THE HIGH COURT AND FAMILY LAW - TWO RECENT EXCURSIONS

The Hon Justice Paul Brereton AM RFD[1]

Address to the Family Court and Federal Magistrates Court Concurrent Conference

Canberra, Saturday, 16 October 2010

Introduction

In this paper I consider two recent adventures of the High Court of Australia in the field of family law – one in a financial matter, namely *Kennon v Spry*,[2] in which the majority decision holding that assets of a discretionary family trust could be counted as property of the parties to the marriage, has become the subject of considerable, but I will suggest unwarranted, controversy; and the other in a children's matter, namely *Bookhurst v Bookhurst*,[3] in which the refusal of special leave has left open a significant debate as to how the views of children are to be considered.

Kennon v Spry

Discretionary trusts

Discretionary trusts – such as the ICF Spry Family Trust – are, of course, common vehicles by which families arrange their financial affairs. They offer many attractions: they allow families to accumulate assets and to then distribute capital and income in a manner which allows taxation consequences to be minimised, permits

[1] The author wishes to acknowledge the contribution of his tipstaff, Ms Kathryn Neilson, to the preparation of this paper.
[2] *Kennon v Spry* (2008) 238 CLR 366.
[3] *SJB v SRB* [2010] HCATrans 196.

distribution of capital and income at the discretion of the trustee according to need or whim, and offers some protection from creditors (and spouses) in the event of adversity. 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'[4] 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'.[5] 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.

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.[6] In *FCT v Vegners*,[7] 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

[4] 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.
[5] Ibid.
[6] *Jacob's Law of Trusts in Australia*, 5th ed, 736 [2916].
[7] (1989) 90 ALR 547, 551-2.

> 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.[8] 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.[9] And in the words of Gummow and Hayne JJ in the same case, the word "beneficiary" is inapt insofar as it suggests the existence of any beneficial interest; such a person is "an eligible object" of the trust.[10]

However, such an eligible object or potential beneficiary 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

[8] *Re Smith* [1928] Ch 915; *Gartside v IRC* [1968] AC 553; *Jacob's Law of Trusts in Australia*, 5th ed, 649 [2315].
[9] *Kennon v Spry* (2008) 238 CLR 366, [60], [62].
[10] Ibid [125].

potential beneficiary and a right to have his [or her] interests protected by a court of equity';[11] 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.[12]

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.

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'.[13]

The Facts:

[11] *Gartside v Inland Revenue Commissioners* [1968] AC 553, 617.
[12] *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).
[13] Nygh and Cotter-Moroz, above n 4, 4-5.

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 [Clause 1].

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 [Clause2].

3. The beneficiaries are all the issue of Charles Chambers Fowell Spry (the Husband's father) and all persons married to such issue [Clause 4]. (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 [Clause 6].

5. No part of the income of the Trust is to be paid or applied for the Husband in repayment of any debt owed to him by the trustee, nor should any such income be accumulated for the Husband [Clause 6A].

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 [Clause 4]), 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* [Clause 2]. (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 [Clause 2].

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* [Clause 3].

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 [Clause 5].

4. The trusts of the Original Trust Instrument were otherwise confirmed [Clause 6].

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)[14] the Husband as Settlor of the Trust executed a further instrument of variation ("the 1998 Variation"), to the following effect:-

[14] *Kennon v Spry* (2008) 238 CLR 366, 373.

1. After the death or resignation of the Husband as trustee, the trustees should be jointly his two eldest daughters, Elizabeth and Catharine. 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 Clause 6 or Clause 7 of the Original Trust Instrument, should be made during his lifetime without his prior written consent [Clause 1].

2. The power of variation contained in Clause 2 of 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 [Clause 2].

3. Clauses 6 and 7 of the Original Trust Instrument were 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' [Clause 4].

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.

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',[15] 'a judgment that further dangerously muddies the waters with respect to the position of the objection of a discretionary trust'[16] 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…'[17] He complains that '[c]onstantly denaturing the purity of the trust concept will eventually leave it useless.'[18] However, my contention is that the decision is neither revolutionary nor heretical, but predictable and orthodox.[19]

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).'[20] 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*,[21] *Ashton*[22] and *Goodwin*[23] have

[15] Lee Aitken, 'Mudding the waters further – *Kennon v Spry*: 'ownership', 'control' and the discretionary trust' ((2009) 32 *Australian Bar Review* 173, 173.
[16] Ibid 180.
[17] Ibid 174.
[18] Ibid 181.
[19] 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.
[20] *Kennon v Spry* (2008) 238 CLR 366, 387.
[21] *In Marriage of Kelly (No 2)* (1981) 7 FamLR 762.
[22] *In Marriage of Ashton* (1986) 11 Fam LR 457.
[23] *In Marriage of Goodwin*(1990) 101 FLR 386.

been considered as his property – as Dr Spry was the sole trustee, with absolute discretion to apply trust property, including to himself as a beneficiary.[24] 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*.'[25] 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 …':[26]

> 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: [27]

> '[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.

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[24] *Kennon v Spry* (2008) 238 CLR 366, 389.
[25] Ibid 390.
[26] Ibid 390.
[27] Ibid 391.

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'.[28] Their Honours said that 'the term "property" is not a term of art with one specific and precise meaning [and] it is, of course, necessary to have regard to the subject matter, scope and purpose of the relevant statue.'[29] 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 interwined 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.[30]

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.[31] 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

[28] Ibid 396-7.
[29] Ibid 397.
[30] Ibid 411.
[31] Ibid 409.

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.[32] 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 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'.[33]

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

[32] Ibid 411.
[33] Michael Brown, 'His, Hers or Theirs?' (2009) 47 *Law Society Journal* 60.

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'[34] 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'.[35] 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.'[36]

In *Davidson & Davidson*,[37] 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.

[34] *In Marriage of Ashton* (1986) 11 FamLR 457, 461.
[35] *In Marriage of Ashton* (1986) 11 FamLR 457, 462.
[36] *In the Marriage of Goodwin* (1990) 101 FLR 386, 392.
[37] (1990) 14 Fam LR 817; (1991) FLC ¶92-197.

> 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 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.
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> 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 Skeats 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*,[38] Ellis, Strauss and Lindenmayer JJ, after referring to *Ashton* and

[38](1991) 15 Fam LR 26; (1991) FLC ¶92-254.

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.
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> 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.
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> ...
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> 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.
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> 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…'[39] 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.'[40] 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.[41]

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

[39] *Kennon v Spry* (2008) 238 CLR 366, 414.
[40] Ibid.
[41] *Gartisde v Inland Revenue Commissioners* [1968] AC 553, 607.

> one way. A "discretion" which can only be exercised one way is not a discretion at all.'[42]

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.[43]

The flaw in this analysis, in my 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 fails to 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:

[42] *Kennon v Spry* (2008) 238 CLR 366, 419.
[43] Ibid 425.

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."[44] 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.'[45]

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 where a defendant could have performed in alternative ways, it would have adopted the means least onerous to

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

it.[46] 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.

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.[47] In this context, a "settlement" is a disposition of property that makes future or continuing provision for either or

[46] *Abraham v Herbert Reiach Ltd* [1922] 1 KB 477, 480; *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130, 156.
[47] *Young v Young (No 1)* [1962] P 27, 30-31.

both spouses.[48] However, an absolute gift does not qualify.[49]

- *Secondly*, it must have a "nuptial element".[50] 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.[51] The Full Court has said that it requires only that the settlement be in some manner consequential upon or incidental to the marriage.[52] 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.[53] But the settlor must have brought the settlement into existence because of a particular (actual or contemplated) marriage.[54] While a post-nuptial settlement may be made at any time after the marriage, it must contemplate the continuation of the specific marriage.[55] Where a settlement is entered into because of the probability of the breakdown of the marriage, it is not a post-nuptial settlement,[56] 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[57]. It may be sufficient to qualify that the disposition makes provision for the children of the

[48] *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.
[49] *Prescott v Fellowes* [1958] P 260.
[50] *Young v Young (No 1)* [1962] P 27, 30-31; *Prescott v Fellowes* [1958] P 260, 278.
[51] *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
[52] *Public Trustee (SA) & Keays* (1985) FLC ¶91-651.
[53] *Joss v Joss* [1943] P 18, 20; *Knight & Knight* (1987) FLC ¶91-854.
[54] *Turnbull & Turnbull* (1990) 15 Fam LR 81; (1991) FLC ¶92-258.
[55] *Young v Young* [1962] P 27; *Melvil v Melvil* [1930] P 159.
[56] *Turnbull & Turnbull* (1990) 15 Fam LR 81; (1991) FLC ¶92-258.
[57] *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.

> spouses, rather than for one or other of the spouses.[58] The settlement of property in trust for a spouse, regardless of the identity of the settlor, can be a nuptial settlement.[59] This is so, even if the trust is discretionary and neither spouse has a vested interest.[60] 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.[61]

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).

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'[62], and Gummow and Hayne JJ agreed with French CJ in that respect.[63]

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

[58] 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.
[59] *Prinsep v Prinsep* [1929] P 225, 235; *Meller v Meller* (1967) 10 FLR 12, 15; *Public Trustee (SA) & Keays* (1985) FLC ¶91-651.
[60] *Prinsep v Prinsep* [1929] P 225; *Knight & Knight* (1987) FLC ¶91-854.
[61] *Prinsep v Prinsep* [1929] P 225; *Knight & Knight* (1987) FLC ¶91-854; *Toohey & Toohey* (1991) FLC ¶92-244; *Spellson & Spellson* (1989) FLC ¶92-044.
[62] *Kennon v Spry* (2008) 238 CLR 366, 395.
[63] Ibid 412.

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.[64] 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.[65] 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,'[66] 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.[67] 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.'[68]

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'[69] 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.'[70].

[64] Ibid, 428.
[65] Ibid 428-9.
[66] Ibid 429.
[67] Ibid 429-30.
[68] Ibid 430.
[69] Brown, above n 33, 63.
[70] *Kennon v Spry* (2008) 238 CLR 366, 445.

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 the Court with respect to family trust or company arrangements.'[71] 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.'[72]

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.'[73] 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.

[71] Ibid 437.
[72] *Kennon v Spry* (2008) 238 CLR 366, 437.
[73] Ibid.

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 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.

Bookhurst & Bookhurst

In this case, the High Court dismissed the father's application for special leave to appeal on 30 July 2010.[74] The question of interest is how the Court should address the views of children, as required by s 60CC(3)(a).

The legislation:

Section 60CC(3)(a), which requires the court to take into account as an additional consideration any views expressed by the child and any factors that the court thinks are relevant to the weight it is to give to the child's views, was inserted into the Act by (Cth) *Family Law Amendment (Shared Parental Responsibility) Act 2006*, as part of the suite of reforms that overhauled the process by which parenting orders are made upon relationship breakdown, aiming to 'recognise the need for a cooperative approach to parenting [and to] promote the object of ensuring that children have a right to a meaningful relationship with both their parents'[75] and 'to encourage parents to continue to take shared responsibility for their children after they separate.'[76]

Section 60CE reinforces that that expression of a view is purely optional, providing that nothing in Part VII of the Act permits a person or the court to require a child to

[74] *SJB v SJB* [2010] HCATrans 196.
[75] Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth) 1.
[76] Commonwealth, *Parliamentary Debates*, House of Representatives, 8 December 2005, 10 (Philip Ruddock).

express his or her views. However, section 60CD provides that the court in order to inform itself of the views of the child the court may:

- have regard to *anything contained* in a report that the court has directed a family consultant to prepare on a matter pursuant to s 62G(2)[77] (and the family consultant is required, by s 62G(3A), to ascertain the views of the child in respect of the relevant matter and include those views in the report);

- order that the child be independently represented in the proceedings,[78] or

- adopt such other means as the court thinks appropriate, subject to the rules.[79] Thus the court can, with leave, hear the evidence of a child directly,[80] but this has occurred very rarely.[81] Judges may interview children, but this is 'uncommon'.[82] The family consultant's report, especially now that the new provisions require that the consultant ascertain and include the child's views in the report, continues to be the major source of evidence about children's wishes.[83]

[77] (Cth) *Family Law Act 1975* s 60CD(2)(a).
[78] (Cth) *Family Law Act 1975* s 60CD(2)(b).
[79] (Cth) *Family Law Act 1975* s 60CD(2)(c).
[80](Cth) *Family Law Act 1975* s 100B.
[81] Belinda Fehlberg and Juliet Behrens, *Australian Family Law: The Contemporary Context* (2008) 363.
[82] Ibid 364.
[83] Ibid 362.

The case:

At first instance,[84] Rose J concluded that by reason of a history of family violence, the presumption of equal shared responsibility had been rebutted and that the mother should have sole parental responsibility for major long term issues in relation to health, religion and cultural upbringing, while both mother and father should have joint parental responsibility for the remainder of the long term issues.[85] It was in the best interests of the children that contact not include unsupervised overnight visits, due to the possibility of children being exposed to the father's emotional outbursts.[86] However, acknowledging that the father had recognised that he did have an 'anger' problem and had agreed to undergo therapy, his Honour made an order that the father have unsupervised overnight periods of time with the children only upon him providing to the mother a report from his therapist outlining the treatment received and 'the therapists unqualified opinion that the father does not, nor is it reasonably foreseeable that he will, pose a risk to the three children or any of them of engaging in abusive behaviour.'[87]

His Honour's reasons recognised that, in accordance with s 60CA, when deciding whether or not to make a parenting order, the court must regard the best interests of the child as the paramount consideration, and that for the purpose determining the child's best interests, the matters in ss 60CC(2) – the primary considerations, 60CC(3) – the additional considerations, and 60B – the Objects of Part VII of the Act[88] - must be taken into account. His Honour specifically referred to the consideration in s

[84] *Bookhurst & Bookhurst* [2009] FamCA 6 [19], [21].
[85] Ibid [159].
[86] Ibid [163]-[168].
[87] Ibid [172].
[88] Ibid [31]-[37].

60CC(3)(a), namely "any views expressed by the child and any factors (such a the child's maturity or level of understanding) the court thinks are relevant to the weight it should give to the child's views".[89] In this respect, his Honour recorded that both the mother and the father had given evidence of the children's views. The mother's evidence was that the children had 'from time to time resisted or objected to spending period of time with the father due to his [the father's] emotional outbursts on a number of matters';[90] while the father's evidence was 'that the three children have welcomed and enjoyed periods of time spent with him.'[91] The joint expert, a children's psychiatrist, also gave evidence of the children's views, stating that she had observed that the children 'were very anxious about speaking of their feelings and feared repercussions from their father if they did',[92] that 'they have experienced him as angry, that they are fearful of his anger...that they do not like going backwards and forwards between two households...'[93] and that the children 'are very anxious and agitated because there is the dilemma that they want to be with him and yet they don't feel safe.'[94] His Honour preferred the evidence of the psychiatrist to that of the parties.[95]

The father appealed to the Full Court. In respect of the order requiring provision of an unqualified psychiatric report as a condition of overnight contact, the Full Court acting on further evidence not tendered at the trial accepted that such an opinion could not be insisted upon having regard to applicable professional standards, set aside the order requiring the 'unqualified' opinion due to its unworkability and remitted it for

[89] Ibid [44].
[90] Ibid [45].
[91] Ibid.
[92] Ibid [45].
[93] Ibid.
[94] Ibid [46].
[95] Ibid [47].

new hearing.[96] However, the father also contended that the trial judgeJ had erred in the treatment of the evidence as to the views of the children, submitting that s 60CC(3)(a) imposed upon the Court an obligation to ascertain the views of the children, and that where there were three children of different ages, it was necessary to reach a conclusion about each individual child, rather than a generalised conclusion like those proffered by the psychiatrist. The Full Court concluded that there had been adequate consideration of the children's views,[97] and that while separate consideration of each child's views may be necessary or appropriate in some cases, it was not required here because the dominant emotions described by the psychiatrist were shared by all three children.[98]

The argument:

Despite his success in the Full Court, the father then sought special leave to appeal to the High Court, arguing that there would be no utility in remitting the supervision orders for a de novo hearing before a single judge if that Judge were bound by the decision of the Full Court that Rose J had given adequate consideration to the views of the children.[99] His counsel submitted that the High Court should provide guidance as to the approach to be taken to ascertainment and evaluation of the views of children. Two potential approaches were posited. The first (for which the husband contended, and which might be called "the direct approach") was that the child be told of the contents of a proposed parenting order, and then asked to express a view or opinion, if he or she wished to do so. The Court would then be required to make

[96] *Bookhurst & Bookhurst* [2010] FamCAFC 26, [66]
[97] Ibid [78].
[98] Ibid [77].
[99] *SJB v SJB* [2010] HCATrans 196, 4.

positive findings of the type in *Gillick v West Norfolk and Wisbech Area Health Authority*[100] (approved by the High Court in *Secretary of the Department of Health and Community Services v JWB and SMB* (‘*Marion’s Case*’)[101] about the maturity and level of understanding of each child in relation to the proposed parenting order, and a finding as to whether the child had had a reasonable opportunity to express a view or opinion in relation to the order. The second (which might be called “the indirect approach”) would be involve the more general approach whereby an expert asked generalised questions such as ‘“What was your scariest moment?” or, “What would you like to do when you grow up?”’[102] the answers to which could inform conclusions as to the child’s views. Counsel for the father submitted that ‘[t]here is no clear decision from the Family Court – there is some in relation to wishes but not views ... it is necessary, in our respectful submission, for this Court to address the content and meaning of that expression and give guidance as to how trial judges and experts, as I say, retained at the request of the trial judge go about this fundamental task.’[103]

The High Court refused the husband’s application for special leave to appeal, but made some observations which suggested that the arguments he advanced were open to be advanced on the new hearing of the case.

The previous law:

[100] [1985] 3 All ER 402 (HL).
[101] (1992) 175 CLR 218.
[102] *SJB v SJB* [2010] HCATrans 196, 5.
[103] Ibid.

Prior to the 2006 reforms, the court was required by (former) s 68F(2)(a) to take into account 'any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight is should give the child's wishes.'

Several pre-2006 decisions consider how the 'wishes' (as opposed to 'views') of children were to be taken into account by the court. *In the Marriage of Harrison and Woollard*[104], Fogarty, Baker and Kay JJ state that '[t]he wishes of children are important, and proper and realistic weight should be attached to any wishes expressed by children'[105] and that 'the court will attach varying degrees of weight to a child's stated wishes depending upon, amongst other factors, the strength and duration of their wishes, their basis, and the maturity of the child, including the degree of appreciation by the child of the factors involved in the issue before the court and their longer terms implications.'[106]

In the Marriage of Doyle,[107] Hannon J said that '[i]f the court is satisfied that the wishes expressed by the child are soundly based and founded upon proper considerations as well thought through as the ability and state of maturity of the child will allow, it is appropriate to have regard to those wishes and to give such weight to them as may be proper in the circumstances.'[108]

[104] (1995) 18 Fam LR 788.
[105] Ibid 797.
[106] Ibid 800.
[107] (1992) 15 Fam LR 274.
[108] Ibid 293.

In Marriage of Wotherspoon and Cooper,[109] Wood J said that '[a]s a matter of law, if a court is to give effect to the wishes of a child in relation to his future custody, it must be satisfied that those wishes are soundly based and founded upon considerations as well thought through as the ability and state of maturity of the child will allow.'[110]

What does the change from "wishes" to "views" mean?

Felberg and Behrens remark that in the light of the change from 'wishes' to 'views', 'it is unclear how relevant the pre-2006 case law will be.'[111] However, in my view there are several fairly strong *indicia* that not much has changed.

The Explanatory Memorandum explained the change as follows:

> A child may not necessarily want to express a "wish" about which of his or her parents the child will live with or spend time with. It is intended that "views" will also capture a child's perceptions and feelings, and will allow for any decision to be made in consultation with the child without the child having to make a decision or express a "wish" as to which parent he or she is to live with or spend time with. It is intended that references to a child's "views" will not exclude a child expressing his or her "wishes".'[112]

Thus the amendment was intended to broaden the section, so as to include the feelings and perceptions of the children as well as their "wishes". The Minister's Second Reading Speech[113] does not offer any further explanation. Several of the speeches made in parliament at the second reading stage did touch upon the subject of

[109] (1980) 7 Fam LR 71.
[110] Ibid 76.
[111] Fehlberg and Behrens, above n 42, 280.
[112] Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth) 13-14.
[113] Commonwealth, *Parliamentary Debates*, House of Representatives, 8 December 2005, 10 (Philip Ruddock).

children's views, but chiefly in the context of expressing concern that they were described by the legislation only as an additional consideration.[114] For example, Senator Siewart expressed her (misguided) concern that 'the child's views will be relegated to the list of additional considerations, effectively putting the parent's desire for access ahead of the child's need for security.'[115] But this legislative history does not point to any intent to change the established manner in which "wishes" are taken into account. The substitution of the word 'views' for 'wishes' is significant only to broaden the subject matter of expressions made by a relevant child that can be taken into account. Thus, I think the pre-2006 case law in relation to consideration of 'wishes' remains applicable.

The husband argued that children had a right to express a view, and that his meant that before making a parenting order the court had to be satisfied that the child, if competent in the *Gillick* sense for that purpose, had been afforded a reasonable opportunity to express her or his views on the proposed arrangements. I would not be inclined to accept that argument. Although the husband invoked s 60B(2) to argue that the right of a child to spend time on a regular basis with both parents was somehow translated by s 60CC(3)(a) into a right to express an opinion if sufficiently mature to do so, that is simply not what the legislation says. A right to spend time is not a right to be heard; an obligation to consider "any wishes" does not convert into a reciprocal right to express wishes as a necessary precondition to the making of a parenting order.

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[114] Commonwealth, *Parliamentary Debates*, Senate, 27 March 2006, 123 (Kerry Nettle); Commonwealth, *Parliamentary Debates*, Senate, 27 March 2006, 126 (Lyn Allison); Commonwealth, *Parliamentary Debates*, Senate, 27 March 2006, 129 (Andrew Bartlett); Commonwealth, *Parliamentary Debates*, Senate, 27 March 2006, 120 (Natasha Stott Despoja).
[115] Commonwealth, *Parliamentary Debates*, Senate, 27 March 2006, 109 (Rachel Siewert).

That said, the circumstance that a child's views are a mandatory, albeit "additional", consideration, may no doubt mean that a failure to take them into account may amount to a miscarriage of discretion. In the special, less adversarial context of children's matters, this may well require that the court satisfy itself that there has been a reasonable opportunity for any views to be expressed (the extent of which will no doubt be influenced by considerations of maturity and understanding). Ordinarily, given the obligation of family consultants to ascertain and record the child's views in their reports, an order for a family report would fulfil that requirement.

However, I do not think that means that a child must necessarily be confronted with a proposed order or arrangement and asked for her or his views. For a person in authority, such as an officer of or consultant appointed by the court, let alone a judge, to do so, might very well have the effect of apparently requiring a child to express a view, contrary to s 60CE. Particularly with younger children, the "indirect approach" may well remain the preferable and prudent one.

Moreover, I would not accept that the court must make any finding in respect of or akin to *Gillick* competence. The present context is far removed from that of *Gillick* competence, where what is in issue is the child's ability to consent in his or her own right to medical treatment, which is an absolute standard. Section 60CC(3)(a) does not contemplate an absolute standard, absent which a child's views are to be disregarded but present which they are to be considered, or acted upon. Rather, it contemplates a spectrum along which the weight afforded to a child's views will vary from greater to lesser depending upon the child's maturity and level of understanding. A child with limited understanding is not deprived of the opportunity of having her or

his views considered. A child of full understanding is not entitled to have his or views considered determinative. The court is bound to consider the views expressed by the child (of however limited understanding), but - in accordance with the pre-existing case law - will afford them such weight as appears appropriate after considering the child's maturity and level of understanding.

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