

THE TREATMENT OF DISCRETIONARY FAMILY TRUSTS **IN THE FAMILY COURT – SOME RELEVANT** **CONSIDERATIONS**

Introduction

From *Stacey's* case in 1977 through to more recent cases such as *Coventry's* case in 2004 practitioners have regularly been confronted with single Court, Full Court, High Court and unreported decisions concerning the Family Court's treatment of assets held in Discretionary Family Trust structures.

The purpose of this paper is not to rehash the principal pronounced in all of the relevant cases over the last 28 years.

It is hoped that in the short time available, this paper will achieve for practitioners a clear and more precise understanding of key aspects concerning the treatment of Discretionary Family Trusts in the Family Court.

In particular, one of the most important matters in concerning assets held in a Discretionary Family Trust is the distinction between notionally treating those assets as assets of the Husband and Wife as opposed to actually making Orders extracting those assets from the Trust structure so that those assets come into the hands of the spouse entitled to a property settlement under Family Court Orders.

The distinction was properly highlighted more recently by His Honour Justice Warnick in the decision in *BP and KS (2003) FLC 93-157*.

As experienced Family Law practitioners most of us are well aware of the basis concepts of a Discretionary Family Trust. We are well aware of what one has to look at when deciding whether a party to the marriage has effective or De Facto control over the operations of that Trust. We know that we must examine the Trust Deed carefully and look to key provisions in that Trust Deed including provisions relating to any appointor, nominator, controller or any provisions relating to the position of a guardian.

We know that we need to look closely at the types and classes of beneficiaries and the Trustee's powers in relation to distributions of income and capital. If a Trustee is a corporation then we need to look closely at the constitution of that company and look and determine who has control of that company which is the Trustee of the Discretionary Family Trust.

We are aware that we need to look beyond the legal documents constituting the Trust (and the corporate Trustee) to the other indicia of control including but not limited to:

1. Mechanisms of decision making;
2. Minutes of Meetings;
3. Major decisions made for purchasing or restructuring of Trust assets;
4. The history of distributions of income and/or capital;
5. Interrelationship between members, Trustees, appointor etc.

We are well aware of the relevant cases where a Court looks to to determine who has effective and real control of an entity.

In this paper, some of those concepts will be touched upon but the main purpose of this paper is to draw our attention and focus to what is often overlooked as being a real and important distinction. That is, the distinction between the treatment of assets of a Trust as property of the Husband and Wife and the execution of Orders to extract such assets from a Trust structure to satisfy a claim.

It is my opinion, despite the very thorough and recent judgment of His Honour Justice Warnick in *BP and KS* (supra) there is still some confusion as to what type of Orders should be sought and as to how the Court will in future cases interpret and enforce obligations imposed upon Husband's and/or Wife's in their capacities as Trustees or where they hold positions of appointment under a Trust instrument.

In order to understand this difficult distinction, we need to revisit some basics and to consider some of the following important concepts:

1. What is a Discretionary Trust?
2. What are a Trustee's fiduciary duties and duty of care generally? Are these Trustee's fiduciary duties different or varied in a Discretionary Trust?
3. What is the nature of a beneficiary's interest under a Trust? Is the nature of the beneficiary under a Discretionary Trust different to that under a fixed Trust?
4. What duties attach (if any) to a person who holds the position of appointor/nominator?

It is important to consider the above issues because as we know from the many reported cases the Court has placed from time to time considerable emphasis on the importance of the position of appointor/controller in the Trust structure and where appropriate made Orders against a spouse to do certain things which in turn affect the decisions made by Trustee under the Trust Deed.

The Basic Concept of a Trust and Discretionary Trust

The answers to any questions we have about Trusts are of course found in equity and not Common Law.

Trusts were and probably still are the most important institution in equity. The basic concept of a Trust is that where for example property is transferred to a Trustee by a settlor in Trust for a beneficiary, then equity will regard the beneficiary as the sole beneficial owner of that property and will not permit the Trustee to enjoy it in any way. Not only will equity uphold the Trust as against the Trustee but will also uphold the beneficiary's status as a sole beneficial owner of a property against everyone else in the world except a bona fide purchaser of the legal estate for value without notice.

Because the interests of a beneficiary under a Trust and indeed that of an owner of any other equitable interests in property is vulnerable to the superior claim of a bona fide purchaser of the legal estate to value without notice, such an equitable owner cannot be regarded as possessing a right *in rem* since his right is not enforceable as against every possible adversary in the world.

The equitable owners right is a right "*in personam*" because it is enforceable only as against individual persons and not as against the rest of the world. Notwithstanding those individual

persons comprise the rest of the world except for the bona fide purchaser of the legal estate to value without notice and the latter successor's entitled.

However, because the equitable owners right is indefeasible as against everyone else except for the bona fide purchaser of the legal estate to value without notice and the latter successor entitled, that right is recognised in equity as a proprietary interest, notwithstanding that it is a right "*in personam*". This equitable proprietary interest of the beneficiary under a Trust and of other owners in equities is thus unique in that although it is a proprietary interest, it is not a right in rem but only a right in personam.

The above situation aptly describes the interest in a fixed Trust where a beneficiary is either the sole beneficiary or has a fixed entitlement in the Trust. However, when considering a Discretionary Trust a beneficiary's position is entirely different.

A Discretionary Trust is where a Trustee is placed under a duty to distribute Trust property and income to such persons among a class of persons as they in their absolute discretion decide. A Discretionary Trust typically exists where the Trustee can decide which beneficiaries amongst a class of beneficiaries or further beneficiaries can be appointed and which amounts of income and capital can be distributed from time to time.

Also, it is important to remember that a Trust is discretionary where the class of beneficiaries is closed and the Trustee cannot select any further beneficiaries but has a discretion to distribute different amounts of income or capital (in their absolute discretion) between the main beneficiaries.

Also, the Trust is still discretionary where the Trustee can appoint or select beneficiaries in their absolute discretion but once appointed must distribute set amounts to each beneficiary.

Typically, in Family Law situations we encounter a Discretionary Family Trust where a Trustee has a wide unfettered discretion to distribute income and capital amongst a wide class of beneficiaries usually including the spouse, children and other extended members of the family and typically other beneficiaries including for example corporations in which a specified beneficiary has an interest in etc.

What is then the interest of a beneficiary under such a Discretionary Trust? Can it still be said that a discretionary beneficiary has an equitable proprietary interest in the assets of the Trust as would be the case in a fixed Trust?

In *Gartside –v- Inland Revenue Commissioners (1968) AC553*, the House of Lords decided that an object of a Discretionary Trust did not have any proprietary interest in the property subject to the Discretionary Trust.

Contrary to some opinion, a beneficiary's interest in a Discretionary Trust however (whilst not being proprietary in nature) is beyond a mere expectancy. This is because if a person has a mere expectancy in property they do not have right to be considered for any receipt of any part of that property. However, a person who is the object of a Discretionary Trust does have a right to be so considered although there is no guarantee they will receive any part of that property. In *Gartside –v- Inland Revenue Commissioners* (supra) Lord Wilberforce declared:

"No doubt in a certain sense a beneficiary under a Discretionary Trust has an 'interest' the nature of it may, sufficiently for the purpose, be spelt out by saying that he has a right to be considered as a potential recipient of benefit by the Trustee and a right to have his interest protected by a Court of Equity. Certainly that is so and when it is said that he has a right to have the Trustee exercise their discretion 'fairly' or 'reasonably' or 'properly' that indicates clearly enough that some objective

consideration (not stated explicitly in declaring the Discretionary Trust but latent in it) must be applied by the Trustee and that the right is more than a mere expectancy”.

However, because the interest held by a beneficiary under the Discretionary Trust is not a proprietary interest it is also not a contingent interest.

The interest of a beneficiary of the Discretionary Trust is therefore neither a vested nor a contingent interest in the Trust property nor a proprietary interest. However, it is more than a mere expectancy in that property. It is the only interest known to the law that is less than a contingent interest but greater than a mere expectancy.

A beneficiary’s interest in a Discretionary Trust has also been described as “*chose in action*”. The beneficiary has a right to due administration and to call upon the Trustee to deal appropriately with the income or capital of the Trust.

The beneficiary has a right to require the Trustee to consider whether to exercise its discretion and a beneficiary further has the right to secure proper administration of the Trust including proper management and proper exercise of a Trustee’s powers and discretions.

In that manner, the interest of a discretionary beneficiary is no less than the interest of any other beneficiary under a Trust.

It is suggested that because the right of a beneficiary under a Discretionary Trust is akin to a chosen in action and greater than a mere expectancy, then the beneficiary has the right to approach the Court to not only ensure the due administration of the Trust but to ensure that the Trustee exercise their discretion fairly, reasonably and properly. The discretion cannot be exercised fraudulently or for an illegal or improper purpose.

A Trustee’s Genuine Duties of Care and a Trustee’s Position in a Discretionary Trust

Due to the fact that a Trustee holds property not for his own beneficial enjoyment but for the benefit of other persons, he is placed under a heavy duty to exercise reasonable care to preserve Trust property that is in his position and to get into his possession Trust property which he is entitled to have in his possession but which is not actually in his possession.

The Trustee’s duty of care is of a fiduciary character because the standard of care which the Trustee is bound to exhibit in the execution of the Trust is not one that is reached by balancing his interests against those of the beneficiary of the Trust but the standard is one that cannot admit of any competing self interests of the Trustee.

The Trustee’s fiduciary duty of care is underpinned by his implicit and strict duty to avoid the situation of conflict or situations that have a real possibility of conflict between his personal interest and those of the beneficiaries under the Trust.

The Trustee’s duty of care needs to be measured by reference to the fact that he is acting solely in the interests of the beneficiaries. The Trustee’s duty of care requires him to consider whether his conduct is prudent for a person looking after other people’s property.

However, in a Discretionary Trust, the Trustee has an absolute discretion as to how to distribute income and capital (if any) to a particular class or individual beneficiary. What does equity tell us about the position, duties and responsibilities of a Trustee of a Discretionary Family Trust?

In *Gisborn –v- Gisborn (1877) 2APPCAS300*, Lord Cairns LC said

“the discretion and authority always supposing that there is no mala fides with regard to its exercise, is to be without any check or control from any superior tribunal. They are to decide upon this principal that it is to be such part as they shall think expedient, not such part as shall be sufficient, not such part as shall be demanded by or further person to be benefit, but such part as they shall think expedient, and upon the question of what is expedient it is their discretion which is to decide and that discretion according to which they are to decide is to be uncontrolled”.

Refer also to more recent decision in *Maciejewski –v- Telstra Super Pty Ltd (1998) 45MSWLR601*.

It is to be noted however that if a Trustee chooses to give reasons for the exercise of their discretion and the reasons are unsound then the Court can invalidate that decision. In *Re Beloved Wilkes Charity (1851) 3MAC440@448* Lord Truro LC said:

“It is to the discretion of the Trustees that the execution of the Trust is confided, that discretion being exercised with an entire absence of indirect motive, with honesty of intention and with a fair consideration of the subject. The duty of supervision on the part of this Court will thus be confided to the question of the honesty, integrity and fairness with which the deliberation has been conducted and will not be extended to the accuracy or conclusion arrived at except in particular cases. If, however, Trustees think it fit to state a reason and the reason is one which does not justify their conclusion, then the Court may say that they have acted by mistake and in error and that it will correct their decision. But if, without entering into details they simply state as in many cases it would be most prudent and judicious for them to do so, that they have met and considered and come to a conclusion, the Court has then no means of saying that they have failed in their duty or to consider the accuracy of the conclusion”.

In *Tabor –v- Brookes (1878) 10CHD273*, Malins VC upheld an exercise of the Trustee’s absolute discretion notwithstanding that he expressly found that they had exercised their discretion unwisely, because the Trustee has not having given their reasons for the exercise of discretion and bad faith not having been alleged against them, the Court could not impeach their decision. In doing so, the Court followed *Gisborn –v- Gisborn*. This decision has been followed in latter cases including *Craig –v- National Trustees Executors and Agency Company of Australasian Limited (1920) VLR569*.

Even though a Trustee who exercises an absolute discretion and good faith cannot have that exercise overturned by a Court, a Trustee entrusted with such a discretion is still entitled to seek advise from the Court as to how that discretion ought to be exercised. Also, where Trustees with an absolute discretion are shown to have failed to consider relevant facts before exercising their discretion, the purported decisions made by them can be interfered with by a Court (refer *Turner –v- Turner (1984) 1CH1000*).

A Discretionary Trustee’s duty to consider the suitability for the appointment of the objects of the Discretionary Trust was accepted as being part of their duty in cases such as *McFail –v- Doulton (1971) AC424@449* and *Krager –v- Paul (1984) VR161*.

In *Krager –v- Paul (supra)* it was stated:

“Put at more specific terms, it is well established that a Trustee under a Discretionary Trust with a mere power has a duty to consider its exercise from time to time and that, in the event of the Trust failing to do so, either the takers in default of appointment or the discretionary beneficiaries have standing to complain.

However, that proposition does not mean that a Court will necessarily force the Trustee to consider at some specific time. Rather the Court will intervene if there were refusal to consider all together or if the purported considered in fact amounted to a failure by the Trustee to exercise the Trustee's discretion in good faith upon genuine consideration and in accordance with the appropriate purpose".

A Trustee must make any determination as an exercise of its discretion as a result of the Trustee's own consideration and deliberations. It is well settled that so long as the Trustee does this, there is nothing improper in receiving or seeking advice from interested parties.

It is therefore suggested that where a Trustee fails to properly consider matters themselves, deliberate and make a bona fide decision themselves, then a decision could be open to challenge.

Particularly, the following may be two (2) examples where a Trustee has failed to properly give due deliberation and consider the exercise of their discretion in a bona fide manner:

1. Where there is an antecedent agreement or arrangement in place which obliges a Trustee to exercise a discretion in favour of one beneficiary rather than the others;
2. Where a Trustee has predetermined (without due consideration) a distribution of capital or income designed to benefit a specific beneficiary or class of beneficiary to the exclusion of the others.

The above distinction seems "cute" but becomes clearer when you consider some of the Family Court cases.

The Position of the Appointor/Controller

In effect, the Family Court through a series of decisions held that the power of appointment is one that is not fiduciary in nature and that if a person occupies this position they can effectively (subject to the terms of the Trust Deed) undertake certain acts so as to benefit themselves personally from the Trust assets.

There are many examples where the Full Court has said words to this effect including *Ashton -v- Ashton (1986) FLC19-777*, *Goodwin and Goodwin Alpe (1991) FLC 92-192* and also the Full Court's decision in *Davidson and Davidson (1991) FLC 92-197* where the Full Court stated:

"The powers which the Husband had in respect of the Trust were similar to those of the Husband in Ashton's case. The Trial Judge correctly followed that decision and treated the assets of the Trust as property over which the Husband had full control and could make payment out of without conflict as to his duties as an appointor on the Trust. In Re Skeats (1989) is not applicable to modern Australian conditions."

The Family Court continues to be littered with cases where the power of appointment holds some special place. It is a position that the Family Court tends to regard as one of having no fiduciary duty and being a power totally unfettered by the holder.

It is suggested that with respect, the position of the Family Court and equity is quite different.

In *Re Skeats* settlement, *Skeats -v- Evans (1889) 42CHD5822*, the Court held that a power of appointment can be described as a power of a fiduciary character and it exercise as a duty of a fiduciary nature to the proper operation and administration of the Trust. That decision was followed in *Re Newen, Newen -v- Barnes (1894) 2CH297@308*.

In Australia, support can be found in various authorities including *Re Burton, Wily –v- Burton (1994) 126ALR557* and *Pope –v- DPR Nominees Pty Ltd and Ors (1999) SASC337*.

In *Re Burton* case, Justice Davies stated:

“That perhaps the more important point is that the power to remove a Trustee to appoint a new Trustee is neither a general power of appointment nor a power which may be executed in the interests of the appointor. The interest of persons other than the appointor must be taken into account. The power is a Trust or fiduciary power, being a power conferred by a Deed of Trust and must be exercised accordingly in the interests of the beneficiaries. A power, even though not a fiduciary power, must be exercised solely in the furtherance of the purpose for which it was conferred. In Duke of Portland –v- Topham (1864) 11HLC31 the Lord Chancellor, Lord Westbury said ‘without further dwelling on the matter in as much as the Lordships concur in opinion, I think we must all feel that the set of principals of the law upon this subject must be upheld, namely that the donee, the appointor under the power, shall, at the time of the exercise of that power and for the purpose for which it is used, act with good faith and sincerity and with an entire and single view to the real purpose and object of the power and not for the purpose of accomplishing or carrying into effect any sinister object (I mean sinister in the sense of it being beyond the purpose and intent of the power) which you may desire to effect in the exercise of that power. If the power is contained in a Deed of Trust, the donee of the power is even more constrained to act in the interests of the persons for whose benefit the power was conferred’.”

It may be an oversimplification to suggest that all powers of appointment are fiduciary in nature, however, that is not to say that fiduciary obligations do not arise in some circumstances in the exercise of a power of appointment.

In *Duke Group Limited (in liquidation) –v- Pulmer (1999) SASC97*, fiduciary duties will arise where there exists a power or discretion to be exercised in the interests of or for the benefit of another and where that other is vulnerable in a sense of the relationship is one of trust and dependency.

That will undoubtedly arise as in this case where beneficiaries rely on the integrity of the appointor to appoint a competent person to carry out the terms of the Trust. The most important single component however, is the duty to act with loyalty to and in the interests only of another.

That person cannot be said to be acting in the interests solely of that other where his own interests conflict with those of the other.

The Distinction Between Treating Assets of the Trust as Matrimonial Property and Making Orders to Extract Assets from the Trust Structure

Attached to this paper is a schedule of many of the more important decisions of the Family Court relating to the Court’s treatment of assets held in Discretionary Family Trust structures.

There is not time nor is it the intention to recount the facts of all of those cases in detail or even briefly. As experienced practitioners we are certainly aware of those cases and some of the facts will be touched upon during the presentation of this paper. However, all practitioners are urged to re-read all of these cases and in particular, one should certainly read the detailed Judgment and reasoning by His Honour Justice Warnick in *BP and KS*.

In his conclusion in *BP and KS* His Honour Justice Warnick stated:

“There are a number of Family Court cases in which findings were made that the capital of Discretionary Trusts was either ‘property’ of a person who could control the Trust or the ‘De Facto property’ of such a person. While such findings might imply to leave the Court at liberty to deal with that property as the Court sees fit, this is not necessarily so”.

The significance of such a finding may initially be that the assets of the Trust can properly be included in a pool of assets for division between the parties. To do so is a notional step and a process of reasoning as distinct from the executive nature of a Court Order dealing with Trust assets.

Even when such a finding underpins a Court Order, there is a difference between firstly an Order requiring a payment from, for example, Husband to Wife (albeit the only source of funds as the capital of a Discretionary Trust of which the Husband is the Trustee or appointor or otherwise in control), leaving it to the Husband to act, presumably according to law and secondly an Order requiring a Trustee to pay funds in the Trust to satisfy an Order for property settlement.

While the distinction between Orders **designed** to facilitate satisfaction of other Orders for property by distribution from a Trust and Orders that **direct** that result may seem fine, it is none the less real.

In relation to all these cases, it is submitted that the following principals emerge:

1. The critical question in all cases is to determine the extent of the control of the Trust by the Husband and/or Wife and determine whether the spouse treats the assets of the Trust as their own property so as to be classed as their “*alter ego*” or “*De Facto property*”.
2. If the relevant indicia of control do not indicate that the assets of the Trust are treated as matrimonial assets then that is the end of the question and the assets of the Trust are a financial resource to be considered under Section 75(2).
3. In the event that the facts establish that there is sufficient issue of control the next question is as to what Orders are appropriate to be made. The following considerations then apply:
 - a. In the event that there are sufficient assets outside of the assets of the Trust to satisfy the claim of the other spouse, then it is wise and prudent to simply order that one (1) spouse pay a cash amount or transfer other assets to the other spouse without making any Orders directly affecting the assets of the Trust. In many of the reported cases this is what occurred;
 - b. In the event that there are insufficient assets outside of the Trust structure to satisfy an Order then there seem to be conflicting views and number of options available to parties when drafting Orders. The options that are available seem to be as follows:
 - i. Make an Order directing that the spouse in control of the Trust simply pay a cash sum to the other spouse. This may be supported by injunctions or other Orders. The clear inference in these types of orders to be implied is that the spouse can lawfully do all act and things necessary under the Trust Deed so as to distribute appropriate capital to the other spouse so as to make payment from the Trust assets. Strong support for this proposition can be found in cases such as *Harris*

and Harris, Ashton and Ashton and in particular the Full Court decisions in *Davidson's* case and also the special leave Application before the High Court.

- ii. The other alternative is to make Orders directly against the spouse by way of mandatory injunction causing them to do things such as to cause the Trustee to make appropriate distributions of capital. Whilst most cases fall short of actually making those Orders, there once again appears strong support for that proposition by the fact that in the abovementioned cases and by the pure fact that the Court clearly infers that such conduct is not unlawful (i.e. when making an Order for a direct payment of cash) and therefore it would be hard to see how a Court would not make Orders in this manner.
- iii. The other alternative seems to be that Orders should be carefully framed such that the Orders are not open to interpretation that there is a predetermined purpose in the making of the Orders or that the Trustee has already made a determination as to how capital is to be distributed. Support for this proposition and the wording of the Orders in this manner can be found in Orders made by Justice Ellis in *Davidson (No. 2)* and also in the Orders made by Maxwell J in the unreported decision of *Alcain*. Also support can be found in the Supreme Court decision (arising from *Davidson's* case) in the case of *Thurlstane Pty Ltd -v- Andco Nominees Pty Ltd* at both first instance and also on appeal. Also, His Honour Justice Warnick would seem to favour this approach in that Orders can't be made by the Court which give effect to a predetermined decision by a Trustee to distribute property.

In discussing these cases it is interesting to note that His Honour Justice Warnick effectively did not determine that the new Trust in existence (when it came to enforcing the Deed) was the "*alter ego*" of the Husband.

The Husband's new Wife had become a Director and this obviously influenced His Honour's decision. Having regard to that finding therefore, there would have been difficulty making any Orders that caused the Husband to do things (or put the Wife in a position to allow her to do things) that predetermined the distribution of capital to a specified beneficiary when the Trust was not the "*alter ego*" of the Husband.

It is questionable as to whether His Honour would have had the same concerns had the post-settlement Trust been similar to the pre-settlement Trust and clearly on the face of it the "*alter ego*" of the Husband.

In summary therefore it is my opinion that more recent authorities would indicate that Orders should be made in the following manner:

1. The original Orders should specify a cash payment to be made by the Husband or the Wife;
2. These original Orders should be accompanied by declarations that the spouse can do things in his position as appointor/controller to appoint a Trustee and then direct that Trustee to make distributions of capital to himself;
3. The Orders should then provide that a default provision in the event that the payment is not made that the spouse execute a Deed removing the existing Trustee and appointing another entity to be determined by further Orders by the Court upon such terms and conditions as are further determined and ordered by the Court, with the liberty to relist the matter.

The above Orders were in effect the Orders made by the Full Court in *Coventry and Coventry and Smith's* case.

They would seem to be the most sensible Orders in that the Order directly at first instance does not affect the Trust in any way and is directed towards the Husband personally. If a payment is not made then the proper method would be to relist the matter back before the Court for further Orders.

It is suggested now that the new Part VIII A provisions could then be used but if they were not successful then certainly Orders could be made as contemplated by His Honour Justice Ellis in *Davidson's* case or by Justice Maxwell in *Alcaine's* case. That is, the further Orders that would be made upon the relisting of the matter would not be made in such a way as to predetermine the purpose or decision that may be made by the new Trustee as to any distribution.

For example, in *Davidson's* case (being the second case when His Honour Justice Ellis revoked the Deed of Variation executed by Mr Davidson) His Honour made Orders upon the following terms:

1. That the Deed of Variation be set aside;
2. That the Husband execute a Deed nominating John Smith (Wife's Accountant) as the appointor for the purpose of the Trust Deed of the MAVK Trust;
3. That in the event of the Husband refusing or neglecting to comply with Order 2 herein within the time specified, then the Registrar of the Sydney Court be appointed to execute such Deed in the name of the Husband and give full force and validity to the said Deed.

In *Alcaine's* case, Justice Maxwell Ordered:

1. That pursuant to Section 79 of the *Family Law Act* the Husband shall do all acts and things and execute all documents to transfer to the Wife or her nominee the whole of the Shareholding in the Alcaine Family Trustee company and resign all offices;
2. That the Wife forthwith thereafter do all things, call and attend and vote and cause her nominee to attend and vote at all necessary meetings so as to bring about an amendment to the Deed governing the Trust and dated 25 August 1983 by the addition of a Clause "5A" in the following terms:

"a) *In considering whether and/or to whom to make any distribution of capital or income, the Trustee from time to time may have regard to any findings and/or recommendations in that regard which may form part of the judgment of Her Honour Justice Maxwell (and of the Judges of any Full Court of the Family Court and of any subsequent Judgment) in Family Court of Australia proceedings no. SY9878 of 1994.*

b) *And that the issue of the further amendments to the Trust Deed sought by the intervener and the Wife be adjourned for consideration by the new Trustee of those proposed amendments and any further Application which a new Trustee may see fit.*

c) *That the Wife shall further forthwith thereafter do all things, call and attend and vote and cause her nominee to attend and vote at all necessary meetings so as to cause Alcaine Family Trustee Company to appoint as Trustee of the PH Alcaine Trust the company GC Nominees Pty Limited and simultaneously with that appointment to resign as Trustee of the said Trust."*

The above Orders in *Alcaine's* case do not oblige the Trustee to exercise their discretion in any particular way.

Therefore, there have been a number of cases where the Court has indicated that it should not make any Orders that directly cause a Trustee to execute a discretion in a particular way on the basis that would clearly be in breach of the Trustee's fiduciary duty.

However, the cautionary approach adopted in the above cases and by His Honour Justice Warnick can perhaps not be said to have found support in the earlier Full Court decisions where the Court was quite brazen in its dismissal of the laws of equity when looking at the real issues of control of a Trust.

In situations where the Full Court has found (such as in *Davidson's* case and *Goodwin and Alpes'* case and *Harrison's* case etc) that a spouse is in De Facto control of a Trust, then they have also found that the office of appointor or controller has no fiduciary duty and can be used to benefit one's own purposes.

In those situations, one then has to question the need for caution in making such Orders. This is particularly so having regard to the comments by the High Court in the special leave to appeal Application in *Davidson's* case. In dismissing the Application for leave to appeal by the Husband in *Davidson's* case, the Chief Justice made the following comments:

"We are not persuaded that there is an error of principal on the part of the Full Court of the Family Court in concluding that the Applicant could cause the Trustee company to apply the capital of the Trust Fund for the benefit of the Respondent or for the benefit of a company in which she was a Shareholder so long as a beneficiary is a Shareholder."

The primary Judge found as a fact that the Trustee company was a creature of the Applicant and the provisions of the Trust Deed are well open to interpretation which supports the conclusion reached by the Full Court."

Interestingly, at first instance in *Davidson's* case the Trial Judge made Orders to the following effect:

1. The payment by the Husband to the Wife of a sum of \$700,000.00;
2. The Husband was restrained from using any power he has to cause any distribution of capital from the MAVK Trust and/or a transfer of its assets save for the purpose of complying with these Orders;
3. Each of the Husband and Wife shall do all things to give effect to these Orders and to transfer the Shares in Thurlstane Pty Ltd to MAVK Pty Limited and if required from MAVK Pty Limited to Lestato Pty Limited and upon the Wife having complied with this Order she shall resign as a Director of MAVK Pty Limited and shall transfer her Shares in that company to the Husband or his nominee.

The Husband later circumvented these Orders by engaging in a number of transactions essentially enabling him to resign from the various entities as a Director and then the Trustee company executing a Deed of Variation (the Husband no longer being a member of the Trustee company) which effectively removed the Husband as appointor of the Trust and revoked and deleted Clauses in the Trust Deed relating to the appointor Clause.

This Deed was subsequently set aside by His Honour Justice Ellis and upheld again by the Full Court.

However, at first instance, His Honour had indicated during his Reasons for Judgment the following:

“It is the view of the Court that to ensure that the monies payable under the Court’s Order are paid by the Husband to the Wife, the Husband shall be required as Trustee of the Trust to transfer to the Wife as beneficiary under that Trust not less than 6,000 of the parcel of Shares in the company”.

The effect of the above Orders would have been that the Wife would have had Shares transferred to her as a beneficiary under the Trust to effectively keep as security for the payment. If the payment of \$700,000.00 was not made then the Husband was further Ordered in his capacity as Managing Director of the companies to facilitate the proper, fair and effective sale of those Shares for the Wife’s benefit etc.

If these Orders had in fact been made by His Honour, then quite clearly they were Orders directing the Husband in his capacity as controller of the Trustee company to undertake a predetermined cause of action by distributing capital to a nominated beneficiary. Obviously, it could be said in such a case that if the Orders were made that the Trustee company had not properly given due and deliberate consideration and in fact an antecedent agreement (being the Orders) existed.

However, the Full Court in *Davidson’s* case made comment about the nature of the Orders made by the Trial Judge. The Full Court said:

“It may be worth recording that had Orders been made along the lines proposed (i.e. the transfer of the Shares) in the Judgment it is possible that the problems referred to hereafter may not have arisen”.

It is my opinion, quite clearly the Full Court are inferring here that if His Honour had made Orders more directly against the Husband and the Trustee company to do things, then all of the other problems would not have arisen. In other words, by being cautious and ordering simply the cash payment and not directing the Husband to cause the Trustee company to do things it allowed the Husband an avenue to engage in other transactions to effectively disobey the Orders and defraud its purpose.

If I am correct in my interpretation of the Full Court in this decision and the other earlier decisions, then clearly there is some conflict with this Full Court’s view and the latter statements by the Full Court in *Coventry’s* case and by His Honour Justice Warnick in *BP –v- KS*.

Assets of the Trust Beyond Reach of the Family Court

Having regard to the new third party amendments that have commenced and the above discussion of the current law regarding the Family Court’s treatment of assets of the Trust there is in my opinion little to be done to put assets of a Trust beyond the reach of the Family Court’s powers in any bona fide manner.

If one were to put their mind to effecting such a result, then one would have to ensure that none of the major indicia of control were in existence so that when the Court came to assess whether the Husband or Wife effectively had De Facto control of the Trust that such a finding could not be made.

That is, attention to matters such as:

1. Ensuring neither spouse has any effective or actual control of the Trustee company, or of the Trustee where that Trustee is an individual;
2. Ensuring that neither spouse is the appointor or guardian and further that the spouse's do not have any control over such persons;
3. That the spouse's don't make decisions as to the day to day distribution of income and Trust capital;
4. That the spouse's don't benefit to the exclusion of other beneficiaries in relation to the distribution of capital and income;
5. The class of beneficiaries would have be extremely wide and include classes of beneficiaries other than just simply the Husband and Wife and their direct family;
6. Spouse's should not be takers in default of any appointment;

In summary, the setting up of a Trust in such a manner which would effectively take control away from the Husband and Wife would in effect defeat the purpose of most Family Discretionary Trusts which are set up for asset protection and income tax minimisation.

Also, obviously the vesting of ultimate control in a third party leaves the spouse's exposed to unfettered discretionary decisions being made by a third party who might be in control of Trust assets and perhaps act adversely to the Husband and Wife's interests.

New Third Party Amendments

The purpose of this paper is not to discuss in detail the new Part 8AA provisions.

However, in relation to some of the matters discussed during this paper it now seems that some of the difficulties as highlighted by His Honour Justice Warnick and some of the other cases may be overcome in the future by the joining of the Trustees and/or Trustee company as a party to the proceedings or in relation to enforcement proceedings so as to effect the intent of the Orders.

For example, in *Davidson's* case, once the Husband had refused to make the initial payment, the enforcement proceedings together with a joinder of the Trustee company as a party to the proceedings and the making of Orders directly against that Trustee company can perhaps now be contemplated in a situation where:

1. Procedural fairness has been given to the Trustee company including proper notice to the company and all of the beneficiaries of the Trust;
2. An indemnity pursuant to Section 90AH can be provided to the third party Trustee who carries out the Orders required to be done (for instance the transfer of capital to the spouse beneficiary);
3. Pursuant to Section 90AG if an Order is made binding on a person in the capacity of Trustee then that Order binds any person who subsequently becomes the Trustee;
4. The Part 8AA provisions override any other law within the Commonwealth or State or any Trust Deed or instrument and further when the third party (eg Trustee) complies with the Order that party cannot be taken to contravene any other law or instrument.

Obviously, the extent of these new laws is yet to be properly tested. One can even imagine situations where a definitive finding of the Trust property being the alter ego or De Facto property of the spouse is not necessarily a pre-requisite to making Orders under this part.

For example, if in a Family Discretionary Trust the assets of the Trust have predominantly been administered for the purpose of the Husband and Wife and their children but a third party is an appointor and/or perhaps a Director of the Trustee company then it is suggested there could perhaps be an argument that Orders could still be made against the Trustee to effect a capital distribution upon the beneficiaries especially in the situation where neither the beneficiaries could claim any substantive change to their existing rights (they do not have any proprietary rights in any event) and that the other third party was only in a position of being a Director of a Trustee company where the new provisions provide appropriate indemnities for such third parties etc.

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ANNEXURE A

<u>Case</u>	<u>Reference</u>
<i>Stacey and Stacey</i>	<i>(1977) FLC90-324</i>
<i>Ashton and Ashton</i>	<i>(1986) FLC91-777</i>
<i>Shaw and Shaw</i>	<i>(1989) FLC92-030</i>
<i>Harris and Harris</i>	<i>(1991) FLC92-254</i>
<i>Goodwin and Goodwin Alpe</i>	<i>(1991) FLC92-192</i>
<i>Davidson and Davidson</i>	<i>(1991) FLC 92-197</i>
<i>Harris and Harris</i>	<i>(1991) FLC92-254??</i>
<i>Gelly and Gelly (No. 2)</i>	<i>(1992) FLC92-291</i>
<i>Alcain and Alcain and Abraham</i>	<i>Unreported, 20 March 1997 SY9878-94</i>
<i>Webster and Webster</i>	<i>(1998) FLC92-382</i>
<i>JEL and DDF</i>	<i>(2001) FLC93-075</i>
<i>Milankov and Milankov</i>	<i>(2002) FLC93-095</i>
<i>BP and KS</i>	<i>(2003) FLC93-157</i>
<i>Coventry and Coventry and Smith</i>	<i>(2004) FLC93-184</i>