**FAMILY COURT OF AUSTRALIA**

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| **Bernard & Bernard** | **[****2019] FamCA 421** |

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| FAMILY LAW – PROPERTY – What constitutes matrimonial property? – Whether the assets in a trust of which the husband is a primary beneficiary should form part of the matrimonial pool for division – wife’s application to include the assets of the Mr Bernard Family Will Trust as part of the matrimonial pool for pool for division dismissed.  |

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| Family Law Act 1975 (Cth) s 79.Partnership Act 1892 |

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| *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337*Ashton and Ashton* (1986) FLC 91-777*Davidson and Davidson* (1991) FLC 92-197*Goodwin and Goodwin Alpe* (1991) FLC 92-192*Harris & Dewell* [2018] FamCAFC 94*Harris and Harris* (1991) FLC 92-254*In the Marriage of Hauff* [1986] FamCA 16*JEL and DDF* (2001) FLC 93-075*Kelly and Kelly* (1981) FLC 91-108*Kennon & Spry* (2008) 238 CLR 366*Spry’s case: Exploring the limits of discretionary trusts* (2010) 84 ALJ 177*Stein and Stein* (1986) FLC 92-804*Stephens & Stephens* (2007) FLC 91-779 |

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| **APPLICANT:** | Mr Bernard |

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| **RESPONDENT:** | Ms Bernard |

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| **INTERVENOR:** | Ms C Bernard |

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| **FILE NUMBER:** | WOC | 930 |  | of | 2016 |

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| **DATE DELIVERED:** | 5 July 2019 |

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| **PLACE DELIVERED:** | Sydney |

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| **PLACE HEARD:** | Sydney |

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| **JUDGMENT OF:** | Henderson J |

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| **HEARING DATE:** | 26 June 2019 |

REPRESENTATION

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| **COUNSEL FOR THE APPLICANT:** | Mr Wilson SC |

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| **SOLICITOR FOR THE APPLICANT:** | Maguire & McInerney Lawyers |

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| **COUNSEL FOR THE FIRST RESPONDENT:** | Mr McInerney SC |

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| **SOLICiTOR FOR THE FIRST RESPONDENT:** | Acorn Lawyers |

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| **COUNSEL FOR THE Second Respondent:** | Ms Power |

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| **SOLICITOR FOR THE Second Respondent:** | Rossi Simicic Lawyers |

# Orders

1. The wife’s Application in a Case filed 1 November 2018 is dismissed.
2. The Orders of Justice Loughnan made 26 March 2018 be stayed.
3. The application for orders filed by the wife on 6 November 2018 against the second respondent be dismissed.
4. The second respondent be released as a party to these proceedings.

Note: The form of the order is subject to the entry of the order in the Court’s records.

**IT IS NOTED** that publication of this judgment by this Court under the pseudonym *Bernard & Bernard* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

Note: This copy of the Court’s Reasons for Judgment may be subject to review to remedy minor typographical or grammatical errors (r 17.02A(b) of the Family Law Rules 2004 (Cth)), or to record a variation to the order pursuant to r 17.02 Family Law Rules 2004 (Cth).

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| Family Court of Australia at Sydney |

FILE NUMBER: WOC 930 of 2016

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| Mr Bernard  |

Applicant

And

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| **Ms Bernard**  |

First Respondent

And

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| **Ms C Bernard**  |

Second Respondent

REASONS FOR JUDGMENT

1. The matter of Bernard is a discrete application arising from section 79[[1]](#footnote-2) proceedings. The application concerns the wife’s claim, that the husband’s interests in the Mr Bernard Family Will Trust, henceforth known as the Mr Bernard Trust, forms part of the matrimonial pool. The husband contends this trust does form part of the matrimonial pool for division and is only a financial resource and is to be taken into account as that species of property when the Court makes property adjustment, pursuant to section 79 of the *Family Law Act* *1975* or the party’s agree.
2. Secondly, the wife seeks orders for the second respondent, who is the sister of the husband, to comply with orders made by Justice Loughnan on 26 March 2018, for the payment of the sum of $80,000 to the wife, from the husband’s interests in the Trust. The enforcement of that order is very much dependent upon the findings I make in this matter on the substantive issue. The husband and the second respondent seek this order be effectively discharged or stayed.
3. In addition the second respondent seeks to be released as party to these proceedings and that all proceedings against her be dismissed. This is agreed by the husband and resisted by the wife.
4. Mr McInerney SC acted for the wife, Mr Wilson SC acted for the husband, and Ms Power acted for the second respondent, Ms C Bernard.
5. The documents I read for the parties were as follows.
6. For the wife:
	1. Application in a Case filed 6 November 2018;
	2. Affidavit of 31 October 2018;
	3. Exhibits Ms Bernard 1 being the annexures to her Affidavit;
	4. Exhibits:
	5. Exhibit 1, a diagram of the F Proprietary Limited structure, in terms of shareholdings, trust and other interests of the husband and his sister;
	6. Exhibit 2, the wife’s chronology;
	7. Exhibit 3, disclosure by the husband of financial matters, as requested by the wife, dated 18 April 2019;
	8. Exhibit 4, the Will of the Late Mr D Bernard, and probate, dated … 2012;
	9. Exhibit 5, copy of the New South Wales *Partnership Act 1892*;
	10. Exhibit 6, two tender bundles, of which I was referred to specific documents, namely F Proprietary Limited balance sheets for 2016, 2017 and 2018; statement of financial position of the [F Proprietary Limited] for the same periods of time; financial income statements for Mr D Bernard Proprietary Limited for the periods June 2016,2017 and 2018; documents from the Bernard Family Will Trust partnership, 2016, 2017 and 2018; income tax returns personally of the husband 2015, 2016, 2017 and 2018;
	11. Case outline prepared by Counsel, together with the wife’s points of claim, and a document marked “applicant wife’s supplementary submissions.”
7. For the first respondent, the husband, I read:
	1. Response to Application in a Case filed 21 February 2019.
	2. Affidavits of 24 June 2019, 10 June 2019 and the annexures contained therein;
	3. Financial Statement filed 20 June 2019;
	4. Affidavit of Mr P, who is the appointer of the Trust, dated 24 June 2019; and
	5. Case summary document prepared by Counsel.
8. For the second respondent, I read:
	1. Response dated 22 February 2019;
	2. Affidavit filed 22 February 2019;
	3. Exhibits marked Ms C Bernard 1; and
	4. Case outline prepared by her Counsel.
9. In addition I read the High Court’s decision in *Kennon v Spry[[2]](#footnote-3)*, the decision of the Full Court in *Harris v Dewell[[3]](#footnote-4)*, and a learned article by Justin Gleeson SC, headed *Spry’s case, exploring the limits of discretionary trusts[[4]](#footnote-5)*.
10. This is a case where I am asked, as I see it, to extend the limits of control or interest of a beneficiary over assets of a discretionary trust. Each the first and second respondents seek that the wife’s application in a case be dismissed.
11. A short relevant chronology is as follows.
12. The wife was born in 1966, and the husband in 1964.
13. They commenced cohabitation in 1988.
14. They were married in 1988, and finally separated in September 2015.
15. They were divorced in 2017.
16. They have two children: Ms E, born in 1990, and Mr G, born in 1994.
17. The paternal grandfather, Mr D Bernard signed a Will in 2012, and was deceased in 2012. The Will provided the following, relevant for my proceedings.
18. Certain testamentary dispositions were given to the deceased’s grandchildren, and a Ms K. The husband, who I shall refer to as Mr Bernard in this judgment and his sister Ms C Bernard, who I shall refer to as Ms C Bernard in this judgment, were appointed the executors and trustee of their late father’s estate.
19. At his death, Mr D Bernard’s estate consisted of the following:
	1. Two bank accounts, one of $398,000 and a second of $35,000.
	2. Two parcels of shares. The first were 50,000 shares in a private company called F Proprietary Limited worth $875,927.
	3. The 2nd were 70,000 shares in a private company called Mr D Bernard Proprietary Limited valued at $293,350.
	4. A commercial property at Town H, being the property upon which Mr D Bernard’s Business had been carried out, worth $1.4 million.
	5. A property at J Street, Suburb L, worth $650,000.
20. His daughter, Ms C Bernard, owed the estate $120,000.
21. Pursuant to the provisions of the will once the testamentary dispositions to grandchildren and the like were carried out by the trustees, the balance then remaining in the estate was to be divided equally between Mr Bernard and Ms C Bernard as follows.
22. The will made provision for the creation of 2 Trusts, the Mr Bernard Family Will Trust, “the Mr Bernard trust” and the Ms C Bernard Family Will Trust, “the Ms C Bernard trust”. In the Bernard Trust Mr Bernard the primary beneficiary is Mr Bernard, the appointer Mr B, the trustee is Ms C Bernard, his sister, and the provisions of the schedule to the Will apply to the Trust. This structure and the provisions are mirrored in the Ms C Bernard Trust and Mr Bernard is the trustee of his sister’s Trust.
23. Since 20 December 2012 the Mr Bernard trust and the Ms C Bernard trust have conducted business together in partnership for profit through the Bernard Family Will Trust partnership the Q partnership.
24. Q owns all the paid up share capital of F Proprietary Limited and Mr D Bernard Pty Ltd. Neither Ms C Bernard nor Mr Bernard in their individual capacity own shares in the F Proprietary Limited although they are Directors of that company. The Mr Bernard and Ms C Bernard Trusts hold shares in F Proprietary Limited.
25. As to Mr D Bernard Proprietary Limited the Mr Bernard and Ms C Bernard trusts hold equal shareholding in that Company and this company owns land at Suburb N.
26. The Mr Bernard and Ms C Bernard Trusts own the land at 1 and 3 M Street Town H via Mr Bernard as trustee of the Ms C Bernard trust and Ms C Bernard as trustee of the Mr Bernard trust.
27. The F Proprietary Limited runs a Business and Mr Bernard is employed as a Manager. This company leases land from the Q partnership and this income forms part of the income stream of the Mr Bernard and Ms C Bernard trusts.
28. Ms C Bernard and Mr Bernard each have the obligations and duties of trustees. Ms C Bernard and Mr Bernard, as partners in the Q partnership have obligations, rights and duties under the *Partnership Act 1892*.
29. The schedule to the Will provides for the following:
	1. Definitions such as beneficiary, spouse, child, trustee, etc;
	2. Who is comprised in the class of beneficiaries under the trust;
	3. The purpose of the trust;
	4. Distribution of income of the trust;
	5. Distribution of capital of the Trust;
	6. Form of a determination by the Trustee;
	7. Manner of distribution of capital;
	8. Consequences of a determination by a trustee for a beneficiary;
	9. Categories of income;
	10. Amendments;
	11. Discretion of the Trustees;
	12. Appointers;
	13. Winding up of the trust.
30. I note that the wife falls within a class of beneficiary under the Mr Bernard trust.
31. The purpose of the trusts is set out at clause 5. It is to provide financial assistance for the maintenance, education and benefit in the life of any one of the primary beneficiaries or the children, grandchildren or great grandchildren of the primary beneficiary. The parties’ son, Mr G, has received a distribution from the trust for his benefit.
32. Secondly, to provide capital for advancement in life of the primary beneficiary, the children, grandchildren and great grandchildren of the primary beneficiary.
33. Thirdly, to invest or utilise all or any part of the capital to assist or benefit a beneficiary.
34. Clause 6 commences under the heading, “*distribution of income*” and says:

The trustees hold the income of a financial year upon trust to pay, apply or set aside the income or any part of it for the beneficiaries or any one or more of them exclusive of the other or others in such shares or proportions as the trustee determines.

1. This is a wide discretion in the trustee.
2. The wife says clauses 7 and 8 of the Will are seminal to this matter.
3. Clause 7 of the Will provides as follows:

The trustees may before the end of a financial year resolve to accumulate the whole or a part of the income of that financial year and such resolution may be in respect of the whole or part of one or more categories of income.

1. Clause 8:

If the trustees fail to effectively pay, apply or set aside the whole of the income of the financial year or to resolve to accumulate the income the trustee must hold the income which is not being so paid or applied or set aside for the primary beneficiary.

1. It is an agreed fact that there has been an accumulation of income which has not been distributed by the Trustee of the Mr Bernard trust and Ms C Bernard trust over a number of years. This money is held for the future development of the site which operates the business and from which rental income, which forms part of the income of the Mr Bernard and Ms C Bernard trusts is received.
2. One of the wife’s claims is that upon a reading of clauses 7 and 8 and, in particular clause 8, if there is not a distribution, payment, application to set aside the whole of the income for a financial year then that income must be set aside for the benefit of the primary beneficiary.
3. The wife asserts such action has not been carried out by the trustees for the Mr Bernard trust as is required under clause 8. Thus, she asserts the accumulated funds from the Mr Bernard trust income must be set aside for the primary beneficiary who is her former husband, and the provisions of clause 10 (a) and (b) apply, and the income becomes money in his hands, and is therefore matrimonial property available for distribution to he and she and from which the outstanding $80,000 costs order can be satisfied.
4. The first and second respondents reject that argument. They assert that on 2 July 2015 the trustees of the Mr Bernard and Ms C Bernard trust each made a resolution to deal with the whole of the income of the trusts into the future. The resolution of 2 July 2015 was before me and reads as follows:

1. It has been resolved that the renovations will need to be completed, as non-completion will result in the possibility of the franchise agreements not being renewed – this was Vehicle 2 and Vehicle 1. This will obviously devalue the trust-owned asset of F Proprietary Limited and potentially reduce the rental income received by the trust.

2. It has been resolved that we appoint V Company to start design work to comply with the new standards.

3. It has been resolved that the trust will need to obtain keep/obtain funds for the renovations and associated development costs.

4. It has been resolved that due to the scale of the project, the trust will need to hold all distributions to beneficiaries, other than distributions to cover income tax instalments generated by the trust, until completion of the renovations.

1. The resolution is signed by Mr Bernard as trustee of the Ms C Bernard Trust, and by Ms C Bernard as trustee of the Bernard Trust Mr Bernard, in their capacity as trustees of the Mr D Bernard Family Will Trust.
2. The first and second respondents assert that the 2 July 2015 resolution was an enduring resolution, continues today and into the future, and that the undistributed accumulated income is being held pursuant to the resolution of 2 July 2015 for the specified use set out in the resolution.
3. I agree with this submission. There is nothing in the Will that says a fresh resolution must be provided each year to deal with the whole of the trust income of a financial year.
4. Secondly, clause 4 of the 2 July 2015 resolution makes it clear all income of the trust was to be accumulated “*until completion of the renovations*” and they are yet to be completed. Clearly the resolution was looking to the future and the use of future income as it is made in contemplation of future events occurring.
5. I find that this resolution falls within clause 8 of the Will as an effective resolution to accumulate income of the trusts.
6. The husband continues to receive income, as managing director of F Proprietary Limited, as well as a distributions from the trust, as is set out in his Financial Statement filed 21 June 2016. He declares his income as a director of $1,615 a week.
7. As to distributions from the Trust in 2015 it was $3,595 in 2016 and onwards nil. This information comes from his tax returns and is consistent with the resolution dated 2 July 2015. Thus, neither the husband or wife have received a distribution from the trust as beneficiaries post-the coming into effect of the 2 July 2015 resolution, other than as was required to pay tax and other such matters, which was clearly referred to in point 4 of that resolution.
8. Going now to the wife’s primary argument.
9. The wife asserts that as the Mr Bernard and Ms C Bernard trusts are mirror trusts, that as Mr Bernard and Ms C Bernard in their capacities as the trustees of each other’s trust operate the partnership of Q they each have the same rights, obligations and duties as each other and towards each. Thus, I can find that the assets of the Mr Bernard trust are in reality his, that he exercises control over the assets in the Mr Bernard trust and it would therefore follow that the assets of the Ms C Bernard trust are hers as in reality she exercises control over the assets of the Ms C Bernard trust. The first and second respondents reject this argument.
10. Going now to the law. The High Court’s decision in *Spry[[5]](#footnote-6)* is a seminal decision in relation to trusts and, in particular, the interplay of trusts and property, and the definition of “property” under section 4 of the *Family Law Act 1975*. The facts of *Spry[[6]](#footnote-7)* are entirely different to the facts of this matter, save to say there was a trust in existence.
11. I begin at paragraph 58 of the decision of the Chief Justice His Honour Justice French where his Honour says:

Although a settlor is taken to transfer to the trustee the property in respect of which he or she creates a trust, there may be retained a right to take a benefit under it. Prior to the 1993 deed, Dr Spry, as sole trustee, had (absolute discretion) to apply all or any part of the income and/or capital of the fund to himself as one of the beneficiaries. On the basis of that power, and consistently with authority, including the decisions of the Full Court referred to above in Goodwin*[[7]](#footnote-8)*, the assets of the trust would properly have been regarded as his property, as a party to the marriage for the purposes of section 79. But the co-existence of the power, together with Dr Spry’s status as a beneficiary, does not define a necessary condition of that conclusion.

By the 1998 deed, Dr Spry removed himself as a beneficiary of the trust, provided that he releases and abandons all and any beneficial interests in the trusts under income.

1. What Dr Spry had done, upon the failing of his marriage and the total failure of his marriage, was to divest himself, or attempt to divest himself and his wife, of what they had been entitled to under the trust, and appoint his four daughters as beneficiaries of the trust. His Honour goes on to say:

This left him, however, in possession of the assets with the legal title to them, and to the income which they generated, unless and until he should decide to apply any of the capital or income to any of the continual beneficiaries. The question remains whether the trust fund was part of the property of the parties to the marriage at that time, within the meaning of section 79.

1. Mrs Spry submitted that the assets of the trust were the property of the parties to the marriage, as Dr Spry was the only person entitled to possession of them, as such the Family Court had power to make the order it had and to describe the trust and its assets as matrimonial property. That the true character of the trust was as a vehicle for the benefit of Dr Spry and Mrs Spry and their children and that this was a relevant factor. His Honour found, the argument advanced by Mrs Spry should be accepted, save:

Save that it is the trust assets coupled with the trustee’s power, prior to the 1998 instrument, to appoint them to her and her equitable right to due consideration that should be regarded as the relevant property, for that is the first task of a Family Court judge, to determine what is the relevant property of the parties, its species, nature and kind, and then ascribe a value to it.

1. As his Honour said:

But for the 1998 instrument, Dr Spry effected, and the 18 January dispositions, section 79 would have had effective application to the trust assets because of their nature. Dr Spry was the sole trustee of a discretionary family trust, and the person with the only interest in those assets, as well as the holder of a power inter alia to appoint them entirely to his wife.

1. At paragraph 64 his Honour discussed the word “property” in section 79:

… is to be read as part of the co-location, ‘property of the parties to the marriage.’ It is to be read widely and conformably with the purpose of the Family Law Act. In the case of a non-exhaustive discretionary trust with an open class of beneficiaries, there is no obligation to apply the assets or income of the trust to anyone.

1. Seminally, his Honour says at paragraph 65:

Where property is held under such trust by a party to a marriage, and the property has been acquired by or through the efforts of that party or his or her spouse, whether before or during the marriage, it does not, in my opinion, necessarily lose its character as property of the parties to the marriage, because the party has declared a trust to 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.

1. Dr Spry’s trust was one in which he was the sole trustee of a discretionary family trust and the only person with an interest in those assets, as well as the holder of the power to appoint them entirely to his wife or other family member. As an aside, it was raised in submissions by me that the wife has a right as a beneficiary in the Mr Bernard Trust and that is correct. The question of the valuation of that right is a matter of some difficulty, and his Honour says at paragraph 78 of his judgment:

I acknowledge consistently with the observations of the Full Court in Hauff and Evans*[[8]](#footnote-9)*, that it is difficult to put a value on either of those rights – that is, a right of a beneficiary to a distribution or entitlement under a trust, though a valuation might not be beyond the actuarial arts in relation to the right to due consideration.

1. The description of the *Spry[[9]](#footnote-10)* trust is not a description of the Mr Bernard or Ms C Bernard Trust.
2. The stark differences in the Mr Bernard and Ms C Bernard trusts and Dr Spry’s trust was helpfully set out in the second respondent’s case outline. Miss Power carefully sets out the significant differences in the nature of the trust being dealt with and referred to in the *Spry case[[10]](#footnote-11)* and the matter before me.
3. The first is, the husband is not the settlor of the trust, as was Dr Spry. The trust was settled by the husband’s father.
4. The husband is not a trustee of the trust, unlike Dr Spry, who was a trustee of his own trust effectively. The husband is a trustee of his sister’s trust, and his sister is a trustee of his trust. This is entirely opposite the Dr Spry’s trust.
5. The husband has no power to appoint and remove trustees, as Dr Spry had in the trust he had set up.
6. The husband is a discretionary beneficiary, although a primary beneficiary, and does not hold any other entitlement. Any entitlement he holds is as trustee of his sister’s trust, the Ms C Bernard Trust. Dr Spry, however, was sole trustee and had the legal title to the property in the trust. Paragraph 66 of the decision of Chief Justice French:

… 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 purpose of the power conferred on the Family Court by section 79. The assets would have been arguably property of the marriage, absence objection to the trust.

1. In the matter before me, the husband does not have legal title to any asset of the trust, nor does he have any power to appoint a trustee or appoint the assets of the fund to a beneficiary. He is a mere beneficiary, albeit described as a primary beneficiary. The husband is dependent upon the trustee of his trust to distribute income, accumulate income, and the trustee has complete discretion in determining any distributions made by the trust. That is clear from the trust deed before me.
2. The right the husband has under the trust conferring a benefit on him is as a discretionary primary beneficiary, and this is that his trustee must act consistently with the obligations and duties that trustees must exercise in considering and administering a trust.
3. This is not a case where the only interests in the trust are those of the trustee who is a party to the marriage, and where no other beneficiary has any legal or equitable interest. There are many classes of beneficiaries including the wife, their children and grandchildren and great grandchildren of the husband.
4. The husband has no proprietary interest in the assets of his trust. He has no control over the trustee directly or indirectly, pursuant to the trust deed. As his Honour, Chief Justice French, said at paragraph 77:

The beneficiary of a non-exhaustive discretionary trust who does not control the trustee directly or indirectly, has a right to due consideration and to due administration of the trust, but it is difficult to value those rights when the beneficiary has no present entitlement and may never have any entitlement to any part of the income or capital of the trust.

1. That is the situation of the trust here. The husband has no power to apply any of the assets or income of the trust of which he is a beneficiary. He has that power in the Ms C Bernard trust of which he is not a beneficiary whereas as in *Spry’s case[[11]](#footnote-12)* at paragraph 79, French CJ says, and Gummow and Hayne agreed:

Dr Spry’s power as trustee to apply assets or income of the trust to Mrs Spry prior to the 1998 instrument was, as pointed out by Gummow and Hayne JJ, able to be treated for the purposes of the Family Law Act as a species of property held by him as a party to the marriage, albeit subject to the fiduciary duty to consider all beneficiaries.

1. That is simply not the case in this matter. The husband’s interest in the trust is as a beneficiary of the Mr Bernard Trust, and none other. He cannot apply assets or income of the trust to any person, himself or the wife. The wife has her own recourse and action as a beneficiary of that trust, as against the trustee who is her former sister-in-law. Whereas in *Spry’s case[[12]](#footnote-13)*, paragraph 137 of their Honours, Gummow and Hayne:

During the marriage, the husband could have appointed the whole of the trust fund to the wife, the potential enjoyment of the whole of that fund was therefore property of the parties to the marriage or either of them.

1. That is not the case here. The assets in the Mr Bernard trust were never matrimonial property as was the case in Dr Spry’s trust. The current assets of this trust were not acquired during the marriage as they are in the main inheritances from the husband’s father’s estate although I accept the parties did not separate until 3 years after probate was granted.
2. One of the subsidiary arguments raised by the wife was that her husband had in reality control of the assets in his trust. That this control meant the assets of the trust were effectively his and therefore matrimonial property.
3. The first tranche of this argument is that the reality is the husband and his sister operate their business as a partnership and that their trusts are mirrors of each other. That in running the Q partnership, in running a joint business, that each Mr Bernard and Ms C Bernard have the same obligations, rights and duties as trustees to each other and as beneficiaries, and as partners to each other under the New South Wales *Partnership Act 1892.* This he wife asserts results in both Mr Bernard and Ms C Bernard having effective control of the assets in their trusts and therefore those assets are matrimonial property of the husband.
4. I fail to see how the assets of a trust are managed can change the nature of a trust at law and I do not see these practical matters create control for Mr Bernard over the assets in his trust. That power rests with his sister Ms C Bernard as it does for Mr Bernard with the Ms C Bernard trust.
5. However, I was referred to a decision of the Full Court on this issue of control in *Harris & Dewell[[13]](#footnote-14)*. In that matter, it was a unit trust that was at issue. The wife asserted that the husband held himself out, and therefore was, by his actions and conduct, in control as the owner of the trust, and not his father. Justice Rees was the trial judge, and she determined:

… the husband did not ostensibly control or hold any interest in the unit trust, it was not his property, although he exercised control over the unit trust –

1. The exercise of control was clear by business dealings and his conduct:

… the husband did not have ‘lawful right to benefit from the assets of the trust in the sense described by Finn J in the matter of Stephens & Stephens*[[14]](#footnote-15)*. Their Honours, in that decision, say: ‘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 affect the obtaining of a beneficial interest in the property of the trust’.

1. I have read out the provisions of this trust deed, and it is clear neither Mr Bernard nor Ms C Bernard can control by any power contained in a trust deed, or affect the obtaining of a beneficial interest in the property of the trust in which they have a beneficial interest. Neither of them can do that and merely because the trusts are mirror images of the other does not give them the power or control the wife asserts.
2. In *Dewell[[15]](#footnote-16)* even though the primary judge held that the husband had exercised some control over his father’s trust, the father had ultimate control by reason of his sole unit holding and his control of the voting rights, despite his son holding himself out as having that control and even exercising that control. The principle is clear control is not sufficient. Her Honour found that the husband had, since 2002, treated the company as if it was his own, carried out purchases of property without his father’s knowledge at times, and will inherit the company upon his father’s death, and in the meantime he treats them, for all his purposes, as his own. Her Honour found that the husband was not a witness of truth.
3. As their Honours point out at paragraph 28, the wife’s argument in *Dewell[[16]](#footnote-17)* before the primary judge:

… was that the husband’s beneficial ownership of units in 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 were 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 the benefit of the trust.

1. I have been urged to find that the carrying out of a partnership by Ms C Bernard and Mr Bernard in their capacity as trustees of mirror trusts ostensibly show that Ms C Bernard and Mr Bernard do control each other, have mutual control, and therefore the assets in the trusts of which they are beneficiaries are their property. The facts do not support such a finding for the following.
2. There is absolutely no evidence to support a finding that Mr Bernard or Ms C Bernard has ever purported to control or deal with the assets in their trusts. The evidence is that they have faithfully carried out their late father’s testamentary wishes to the letter.
3. Despite the behaviour of the husband in the matter of *Dewell[[17]](#footnote-18)*, of purporting to act as if his father’s unit trust was, in fact, his own, her Honour found that she was not satisfied that whilst his father remains the owner of the unit trust, the husband has some lawful right to the benefit of the assets of this trust, despite the control he had exhibited, and that the grandfather was the legal and beneficial owner of units in the trust.
4. There is no blurring by Ms C Bernard or Mr Bernard in relation to their ownership of assets, their roles and obligations as trustees, as partners or in the control either holds over the assets in their trusts in their personal capacity. That, of itself, is a significant difference in the factual situation before me to *Dewell[[18]](#footnote-19)*. Ms C Bernard and Mr Bernard have been scrupulous in their company dealings, in their promulgation of resolutions, to ensure accumulation of funds to carry out the renovations of the property, holding of meetings and in the filing of tax returns and their distinct roles as trustee and beneficiary. I rarely see a family law matter where tax returns and disclosure is so up‑to‑date and thorough, as has been in this matter.
5. Thus neither Ms C Bernard nor Mr Bernard have purported to exercise control over the assets in their trusts nor purported to have some lawful right to the assets in their trust. Their actions are to the contrary as is the whole of the evidence.
6. This trust is not a sham, far from it. Their Honours in *Dewell[[19]](#footnote-20)* quoted the wise words of Gibbs CJ in the *Ascot Investments Proprietary Limited v Harper[[20]](#footnote-21)* matter, where his Honour says:

Except in the case of shams and companies that are mere puppets of a party to the marriage, the Family Court must take the property of a party to a marriage as it finds it. The Family Court cannot ignore the interests of third parties in the property, nor the existence of conditions or covenants that limit the right of a party who owns it. To take two obvious examples, the Family Court could not compel a husband to assign to his wife a lease without obtaining the necessary consent of the lessor, and could not order the transfer to a wife of land owned by a husband free of mortgage when, in fact, the land was mortgaged to a third party. Thus, in the present case, the Court must deal with the husband’s shares in Ascot Investments as they are in fact are. That is, as shares in the company whose memorandum and articles are contained on restriction on transfer.

1. Similarly in this matter, the wife must deal with the assets that the husband holds as they are, which is as a primary beneficiary under a trust, and not the controller or trustee, appointer, director of that trust. That power is vested in his sister.
2. Their Honours in *Dewell[[21]](#footnote-22)* refer to *Spry[[22]](#footnote-23)* at 390 and 391.

An exercise of the power under section 79 requiring the application of the assets of the trust in whole or in part in favour of Mr S. would, prior to the 1998 instrument, have been consistent with the proper exercise of Dr Spry’s powers as trustee, and would have involved no breach by him of his duty to other beneficiaries.

1. That is clearly the opposite of the situation here. To provide to the husband all the assets of the trust of which Ms C Bernard is a trustee would be a significant breach by her of her obligations as trustee to the other beneficiaries under that trust, who include no less than the wife and the parties’ children. The parties’ children could bring an application to set aside any such disposition.
2. Their Honours went on further to say at paragraph 392:

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 power 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 as at the distribution date.

1. This is precisely opposite to the trust of which the husband is a beneficiary. He has no legal title to the assets, the origins of the assets or their greater part were not property acquired during the marriage and came from a substantial inheritance by the husband from his late father in 2012, consisting in 2012 of no less than 50% of $3,772,000. I accept the marriage subsisted for 3 years post 2012 having commenced in 1998. The parties did not acquire these assets from 1988 until 2012. They had been married for 24 years before these assets came into their world, and were together for three years thereafter.
2. There are other interested beneficiaries who have an interest, the wife as well as the parties’ children, grandchildren and great grandchildren of Mr Bernard the primary beneficiary. There is an obligation on the trustee, Ms C Bernard, to apply the income of the trust to these other beneficiaries in compliance with the Will for their maintenance and education in the life of any one or more of not only the primary beneficiary but all the beneficiaries.
3. There is no de facto ownership of the property of the trust, as there was in the *Ashton[[23]](#footnote-24)*. The Full Court decision in *Davidson[[24]](#footnote-25)*, the Court found that the assets of the trust were the de facto property of the husband by virtue of his control of the trustee company, enabling him to have recourse to those assets to satisfy the lump sum payment. The only control Mr Bernard has over the assets of the trust in which he is a beneficiary is as a class of a beneficiary, albeit a primary beneficiary. There is no particular special control or power of appointment or exercise of discretion that Mr Bernard has over, or that any beneficiary has over the trust and its assets that I can see from a reading of the Will or how the Trust has operated.
4. From the following decisions – *Kelly and Kelly[[25]](#footnote-26)*, *Stein and Stein[[26]](#footnote-27)*, *Harris and Harris[[27]](#footnote-28)*, *JEL and DDF[[28]](#footnote-29)*, it is clear the Judge must identify and analyse the nature of any powers in the trust deed that may rest with a beneficiary. The Mr Bernard trust is not a puppet trust whereby the trustee would act in accordance with a beneficiaries bidding. This is contrary to how Ms C Bernard and Mr Bernard have carried out their respective obligations and duties as trustees of the Mr Bernard and Ms C Bernard trusts.
5. Finally her Honour, Justice Finn, in *Stephens and Stephens[[29]](#footnote-30)* said:

I accept that no early authority in this Court has gone so far as to hold that control alone, without some lawful right to the benefit from the assets of the trust, is sufficient to permit the assets of the trust to be treated as property of the party who has that control.

1. I have no evidence to support the wife’s’ assertion that the husband has control of the assets of the Mr Bernard trust, has acted as if he does let alone a lawful right to the benefit of the trust assets. As their Honours say at paragraph 68 in *Harris & Dewell[[30]](#footnote-31)*:

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 in the trust.

1. And Justice Finn’s words were echoed:

Some lawful right to benefit from the assets of the trust.

1. The wife’s argument is an extension which is not permissible under the law and her application must fail. What the Will created was an obligation of the husband to act as trustee of his sister’s family trust, namely the Ms C Bernard Family Law Trust. Concomitantly, the Will provided that Ms C Bernard had obligations and duties as trustee to her brother, as primary beneficiary of the Mr Bernard Family Trust, and the other members of that trust.
2. Having so found, I must stay the operation of the orders made by Justice Loughnan. It is clear from the resolution of 2 July 2015 that Ms C Bernard as trustee of the Mr Bernard trust cannot pay $80,000 to the wife, as ordered as to do so would be a breach of her fiduciary duties as trustee. Justice Loughnan did not have that resolution before him, nor have the benefit I have had, of a full argument on these matters and thus his order is permanently stayed.

I certify that the preceding ninety-nine (99) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Henderson delivered on 5 July 2019.

Associate:

Date: 5 July 2019

1. *Family Law Act 1975* (Cth), s 79. [↑](#footnote-ref-2)
2. *Kennon & Spry* (2008) 238 CLR 366. [↑](#footnote-ref-3)
3. *Harris & Dewell* [2018] FamCAFC 94. [↑](#footnote-ref-4)
4. *Spry’s case: Exploring the limits of discretionary trusts* (2010) 84 ALJ 177. [↑](#footnote-ref-5)
5. Above, note 2. [↑](#footnote-ref-6)
6. Above, note 2. [↑](#footnote-ref-7)
7. *Goodwin and Goodwin Alpe* (1991) FLC 92-192. [↑](#footnote-ref-8)
8. *In the Marriage of Hauff* [1986] FamCA 16. [↑](#footnote-ref-9)
9. Above, note 2. [↑](#footnote-ref-10)
10. Above, note 2. [↑](#footnote-ref-11)
11. Above, note 2. [↑](#footnote-ref-12)
12. Above, note 2. [↑](#footnote-ref-13)
13. Above, note 3. [↑](#footnote-ref-14)
14. *Stephens & Stephens* (2007) FLC 91-779. [↑](#footnote-ref-15)
15. Above, note 3. [↑](#footnote-ref-16)
16. Above, note 3. [↑](#footnote-ref-17)
17. Above, note 3. [↑](#footnote-ref-18)
18. Above, note 3. [↑](#footnote-ref-19)
19. Above, note 3. [↑](#footnote-ref-20)
20. *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337. [↑](#footnote-ref-21)
21. Above, note 3. [↑](#footnote-ref-22)
22. Above, note 2. [↑](#footnote-ref-23)
23. *Ashton and Ashton* (1986) FLC 91-777. [↑](#footnote-ref-24)
24. *Davidson and Davidson* (1991) FLC 92-197. [↑](#footnote-ref-25)
25. *Kelly and Kelly* (1981) FLC 91-108. [↑](#footnote-ref-26)
26. *Stein and Stein* (1986) FLC 92-804. [↑](#footnote-ref-27)
27. *Harris and Harris* (1991) FLC 92-254. [↑](#footnote-ref-28)
28. *JEL and DDF* (2001) FLC 93-075. [↑](#footnote-ref-29)
29. Above, note 14. [↑](#footnote-ref-30)
30. Above, note 3. [↑](#footnote-ref-31)