husband is empowered from time to time to remove any trustee in his absolute discretion. After his death, the trustee shall be the then existing trustee together with the Husband's eldest male issue from time to time alive.

2. The Husband (as Settlor) may at any time vary the terms of the Trust, but not so as to increase his rights under the Trust to the beneficial enjoyment of the fund.

3. The beneficiaries are all the issue of Charles Chambers Fowell Spry (the Husband's father) and all persons married to such issue. (The Husband falls within that definition, and after the marriage, at least until the divorce became absolute, the Wife was a beneficiary within that definition).

4. The trustee is empowered from time to time in its absolute discretion to apply all or any of the income and/or capital to or for any or all of the beneficiaries either by payments or applications for the benefit of the relevant beneficiary, or payments to a trust established substantially for the benefit of such beneficiary.

5. No part of the income of the Trust is to be paid or applied for the Husband in

81 Nygh and Cotter-Moroz, above n 3, 4-5.

repayment of any debt owed to him by the trustee, nor should any such income be accumulated for the Husband.

6. At the date of distribution (which is defined to mean 100 years from 21 June 1968, or 21 years after the death of the last survivor of all children alive at 21 June 1968 of three prominent Victorian lawyers, whichever is the earlier), the Trust fund is to be divided among such of the beneficiaries as the trustee thinks fit, and in default amongst all male beneficiaries equally *with the exception of the Settlor*. (This clause casts further light on the status of the Husband as a beneficiary. It confirms that he was a discretionary beneficiary, but not a default beneficiary).

In 1978, the husband married the wife; they had four children. In 1983, the husband varied the trust deed by excluding himself as a beneficiary, appointing the wife as trustee in the event of his death or resignation (with their eldest daughter to succeed in the event of the wife's death or resignation). This 1983 Variation Deed recited the original trust instrument of 21 June 1968, and contained provisions to the following effect:-

1. The Husband (as Settlor) released and abandoned all and any beneficial interest or rights held by him or which might thereafter be held by him under the Trust instrument or in the Trust fund or its income, and confirmed that he ceased to be a beneficiary or a person to whom or for whose benefit all or any part of the Trust fund and income might be applied.

2. For the purpose of removal of doubt, it was confirmed that 'issue' in the Trust instrument included all descendants however remote; that appointments by the settlor of a trustee or trustees may be revocable or irrevocable; *and that any variation of the Trust should be invalid to the extent to which it purported to confer directly or indirectly any right or benefit upon the Settlor*.

3. The Husband (as Settlor) appointed the Wife to be trustee on his death or resignation, and the child Elizabeth after the death or resignation of the Wife, provided that such appointment was revocable by the Husband at any time.

4. The trusts of the Original Trust Instrument were otherwise confirmed.

The consequence of the First Variation was that the Husband ceased to be a potential beneficiary, but the Wife remained a potential beneficiary, of the Trust.

On 7 December 1998 (at a time when the marriage was in difficulty[82]) the Husband as Settlor of the Trust executed a further instrument of variation ('the 1998 Variation'), to the following effect:-

1. After the death or resignation of the Husband as trustee, the trustees should be jointly his two eldest daughters. However, if he ceased to be trustee, no payment or distribution or application of income or capital, nor any exercise of the discretionary powers of application under the Original Trust Instrument, should be made during his lifetime without his prior written consent.

2. The power of variation contained in the Original Trust Instrument was varied so that (a) it may be exercised by the Husband 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 and, unless expressly stated to be irrevocable, should be revocable.

3. The Original Trust Instrument was varied so that no power or discretion to pay or apply capital should be exercised 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, and the Husband and the Wife were excluded absolutely and irrevocably from all and any interest, rights and possibilities in the capital of the Trust fund; moreover this variation was said to be irrevocable, and 'no future purported variation purporting to amend this clause for or purporting to confer any interest, right or possibility in the capital of the fund on the Settlor or on the said Helen Marie Spry shall be valid in any way'.

This variation had the effect of excluding the wife as a capital beneficiary.

The trust owned the matrimonial home. The husband acquired various shares and investments for the trust, and distributions were made to the wife and children for living and household expenses and other expenses such as school fees. No distributions were made to the husband while he was still a beneficiary as his income attracted the maximum marginal tax rate.

82 *Kennon v Spry* (2008) 238 CLR 366, 373.

In October 2001, the parties separated. Following their separation, in January 2002 the husband established four separate trusts, one for each of the four children of the marriage, and distributed between the four new trusts, in four equal shares, the capital and income of the Trust.

In May 2002, the wife applied to the Family Court for an order that the husband pay her fifty percent of the assets held in their individual or joint names by the Trust or the children's trusts, and also for an order under s 106B(1) setting aside the 1998 variation and the 2002 distributions. She succeeded at first instance, with Strickland J setting aside the 1998 variation and the 2002 distributions under s 106B(1), and holding that there was thereafter no obstacle to the husband revoking the 1983 variation and reinstating himself as a beneficiary, so that he could procure a distribution of the trust assets to himself; and further that the husband sufficiently controlled the trust that, after setting aside the 1998 and 2002 transactions, the trust assets could be treated as his property. Including the value of the trust assets in the divisible pool, his Honour awarded fifty-two percent to the husband and forty-eight percent to the wife, and ordered the husband to pay the wife the sum of $2,182,302. But it should be noted at the outset that no order was made against the trustee, or in respect of the trust assets; there was simply an *in personam* order against the husband for payment of a monetary sum.

The husband appealed to the Full Court, where his appeal was dismissed (Bryant CJ and Warnick J, Finn J dissenting). The majority agreed that the husband would be able to reverse his election not to be considered in the exercise of the trustee's discretion, either unilaterally (Warnick J) or by both parties to the Deed revoking it (Bryant CJ), so that the assets of the trust could be included in the property pool. Finn J concluded (correctly, in the view of Gummow and Hayne JJ) that the husband could not restore himself to the status of eligible beneficiary, the amendment excluding him being irrevocable and not being amenable to s 106B having occurred long before any matrimonial difficulties.

The husband appealed, by special leave, to the High Court. The High Court did not accept that the husband could restore himself to the position of beneficiary, but nonetheless held that the trust assets could be counted as property. There are two major issues in the High Court's decision: whether the assets of the family trust were property of the parties to the marriage (as was held by French CJ, Gummow J and Hayne J; Heydon J dissenting), and whether the

family trust was an ante-nuptial settlement within s 85A (as was held by Kiefel J, Heydon J dissenting and the other Justices not deciding).

On the first issue, the majority decision has attracted robust criticism, and a powerful dissent from Heydon J, as if it were a novel extension of the concept of property for the purposes of s 79 and an unwarranted erosion of the sanctity of trusts. Lee Aitkin has described the decision as 'heterodox',[83] 'a judgment that further dangerously muddies the waters with respect to the position of the objection of a discretionary trust'[84] and a 'retrograde step for trust law, justified…on the basis of the need for a practical approach to the mischief which may arise when ownership is separated from control of an asset. It flies in the face of basic principle…'[85] He complains that '[c]onstantly denaturing the purity of the trust concept will eventually leave it useless.'[86] However, my contention is that the decision is neither revolutionary nor heretical, but predictable and orthodox.[87]

French CJ:

The Chief Justice approached the principal issue by posing the question '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).'[88] His Honour considered the position of Dr Spry prior to the 1983 Variation and found that prior to his removal as a beneficiary, the trust assets would, consistently with authorities such as *Kelly*,[89] *Ashton*[90] and *Goodwin*[91] have been considered as his property - as Dr Spry was the sole trustee, with absolute discretion to apply trust property, including to himself as a

83 Lee Aitken, 'Mudding the waters further – *Kennon v Spry*: 'ownership', 'control' and the discretionary trust' ((2009) 32 *Australian Bar Review* 173, 173.
84 Ibid, 180.
85 Ibid, 174.
86 Ibid, 181.
87 A view which is at least not unique: Even though the decision has been subject to widespread criticism, some commentators have welcomed it. Timothy North SC for example has passionately stated that 'those who might bemoan the development of the law in this case as some form of sacrilegious defiling of the purity of the laws of trust will have to find some way of overcoming their grief and of their prior misconceptions as to that body of law. They need to adjust to the reality that as a decision of the High Court, this is a decision which pronounces upon the accepted and orthodox doctrine…' TD North SC, '*Spry v Kennon*: The Last Word' (2010) 21 *Australian Family Lawyer* 15, 16.
88 *Kennon v Spry* (2008) 238 CLR 366, 387.
89 *In Marriage of Kelly (No 2)* (1981) 7 Fam LR 762.
90 *In Marriage of Ashton* (1986) 11 Fam LR 457.
91 *In Marriage of Goodwin*(1990) 101 FLR 386.

beneficiary.[92] His Honour said that the word 'property' in s 79 'is to be read widely and conformably with the purposes of the *Family Law Act*.'[93] His Honour identified the relevant property as 'the Trust assets, coupled with the trustee's power, prior to the 1998 Instrument, to appoint them to [the wife] and her equitable right to due consideration …':[94]

> 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.

His Honour added: [95]

> '[w]here 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.
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> For so long as Dr Spry retained the legal title to the Trust and her equitable right, it remained … property of the parties to the marriage for the purposes of the power conferred on the Family Court by s 79. The assets would have been unarguably property of the marriage absent subjection to the Trust.'

I suggest that the essence of his Honour's decision is that the combination of the husband's discretionary power of distribution as trustee, with the wife's standing as an eligible beneficiary, meant that at the husband's whim all the trust assets could be made assets of a party to the marriage, and that his rights and powers as trustee were, in the context of matrimonial property proceedings, of worth to him equivalent to the value of the trust assets.

Hayne & Gummow JJ:

Hayne and Gummow JJ also emphasised that the term 'property of the parties to the marriage or either of them' was to be broadly understood, and 'should be read in a fashion which advances rather than constrains the subject, scope and purpose of the legislation'.[96] Their Honours said that 'the term 'property' is not a term of art with one specific and precise

92 *Kennon v Spry* (2008) 238 CLR 366, 389.
93 Ibid, 390.
94 Ibid, 390.
95 Ibid, 391.
96 Ibid, 396-7.

meaning [and] it is, of course, necessary to have regard to the subject matter, scope and purpose of the relevant statue.'[97] Having agreed that the 1998 and 2002 variations were properly set aside under s 106B, their Honours held that the value of the discretionary trust should be included in the asset pool of property of the parties of the marriage or either of them, because of three intertwined circumstances: firstly, that the wife, as a beneficiary, had a right to due administration of the trust; secondly, that the husband, as trustee, had a fiduciary duty to consider whether and in what way the power should be exercised; and thirdly, because during the marriage the husband could have appointed the whole of the trust fund to the wife.[98]

In this respect, their Honours said that, in family property proceedings, it was within the power of the court to proceed 'as if' changes to property rights otherwise brought about by the anterior divorce had not occurred.[99] This was a reference to the circumstance – apparently not adverted to by French CJ – that the wife ceased to be an eligible beneficiary upon divorce. In my view, an alternative basis by which the same result could have been achieved is that even after the divorce, and once the 1998 transaction had been set aside, the husband could have used his powers of amendment, as settlor, to enlarge the class of beneficiaries so as to include former as well as current spouses.

Their Honours observed that the order did not earmark any particular asset to satisfy the order, nor require him to take any action as trustee or settlor, but left it open to him to satisfy his obligation to the wife, if he so wished, by recourse to the augmented assets of the trust.[100] It is thus not a particularly radical approach - in principle, the decision is not so far reaching as *Ashton* to which we shall come.

Precursors to *Spry*

The majority judgment held that the assets of a family discretionary trust could be treated as property in circumstances where the husband was a sole trustee but not a beneficiary, and where the wife was only one amongst a class of potential beneficiaries. It has been suggested that in this way it challenges previously held views as to the status of family discretionary

97 Ibid, 397.
98 Ibid, 411.
99 Ibid, 409.
100 Ibid, 411.

trusts, 'forcing a rethink on whether a discretionary trust is still an effective form of asset protection against the long arm of the Family Court'.[101]

However, the Family Court of Australia has, on occasion, been able to treat property held by family discretionary trusts as property of the parties, where one spouse was the trustee (or, perhaps more controversially, the appointor), and the class of beneficiaries has included either that spouse, or (again, perhaps more controversially) the other spouse.

Thus, *In the Marriage of Ashton* the husband, who had been a trustee of the trust but was now only the sole appointor, was ordered to cause the trustee to pay, or to appoint himself as trustee and cause the trust to pay, a lump sum payment to the wife, on the footing that the husband 'was in full control of the assets of the trust'[102] and because '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'.[103] Instructively, the beneficiaries included 'any past or present wife of' the husband, but not the husband. Leave to appeal from that decision was refused by the High Court (5 December 1986, Gibbs CJ, Wilson and Brennan JJ).

In the Marriage of Goodwin, the Court held trust property to be that of the husband as '[t]he 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 payment exclusively of other beneficiaries as the husband saw fit.'[104]

In *Davidson & Davidson*,[105] Simpson, Nygh and Murray JJ said, in the context of a trust which the husband was conceded to control and direct absolutely:-

> The wording of the provisions of the MAVK Trust Deed which have been cited above, coincides closely with those of the Ashton Family Trust considered in some detail by Strauss J when delivering the judgment of the Full Court *In the marriage of Ashton* (1986) 11 Fam LR 457; (1986) FLC ¶91-777. As was the case in *Ashton* the trustee of the MAVK Trust is a company of which the husband is ostensibly an equal shareholder but which the learned trial judge described as 'the creature' of the husband. We are of the view that on the evidence this finding was open to him.
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> Moreover, as was the case in *Ashton* (Fam LR at 461; FLC at 75,652) the list of beneficiaries in para (8) includes a company in which the husband's present wife, child

101 Michael Brown, 'His, Hers or Theirs?' (2009) 47 *Law Society Journal* 60.
102 *In Marriage of Ashton* (1986) 11 Fam LR 457, 461.
103 Ibid, 462.
104 *In the Marriage of Goodwin* (1990) 101 FLR 386, 392.
105(1990) 14 Fam LR 817; (1991) FLC ¶92-197.

> or other relative of the husband has a shareholding and there is nothing in the deed to prevent the husband from holding the overwhelming majority of the shares in such a company and from receiving the full benefit of a distribution to that company. The husband in the present case therefore has an ability through Lestato Pty Ltd to distribute capital or income to himself or through a company in which, say, his present wife or one of his children is a minority shareholder.
>
> It was argued that such a manipulation of the provisions of the trust would amount to a breach of the fiduciary duty of the husband as appointor relying on the decision of KJ in the *Re Skeats' Settlement; Skeats v Evans* (1889) 42 Ch D 522. Whatever may have been the position 100 years ago, Australian courts today have to look at the reality of the situation and the purpose which family trusts serve today. A limitation as to the husband's power to control the assets and income of the trust in accordance with the provisions of the trust deed, is inconsistent with the reasoning of the Full Court in *Ashton* above. Leave to appeal from that decision was refused by the High Court on 5 December 1986 by a bench composed of Gibbs CJ, Wilson and Brennan JJ. Whatever might be the remaining effect of Skeat's case, it is not authority for the proposition that the husband is prevented from appointing a trustee who has complied to his wishes.
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> It is our view, therefore, that if the husband were to follow the procedure outlined above, it will not render him liable to any other beneficiary.
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> As an alternative more direct method of distribution, the husband through Lestato Pty Ltd, could, pursuant to cl(12)(a) of the deed, apply 'the whole or any part of the capital of the trust fund' for the benefit of the Wife. Such a payment could not in our view, be impugned by any other beneficiary. The Husband complains that as this would not be a payment by the husband personally, the wife could the claim that amount from the husband himself, but his counsel did not pursue that submission with any vigour, and acknowledged that a court would be unlikely to enforce any such claim by the wife against the husband. It seems to us moreover, that the husband could properly utilise Clause (12)(a) to pay the wife direct and distribute the balance of the trust property ultimately to himself through his company if he wished, thereby avoiding the husband's argument that the trust could be used to benefit the wife but not him.

It is worth noting that, in dismissing an application for special leave to appeal in *Davidson*, the High Court said:-

> We are not persuaded that there was an error or principle on the part of the Full Court of the Family Court in concluding that the applicant [husband] could cause the trustee company to apply the capital of the trust fund for the benefit of the respondent [wife] or for the benefit of a company in which he was a shareholder, so long as a beneficiary is a shareholder.
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> The primary judge found as a fact that the trustee company was a creature of the applicant and the provisions of the trust deed are well open to an interpretation which supports the conclusion reached by the Full Court.

In *Harris & Harris*,[106] Ellis, Strauss and Lindenmayer JJ, after referring to *Ashton* and *Davidson*, said:-

> 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*, (supra), a trust as such is not a legal person, although the trustee itself must be a legal person. The trust deed here is one of the usual forms. It provides for an appointor who has the power to remove any trustee and 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: see, for example Cll 5.02, 9.01, 9.02 and 15.01. 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.
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> ...
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> It was argued on behalf of the husband that what he had in the trust was a *chose in action* as a beneficiary under the trust, and that such *chose in action*, although property, had no real or ascertainable value.
>
> This submission might be appropriate if the position of the wife as a beneficiary under the trust had to be evaluated, for she had no right or power to require the payment to her of any part of the property or income of the trust. On the other hand, 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 legitimate income tax advantage and may have had other commercial motives.
>
> ...
>
> 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 purposes of s.79 of the *Family Law Act* 1975, 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.

106 (1991) 15 Fam LR 26; (1991) FLC ¶92-254.

> 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. See also s.80(1)(d), (e) and (k).

In my opinion, *Spry* is entirely consistent with the line of cases to which I have referred. What emerges from those cases, although not always clearly articulated in them, is that the critical criterion that enabled assets of a discretionary trust to be treated as property of the parties is the capacity of one spouse to exercise powers which can cause the trust assets to become property of one *or other* of the spouses, and thus amenable to s.79. That is more clearly so where the 'controller' is also an eligible beneficiary, but *Ashton* and *Davidson* show it to be so also where only the other spouse is an eligible beneficiary. Where those criteria are satisfied, the controller has power - as trustee directly, or as appointor indirectly – to augment the pool of 'property of the parties to the marriage or either of them', to the extent of the trust assets, if he or she so chooses. In distinction from the ordinary case, the trustee's interest is valuable, because it is in his or power to procure a distribution of the whole of the trust assets, if not to himself or herself, then to the other spouse, and thus to make it property of one or other of the spouses available for division between them.

In *Spry*, the powers that the husband enjoyed in respect of the Trust, prior to the 1998 variation, differed in some respects from those in *Harris*. By reason of the 1983 variation, he could not bring about a distribution directly or indirectly to himself. But he could bring about a distribution to the wife, if necessary by amending the terms of the trust to expand the class of beneficiaries to include past as well as present wives. Critically, in my opinion, but for the 1998 variation, the Husband had the capacity to use his powers as settlor and trustee to bring about the vesting of the whole of the assets of the Trust in at least one of the parties to the marriage, and thus within the reach of s.79.

The dissent:

Heydon J approached the question by asking whether, even if the 1998 and 2002 instruments were set aside, it could be said for the purposes of s 79(1) that either spouse had 'property' in the assets of the trust. His Honour agreed with the submissions of counsel for the trustees of the children's trusts and counsel for the husband that 'no-one was entitled in possession or reversion… [to the trust property] but that the objects of the trustee's power of appointment

merely had hopes or expectations coupled with a right of due administration…'[107] and 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.'[108] His Honour quoted the often-cited proposition in *Gartside v Inland Revenue Commissioners* that the object of a bare power of appointment has no propriety interest in trust but only a mere expectancy or hope of consideration by the trustee.[109]

His Honour stated that ('first argument') should the submission described above be rejected, it would give an unacceptably extended meaning to the term 'property' which

> would lead to a wholly unreasonable result … 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.[110]

His Honour also ('second argument') rejected the argument advanced by the wife that as the husband as trustee had a bare power of appointment and none of the objects or of the default beneficiaries had any beneficial interest, the husband as trustee was entitled to the whole estate in possession and as such orders under s 79 could be made. His Honour said:

> 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.[111]

107 *Kennon v Spry* (2008) 238 CLR 366, 414.
108 Ibid, 415.
109 *Gartisde v Inland Revenue Commissioners* [1968] AC 553, 607.
110 *Kennon v Spry* (2008) 238 CLR 366, 419.
111 Ibid, 425.

The flaw in this analysis, in my very respectful opinion, is that while it attends separately to the limited nature of the wife's interest as an eligible beneficiary (the first argument), and the limited interest of the husband as a trustee (the second argument), it does not have regard to the effect of the two in combination. Absent matrimonial property proceedings, the husband could lawfully appoint the whole of the trust assets to the wife, and thereby enhance the pool of 'property of the parties to the marriage or either of them', albeit 'at the expense of other members of the class of objects of the power of appointment'. No other member of that class of objects has any greater interest than the wife. There is no unreasonableness, absurdity or injustice in the situation that in subsequent matrimonial proceedings, he be treated as if he acted in the best interests of the joint matrimonial estate.

The critique:

Some of the arguments advanced against the majority decision are reflected in an article by John Glover, who argues that 'finding that the husband had a beneficial interest in the trust based in his power to appoint the wife and the wife's right to be considered surely means that the dispositive power must be exercised in the wife's favour. Where has the discretion gone? Only through illegal and fraudulent denial of discretions which qualified his positive power could the *Spry* trustee act consistently with the Chief Justice's findings.'[112] Glover disapproves of the weight given to Dr Spry's power to appoint to the wife, and states that '[t]he fact that exercise of the power may result in property (for the power-holder or someone else) does not mean that the power is itself property. Power is a capacity to act and not a thing which one owns. Equity jurisprudence has distinguished between powers and property for centuries.'[113]

It is true, as Heydon J demonstrated, that even a general power of appointment over property, pursuant to which the donee can appoint the property to anyone including himself or herself, is not the equivalent of property, at least for all purposes. But it is very close to it. Indeed, if one has power to appoint property to oneself, it is difficult to see why for at least some purposes it should not be treated as one's property. The law not uncommonly assumes, when valuing property or assessing damages, that a party will act or perform functions in the manner most advantageous to the party. Thus the assumption of the 'highest and best use' when valuing property, and the presumption in assessing damages for breach of contract that

112 John Glover 'Are the Lights Changing for Discretionary Trusts?' (2010) 84 *Law Institute Journal* 34, 35.
113 Ibid.

where a defendant could have performed in alternative ways, it would have adopted the means least onerous to it.[114] It is entirely consistent with that approach that, for the purpose of valuing the husband's interest in the trust, it be assumed that he will exercise his powers in the manner most favourable to the joint matrimonial estate. An alternative way of looking at it, as expressed by Gummow and Hayne JJ, is that the order *in personam* having been made, the husband could if he wished satisfy it by making a distribution to the wife from the trust.

Nuptial settlements - section 85A

At the hearing of the appeals before the High Court, the wife sought to rely on a further argument, that had not been relied on at the hearing at first instance or in the Full Court, that s 85A of the *Family Law Act* authorised the making of the orders she sought. Section 85A(1) provides that the court may make such order as it 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. Section 85A(2) provides that in making such an order, the court should take into account the matters referred to in s 79(4) so far as they are relevant.

Conventionally, it has been considered that to engage s 85A:

- *First*, there must be a settlement.[115] In this context, a 'settlement' is a disposition of property that makes future or continuing provision for either or both spouses.[116] However, an absolute gift does not qualify.[117]

- *Secondly*, it must have a 'nuptial element'.[118] It has been said that this means that it must provide for one or both of the spouses, in the character of a spouse and during the continuance of the marriage, on the footing that the marriage (though not necessarily cohabitation) is going to continue.[119] The Full Court has said that it requires only that the settlement be in some manner consequential upon or incidental

114 *Abraham v Herbert Reiach Ltd* [1922] 1 KB 477, 480; *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130, 156.
115 *Young v Young (No 1)* [1962] P 27, 30-31.
116 *Smith v Smith* [1945] 1 All ER 584; *Prescott v Fellowes* [1958] P 260; *Dewar v Dewar* (1960) 106 CLR 170, 174; *Greer & Greer* (1985) FLC ¶91-645.
117 *Prescott v Fellowes* [1958] P 260.
118 *Young v Young (No 1)* [1962] P 27, 30-31; *Prescott v Fellowes* [1958] P 260, 278.
119 *Prinsep v Prinsep* [1929] P 225, 232; *Meller v Meller* (1967) 10 FLR 12, 14; *Young v Young (No 1)* [1962] P 27, 30-31

> to the marriage.[120] Following this, it has been said that it suffices if a particular marriage is a fact of which a settlor takes account in framing the settlement.[121] But the settlor must have brought the settlement into existence because of a particular (actual or contemplated) marriage.[122] While a post-nuptial settlement may be made at any time after the marriage, it must contemplate the continuation of the specific marriage.[123] Where a settlement is entered into because of the probability of the breakdown of the marriage, it is not a post-nuptial settlement,[124] although a maintenance agreement that contemplates that the parties will separate but continue to remain married to each other may be a post-nuptial settlement[125]. It may be sufficient to qualify that the disposition makes provision for the children of the spouses, rather than for one or other of the spouses.[126] The settlement of property in trust for a spouse, regardless of the identity of the settlor, can be a nuptial settlement.[127] This is so, even if the trust is discretionary and neither spouse has a vested interest.[128] It is not fatal that third parties are also potential beneficiaries, although their relative standing in the structure of the trust may affect whether it can be said to have the requisite nuptial element.[129]

Had I been asked before the judgment of the High Court whether this was a nuptial settlement, I would have said not: the Trust was constituted long before the marriage and not by reference to the marriage; it could not be an 'ante-nuptial settlement' within the scope of s.85A; it was not made 'in relation to' the relevant marriage, and rather had the appearance more of a settlement for the benefit of the family of the husband's father (by reference to whom the beneficiaries were defined).

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120 *Public Trustee (SA) & Keays* (1985) FLC ¶91-651.
121 *Joss v Joss* [1943] P 18, 20; *Knight & Knight* (1987) FLC ¶91-854.
122 *Turnbull & Turnbull* (1990) 15 Fam LR 81; (1991) FLC ¶92-258.
123 *Young v Young* [1962] P 27; *Melvil v Melvil* [1930] P 159.
124 *Turnbull & Turnbull* (1990) 15 Fam LR 81; (1991) FLC ¶92-258.
125 *Lockett v Lockett (No.2)* (1920) 37 WN(NSW) 272; *Burnett v Burnett* [1936] P 1, 15; *Tomkins v Tomkins* [1948] P 170; *Jeffrey v Jeffrey (No.2)* [1952] P 122.
126 As to which see *Garratt v Garratt* [1922] P 230; but contra *Boswarthick v Boswarthick* [1927] P 64, 72; *Brown v Brown* [1959] P 86, 89; *Smith v Smith* [1945] 1 All ER 584.
127 *Prinsep v Prinsep* [1929] P 225, 235; *Meller v Meller* (1967) 10 FLR 12, 15; *Public Trustee (SA) & Keays* (1985) FLC ¶91-651.
128 *Prinsep v Prinsep* [1929] P 225; *Knight & Knight* (1987) FLC ¶91-854.
129 *Prinsep v Prinsep* [1929] P 225; *Knight & Knight* (1987) FLC ¶91-854; *Toohey & Toohey* (1991) FLC ¶92-244; *Spellson & Spellson* (1989) FLC ¶92-044.

Not all of the Justices found it necessary to address the s 85A issue: French CJ observed that it was 'not necessary in the light of the preceding conclusions to consider whether s 85A has any application'[130], and Gummow and Hayne JJ agreed with French CJ in that respect.[131]

Heydon J took the view that s 85A could not be engaged. His Honour found that the trust was clearly not post-nuptial, as although the trust was set down in writing in 1981, it had been created by parol in 1968. As the parties married in 1978, ten years after the creation of the trust, it could not be considered post-nuptial.[132] His Honour said that it was not possible to treat each disposition of property to the trustee after the marriage as the creation of a separate trust: there was only one trust.[133] In considering whether the trust was an ante-nuptial settlement made in relation to the marriage, Heydon J held that this required that the trust 'have been made in contemplation of the particular marriage in relation to which s 85A is invoked,'[134] and that the trust could not fulfil this criterion: first, there was nothing in the recitals or substance of the trust to suggest that it was made in relation to the particular marriage; secondly, there were a number of substantial beneficiaries of the trust who were not connected with the marriage – the husband's sister and her children and the daughter of the husband's deceased sister, any person married to those individuals and any of those individuals' issue.[135] As such, Heydon J stated that the words 'made in relation to marriage' '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.'[136]

However, Kiefel J, whose judgment has described by Justin Gleeson SC, as 'perhaps the most intriguing and far-reaching of the judgments … in this matter'[137] upheld the wife's contention that s85A(1) provided the power and the means by which the trial judge's finding and intention could be carried into effect.'[138].

Her Honour noted the Report of the Joint Select Committee on the *Family Law Act*, which had predated the insertion of s 85A and which 'discussed the need for powers to be given to

130 *Kennon v Spry* (2008) 238 CLR 366, 395.
131 Ibid, 412.
132 Ibid, 428.
133 Ibid, 428-9.
134 Ibid, 429.
135 Ibid, 429-30.
136 Ibid, 430.
137 Brown, above n 101, 63.
138 *Kennon v Spry* (2008) 238 CLR 366, 445.

the Court with respect to family trust or company arrangements.'[139] Her Honour concluded that '[i]t 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 … 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.'[140]

Her Honour considered that the term 'settlement', although difficult to define, was to be given a broad meaning, and may involve 'a disposition of property for the purposes of regulating the enjoyment of the settled property … it is necessary that it provide for the financial benefit of one or other of the spouses. It may imply some kind continuing provision for them.'[141] Her Honour said that it was necessary to determine the degree of association and the temporal relationship required between the settlement and the marriage for s 85A to apply. This required, in her Honour's opinion, consideration of the language and purpose of the Act and the context of the particular provision.

Critically, her Honour found that the Spry trust assets could attract the operation of s 85A, as many of the assets had been obtained by the contributions of the parties to the marriage, and had been transferred to the trust during the marriage, so that each such transfer was a 'settlement' within the meaning of s 85A.

Her Honour also found that the necessary 'nuptial' element was present, at the time of those settlements, although not at the time of the original settlement, as the trust was used to hold property for the benefit of the parties to the marriage. Her Honour did not accept that the presence of other potential beneficiaries (the husband's sisters, their spouses and their issue) denied the requisite nuptial element.

The critical feature in Kiefel J's reasoning, the fundamental conflict with that of Heydon J, and the point which has caused me to change my mind, is whether each disposition of property to the trust after marriage can be regarded as a 'settlement'. I respectfully agree with Kiefel J that it can. A settlement is a disposition of property on certain terms. There can be further settlements on a trustee, on the same trusts, after the initial settlement. Each

139 *Kennon v Spry* (2008) 238 CLR 366, 437.
140 Ibid, 437.
141 Ibid.

disposition of property to the trustee is a settlement of property on the trustee on the terms of the trust. The question is not whether there was a nuptial element when the trust was first declared, but whether there was such an element at the time of each disposition. By the time of the marriage, in my view there plainly was.

However, one consequence of this, not followed through in her Honour's judgment, is that it is the property dealt with by each settlement that can be the subject of s 85A – not all the trust assets. Arguably, proceeds of property so settled would be captured. But the assets originally settled and their proceeds, and assets acquired by the trust from its own resources (as distinct from settled on it) would not. In my view, s 85A would have authorised orders varying the interests of the husband and wife in certain but not the whole of the trust assets. In the event, no orders altering interest in any trust assets were made.

Conclusion

The convenience of discretionary trusts, and the wide powers they confer directly on trustees and indirectly on appointers, should not be allowed to mask the considerable obligations that a trustee assumes. This is accentuated in the case of trustees of self-managed superannuation funds, who have still further responsibilities. It must now be clearly appreciated that where an appointor or trustee retains power, directly or indirectly, to cause trust assets to become vested in him/herself or his/her spouse, there is a high degree of likelihood that those assets will be counted as property of the parties available for division under s 79. Moreover, where during a marriage property is transferred to the trustee of a family discretionary trust, such property is at high risk of being held to be the subject of a nuptial settlement within s 85A and amenable to adjustive property orders.