

Section 85A & Kennon v Spry: Have the goalposts really moved?

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"Matrimonial causes": jurisdictional limitations on Courts exercising original jurisdiction under the Family Law Act

The *Family Law Act 1975 (Cth)* ('FLA') being an Act of the Commonwealth Parliament derives its jurisdiction ultimately from the *Constitution of the Commonwealth of Australia* ('the Constitution'), including powers referred by the States under paragraph (xxxvii) of s 51 of the Constitution. The major (though by no means only) sources of power for the FLA in the Constitution are the marriage power (s 51 (xxi)) and the matrimonial causes power (s 51 (xxii)).

Under s 78(1) of the FLA, in "proceedings between the parties to a marriage with respect to existing title or rights in respect of property," a court exercising jurisdiction under the FLA ('the court') "may declare the title or rights, if any, that a party has in respect of the property."

Under s 79(1), in

property settlement proceedings, the court may make such order as it considers appropriate:

- (a) in the case of proceedings with respect to the property of the parties to the marriage or either of them—altering the interests of the parties to the marriage in the property; or
- (b) in the case of proceedings with respect to the vested bankruptcy property in relation to a bankrupt party to the marriage—altering the interests of the bankruptcy trustee in the vested bankruptcy property;

including:

- (c) an order for a settlement of property in substitution for any interest in the property; and
- (d) an order requiring:
 - (i) either or both of the parties to the marriage; or
 - (ii) the relevant bankruptcy trustee (if any);to make, for the benefit of either or both of the parties to the marriage or a child of the marriage, such settlement or transfer of property as the court determines.

Under s 4(1) of the FLA, *property settlement proceedings* means:

- (a) in relation to the parties to a marriage—proceedings with respect to:
 - (i) the property of the parties or either of them; or
 - (ii) the vested bankruptcy property in relation to a bankrupt party to the marriage; or

- (b) in relation to the parties to a de facto relationship—proceedings with respect to:
 - (i) the property of the parties or either of them; or
 - (ii) the vested bankruptcy property in relation to a bankrupt party to the de facto relationship.

Thus the court's declaratory and order-making capacity under ss 78 and 79 of the FLA (as well as, for example, the injunctive power in s 114(1)(e)) is anchored in a particular subject matter, namely 'property'.

'Property' is itself defined in s 4(1) of the FLA as follows:

property means:

- (a) in relation to the parties to a marriage or either of them—means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion; or
- (b) in relation to the parties to a de facto relationship or either of them—means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion.

The High Court noted in *Dougherty v Dougherty*¹ that

[i]t may be said of s.79...that it is obvious that the section must be read down. It purports to confer a wide discretionary power to vary the legal interests in any property of the parties to a marriage or either of them, but with no reference at all to the criteria by which a permissible claim to the exercise of the power may be identified.

The required device to limit jurisdiction is provided by a combination of sections including ss 31 and 39, which provide for various courts to be allocated jurisdiction with respect to the institution and determination of 'matrimonial causes'.

The definition of 'matrimonial cause' in s 4 of the FLA (as distinct from that applying to the Constitution) includes, among numerous other things, the following:

- (ca) proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings:
 - (i) arising out of the marital relationship;
 - (ii) in relation to concurrent, pending or completed divorce or validity of marriage proceedings between those parties; or

In relation to the meaning of the expression 'arising out of the marital relationship', the High Court in *Dougherty v Dougherty* noted that claims

¹ 163 CLR 278 at para 7.

grounded solely in contract or tort or equity or otherwise arising by reason of a relationship, for example of partnership, where the marriage relationship is purely coincidental are not likely to attract the power².

So much for that part of the FCA's jurisdiction that flows directly from the FLA. In addition, it should be noted that the FCA

is not restricted to the determination of a family law claim or proceeding; it may exercise accrued jurisdiction to determine the non-federal aspects of a justiciable controversy of which the family law claim or cause of action forms a part.³

Nevertheless, the Full Court in *Warby v Warby* also noted that a relevant consideration to the FCA's decision to exercise its accrued jurisdiction is "whether the claims are non-severable from a matrimonial cause and arise out of a common sub-stratum of facts."⁴ The extent of the available accrued jurisdiction (which derives from ss 76(ii) and 77 of the Constitution) remains somewhat untested in the FCA, although given the decision of the High Court in *Re Wakim*⁵ (which rendered the cross-vesting scheme unconstitutional), accrued jurisdiction presents an important source of additional jurisdiction to the FCA.

The scope of the s 4(1) definition of 'property'

In relation to the meaning of the word 'property', the Full Court of the FCA noted in *In the Marriage of Duff*⁶ that

[t]he word has also been comprehensively defined in statutes both State and Imperial relating to married women's property. We do not propose to instance those definitions here, but in *Jones v Skinner*⁷ Langdale MR said: 'Property is the most comprehensive of all terms which can be used inasmuch as it is indicative and descriptive of every possible interest which the party can have.' This is a definition which commends itself to us as being descriptive of the nature of the concept of 'property' to which it is intended that the Family Law Act 1975 should relate and over which the Family Court of Australia should have jurisdiction to intervene when disputes arise in relation to the property of spouses as between themselves or when the court is asked to exercise the powers conferred upon it under Pt VIII or its injunctive powers under s 114 so far as they are expressed to relate to a property of the party to a marriage.

Nevertheless, the FLA plainly does not comprehend that all potential assets fall into the category of 'property', since s 75(2) draws a distinction between 'property' and 'financial

² Ibid.

³ *Warby v Warby* [2001] FamCA 469 at para 79.

⁴ Ibid, para 95.

⁵ (1999) 198 CLR 511.

⁶ (1977) 15 ALR 476 at 484.

⁷ (1835) 5 LJ Ch 87 at 90.

resources'; for example, the majority of the Full Court of the FCA in *Coghlan and Coghlan*⁸ determined that even in the teeth of Part VIII B of the FLA (which provided the FCA with jurisdiction to make orders with respect to superannuation interests), the legislature intended that superannuation interests be considered 'another species of asset' aside from 'property' as defined in s 4(1).

The potential complexities involved in determining whether or not an interest amounts to 'property' can be seen from the High Court decision of *Kennon v Spry*. At issue in that case was the question of whether there was 'property' for the purposes of the s 79 order under appeal, in circumstances where prior to the divorce order the wife had been a member of the class of beneficial objects of a discretionary trust (significantly, not a beneficiary), and the husband was the trustee and appointor of that trust. The situation was complicated by the facts that the husband was neither a capital nor income beneficiary under the trust, and that at the time of trial the wife by virtue of a divorce order was no longer even a beneficial object under the terms of the trust deed.

The majority in *Kennon v Spry* found that the wife had an equitable right to due consideration as a potential beneficiary, although this of course did not amount to a vested interest in the trust property. She was also found to have a chose in action for the due administration of the trust, which was, however, similarly worthless without its link to a trustee subject to the jurisdiction of the Court who had real legal power to effect a distribution in her favour, which is what the majority found the husband had. It was irrelevant that the husband could not benefit under the Deed; what was important was that his "power to apply assets or income of the Trust to Mrs Spry...was able to be treated...as a species of property"⁹. Thus there were several articulated links between the wife and the valuable assets of the trust: there was her equitable chose in action for due administration of the trust; there was a trustee who was a party to the marriage; there was the trustee's fiduciary duty to the objects to give due consideration to the question of whether and in what way to benefit them; and there was the actual power in that trustee potentially to make a distribution of the entirety of the trust property in the wife's favour (itself another species of property) regardless of the fact that she was not a beneficiary but merely one of a class of objects of the trust. It was the sum of these articulated proprietary links that attracted s.79¹⁰.

But in addition to considering the avenue presented by s 79 for the effective pruning of the shelter Dr Spry had sought beneath the boughs of the family trust, the members of the

⁸ (2005) FamCA 429.

⁹ [2008] HCA 56 at paragraph 79 per French CJ.

¹⁰ [2008] HCA 56 at paragraph 137, per Gummow and Hayne JJ.

High Court also considered the applicability of s 85A to the circumstances of this complex case. To appreciate the purport of the High Court's various approaches, it would be useful to rake over the ashes of similar, though different, provisions in previous legislation.

Section 85A and its predecessors

The ancestor of provisions of the sort found in s 85A of the FLA was s 5 of the *Matrimonial Causes Act 1859* (UK), which provided as follows:

The Court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements *made on the parties* whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit [emphasis added].

S 86(2) of the *Matrimonial Causes Act 1959* (Cth) used somewhat different wording to achieve a similar result in the following terms:

The court may, in proceedings under this Act, make such order as the court 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 *on the parties to the marriage*, or either of them [emphasis added].

When the *Family Law Act* was introduced in 1975 it did not include a similar provision. This had to wait until 1983, when the current s 85A was introduced by the *Family Law Amendment Act 1983* (Cth). In discussing the legislature's motivation for introducing s 85A so late in the day, Kiefel J noted at paragraph 209 of her judgment in *Kennon & Spry* that:

[t]he Report of the Joint Select Committee on the *Family Law Act*, which predated the 1983 amendment, discussed the need for powers to be given to the Court with respect to family trust or company arrangements. It followed upon the receipt of submissions, including submissions from the Family Court. It 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. Vehicles such as these had been in common use for some time prior to 1983. 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 [references removed].

The section itself provides as follows:

S 85A

- (1) The court may, in proceedings under this Act, make such order as the court 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* [emphasis added].

- (2) In considering what order (if any) should be made under subsection (1), the court shall take into account the matters referred to in subsection 79(4) so far as they are relevant.
- (3) A court cannot make an order under this section in respect of matters that are included in a financial agreement.

Note that in the various provisions set out above I have added emphasis to the words used to give context to the relevant settlement. So far as the earlier provisions are concerned the settlement must be *on the parties to the marriage*; so far as s 85A is concerned, the settlements must be *made in relation to the marriage*. This difference has proved significant, and will be dealt with in detail below.

Note that here the reference is not to 'property of the parties', but to 'property dealt with by ante-nuptial or post-nuptial settlements made in relation to the marriage'. A question that has arisen is whether s 85A simply deals with a subset of a broader class of property dealt with by s 79. In the following passage from *Kennon v Spry*¹¹, Gummow and Hayne JJ dealt with, and rejected, the contention that ss 79 and 85A are examples of a general and special power respectively, with the special power in s 85A having the effect of encroaching on the general power contained in s 79. In deciding that this was not the case, they indicated that s 85A is an extension of power beyond the bounds of s 79, rather than a special power dealing with a subset of matters that would ordinarily be covered by s 79¹².

132. The provision appears to have been a legislative response in part to apprehensions that as s 79 stood the court could not "deal directly" with the unascertained interest which a spouse may have in a discretionary trust¹³. However that may be, s 85A should not be read as confining the powers otherwise given by ss 79 and 80 in any relevant respect. In particular, it should not be read as confining the power to make an order for payment of a money sum in a way that would preclude the making of an order that either permits or requires the application of an element of the property of one or other of the parties to a marriage in satisfaction of the order for payment.

133. Section 85A should be read as focused upon the variation of settlements of the kinds identified in the provision. No relevant implication of the kind considered in *Anthony*

¹¹ [2008] HCA 56.

¹² Although note the following comment by French CJ at para 82: 'I am, however, inclined to doubt that s 79 and s 85A have mutually exclusive areas of operation notwithstanding the concerns that led to the enactment of s 85A.'

¹³ Australia, Parliament, *Family Law in Australia: Report of the Joint Select Committee on the Family Law Act*, July 1980, vol 1, §5.117.

*Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia*¹⁴ now arises. Of *Anthony Hordern* and the subsequent cases, it was said in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom*¹⁵:

"*Anthony Hordern* and the subsequent authorities have employed different terms to identify the relevant general principle of construction. These have included whether the two powers are the 'same power'¹⁶, or are with respect to the same subject matter¹⁷, or whether the general power encroaches upon the subject matter exhaustively governed by the special power¹⁸. However, what the cases reveal is that it must be possible to say that the statute in question confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to the restrictions in the former power. In all the cases considered above, the ambit of the restricted power was ostensibly wholly within the ambit of a power which itself was not expressly subject to restrictions."

134. The relationship between s 85A and the other provisions of Pt VIII of the Act is not of the character described in this passage.¹⁹

The issue of just how far s 85A may extend the FCA's jurisdiction received extended treatment in Kiefel J's judgment in *Kennon v Spry*, and will be dealt with in some detail later in this paper.

The currently accepted breadth of the expression "ante-nuptial or post-nuptial settlements"

In *In the marriage of Knight* (1987) FLC ¶91-854 the subject of the dispute was a trust under whose deed the beneficiaries were identified as follows (at 76,452):

The trustee shall stand possessed of the trust fund upon the vesting day in trust for the beneficiaries hereinafter referred to or such one or more of them exclusively of the other or others in such shares and proportions as the trustee in his absolute discretion may determine on or within a period of one month before the vesting day and in default of such determination as aforesaid by the trustee upon trust for the children of the said Christopher John Knight in equal shares. The beneficiaries hereinbefore in this deed referred to are:

¹⁴ (1932) 47 CLR 1 at 7, 20-21; [1932] HCA 9.

¹⁵ (2006) 228 CLR 566 at 589 [59]; [2006] HCA 50.

¹⁶ *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7.

¹⁷ *R v Wallis* (1949) 78 CLR 529 at 550; [1949] HCA 30.

¹⁸ *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 678; [1979] HCA 26; *Refrigerated Express Lines (A/asia) Pty Ltd v Australian Meat and Live-Stock Corporation* (1980) 29 ALR 333 at 347.

¹⁹ [2008] HCA 56 at paras 132 -134, per Gummow & Hayne JJ.

John Thomas Knight, Gladys May Knight, the said Christopher John Knight, the wife of the said Christopher John Knight, any child or children or grandchild or grandchildren of the said Christopher John Knight living at the time of my death or born within twenty years from the date of my death.

In this matter John and Gladys Knight were the husband's parents, while the husband was Christopher John Knight. The husband and the wife were married on 14 June 1969, and the Deed of Settlement was entered into on 24 June 1970.

Nygh J considered that there was a difference between earlier, similar provisions to s 85A and s 85A itself which was critical; namely that the earlier provisions related to settlements *on the parties*, whereas s 85A relates to settlements made *in relation to the marriage*. At 76,453 he noted that

[t]he Australian legislation does not require that the settlement be on the husband or on the wife. A settlement on the children only will equally suffice. It does, however, require a relationship with the marriage between the parties. For that reason the definition given by *Henn Collins J. in Joss v. Joss (1943) P. 18 at p. 20*, is in my view to be preferred. There his Lordship said:

“What is really meant, I think, is that the particular marriage must be a fact of which a settlor takes account in framing the settlement. If the particular marriage is recited or referred to, it is patently a factor. Hence, a settlement made before marriage, but not in relation to or contemplation of a particular marriage, is not within the section, but a settlement is within it if from its recitals or substance it is apparent that it is related to a particular marriage. Similarly, in the case of a settlement made after marriage. If the marriage is recited or expressly referred to it is patently a factor but if it is not recited or referred to it may still be a factor, and, since the marriage is an existing fact which the settlor must have had in mind, the absence of recital makes little difference.”

At 76,454 His Honour observed that

To paraphrase *Hill J.*: As at the time of the settlement there was a husband, Mr Knight, there was a wife, Mrs Knight. The first child of the marriage was born shortly thereafter. Again following *Hill J. in Prinsep v. Prinsep* I see little difficulty in the fact that the deed contemplates that future wives and children of other relationships may benefit. If Mr and Mrs Knight senior had not been mentioned as beneficiaries in cl. 4, I would have had little hesitation in holding that this was indeed a post-nuptial settlement made in relation to the marriage of Christopher John Knight and his then wife.

But it was the presence of significant third party beneficiaries that proved fatal in this case. Although in *Prinsep v Prinsep*, the presence of mere contingent third party beneficiaries was

not seen as a problem in categorising the settlement as pre- or post-nuptial²⁰, because the parents in *Knight* ranked equally as beneficiaries with the husband and wife His Honour's conclusion was as follows (at 76,454 – 76,455:)

In my view a settlement cannot be described as being a settlement in relation to a marriage, if persons outside of the marriage are substantial potential beneficiaries. The purpose of sec. 85A is to allow the court to deal with the property which is the subject of the trust. To the extent that the court removes any assets from the trust, it takes away any potential benefit which a third party may have derived therefrom. As *Gibbs J.* said in *Ascot Investments Pty. Ltd. v. Harper and Harper* (1981) FLC ¶91-000 at p. 76,061; (1981) 6 Fam. L.R. 591 at p. 601, Parliament did not intend that the legitimate interests of a third party should be subordinated to the interests of a party to the marriage or that the Family Court should be able to make orders that would operate to the detriment of third parties.

So far as s 79 is concerned, we now have the benefit of Part VIII AA, and in particular s 90 AE, which gives the court the ability to make orders affecting third parties. However, s 90 AA clearly states that the object of Part VIII AA is to enable the court to make orders under ss 79 and 114 binding on third parties. It does not mention s 85A. And s 90 ADA specifically provides that Part VIII AA does not affect any other provisions of the FLA. Accordingly, even though *Ascot Investments* now needs to be read in the light of Part VIII AA, Nygh J's determination for the purposes of s 85A that the legitimate interests of a third party cannot be subordinated to the interests of a party to the marriage cannot have been similarly affected by the introduction of Part VIII AA.

Justice Kiefel's judgment in Kennon v Spry

In *Kennon v Spry*, Kiefel J observed that²¹

[a] nuptial "settlement" of property does not equate with the term as conveyancers would understand it. It may have in common with such settlements a disposition of property for the purposes of regulating the enjoyment of the settled property and it may provide for succession. It limits the alienation and transferability of the property. It cannot involve an absolute interest in property, given that the statutory provisions referred to give the courts power to vary it. The form that a settlement takes has not been regarded as of importance; rather it is necessary that it provide for the financial benefit of one or other of the spouses. It may imply some kind of continuing provision for them. Beyond these characteristics, no definition of a settlement is possible. [references deleted]

²⁰ Hill J noted in relation to the contingent beneficiaries: "That interest is created by clause 9, and only comes into effect if no child of Mr. Prinsep attains a vested interest and Mr. Prinsep makes no appointment. The child is now nearly sixteen years old. Mr. Prinsep has re-married and may have other children, and it is extremely unlikely that he would not exercise his powers of appointment if the settlement of August 25, 1920, were left untouched, or would not, if the child were to die unmarried before attaining twenty-one years, deal with the trust funds by will. The interest of the brothers is too remote to allow it to hamper the Court in making a proper provision for Mrs. Prinsep and the child." [1929] P. 225 at 236.

²¹ [2008] HCA 56 para 210.

Her Honour, while acknowledging at paragraph 216 that s 85A plainly comprehends a connection between the relevant settlement and the particular marriage, thought that the following two issues nevertheless left considerable room for flexibility:

1. the necessary degree of association with the marriage; and
2. the timing of the relationship between the marriage and the settlement.

Her Honour was certainly aware that her comments were covering new ground and was at some pains therefore to establish her judgment as an analysis of s 85A as a provision with a different legislative context to that of earlier provisions. At paragraph 219 she noted that

[t]here is another feature of the Act introduced in 1975 which informs a reading of s 85A and which reflects the focus of the section as being on the property dealt with by the settlement. An important aspect of the Act, so far as concerns settlements of property, is that it requires the Court to make orders respecting property by reference to the contributions of the parties to the marriage to property which is accumulated in the course of the marriage. And as s 85A(2) shows, the relevance of the parties' contributions is not limited to "property" of the parties as strictly defined in s 4. This policy, which facilitates a distribution and settlement of property, was not present in the 1959 Act or in the English legislation.

The necessary degree of association with the marriage

At paragraphs 217-218 Her Honour had already laid the groundwork for her highly contextual reading of s 85A:

The expression "in relation to" is of wide and general import and should not be read down in the absence of some compelling reason for doing so. As Toohey and Gummow JJ said in *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service*, the words are prima facie broad and designed to catch things which have a sufficient nexus to the subject. The question of nexus is dependent upon statutory context. Amongst the examples given by their Honours was the consideration given by Gibbs CJ, in *Perlman v Perlman*, to the meaning of the words "in relation to" in the Family Law Act with reference to two sets of proceedings. His Honour said that they "import the existence of a connection or association between the two proceedings, or in other words that the proceedings in question must bear an appropriate relationship to completed proceedings of the requisite kind"

The process of construing s 85A, in order to determine its intended operation and the degree of connection necessary between settled property and the marriage, requires consideration of the language and purpose of the Act. The process of construction should begin with examining the context of the provision in question. "Context" includes the existing state of the law and the problem that the statute was intended to remedy. It has earlier been observed that s 85A was intended to extend the Court's powers to property which did not fall within s 79, but which nevertheless fell within the conception of a nuptial settlement of property.

At paragraph 224 she identified the fundamental contextual issue as she saw it, namely the significance of the fact that the *Family Law Act* proceeds from a contributions-based perspective when addressing the problem posed by the division of matrimonial property:

The contributions of the parties to the marriage, direct or indirect, are central to the means by which the Court is to determine proceedings with respect to property. Reference to those contributions serves both to identify the property in question and to provide one means of assessment for the purpose of decision. Property which the Court is intended to deal with extends beyond property in which the parties have a legal interest. *By the wide meaning given to the term "settlement" in this context, it is sought to give the Court power to deal with all property held for the use and benefit of the parties to the marriage and which may represent an accumulation of their assets in the course of the marriage. The purpose of s 85A is to ensure that, since the previous arrangements for the property cannot continue, the property is applied equitably to the benefit of the parties, or the children.* Whether a disposition or other settlement qualifies as an ante-nuptial (or post-nuptial) settlement made in relation to the marriage is informed by these purposes, rather than by reference to authorities dealing with statutes employing different language and having purposes which cannot be regarded as wholly the same.

At paragraph 225 Her Honour proposed the most interesting aspect of her approach to s 85A, namely the idea that the concept of 'settlement' is not confined to the initial establishment of an express trust, although in this respect, she is perhaps not extending the idea beyond the conscience-driven equitable principles that are applied in matters involving resulting and constructive trusts:

"Settlement" is to be given a broad meaning consonant with the intention of s 85A to bring discretionary family trusts within the ambit of the Act. "Property" is to be read as including those assets to which the parties have contributed throughout the course of their marriage and which are held for their use and benefit. The Trust assets constitute property, much of which was obtained by way of the parties' contributions to the marriage. The assets therefore attract the operation of s 85A. *Further, as shall become clear, on each occasion that property was transferred to the Trust, the parties "dealt with" their property, and effected settlements within the meaning of s 85A. The Trust property represents contributions of the parties and is held on terms of a settlement. It is "property dealt with by ... settlements".* [emphasis added]

This is clarified further at paragraph 229:

There appears to be no reason why each disposition of property to the Trust, from the time of the parties' marriage, cannot be viewed as a separate trust created at that time, albeit on the terms of the Trust. It has been said that it is sufficient for the establishment of a trust that property is impressed with a trust obligation. In any event the conception of a settlement in s 85A is substantially informed by statutory context and purposes.

The timing of the relationship between the marriage and the settlement

By loosening up the conception of 'settlement' and emphasizing the contributions-based philosophy underlying s 85A, Kiefel J was able then to dispense with the necessity for contemporaneity of the nuptial element with the creation of the trust. At paragraphs 227-228 she noted that:

Section 85A(1) is intended to have a wide operation, to property held for the benefit of the parties on a settlement and to which they have contributed. It is intended to apply to settlements whether they occur before or during marriage. The essential requirement of the section is that there be a sufficient association between the property the subject of a settlement and the marriage the subject of proceedings. It does not require that a settlement made prior to marriage be directed to the particular marriage at the point it is made. It is sufficient for the purposes of the section that the association of which it speaks ("made in relation to") be present when the Court comes to determine the application of the property settled under s 85A(1). In the present case the Trust was used to hold property for the benefit of the parties to the marriage upon the terms of the Trust. It thereby acquired the nuptial element. Section 85A(1) applies.

The submissions for the trustees would also deny that the property held by the Trust was settled after marriage, by viewing the original settlement of the Trust as the only one to which s 85A(1) can apply. It may be accepted that the Trust was the form adopted as the expression of the nature of the provision the parties intended for themselves, but it does not reflect the continuous nature of the parties' contributions to the Trust throughout the marriage. An approach which recognises settlements of property made from time to time by the parties to the marriage is more consonant with the focus of the Act on the property which is the subject of a settlement and the contributions which the parties make to that property during the course of a marriage. Such an approach is therefore better able to give effect to the goals of the Act. It facilitates both an identification of property the subject of contributions and a means of assessing that contribution, as earlier observed.

The third party problem

The issue that proved fatal in *Knight* referred to above was the existence of two third-party beneficiaries. How did Kiefel J deal with this issue? At paragraph 236 Her Honour noted that:

Ascot Investments Pty Ltd v Harper to which reference was made, was not concerned with a situation such as concerns the third parties in this case. It was there held that the Family Court had no power to order directors of a company to register shares, where the Memorandum and Articles of Association of the company enabled them to decline to do so, at least where the company was not controlled by the husband. It was not doubted that the rights of third parties may be indirectly affected by orders of the Court. It has long been accepted that third party interests could be altered by courts dealing with property the subject of a nuptial settlement [*Blood v Blood* [1902] P 78]. Whether, and the extent to which, a court would alter such

interests might depend upon the remoteness or uncertainty of those interests. Here the interests of the other beneficiaries, in the due administration of the Trust, were always subject to the husband's control. The extent of that control, to the detriment of the third parties' interests, was shown by the attempted distribution of the entire Trust property to the children's trusts.

Her Honour noted in the extract above that it had long been accepted that the interests of third parties could be altered, and that the court's willingness to do this would depend on the remoteness or uncertainty of those interests. In the case she cited as authority for this proposition, Gorrell Barnes J noted as follows²²:

Now, in the present case, the child took a vested interest under the settlement, but did nothing to dispose of or charge that interest; and no one will be prejudiced by the order which I propose to make, except his father, the respondent, who took, by devolution on the child's death, the interest that the child became entitled to when he came of age. Now, if that position is looked at and the words of the section are looked at, it seems to me clear that there is power to do what is sought to be done here, and that no harm, on the one hand, can be done by acting on that view, whereas, on the other hand, the position of the petitioner, unless that is done, would be one which, as I have said, would be an extremely extraordinary one to contemplate.

This is perhaps not quite so broad an authority as Her Honour might have hoped, and certainly does not lead us beyond the conclusions arrived at by Nygh J in *Knight*.

Where to from here?

Perhaps the most conspicuously novel aspect of Kiefel J's judgment in *Kennon & Spry* is the suggestion that a settlement for the purposes of s 85A does not have to be identical with, or even contemporaneous with, a formal express trust; the fact that property is impressed with trust obligations is sufficient, and that can happen as property is contributed to (presumably directly or indirectly) the trust, which Her Honour held could be by way of serial 'settlements'.. If Her Honour is correct in this then one constraint on cracking open family trusts will have been lifted. In addition, that Her Honour arrived at this conclusion from the perspective of the contributions-based philosophy of the *Family Law Act* as much as anything else is intriguing, and is perhaps the harbinger of things to come. But of course, all of this necessarily runs up against third party issues. On this aspect of the case, it does not appear that Her Honour took things much beyond what Nygh J said in *Knight*: it remains a question of fact as to whether and to what degree a third party is affected by a potential order. Given that Part VIII A does not apply to s 85A, it is hard to imagine that a s 85A order would ever be just and equitable in circumstances where affected third parties were other than mere beneficial objects or contingent beneficiaries.

²² *Blood and Blood* [1902] P 78 at 83.

If correct, the net effect of Kiefel J's judgment would be to significantly increase the FCA's reach into discretionary family trusts. Kiefel J's argument follows a very different route to that applied by the majority in the High Court in their analysis of the family trust under s 79. Under Kiefel J's reasoning, in applying s 85A there would be no need to find a trustee who was a party to the marriage, or even, perhaps, a discretionary family trust established by one of the parties. It might perhaps be sufficient to attract s 85A under Her Honour's approach if there is a discretionary trust set up by one of the parties' parents to which one of the parties contributed, either directly or indirectly. So long as the third party issue is addressed (as it may well be if one of the parties is the trustee and there are no vested beneficiaries), being employed at less than market wages by a family business tied to a family trust may well be enough to establish an indirect disposition to the trust, and therefore a 'settlement' for the purposes of s 85A.

Schedule 1: Types of Trust

Implied or Resulting trust

Express Trust

Constructive trust



Fixed Trust

Discretionary Trust



All the beneficiaries are ascertainable and their beneficial interests 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 entitlement of beneficiaries to income, or to corpus, or both, is not immediately ascertainable. The beneficiaries are selected from a nominated class by the trustee or some other person and this power may be exercisable once or from time to time.



| Powers of Selection of Objects | | | |
|--|---|---|--|
| General Power: a power of selection exercisable in favour of any person including the donee of the power: tantamount to ownership of the property concerned | Special Power: the objects are limited to some class | Hybrid Power: the objects are such that the donee might appoint to anyone except designated classes or groups | Intermediate Power: Donee may add some or all of a number of persons to a class of specified objects (<i>Re Manisty's Settlement</i> [1974] Ch 17) |



| Trust Powers | Bare Powers |
|------------------------------|------------------------------------|
| Mandatory: must be exercised | Facultative: Need not be exercised |



| Exhaustive Discretionary Trust |
|---|
| Trustee required by the terms of the trust deed to distribute the entire income at specified intervals. <i>Australian Securities and Investments Commission v Carey (No 6)</i> (2006) 153 FCR 509; Thomas G and Hudson A, <i>The Law of Trusts</i> , (Oxford University Press, 2004) at 184 ff. |

| Non-Exhaustive or Purely Discretionary Trust |
|---|
| No obligation on the part of the trustee to apply any of the income or capital of the Trust to any of the beneficiaries at any time |