

Is Kennon still Spry?

A review of the principles relating to the characterisation of discretionary and unit trusts in Part VIII and Part VIIIAB proceedings.

Introduction

In the current financial landscape, the existence of a discretionary and/or unit trust in a family law matter is almost the rule, rather than the exception. In a recent report commissioned by the Australian Taxation office, RMIT University concluded that there were approximately 850,000 trusts in Australia (amounting to circa one trust for every 29 individuals) in 2015-2016, with same holding assets of more than \$3 trillion AUD. The report predicted that there could be more than a million trusts in Australia by 2022.¹

As we know, the family law courts exercise broad discretion when determining proceedings pursuant to Part VIII and Part VIIIAB of the *Family Law Act 1975* (Cth) (**the Act**). In the exercise of that discretion, a court's findings in relation to the characterisation of a party's interest in a trust can have a substantial effect on each party's entitlement. It can also have significant impact upon the relief sought by the parties² and thus the administration of justice. Accordingly, the data recounted above demonstrates that perhaps now, more than ever, it is incumbent upon practitioners to maintain an accurate understanding as to the manner in which the family law courts exercise discretion in relation to these vehicles.

This paper revisits principles underlying discretionary and unit trusts and the family law courts' historic characterisation of them. It then reviews and summarises recent judgments involving these issues, together with the manner in which the exercise of discretion has been applied, in the hope of providing further insight to practitioners. The paper concludes by offering suggested disclosure in cases involving discretionary and/or unit trusts.

Finally, the paper has been written for both junior and experienced practitioners alike to assist them to navigate matters involving trusts.

An overview of discretionary and unit trusts

The essence of a trust is the separation of the legal title (held by the trustee) from the equitable interest (held for the benefit of the beneficiary or object of the trust). The essential elements of a trust are:

1. a trustee;
2. trust property;
3. a beneficiary or object; and
4. an equitable obligation binding the trustee to deal with trust property for the benefit of the beneficiary, or for the advancement of certain purposes.³

Whilst it is acknowledged that practitioners will have a detailed understanding of the discrete characteristics of discretionary and unit trusts, for the sake of completeness, and by way of concise summary:

1. With respect to discretionary trusts:

¹ Associate Professor Ashton de Silva, Professor John Glover, Dr Venkateshwaran Narayanan, Dr My Nguyen, Associate Professor Kate Westberg, Current issues with trusts and the tax system: Examining the operation and performance of the tax system in relation to trusts, with a particular focus on discretionary trusts linked to high net worth individuals, RMIT University. A copy of the report may downloaded here:- <https://iorder.com.au/publication/Download.aspx?ProdID=1-GJ16CAC-P1>

² As an example, a party may seek relief for maintenance in addition to an alteration of property interests.

³ Tina Cockburn, Tracey Carver and Anne Matthew, *Equity and Trusts*, 4th Edition, 2014 at p.217

- (a) Arguably the most common type of trust in family law matters.
- (b) Subject to the terms of the trust deed, the trustee is empowered with unfettered discretion to allocate trust property, including income and capital, to beneficiaries.
- (c) A beneficiary may have an equitable right to due consideration and due administration.⁴

2. With respect to unit trusts:

- (a) A manager directs a trustee to allocate trust property to the unit holder(s).
- (b) 'Initial' unit holders are identified in the trust deed and acquire a defined beneficial interest in trust property, including income and/or capital.
- (c) Subject to the terms of the trust deed, unit holders may sell, grant or redeem their units.
- (d) Commonly used as part of a wider structure.

There are, of course, trusts beyond those described above. By way of some examples, fixed trusts, bare trusts⁵ and trusts arising at equity, including constructive and resulting trusts, are often relevant to Part VIII and Part VIIIAB proceedings. Discussion of same is, however, beyond the scope of this paper.

Relevant roles in discretionary and unit trusts

It is, again, acknowledged that practitioners will have a detailed understanding of the relevant 'roles' associated with trusts. Nonetheless, by way of concise summary:

Role	Description
Settlor	The individual who establishes and 'settles' the trust. The settlor will cause a transfer of an asset to a trustee.
Appointor	The individual(s) empowered to appoint and remove the trustee. The appointor may also be empowered with other rights including, for example, in relation to amending the trust deed, changing the vesting date of the trust and/or changing the beneficiaries of the trust.
Trustee	The individual(s) empowered to allocate trust property (capital and/or income) pursuant to the terms of the trust deed. The trustee holds the trust property on trust for the beneficiaries and a fiduciary relationship exists between them. The individual(s) may be a 'real person' or a corporate entity.
Beneficiary	The individual(s) beneficially entitled to an allocation of trust property (capital and/or income) pursuant to the terms of the trust deed.
Unit holder	The individual(s) that own a unit in a unit trust. The unit trust entitles the unit holder to right to a specific allocation of trust property (capital and/or income) and to vote pursuant to the terms of the trust deed. The individual(s) may be a 'real person' or a corporate entity and, further, the unit holder may be a trustee on behalf of an alternate trust.

⁴ See, i.e., *Kennon v Spry* [2008] HCA 56.

⁵ Often utilised to facilitate the purchase of real property by a self-managed superannuation fund.

When to consider a party's interest in a discretionary or unit trust

Consideration of a party's interest in a trust should occur at the outset of any Part VIII and Part VIIIAB proceedings. The task of a court, and thus the parties, in such proceedings is settled law in Australia.⁶ It requires a determination as to the parties' legal and equitable interests in property as 'step one' of the process.

As the plurality of the High Court of Australia opined in *Stanford and Stanford*:⁷

...First, it is necessary to begin consideration of whether it is just and equitable to make a property settlement order by identifying, according to ordinary common law and equitable principles, the *existing* legal and equitable interests of the parties in the property. So much follows from the text of s 79(1)(a) itself, which refers to "*altering* the interests of the parties to the marriage in the property" (emphasis added)...⁸

Whilst the decision in *Stanford* pertains to a Part VIII proceeding (i.e. s 79 of the Act), it is equally relevant to s 90SM of the Act noting the largely identical language.

Further, any contested issue pertaining to an interest in a trust can be determined at the initial stages of a final hearing.⁹ It can also be determined as a discrete event in the Part VIII or Part VIIIAB proceeding.¹⁰ It is therefore incumbent on practitioners to properly determine relevant evidence in relation to same at an early juncture and endeavour to resolve the controversy in the interests of the parties and the administration of justice.

The family law courts' approach to discretionary and unit trusts

Practitioners must remain cognisant of the broad discretion exercised by the family law courts in Part VIII and Part VIIIAB proceedings when considering a court's approach to these vehicles. Such jurisprudence was developed prior to, and has been developed since, the introduction of Part VIIIAB of the Act. Accordingly, the following summary may be described as general in nature only, with each case needing to be considered on its own merits.

Unit trusts

As a party's unit(s) in a unit trust may be sold, granted to another individual or redeemed, the interest in the unit is generally considered 'property of the parties...or either of them' for the purposes of ss 4, 79(1) or 90SM(1) of the Act.¹¹ The interest should therefore be included in the parties' balance sheet.

It is, however, important to remain cognisant that:

1. A unit holder's power to sell, grant or redeem the interest must be exercised having regard to the terms of the trust deed. Those terms may have an impact upon the underlying value of the unit (i.e. require application of a discount to value).¹²
2. The nature of the unit must be considered. Whether a party has an interest in a capital unit or income unit may impact upon characterisation of the interest and/or its value.¹³

⁶ See, i.e., the approach identified in cases such as *Hickey & Hickey & Attorney General of the Commonwealth* [2003] FamCA 295 and *Bevan & Bevan* [2013] FamCAFC 116.

⁷ [2012] HCA 52.

⁸ *Ibid* at [37] per French CJ, Hayne, Kiefel and Bell JJ.

⁹ See, i.e., *Stephens & Stephens and Ors* [2007] FamCA 680.

¹⁰ See, i.e., *Camden Pty Ltd & Laue and Ors* [2018] FamCAFC 91.

¹¹ See, i.e., *Tritton & Poyzer* [2010] FamCA 666 and *Pilot & Pilot* [2010] FamCA 1064.

¹² See, i.e., *In the Marriage Of: Leonard Charles Goodwin Appellant/Husband and Angel Helen Goodwin Alpe Respondent/Wife* [1990] FamCA 147.

¹³ See, i.e., *Anison & Anison and Anor* [2015] FamCA 973.

3. The rights that the unit attracts must be considered. By way of example, voting rights associated with a unit may have an impact upon characterisation of the interest and/or its value.¹⁴

Discretionary trusts

There have been copious decisions of the family law courts in which there was controversy as to the characterisation of a party's interest in a discretionary trust. At its most fundamental, the parties' interests in a discretionary trust will generally be found to be either:

1. 'property of the parties...or either of them' for the purposes of ss 4, 79(1) or 90SM(1) of the Act; or
2. a financial resource¹⁵ of a party for the purposes of ss 79(4)(e), 75(2), 90SM(4)(e) or 90SF(3) of the Act.¹⁶

There are, of course, the prospects of other factual matrixes in which a party's interest in a trust is neither property, nor a financial resource.¹⁷ Such is the importance of taking specific instructions, seeking provision of relevant documents and reviewing carefully the terms of the relevant trust deed.

When determining whether a party's interest in a trust should be considered 'property', a court will consider, *inter alia*, the extent to which each party (or both) have a degree of influence and control over the trust. Consideration will be undertaken as to whether the trust is 'sham' and, in reality, the 'puppet' or a party (of both of them).

That is, however, one element of essentially three elements to be considered in cases involving trusts and trust assets (including income and capital). Whilst the degree of influence and control is element to be considered, consideration is also required as to whether:

1. one (or both) or the parties have a legal or equitable right through which an order of the court may be made 'altering' the interest(s) in trust assets; and
2. a legitimate third party has a legal or equitable right which may be exercised in relation to the trust or trust assets.

The following cases have been instrumental in developing the foregoing jurisprudence:

1. *In the Marriage of Goodwin*¹⁸ in which the Full Court of the Family Court of Australia (***the Full Court***) concluded that:

...we have no doubt that his Honour was entitled to find that the trust property was, in reality, the property of the husband in the present case. The husband had the sole power of appointment of the Trustee, which was a creature under his control, and he was a beneficiary to whom the Trustee could make payments exclusively of other beneficiaries as the husband saw fit. If further evidence was needed that the husband controlled both the Trustee and the trust for his own purposes, it is to be found in the fact of the removal of the wife and her son as beneficiaries of the trust following the separation. This evidence confirms both the power of the husband and the fact that the Trustee acted as his creature...¹⁹

¹⁴ See, i.e., *Hunt & Atkins and Ors* [2014] FamCA 1076 and *Anison & Anison and Anor* [2015] FamCA 973.

¹⁵ See, i.e., *Shaw and Shaw* (1989) FLC ¶92-030, *Webster and Webster* (1998) FLC ¶92-832 and *Milankov and Milankov* (2002) FLC ¶93-095.

¹⁶ Together with the Part VIIIAB equivalents of ss 90SM(4)(e) and 90SF(3).

¹⁷ See, i.e., *Stacy and Stacy* (1977) FLC ¶90-324 and *Toohy and Toohy* (1991) FLC ¶92-244.

¹⁸ [1990] FamCA 147.

¹⁹ *Ibid* per Nicholson CJ and Simpson and Finn JJ at [32].

2. *Harris and Harris*²⁰ in which the Full Court determined that as 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...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...²¹

3. *JEL and DDF*²² in which the Full Court cited, with approval, the trial judge's finding in relation to the characterisation of the parties' interests in the trusts as property, namely that in:

...essence then, the husband and the wife, as the sole directors and equal shareholders in each of the trustee companies, may vote to distribute any or all of the income and/or capital of the trust to the husband and/or the wife, in their absolute discretion. The husband as the appointor of the Family Trust, or the husband and the wife as the sole directors of and equal shareholders in Dimin and Matamin, the trustees and appointors of the Investment and Mining Trusts, may appoint the husband and/or the wife as trustees of the respective trusts, thereby enabling a distribution of any or all of the income and/or capital of the trusts to the husband and/or the wife...²³

4. *Kennon v Spry*²⁴ in which the majority of the High Court of Australia concluded that the trust property was property of the parties or either them once a deed (created to endeavour to frustrate an anticipated court order) had been set aside. The High Court held that where:

...property is held under such a trust by a party to a marriage and the property has been acquired by or through the efforts of that party or his or her spouse, whether before or during the marriage, it does not...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...²⁵

[and]

...for so long as Dr Spry retained the legal title to the Trust fund coupled with the power to appoint the whole of the fund to his wife and her equitable right, it remained, in my opinion, property of the parties to the marriage for the purposes of the power conferred on the Family Court by s 79...²⁶

[and]

...the characterisation of the assets of the Trust, coupled with Dr Spry's power to appoint them to his wife and her equitable right to due consideration, as property of the parties to the marriage is supported by particular factors. It is supported by his legal title to the assets, the origins of their greater part as property acquired during the marriage, the absence of any equitable interest in them in any other party, the absence of any obligation on his part to apply all or any of the assets to any beneficiary and the contingent character of the interests of those who might be entitled to take upon a default distribution at the distribution date...²⁷

²⁰ [1991] FamCA 124.

²¹ *Ibid* per Ellis, Strauss and Lindenmayer JJ.

²² [2000] FamCA 1353.

²³ *Ibid* per Kay, Holden and Guess JJ at [44].

²⁴ [2008] HCA 56.

²⁵ *Kennon v Spry* [2008] HCA 56 per French CJ at [65].

²⁶ *Ibid* per French CJ at [66].

²⁷ *Ibid* per Frqanch CJ at [392].

In the absence of the necessary control and legal or equitable right to the trust property, the benefits that a party (or both) receive from a trust may be considered a financial resource.²⁸ This will then be relevant to the assessment of a 'just and equitable' alteration of the parties' legal and equitable interests in property noting the operation of ss 79(4)(e), 75(2), 90SM(4)(e) or 90SF(3) of the Act.

Recent cases

The paper considers four recent cases to investigate whether the principles enunciated above remain applicable in the post-*Spry* and post-*Stanford* era. Those cases are:

1. *AC and Ors & VC and Anor*,²⁹
2. *Kelton & Brady and Anor*,³⁰
3. *Harris & Dewell and Anor*,³¹ and
4. *Mitford & Mitford an Ors*.³²

Turning to each of these cases individually:

AC and Ors & VC and Anor

In *AC*, the Full Court considered the application of Part VIII A of the Act and, in particular, whether Part VIII A could be used to require a trustee (including a third party trustee) to bring forward the vesting date of a trust fund in order to value and distribute an irrevocable entitlement of the husband and wife to the trust assets.

The facts:

1. The husband and wife were married in 1979, and separated in 2005.
2. The husband and wife owned net assets of \$2,860,179 (excluding trust assets).
3. The relevant trust was a discretionary trust, established by a Deed of Settlement dated June 1985, with a vesting date of June 2064. The husband was the guardian and appointor of the trust.
4. The specified beneficiaries of the trust were the husband, the wife and their three adult children.
5. The original trustee was the husband's father, but by a Deed of Appointment made in August 1985, a corporate trustee was appointed in lieu. The husband and his father each held one of the two issued shares in, and were directors of, the corporate trustee.
6. In February 1997, the husband resigned as appointor and guardian of the trust and as a director of the corporate trustee. Prior to the husband's resignation, he did not appoint another Appointor or Guardian.
7. Between 2001, and 2004, there were changes in the shareholding in the corporate trustee which resulted in the husband's father holding the entire shareholding (12 shares). When the husband's father died in 2008, the entire shareholding passed to the husband's mother (who was also one of two directors of the corporate trustee).

²⁸ See note 12 above.

²⁹ [2013] FamCAFC 60.

³⁰ [2017] FamCAFC 186.

³¹ [2018] FamCAFC 94.

³² [2018] FamCA 1067.

8. All of the properties forming part of the trust assets were acquired prior to the husband's resignation as Appointor and Guardian in 1997, and it was generally agreed that the funds used to purchase the properties originated from the husband's parents.
9. The total assets of the relevant trust were approximately \$6,565,390.

The contentions at first instance

At trial, the wife sought an order requiring the trustee of the trust to exercise its powers pursuant to the terms of the trust deed to bring forward the vesting day of the trust and to distribute the trust assets to the specified beneficiaries in accordance with the provisions in the trust deed.³³ The husband opposed that order.

Her Honour, Justice Crisford, considered the discretion given by ss 90AF(1) and (2) of the Act with reference to the matters contained in ss 90AF(3) and (4) of the Act and satisfied herself that the proposed orders were "reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to a marriage."

Her Honour found that the husband's mother was the controller of the trustee and the trust (this finding was not challenged on appeal) and made extensive findings (which were also not challenged on appeal) as to the implications of the trust no longer having a guardian or appointor, including that the trustee could not be replaced and that the husband and wife as specified beneficiaries each had a "fixed and irrevocable entitlement to a share of capital upon a vesting of the trust."³⁴

Her Honour found as follows:

[245] ... I am satisfied that Part VIII AA and its provisions have been complied with.

[246] I find that there is a sufficient nexus between the assets of the Trust and the property of the parties to the marriage for Part VIII AA to apply in this case insofar as it relates to the early vesting.

[247] I do not find this to be an arbitrary invasion of the rights of a third party but an alternation of those rights where they are sufficiently connected to the division of the property between spouses. I find it to be a necessary step to bring about a just result. This was a Trust interwoven with the financial lives of these spouses for about 20 years.³⁵

The trial judge found that the husband's mother used \$2,500 - \$3,000 a month from the trust for living expenses and that based on current life expectancy tables she would receive \$338,400 from the trust going forward.³⁶

Her Honour ordered that the net assets of the husband and wife (excluding superannuation) should be divided between them "as to 38% to the wife and 62% to the husband." Her Honour found the net assets of the parties to be \$5,351,135. This amount included an estimated value of \$2,490,956 as the "gross amount of 2/5 of the Trust after [the payment of] \$338,000 to [the husband's mother]."³⁷

The order made at first instance required the trustee of the trust to exercise its powers pursuant to Trust Deed to appoint 30 June 2010, as the vesting day for the Trust. Upon vesting, Her Honour's orders required the trustee to distribute the trust assets in accordance with the trust deed. Put another way, Her Honour's orders had the effect of bringing forward the vesting date to make trust property available to satisfy the wife's property settlement entitlement.

³³ *AC and Ors & VC and Anor* [2013] FamCAFC 60 at [33].

³⁴ *Ibid* at [30].

³⁵ *Ibid* at [41].

³⁶ *Ibid* at [40].

³⁷ *Ibid* at [2].

The contentions on appeal

On the same day that Her Honour made orders (9 December 2011), a Notice of Appeal was filed on behalf of the husband's mother, the other director of the corporate trustee and the corporate trustee. Prior to the hearing of the appeal the husband's sister (a general beneficiary of the trust) sought to be heard in support of the appeal. The Commonwealth Attorney General intervened in the appeal pursuant to s 78A of the *Judiciary Act 1903* (Cth).

Submissions of the husband's mother and the corporate trustee

Whilst there were seven grounds of appeal, the Full Court described the "core of the appeal" as being contained in the following propositions:

1. Part VIII AA of the Act can only be used to implement orders relating to what has properly been found to be the property of the parties to the marriage; and
2. Part VIII AA would be beyond constitutional power if it could be used to alter the substantive property rights of third parties (as was asserted to have been done by the trial judge in this case).³⁸

Put another way, the appellants argued that the trial judge had failed to distinguish between the husband and the wife having rights in relation to the trust which could be categorised as "property" for the purposes of the Act, and the trust itself being the property of one or both of them.

The appellants also argued that:

1. Part VIII AA could not be used to effectively "created new property" for the spouses and in doing so, alter the rights of third parties;³⁹ and
2. the entitlements of the husband and wife could have been satisfied without vesting the trust, and thus the requirement in s90AF(3)(a) that the making of the order was "reasonably necessary...to effect a division of property between the parties to the marriage" had not been met.⁴⁰

In relation to the husband's mother, it was further submitted that no-one had sought an order that she should be paid the sum of \$338,000 and that she had not been given notice of, or the opportunity to address the possibility of such an order during the hearing. Accordingly, it was asserted that the husband's mother had not been afforded procedural fairness.

Submissions of the husband's sister

The husband's sister, who was a general beneficiary of the trust as indicated above, challenged the order insofar as it brought forward the vesting date of the trust. She argued that the order was not justified by s 90AF of the Act for the reasons that it changed the nature of the interest of the husband and wife in the corpus of the trust from a vested future interest to an interested vested in possession, and as a consequence it deprived her the right for a distribution of income from the trust until such time in the further as the trust vests.

³⁸ Ibid at [14].

³⁹ Ibid at [59].

⁴⁰ Ibid at [60].

Submissions of the Commonwealth Attorney-General

The Attorney-General did not adopt a position on whether the order appealed in this case was validly made under Part VIII A of the Act. The Attorney-General's submissions focused on the constitutional argument mounted by the appellants and argued that "an order property made under Part VIII A...that binds third parties, including the doing of a thing in relation to property of parties to the marriage or alters the third party's rights, liabilities or property interest, is supported by both s51(xx) and (xxii) of the Constitution."⁴¹

The Full Court's Decision

The Full Court did not agree with the appellants' argument that Her Honour had effectively "created property." The Full Court stated that, "the fact of the matter is that the entitlement already existed and what her Honour had to do was to try and value it and then to distribute it between the spouses..."⁴²

The Full Court also held that the powers in Part VIII A of the Act can be used to require a trustee to bring forward a vesting date of a trust for the purposes of distributing trust assets at the expense of third party interest provided that the requirements in ss 90AE(3) and (4) and ss 90AF(3) and (4) of the Act have been complied with. This was notwithstanding the fact that, on appeal, it was generally accepted that the wife's entitlement could "probably" have been satisfied from non-trust assets. Satisfying these provisions will require practitioners to ensure that proper evidence is obtained with respect to those matters; including the economic, legal and other capacity of the third party to comply with the order and the taxation effects and administrative costs likely to be imposed on the third party.

With respect to this point, the Full Court stated that,

...Whatever may be the outer limits of the powers in Part VIII A, we are satisfied the Part can be used to require a trustee (including a third party trustee) to bring forward the vesting date of a trust fund for what can be termed, the "ancillary" purposes of valuing an irrevocable entitlement to ultimately share in the trust fund, and of distributing that share to the party entitled, and that these powers can be exercised even at the expense of third party interests, provided that the requirements in ss 90AE(3) and (4) and ss 90AF(3) and (4) are met, and the order, if made under s79, is "just and equitable", or if made under s 114, is "proper"...⁴³

In relation to the argument that the vesting of the trust extinguished the rights of other beneficiaries, such as the right of general beneficiaries to future income distributions, the Full Court was not persuaded, and approved the trial judge's reasoning that it was never intended, based on the objective facts of the case (including the history of distributions) that the general beneficiaries would have an interest in trust assets.⁴⁴

However, the appeal ultimately succeeded on the basis that the husband's mother, as the controller of the trust, and also as a general beneficiary, was not accorded the required procedural fairness, and consequently the orders could not be considered "proper."

Kelton & Brady and Anor

In *Kelton*, Murphy J sitting as a single judge of the Full Court, considered the issue of "apparent relevance" in the context of a party to the marriage issuing a subpoena for the production of documents relating to a discretionary trust of which the other party was a beneficiary.

⁴¹ Ibid at [32].

⁴² Ibid at [84].

⁴³ Ibid at [85].

⁴⁴ Ibid at [93].

The facts:

1. The husband and wife separated in 2016, and were engaged in a property proceeding in the Federal Circuit Court of Australia. In the course of that proceeding, the husband issued a subpoena directed to a chartered accountant, Mr A.
2. The subpoena sought that the accountant produce a number of documents relating to the trust. No objection was taken to the production of the trust deed. However, objection was taken to producing to the husband financial accounts including balance sheets and profit and loss statements and associated notes for the trust.
3. The trust was established by Deed in 2007, and the wife's mother was the appointor of the trust and the sole director and shareholder of the corporate trustee.
4. The trust was a discretionary trust and the wife disclosed her interest as a discretionary beneficiary of the trust in her sworn Financial Statement. The three 'principal beneficiaries' of the trust were the wife, the wife's sister and their mother.
5. The sworn evidence of the wife's mother was that:
 - (a) the wife's mother provided the capital of the trust on its establishment;
 - (b) the funds were accumulated by her and her late husband as a result of their efforts during their lifetime;
 - (c) at no time did the wife make "any contribution toward the acquisition, preservation or management of the capital or income of the Trust;"
 - (d) the wife has not received any distribution of income or capital from the trust in her capacity as a beneficiary or default beneficiary of the trust; and
 - (e) the wife does not have a beneficiary loan account with a credit or debit balance in the books of the account of the trust.

The first instance decision

The judge at first instance set aside the subpoena on the basis of relevance and fishing. The judge's reasoning is contained in the final two paragraphs of the first instance judgement which read as follows:

...In the present case I consider that this matter aligns squarely with the *MacDowell* case because the wife has never been a shareholder or director and has never received any distribution from the Trust on her evidence and the evidence of the director of the trustee company. The wife has only in recent times enjoyed the benefit of living in a house the Trust owns rent free for [omitted] months. There is no satisfactory justification for the husband's attempt to subpoena the documents sought from the person subpoenaed. There has been no consent as there was in *MacDowell* to providing certain documents. I am satisfied that it is appropriate to set aside the subpoena on the basis of relevance...

[and]

...The husband's evidence at paragraph 13 above swears he has no knowledge of the wife not having received a distribution from the trust and no knowledge of a beneficiary loan account. In my view the husband would need to point to some evidence to support the assertion the wife received a distribution or has a loan account otherwise the issue of the subpoena could be described as a fishing exercise. *Botany Bay Instrumentation and Control Pty Ltd v Stewart* [1984] 3 NSWLR 98 at 100-101. For that reasons [sic] I would also set aside the subpoena..."⁴⁵

⁴⁵ *Kelton & Brady and Anor* [2017] FamCAFC 186 at [8].

The husband appealed.

The contentions on appeal

At the appeal, Murphy J framed the husband's grounds of appeal by reference to what His Honour said were the three questions raised by the appeal, as follows

1. Were the documents sought "apparently relevant" to the issues in the proceeding and did Her Honour err in applying the law in concluding that they were not?
2. In that respect, did Her Honour fail to refer to all of the evidence germane to the question of relevance?
3. Are her Honour's reasons adequate to explain her conclusions and orders?

His Honour, sighting *Hatton*, stated that "it is now settled that a subpoena can be set aside in so far as it seeks production of documents which have no "apparent relevance" to the issues in the proceedings."⁴⁶ Murphy J further stated that:

...In so holding for the purposes of proceedings in the Family Court, the Full Court in *Hatton*, above, cited with approval what was said by Beaumont J in *Trade Practices Commission v Arnotts Ltd and Ors (No 2)*...^[5]

[and]

... Does the material sought have an apparent relevance to the issues in the principal proceedings, ie, is adjectival, as distinct from substantive, relevance established? Does the subpoena have a legitimate forensic purpose to this extent? This involves a consideration of the matter from the standpoint of [the person at whose request the subpoena was issued]...⁴⁷

The onus was on the accountant to establish that the documents sought had no apparent relevance to the issues in the proceedings.⁴⁸

The basis for the subpoena was set out in the husband's affidavit, in which he deposed as follows:

... [The wife's mother] states that at no time has [the wife] received a distribution of income or capital in her capacity as a beneficiary of [the Trust]. I do not know this from my own knowledge. I seek to test this assertion by viewing the financial statements of [the Trust] ... I have no knowledge of whether or not [the wife] has a beneficiary loan account in [the Trust] and seek to satisfy this issue by inspection of the financial accounts...⁴⁹

The evidence of both the wife and the mother was to the effect that no distributions had ever been made to the wife and the mother deposed that it was not intended to make any distributions to the wife of income or capital in the foreseeable future. The wife's mother specifically deposed that the wife did not have a beneficiary loan account with either a credit or debit balance.

It was contended on appeal by counsel for the husband that the financial accounts of the trust would show "either the potential value of either a proprietary right or a financial resource, which may favour the wife at some future point in time."⁵⁰ His Honour rejected the assertion that the financial accounts would show the value of any such interest ,but conceded that the accounts would be a "starting point" in arriving at any such valuation. His Honour further opined that:

⁴⁶ Ibid at [15].

⁴⁷ Ibid at [16].

⁴⁸ *Trade Practices Commission v Arnotts Ltd and Ors (no.2)* (1989) 99 ALR 90

⁴⁹ Ibid at [18].

⁵⁰ Ibid at [39].

...There was no evidence adduced before her Honour as to whether the “actuarial arts” might be able to value the asserted interest in property (if that is what it is found to be) or the financial resource, much less the basis or bases upon which any such “valuation” might be conducted or how a present value of any such “value” might be calculated or what assumptions or qualifications may underlie it...

...In any event, even if an actuarial “valuation” was possible, it would axiomatically be a “valuation” of: an indeterminate interest, of indeterminate amount, received (if at all) at an indeterminate time, and qualified by possible future events (including removal of the wife as a beneficiary) that may, or may not, occur at an indeterminate future time...

...The relevance of any such evidence (even assuming it is obtainable; is obtained and is admissible; including being based on relevant expertise and established facts giving the basis for the opinion) is, to my mind, likely to be marginal at best within the context of the broad range of matters which a court must take into account by reference to each of s 79(2) and s 79(4) and, if an order is to be made, the broad discretion inherent within it...⁵¹

In dismissing the appeal, and upholding the first instance judge’s decision that the documents lacked “apparent relevance”, His Honour noted that the s 79 process would be informed by facts that were already known and documents which must in any event have been disclosed (such as the wife’s tax returns and bank statements). By way of example, the husband was already aware of the following:

1. an inheritance received by the wife’s mother from the mother’s husband amounted to about \$20 million;
2. the mother deposed that she “personally provided the capital of the Trust on its establishment” and that this capital was “accumulated by me and my late husband as a result of our efforts during our lifetime;”
3. the wife’s mother had the capacity to gift to the wife \$100,000 in (omitted) 2007;
4. the wife’s mother had the capacity to gift to the wife \$1 million in (omitted) 2007;
5. the wife’s mother had the capacity to gift to the wife \$120,000 also in 2007 which was invested in the wife’s superannuation fund;
6. the wife had accommodation in real property owned by the Trust;

The decision in *Kelton* reminds practitioners that obtaining trust documents from trusts with respect to which a party is a discretionary beneficiary, will depend upon the specific facts and circumstances of each case, and in particular, the extent to which that party has received distributions and/or benefits from the trust. Should it be contended that a valuation of the trust is required, evidence should be adduced as to how the valuation will be undertaken and specific thought should be given as to how such valuation could be said to be relevant, especially in circumstances where a party is a mere discretionary beneficiary.

Harris & Dewell and Anor

In *Harris* the Full Court was required to determine whether a trial judge correctly found that a unit trust (and the assets of same) should not be treated as property of the husband notwithstanding the extent, manner and history of the husband making decisions directly affecting the unit trust and his dealings with the unit trust’s assets.

⁵¹ Ibid at [42] to [44].

The facts⁵²

1. Ms Dewell (*the wife*) and Mr Harris (*the husband*) commenced co-habitation in 1986, and were married in 1991. Both were employed in different roles in the same industry.
2. At the final hearing, the wife was 59 years old and the husband 60 years old. The husband's father (*the second respondent*) was 99 years old.
3. The parties had two adult children who were 24 years old, and 21 years old, respectively.
4. The parties, together with the adult children, continued to reside in the former matrimonial home as at the final hearing, notwithstanding separation occurred in July 2010.
5. The assets of the second respondent were a significant controversy in the proceeding. The second respondent was the holder of all the units in the E Unit Trust (*EUT*) which was established in 1981. The trustee of the EUT was F Pty Ltd (*F Pty Ltd*). The second respondent had a substantial loan account with F Pty Ltd.
6. The husband was appointed a director of F Pty Ltd on 8 February 1996. He subsequently took a transfer of one-third of the shares in F Pty Ltd on 9 September 1999.
7. The wife contended that the husband was the beneficial owner of the units in F Pty Ltd. The husband the second respondent disputed the wife's assertion and contended that substantial sums were owed to the second respondent, and to F Pty Ltd, by the husband. Those loans were disputed by the wife.
8. There was not a substantial controversy surrounding the parties' legal and equitable interests in property, save in relation to the beneficial owner of the units in F Pty Ltd. The controversy pertained to the which was contended to arise out of contribution of funds, the intermingling of funds and the husband's involvement with various transactions whereby F Pty Ltd borrowed money from banks. In summary:
 - (a) In 2001, F Pty Ltd purchased J Street, Suburb K for \$850,000.
 - (b) In September 2001, the second respondent lent \$1 million to the husband to finance the rebuilding of Suburb C.
 - (c) On 2 August 2002, the husband provided a handwritten note to the ANZ Bank authorising the Bank to withdraw funds from "*my accounts in F Pty Ltd*" and forward a cheque "*in my name.*"
 - (d) In 2002, the husband purchased 2 J Street, Suburb K for \$525,000.
 - (e) In 2003, F Pty Ltd purchasing 3 J Street, Suburb K, for \$1,260,000.
 - (f) In 2005, F Pty Ltd purchasing L Street, M Town for \$820,000.
 - (g) From at least 1 September 2006, the husband began:
 - (i) collecting rents payable to F Pty Ltd and paying same into his own Westpac Bank account; and
 - (ii) paying F Pty Ltd's expenses in relation to those properties from his own account.
 - (h) On 13 January 2009, F Pty Ltd sold Lot 1, N Town and a sum in excess of \$378,000 was deposited into the husband's Westpac Bank account.

⁵² *Dewell & Harris and Anor* [2016] FamCA 938.

- (i) On 6 July 2009, F Pty Ltd sold Lot 2, N Town and the sum of \$292,000 was deposited into the husband's Westpac Bank account.
- (j) From November 2010, the husband commenced paying \$60,000 per quarter from his own funds to pay interest payable by F Pty Ltd to the ANZ Bank pursuant to a loan facility taken out by F Pty Ltd.
- (k) On 11 April 2011 (post-separation), the husband resigned as a director of F Pty Ltd, leaving the second respondent a director.
- (l) On 4 May 2011, the husband negotiated the purchase of a rural property known as "Property P". The property was in two lots. One lot was purchased and registered in the name of the husband. One lot was registered in the name of F Pty Ltd. The husband provided the whole of the money for the purchase of both lots.
- (m) On 22 July 2013, the husband made arrangements for the rental income due to F Pty Ltd to be paid into the accounts of F Pty Ltd.
- (n) On 16 February 2014, the second respondent executed a Power of Attorney in favour of the husband.
- (o) In April 2014, the husband effected the sale of the portion of "Property P" which was registered in his name for \$1,850,000. Simultaneously, the husband caused the lot belonging to F Pty Ltd to be sold for \$1,500,000 and those funds were paid into the accounts of F Pty Ltd.
- (p) In 2014:
 - (i) F Pty Ltd purchased 1 T Street, Suburb K for \$550,000 and 2 T Street, Suburb K for \$924,000;
 - (ii) the husband purchased 3 T Street, Suburb K for \$1,500,000.

The contentions at first instance

The wife contended in first instance that the:

...husband's beneficial ownership of the units in the EUT was founded on a series of factual propositions which were said to establish that the actions and commercial activities of FPL and the trust were entirely under the control of the husband. Additionally, factual findings urged upon the primary judge were to the effect that the husband's actions and commercial activities carried out ostensibly for the trust were in fact for the benefit of the husband and not for the benefit of the trust...⁵³

The wife therefore sought to satisfy the trial judge that the EUT was the husband's '... "puppet" or "creature" by reason of the extent manner and history of the husband making decisions directly affecting the trust and his dealings with its property.'⁵⁴ She relied upon a number of facts which formed the basis of '...extensive findings...'⁵⁵ Such finding included, but were not limited to findings that the husband:

1. Executed a contract of sale (and other relevant documents) to purchase a real property on behalf of F Pty Ltd despite not being a direct of the entity at that time. The Second

⁵³ *Harris & Dewell and Anor* [2018] FamCA 1067 per Strickland, Murphy and Johnston JJ at [28].

⁵⁴ *Ibid* at [2].

⁵⁵ *Ibid* at [36].

Respondent conceded in cross-examination that he thought that the real property was the husband's personal asset.⁵⁶

2. Treated the EUT as it is were his own since at least 2002.⁵⁷
3. Included units in the EUT as an asset of his in an application for finance made in 2010, together with real property held on trust by the FPL.⁵⁸
4. Executing a Statutory Declaration in July 2011, declaring that he and the Second Respondent were beneficiaries of the EUT.⁵⁹

The husband and the Second Respondent conceded that the husband had:

1. engaged in various dealings on behalf of EUT;
2. directed agents on behalf of EUT; and
3. the benefit of the use of assets owned by EUT as security for his own personal borrowings.⁶⁰

The husband and the Second Respondent contended, nonetheless, that as the husband had '...never been a unit holder...'⁶¹, the '...ostensible picture of control of the trust...is of ultimate control vesting in the [Second Respondent] by reason of his sole unit holding and his control of the voting rights in the trustee...'⁶² The husband could not take legal steps to receive (or allocate) a distribution of trust property and thus the trust property could not be 'property of the parties or either of them.'

Whilst the trial judge noted the husband's control of the EUT, Her Honour agreed with the contentions of the husband and the Second Respondent. The trial judge determined that:

...I am not satisfied that, whilst [the father] remains the owner of the [EUT], the husband has some "lawful right to benefit from the assets of the trust".

Despite the control exhibited by the husband in respect of the dealings of the [EUT], I am not satisfied that the [EUT] is an alter ego or device used by the husband for his sole benefit.

I find that [the Second Respondent] is the legal and beneficial owner of the units in the [EUT]...⁶³

The contentions on appeal

Whilst it was the husband that sought to appeal the order of the trial judge, the wife also filed a cross-appeal. She sought to agitate, *inter alia*, the contentions regarding the EUT that she had advanced at first instance.

In particular, it was contended on behalf of the wife on appeal that:

...reference to the terms of the EUT trust deed and the ostensible control of the trust emerging from both the deed and the control of its trustee, F Pty Ltd ("FPL"), is not determinative of whether, for the purposes of s 79 of the Act, the units are property of the husband...

⁵⁶ *Harris & Dewell and Anor* [2018] FamCA 1067 per Strickland, Murphy and Johnston JJ at [33].

⁵⁷ *Ibid* at [34].

⁵⁸ *Ibid* at [35].

⁵⁹ *Ibid* at [35].

⁶⁰ *Ibid* at [31].

⁶¹ *Ibid* at [20].

⁶² *Ibid* at [26].

⁶³ *Dewell & Harris and Anor* [2016] FamCA 938 per Rees J at [105] – [107].

...Rather, it is said that clear and unchallenged factual findings made by her Honour about the control of the trust, and dealings by it and within it, should have led her Honour to conclude that it is the “puppet” or “creature” of the husband and, thus, to a conclusion that the trust is, in effect, him, and its units his property...⁶⁴

The wife did not, however, contend that the EUT was ‘...a sham.’⁶⁵

The husband, once again, opposed the wife’s contentions regarding the characterisation of the EUT’s property. He contended that:

...the trust is a third party to the matrimonial litigation; its independent existence should be protected as such and that the reach of s 79 does not extend to interfering with its substantive rights...⁶⁶

In support of the position advanced by the husband, the Second Respondent contended that:

...in order to establish the wife’s central proposition, it is necessary to establish more than control, including more than the control established by the findings in this case. That is true, it is submitted, even if the degree of control can be described as “complete control”. It is contended that so much is consistent with principle...⁶⁷

The Full Court considered a number of decisions when determining whether or not the trial judge had correctly characterised the husband’s purported interest in the EUT. Same included consideration of *Ascot Investments Pty Ltd v Harper*⁶⁸, *Kennon v Spry, Ashton and Ashton*⁶⁹ and *Davidson and Davidson*.⁷⁰

From these earlier decisions, the Full Court identified the concept of control as being relevant to the characterisation of trust property as property of the parties, together with the need to consider the impact of ‘...a third party with an existence and means of control distinguishable from the relevant party to the marriage.’⁷¹ Their Honours noted that, *inter alia*:

...central to the decision in *Ashton* that the assets of the trust should be treated as property of the husband for s 79 purposes is the fact that, by reason of positions held within the trust structure, the husband, via the powers vested in him by the trust deed, was able to effect the distribution of trust assets to himself should he so choose...⁷²

The Full Court opined further that:

...Common to both *Ashton* and *Davidson* is the capacity of a party to the marriage (the husband in each case) to use existing powers pursuant to the trust deed, or through the trustee company, so as to effect the lawful distribution of property to himself. That is, despite the structure not being *ostensibly* indicative of a party holding an interest in property, the powers available to *that party* could affect their receipt of a beneficial interest in trust property.

The same underlying premise is apparent in other Full Court authorities that have upheld findings that the property of a trust can be treated as property of a party to the marriage for s 79 purposes...⁷³

⁶⁴ *Harris & Dewell and Anor* [2018] FamCA 1067 per Strickland, Murphy and Johnston JJ at [15].

⁶⁵ *Ibid* at [37].

⁶⁶ *Ibid* at [17].

⁶⁷ *Ibid* at [18].

⁶⁸ [1981] HCA 1.

⁶⁹ [1986] FamCA 20.

⁷⁰ (1991) FLC 92-197.

⁷¹ *Harris & Dewell and Anor* [2018] FamCA 1067 per Strickland, Murphy and Johnston JJ at [45].

⁷² *Ibid* at [56].

⁷³ *Ibid* at [58] and [59].

Having regard to the particulars of the EUT structure, it was clear that the Second Respondent not only had ultimate control over the distribution of trust property, and as EUT's sole unit holder, he was the only person entitled to benefit from distributions and the only person who could be affected adversely by actions contrary to the interests of the trust's beneficiaries. Moreover, the Second Respondent was entitled to give the husband "the run of the trust" and to permit the husband to deal with trust property.⁷⁴

Applying the principles described in summary above, the Full Court determined that trial judge was correct to determine that the EUT was not property of the parties or either of them. In so concluding, the Full Court held that:

...It should be accepted that the principles emerging from the High Court and from the decisions of this Court to which reference has been made permit of a finding that property ostensibly that of a trust can be treated as property of a party for s 79 purposes where evidence establishes that the person or entity in whom the trust deed vests effective control is the "puppet" or "creature" of that party. The metaphor is used to connote a situation where the person or entity with control (the "puppet") does nothing without the party (the "puppet master") controlling or directing that person or entity.

Control is not sufficient of itself. What is required is control over a person or entity who, by reason of the powers contained in the trust deed can obtain, or effect the obtaining of, a beneficial interest in the property of the trust. In our respectful view, it is in that sense, that Finn J speaks of "some lawful right to benefit from the assets of the trust..."⁷⁵

The decision thus reiterates the importance of not only control (whether effective or otherwise), but the requirement that the one or both of the party's be able to exercise a right to receive the beneficial interest in trust property.

Further, and of note, the Full Court referred to:

...Mr Richardson SC on behalf of the wife characterised the EUT as "the puppet" and the husband as "the puppet master". Yet, if the principles emerging from the authorities are to avail the wife, it was necessary for the evidence to establish that *the father* was the puppet and the husband was the "puppet master". It is the father who, by reason of the powers contained in the trust deed and his position as the sole unit holder, can obtain, or effect the obtaining of, a beneficial interest in the property of the trust...⁷⁶

The decision therefore also reiterates the importance of adducing relevant evidence as to the matters described above. One wonders what the outcome may have been if evidence was adduced identifying that the Second Respondent would do anything requested by the husband.

Mitford & Mitford an Ors

In *Mitford*, Berman J was required to determine whether or not to make an interim order for the discovery and production of documents pertaining to two trusts, the Metford Family Trust and the Mitford Land Trust.

The facts⁷⁷

1. The wife was 60 years old and the husband was 61 years old at the time of the hearing.
2. The parties were married and commenced cohabitation in 1978 in South Australia.
3. The parties had three surviving adult children with, tragically, the parties' second eldest child passed away at infancy.

⁷⁴ *Harris & Dewell and Anor* [2018] FamCA 1067 per Strickland, Murphy and Johnston JJ at [72].

⁷⁵ *Ibid* at [67] and [68].

⁷⁶ *Ibid* at [69].

⁷⁷ *Mitford & Mitford and Ors* [2018] FamCA 1067 per Berman J at [10] – [31].

4. The parties separated on 13 March 2015, and a Divorce Order took effect in March 2017.
5. At the date of the parties' marriage, the husband worked for his parents' farming business. Mr K Mitford was the husband's father. He died in 2017. Ms L Mitford was the husband's mother.
6. The husband's parents married in 1953. Mr K Mitford was farming with his family and following their marriage and with some assistance from the Mitford family, Mr K and Ms L commenced farming in their own right.
7. In 1966 the family moved to F Town and purchased farming property that was known as 'M Farm.'
8. The farming enterprise purchased other parcels of land in the area, some of which was held in the names of Mr K and Ms L, some in the name of the eldest son, Mr J, and other property was held jointly.
9. On 8 October 1976 Mitford Pty Ltd (**MPL**) was incorporated to become the sole trustee of the Mitford Family Trust. The Mitford Family Trust was settled on 13 December 1976.
10. On 26 September 2014, MPL was removed as trustee of the Mitford Family Trust and Mr K Mitford in his capacity as appointor appointed C Pty Ltd (**CPL**) as trustee.
11. The husband's brother, Mr N Mitford, passed away in 2014. Following the death of Mr K Mitford, it appeared his Power of Appointment in respect of the Mitford Family Trust passed to the husband.
12. At the time of the hearing, the husband and his mother, Ms L Mitford, were the joint appointors. Ms L Mitford was also the sole director and shareholder of CPL.
13. The Trust Deed for the Mitford Family Trust was not provided to the Court. The husband's understanding was that the beneficiaries of the Mitford Family Trust are the descendants of Mr K Mitford and their spouses.
14. The husband contended that he has not received any distribution from the Mitford Family Trust, but is employed part-time in his capacity as an administration manager for CPL. It was conceded that the Mitford Family Trust owns substantial landholdings and valuable farm equipment utilised in the F Town farming enterprise.
15. The husband's brother, Mr O, died in 1983. He held farm land known as "P Farm" and a one third interest with his parents in "Q Farm". Mr O bequeathed his interest in the farming land to the husband and his brother, Mr R.
16. In 1988 the husband transferred his interest in P Farm to Mr R in exchange for Mr R's interest in Q Farm. Consequent upon that transaction, Mr R became the sole owner of P Farm and the husband held a one third share in Q Farm.
17. The husband and his parents sold Q Farm in 1988, and purchased substantial farm land at E Town in Victoria known as BPL. The husband and wife lived at the B Homestead and Mr R and his family lived at P Farm.
18. The family incorporated B Pty Ltd (**BPL**) in 1988 to be the trustee of the Mitford Land Trust which holds the BPL farming land. The husband and his father were the appointors of the Trust. The husband's parents, Mr R and the husband each held one share in BPL.
19. In 2004 the husband contends that a restructure occurred that had the effect of dividing up and separating the ownership and operation of the F Town and E Town farming enterprises.

20. During the marriage, the parties and their children lived in the B Homestead. The parties' son, Mr J, worked for BPL and his partner and children live in another house on the property. A farm manager was employed and the husband's duties in relation to BPL were generally restricted to administrative and marketing tasks.
21. Following the commencement of the family law proceeding, the husband resigned as co-director of BPL, but retained his equal shareholding with his mother.
22. The husband considered that the gross value of the Mitford Land Trust would be in excess of \$9 million. The wife contended that the value would significantly exceed this amount.
23. BPL and CPL were joined to the proceeding as the Second Respondent, and the Third Respondent, respectively.

The parties' applications

By way of an Application in a Case filed 10 October 2018, the wife sought, *inter alia*, further disclosure from the husband. Whilst the Court expressed dissatisfaction as to specificity of the wife's relief, she sought "...full and proper discovery of all documents that [the husband] had in his possession or has had in his possession" in relation to the Mitford Land Trust and the Mitford Family Trust respectively.⁷⁸

The wife contended that, *inter alia*, the assets of the Mitford Land Trust and Mitford Family Trust were assets "of the husband or at the least a financial resource of the husband."⁷⁹

At this stage either she or the husband have an equitable interest in respect of the assets of the two Trusts, nor does she seek any order by way of declaration. She did not, however, assert either she or the husband [had] an equitable interest in respect of the assets of the two Trusts, nor [did] she seek any order by way of declaration.⁸⁰

The wife's application was not otherwise directed to BPL or CPL.⁸¹ Rather, it sought ...that the husband disclose documents in his capacity as a joint appointor of the Mitford Land Trust and the Mitford Family Trust, in his capacity as a director of CPL and in his capacity as a beneficiary of the Trusts.⁸²

The husband's responding application was silent in relation to the issue of disclosure. He contended, nonetheless, that he did not have the legal right to possession of the documents sought and did not concede the BPL or CPL were his mere puppets.⁸³ BPL sought dismissal of the wife's application, together with other orders, and CPL sought to be removed as a party to the proceeding.

Commentary regarding financial discovery

Berman J began determination of the wife's application with consideration of Chapter 13 of the *Family Law Rules 2004* (Cth) and financial disclosure broadly. His Honour initially recounted rr 13.01 and 13.07 of the Rules and decision of:

1. *Briese & Briese*⁸⁴ in which it was opined that the "...need for each party to understand the financial position of the other party is at the very heart of cases concerning property and maintenance."⁸⁵

⁷⁸ *Mitford & Mitford and Ors* [2018] FamCA 1067 per Berman J at [36].

⁷⁹ *Ibid* at [65].

⁸⁰ *Ibid* at [66].

⁸¹ *Ibid* at at [53].

⁸² *Ibid*.

⁸³ *Ibid* at [76].

⁸⁴ [1985] FamCA 23.

⁸⁵ *Mitford & Mitford an Ors* [2018] FamCA 1067 per Berman J at [38].

2. *Martin & Martin & Anor (No 2)*⁸⁶ in which Cronin J found that the focus of the Court should be whether it was “on the cards” that the documents would materially assist.⁸⁷

Berman J continued by identifying the difficulty which can arise in early stages of a proceeding in relation to defining the issues and, as a consequence, ‘...a category of documents [which] may have a sensible relevance.’⁸⁸ His Honour continued by identifying the current focus of the law as to ‘...prevent unnecessary discovery...’⁸⁹ by application of the ‘...“directly relevant” test...’⁹⁰

The decision

The husband conceded that he held a number of the documents sought by the wife. As indicated above, he contended, however that he did not have a legal right to possession.⁹¹

Berman J considered the decision of the Full Court in *Masoud & Masoud*.⁹² In that case, the Full Court held that:

...The meaning of “possession and control” has been considered extensively. For a document to be within the power of a party, the party must be in actual possession of it or must have an immediate indefeasible right at the time of discovery to demand possession from the person who has physical possession of it: see *Lonrho Ltd v Shell Petroleum Co Ltd (No 1)* [1980] 1 WLR 627. In *Schweitzer & Schweitzer* [2012] FamCA 445, O’Reilly J held at [45] that “possession” as contemplated by r 13.07 “means not mere physical possession (custody) but “possession” within the accepted meaning being “the legal right to possession”: see in *B v B*, per Dunn J at 805; 807”. Further, her Honour stated at [50] that a beneficiary of a discretionary trust “has no interest in the corpus, but only the right to require due administration of the trusts, and ... is entitled to access to the financial documents of the trustees *only* for the purpose of ascertaining that there is due administration.” In the present case, therefore, the husband has no access to the financial documents of the trustees beyond that required to ascertain there is due administration. It cannot be said that he has the requisite “control” of the trust deed that would warrant its disclosure...⁹³

His Honour continued further by reiterating that the Full Court ‘...did not consider that the duty of disclosure should obligate “a party to garner documents by any means”.’⁹⁴

Berman J then turned to consider decisions in relation to the characterisation of discretionary trusts as ‘property. His Honour considered *Ashton and Ashton* and *In the Marriage of Goodwin* reiterating the principles enunciated in those cases as has been discussed above.

His Honour then turned to consider the evidence. Berman J concluded that:

...Given the lack of any detailed claim put forward on behalf of the wife, whilst I am satisfied that the wife at least raises an arguable case, I am not able to make any finding that the husband has effective legal control over the Trust to the extent that it should be considered as a “mere puppet” of the husband, or that it is effectively his alter-ego. Ms L Mitford speaks against that proposition and there may be a range of other competing interests and potential beneficiaries in respect of each of the Trusts...⁹⁵

His Honour was satisfied that ‘...the husband in his capacity as a beneficiary has a right to such records of the Trust and other documents that are relevant to the due administration of the Trusts.’⁹⁶

⁸⁶ [2014] FamCA 232.

⁸⁷ *Ibid* at [28].

⁸⁸ *Mitford & Mitford an Ors* [2018] FamCA 1067 per Berman J at [43].

⁸⁹ *Ibid* at [48].

⁹⁰ *Ibid* at [49].

⁹¹ *Mitford & Mitford and Ors* [2018] FamCA 1067 per Berman J at [55].

⁹² [2016] FamCAFC.

⁹³ *Ibid* at [20].

⁹⁴ *Mitford & Mitford and Ors* [2018] FamCA 1067 per Berman J at [59].

⁹⁵ *Ibid* at [82].

⁹⁶ *Ibid* at [83].

Further, whilst His Honour concluded that such an obligation did not necessarily require disclosure of ‘...all documents required to be kept by a trustee relating to the due administration of the Trust should be the subject of disclosure and production...’,⁹⁷ His Honour suggested that the ‘...at the very least the husband’s beneficial interest in the Trust may well be a financial resource which is entitled to be explored by the wife.’⁹⁸

Berman J therefore made an order for the disclosure specific documents as sought by the wife. Same included, *inter alia*, the financial statements for the Mitford Family Trust.⁹⁹

The decision identifies the need to specify documents sought to be disclosed in the proceeding, together with the need to adduce evidence as to the relevance to an issue in contention. Moreover, it serves as a timely reminder as to practitioners’ obligations to endeavour to limit the issues in dispute by ensuring the provision of relevant disclosure.

Documents and information to seek in relation to trusts

The foregoing cases identify the relevant instructions to be obtained from parties when it appears that one (or both of them) may have an interest in a discretionary or unit trust. Those instructions include, by way of example:

1. the circumstances of pertaining to the establishment of the trust;
2. the individual(s) ‘involved’ with the trust;
3. communications (whether verbally or in writing) pertaining to the trust or trust property;
4. the name and nature of the trust;
5. a history of control or benefits received;
6. the known property of the trust;
7. the parties’ use of, or contribution to, trust property; and
8. contributions made by the parties to the trust property.

Such instructions should then identify the documents, or categories of documents, which should be requested in order to clarify the nature of the trust itself the parties’ interest(s) in the trust. Those documents can include, but are not limited to:

1. The trust deed and any amending deed.
2. The full financial statements and taxation returns for the trust. Same will identify, among other things, the property of the trust and relevant loan account(s).
3. Correspondence which may pertain to:
 - (a) the establishment of the trust;
 - (b) the acquisition, conservation and maintenance of trust property;
 - (c) control of the trust;
 - (d) the use of trust property;
 - (e) benefits derived from the trust.

⁹⁷ *Mitford & Mitford and Ors* [2018] FamCA 1067 per Berman J at [84].

⁹⁸ *Ibid* at [87].

⁹⁹ *Ibid* at [89].

4. Bank statements which may identify:
 - (a) contribution to trust property;
 - (b) the acquisition, conservation and maintenance of trust property;
 - (c) historic trust distributions and allow a reconciliation of same with a party's own bank statements;
 - (d) the use of trust property; and
 - (e) benefits derived from the trust.

The foregoing is not exhaustive and should be considered a guide only. They do, nonetheless, identify a primary 'starting' point as to instructions to obtain, and documents to seek.

Conclusion

As stated in the introduction it is incumbent upon practitioners perhaps now, more than ever, to maintain an accurate understanding as to the manner in which the family law courts exercise discretion in relation to discretionary and unit trusts.

In the post-*Spry* and post-*Stanford* era courts have reiterated that the element of control is but one factor to consider when determining the characterisation of these vehicles in proceedings pursuant to Part VIIIA and Part VIIIAB of the Act. Proper consideration must be had as to the parties' legal and equitable interests in trusts and trust property, together with the legitimate interests of third parties.

Practitioners must consider these issues carefully and seek relevant admissible evidence. When compiling/collating such evidence, care needs to be taken to determine what evidence is required to establish the desired outcome (i.e. which element is being satisfied). When in doubt, Counsel (and possibly third party experts such as accountants) should be briefed to advise in relation to same.

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