

# NICHOLE'S NEWSLETTER

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NEWSLETTER  
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## Update on new de facto laws

Our last newsletter outlined the significant changes to de facto property law made by the recent amendment to the federal *Family Law Act 1975* and the introduction of the *Victorian Relationships Act 2008*. The Act amending the federal law received royal assent on 21 November 2008; and will commence on 1 March 2009. All de facto relationships breaking down after this date will be captured by the new federal law.

Our last newsletter also outlined the *Relationships Act 2008*'s provision for property matters between 'caring relationships'. To avoid any doubt, we would like to reiterate that these provisions will only apply to relationships between adults who provide personal or financial commitment and support of a domestic nature to each other where this is not provided for a fee or reward or on behalf of an organisation. Therefore typical relationships between carers and clients will not come under this law. Rather the relationship will arise between, for example, adult companions, a parent and an adult child, or two adult siblings that have a high level of commitment to provide support to the other, so that their relationship can properly be described as being of a domestic character.

Our last newsletter also referred to the *Relationships Amendment (Caring Relationships) Bill 2008*, which will amend the *Relationship Act* to clarify the definition of a caring relationship and require that parties receive a certificate of independent legal advice before registering their caring relationship. This Bill received Royal Assent on 11 February 2009, and will now commence no later than 1 December 2009.

## Editor's Note

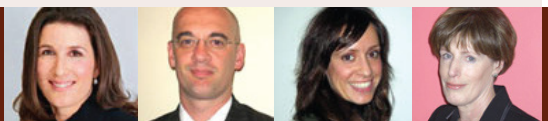
Our first edition of the Nicholes Newsletter for 2009 is a bumper issue that includes something for everyone!

Our 'Family Law and Social Policy' section covers all the latest developments in this side of family law including:

- same sex parentage under the new federal law
- new Victorian surrogacy law
- new family violence legislation

Our 'Family Law in the Current Financial Climate' section will give readers involved in financial services a background of how family law may relate to clients affected by the financial crisis. This includes:

- how family law affects bankruptcy proceedings—for bankrupts, non-bankrupt spouses and creditors
- recent High Court decision in *Kennon v Spry* which developed the court's approach to family trusts in family law property proceedings
- And see also our update on the new de facto laws (covered by our November special edition), and a summary of recent significant child abduction case!



## Child abduction: significant new case law

### NFL case makes new law!

In late December 2008, the Family Court made a decision in the matter of *SCA & Papastavrou* which has significantly changed the landscape of child abduction case law in Australia. The Court ordered that a woman did not have to return her children to her husband in Greece, after bringing them to Australia to escape a severe family violence. It is the first time that orders of this kind have been made in Australia.

The case involved an Australian woman who moved to Greece in 1996 and married a Greek man in 1999. The couple had two children, both born and brought up in Greece. As time went on, the father began committing brutal and repeated acts of violence against the mother, often in the presence of the children. The mother developed the medical condition 'positional vertigo' as a result of beatings to her head.

After nearly three years of abuse the mother asked the father to leave the family home. He did so several days later and continued to see the children on a weekly basis in a public cafeteria, until one day late in 2007 when he seriously abused both the mother and the oldest child in the family home.

The mother called the Greek police at this time, but was informed they could do little about the situation except talk to the father. She visited her GP the following day, who advised that she needed the physical and emotional support of her family and recommended that she return to Australia.

The mother claims that she informed the father of her intention to return to Australia until she recovered her health, and that he replied that he did not care. The father denies any prior knowledge of the mother's travel plans.

Several weeks after the mother and children arrived in Australia, the father lodged an application for the children to be returned to Greece.

The international law on child abduction comes under the Hague Convention on Civil Aspects of International Child Abduction, which Australia has ratified. The Convention establishes that where children have been unilaterally removed to another country, the Court in that country must order that they be returned to their home country unless certain exceptions or 'defences' can be proven. The 'grave risk' defence requires proof that return would expose the children to grave risk of harm or intolerable situation. In this case the mother argued that return to Greece

would create such an intolerable situation, by exposing the children to a grave risk of domestic violence against both themselves and their primary caregiver, the mother.

In several previous child abduction cases in Australia, mothers have argued that the grave risk defence should be found on the basis of a history of family violence. However the Family Court has never previously accepted this argument. Even where incidents of family violence are proven, the Court has previously found that this does not pose a 'grave risk', as the children can be protected upon their return through the police, child protection agencies and appropriate custody arrangements. The mother's case used expert evidence proving that Greece did not have adequate legal systems and social services to protect victims of domestic violence. This was obviously a matter of diplomatic sensitivity with Greece. Nevertheless the Court used this evidence as a basis for its orders in favour of the mother, as the other side did not produce compelling evidence to the contrary.

The Court also relied upon evidence that the mother's medical condition made her more vulnerable to sustaining secondary injury if she was subjected to further violence. The Court further accepted that there was a grave risk posed to the children by the possibility that the mother could be sent to jail in Greece because of criminal proceedings that the father had issued against the mother in relation to the abduction.

For the mother, the Court's decision opens the door to a new life in Australia—free from fear for herself and her children, and surrounded by the support of her family as she regains health.

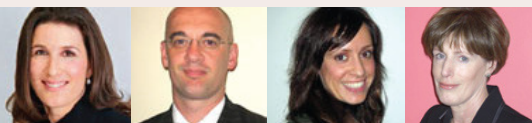
For other women in the same situation, the win sets a precedent that will help them to also escape intolerable circumstances of family violence.

Nicholes Family Lawyers represented the mother in this case.

## FAMILY LAW AND SOCIAL POLICY

### Same sex parentage under new federal law

The recent amendments to the *Family Law Act 1975* provide that a child adopted by a de facto couple, or by a party with the consent of their de facto partner, should be recognised as a child of the relationship. This applies to both male and female same-sex couples, as well as heterosexual de facto couples.



The amendments have also extended the provisions regarding children born through assisted reproductive technology (ART) to provide that such children should be recognised as a child of the birth mother and the birth mother's de facto partner (the 'other intended parent'). This is regardless of whom provided genetic material for the child, and of whether the other intended parent is female. The presumption that the birth mother is a parent means these provisions will only apply to female same-sex couples and heterosexual de facto couples. Children who have been born through ART and being raised by male same-sex couples are not included here, because such arrangement must obviously involve surrogacy and a birth mother. Surrogacy law currently comes under state laws, so the Commonwealth Parliament does not have jurisdiction to legislate on this. The *Family Law Act 1975* simply provides that court orders made under state law regarding parentage of children born through surrogacy arrangements should be followed under the federal law.

## New Victorian Surrogacy Law

On 11 December 2008, the *Assisted Reproductive Technology Act 2008* (Vic) (the 'ARTA') received Royal Assent, and will now commence no later than 1 January 2010. This regulates the many aspects of ART, including who can undergo ART treatment, what form of consent is required, how reproductive material can be donated, and parentage of children born through ART.

A major change introduced by the ARTA will be the provision for surrogacy arrangements. Until the ARTA commences, surrogacy is extremely difficult to arrange in Victoria. This is firstly because under existing law, women can only access ART if they are medically infertile. Therefore if a couple wish ('the commissioning couple') wish to have a child through a surrogate using ART, they must find a medically infertile woman to act as surrogate. Until the ARTA commences, further problems arise with legal parentage, as under Victorian law the birth mother and her partner are presumed to be the child's parents rather than the commissioning couple.

The ARTA will address these difficulties by allowing women to access ART if they are either medically infertile, or if the treatment is approved by the Patient Review Panel ('the Panel') that is established by the ARTA. This allows surrogates to receive treatment by an ART provider even if they are fertile, but only if the surrogacy arrangement has been approved by the Panel. In considering whether to approve the arrangement, the Panel must be satisfied that:

- the surrogate mother is at least 25 years old,
- all the parties have received counselling and

legal advice,

- the parties are aware of the personal and legal circumstances of the arrangement
- the parties are able to make informed decisions about the arrangement, and
- the parties are prepared for the consequences if the arrangement does not proceed as planned.

While the child born through such a surrogacy arrangement is aged between 28 days and 6 months old, the commissioning parents can apply to the court for substitute parentage orders which will make them legal parents. The court will only make these orders if:

- there is a surrogacy arrangement approved by the Panel,
- the surrogate consents to the orders,
- the child is living with the commissioning parents, and
- the orders are in the child's best interests.

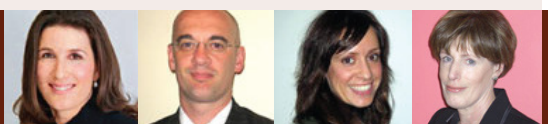
The *Adoption Act* will apply to these parentage orders as if they were adoption orders, thus making the commissioning parents the legal parents of the child. The ARTA uses asexual language and pronouns, so presumably male same-sex couples will be able to commission surrogacy and obtain parentage orders through this legislation, as well as other couples.

The ARTA provides that surrogate mothers must not receive any material benefit or advantage besides reimbursement for prescribed costs that she actually incurred as a direct consequence of the surrogacy arrangement. The Act also prohibits any person from publishing any statements seeking or offering to enter or facilitate surrogacy arrangements. Breach of either of these provisions may incur up to two years imprisonment. This shows the Victorian Parliament's clear intention to prevent commercialisation of surrogacy which has occurred in the USA, where there are egg brokers and surrogacy agents, classified advertisements and very generous 'compensation' schemes for surrogates.

## New Family Violence Legislation

The *Family Violence Protection Act 2008* (the 'FVPA') came into force in Victoria on 8 December 2008. The FVPA repeals the *Crimes (Family Violence) Act 1987*, and was enacted in response to the Victorian Law Reform Commission's review of the law in this area.

The FVPA's objectives include reducing family violence to the greatest extent possible and promoting the accountability of perpetrators of family violence, by providing a system of family violence intervention orders (FVIO) and safety notices (FVSN).



The *FVPA* changes previous family violence by broadening the definition of family violence and family member, and by giving the police power to issue family violence safety notices after court hours.

### Definition of Family Violence

FVIOs will be issued where it is established that a family member has experienced family violence as defined by the *FVPA*. This includes behaviour that:

- is physically or sexually abusive;
- is emotionally or psychologically abusive. This includes repeated derogatory taunts, threatening to disclose a family member's sexual orientation or withhold their medication, preventing a family member from making or keeping connections with their family, friends or culture, threatening to commit suicide, self-harm or harm to another person with the intention of tormenting the family member;
- is economically abusive. This includes unilaterally removing or retaining a family member's property or assets without the consent, preventing a family member from gaining or keeping employment, or coercing a family member to sign a contract relating to financial matters, such as a power of attorney or contract of guarantee;
- is threatening or coercive;
- in any way controls or dominates the family member and causes that family member to feel fearful for their own or another's safety;
- causes a child to hear, witness, or otherwise be exposed to family violence.

This includes circumstances where a child comforts or provides assistance to a family member who has been physically abused by another family member, where a child is present when police officers attend after such an incident, or where a child cleans up after a family member has intentionally damaged another family member's property.

Other examples of family violence provided in the *FVPA* include intentionally damaging a family member's property, unlawfully depriving a family member of his or her liberty, causing injury or death to an animal in order to control or coerce a family member, or threatening to do the above.

Unlike the former *Crimes (Family Violence) Act 1987*, the *FVPA* clearly provides that behaviour may come under the statutory definition of family violence even if it is not a criminal offence.

### Definition of Family Member

The final big change introduced by the Act is a broader definition of family member, which now includes:

- any person who has been the relevant

- person's spouse or domestic partner, who has had an intimate personal relationship with the relevant person (not necessarily a sexual relationship),
- who is or has been a relative of the relevant person,
- a child who does or has regularly resided with the relevant person,
- the child of a person who has or has had an intimate personal relationship with the relevant person, or
- any other person whom the relevant person regards as being like a family member if this is reasonable considering the circumstances of the relationship.

### Issuing FVIOs

This broader definitions of family violence and family members mean that FVIOs will be more easily issued than previously. However this does not mean that they will be issued too easily or readily. Final FVIOs will only be issued by the court where the respondent has committed family violence on the balance of probabilities and is likely to do so again. Therefore it is not sufficient for a party or client to allege an incident of family violence; it must also be sufficiently likely that this will be repeated.

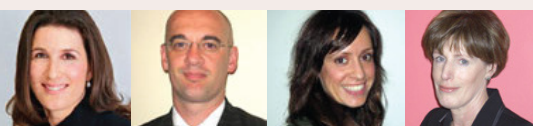
The court may also, on their own initiative, make a final order for the protection of children of the affected family member or respondent. Final FVIOs can be made for more than one affected family member if this is relevant and no parties in the proceeding oppose to such an order being made.

Interim FVIOs can also be made by the court upon application pending final orders, where the court is satisfied that this is necessary to ensure the safety of an affected family member or child, or to preserve any property of the affected family member. Interim orders can also be obtained pending final orders upon application if no party to the proceeding opposes to the interim order.

### Police issued Safety Notices

Family Violence Safety Notices (FVSNs) may be issued where a police member has assessed that there is an immediate risk to the safety of a family member in circumstances where the court is closed or the normal court process cannot be accessed to obtain an FVIO. The police member must make an application for the FVSN to another police member of the rank of a sergeant or higher, even if the applicant police member is a sergeant or higher rank. This is to ensure transparency and accountability in the FVSN process.

An FVSN is not a permanent intervention order. The FVSN must include a first mention date for an application for an FVIO, and a summons to this. The FVSN commences when served on the respondent and ends when the court makes an order at the first



mention date, either making or refusing to make an FVIO.

FVSNs may include the same conditions as an FVIO, such as excluding the respondent from the family home. If such an exclusion condition is made, the police must consider the accommodation needs of the respondent and any dependent children, and take reasonable steps to ensure temporary accommodation is accessible to them where necessary.

If the FVSN does not involve an exclusion condition, the police must consider the accommodation needs of the protected person and any dependant children, and if necessary, take reasonable steps to ensure temporary accommodation for them.

The police have no obligation to provide free accommodation to parties affected by an FVSN.

## FAMILY LAW IN THE CURRENT FINANCIAL CLIMATE

### Bankruptcy and Family Law

#### Position of bankrupt spouse

Upon bankruptcy, the bankrupt's property vests in the trustee in bankruptcy. If the non-bankrupt spouse initiates family law proceedings against the bankrupt, the trustee in bankruptcy is able and at times obliged to participate in the proceedings. However, the trustee does not have the ability to bring family law proceedings against the non-bankrupt spouse ('NBS').

#### Position of the non-bankrupt spouse

Changes to law introduced in 2005 have given the Family Court jurisdiction to adjust property interests of bankrupt parties—even in property that had vested in the trustee. This means that if a NBS applies for and is awarded orders for property or maintenance against the bankruptcy trustee, the NBS can obtain a claim to property and assets of the marriage that they otherwise would probably lose through the bankruptcy if the couple remained together.

Moreover, under s72(2) of the *FLA*, the Court may require that spousal maintenance orders be satisfied by the transfer of vested bankruptcy property to the NBS. This will secure the NBS' maintenance claim where periodic payments would be impracticable due to the bankruptcy, and will reduce the pool of vested property available to creditors.

It also may be possible for the Court to require that the bankrupt meet payments owing to the NBS under

property orders out of property that has not vested in the bankruptcy trustee i.e. superannuation. Such a step would require a good deal of consideration for public policy, and has not been developed as yet.

The 2005 changes also allow the NBS to commence family law proceedings for property settlement or spousal maintenance even after the other party has been declared bankrupt.

Accordingly, in some circumstances the NBS may be in a better financial position if they separate from the bankrupt and issue proceedings for property and maintenance orders against the bankrupt. However it is also important to note that orders are made entirely at the Court's discretion. Therefore if the Court suspects that the parties have separated and issued proceedings in order to quarantine assets from creditors, it may adjust orders accordingly. As below, creditors and the trustee in bankruptcy can make submissions to the Court regarding their interests.

#### Position of other creditors

The Family Court's power to adjust interests in property vested in the bankruptcy trustee obviously affects the interests of other creditors, as orders granting property interests to the NBS it may reduce the assets available to be distributed between the creditors.

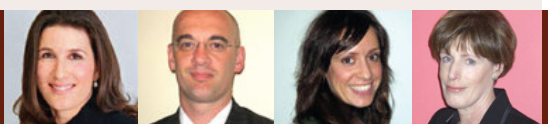
Therefore s 75(2)(ha) was also inserted into the *FLA* in 2005, requiring the Court considers the effect of any proposed order on the ability of a creditor to recover debt owed to them.

Little guidance has been given to how the court should consider creditors' interests or balance these against the NBS's. The bankruptcy trustee will generally be added as party to the proceedings and given opportunity to make submissions on this matter. Creditors can also apply to intervene in proceedings as parties whose interests may be affected by the proceedings.

Creditors should be aware that if their clients are owed money, (especially unsecured debt) by a party involved in family law proceedings, their recovery of this debt may be affected by the outcome of these proceedings. The clients may apply to be added to and make submissions in the proceedings in this regard. In any case, it is important for creditors to stay aware of their debtors family law matters if possible.

#### Injunction to preserve marital property pending Family Court orders

In the case of *Depute Commissioner of Taxation v Kliman and Kliman* (2002) FLC 93-113, the Full Family Court considered the question of whether the Court had jurisdiction to grant a third party creditor an injunction restraining the husband and wife from disposing of their property pending the outcome of their family law property dispute.



The Court found that it was able to grant such an injunction where the third party had an existing legal entitlement as against a party to the marriage, which clearly impacted what would be considered as property of the marriage without further adjudicative determination i.e. where the Court would not have to hear and consider what the third parties' property rights are.

In this case the third party's property rights were a tax debt owed by the husband to the Deputy Commissioner of Taxation under Supreme Court orders.

### Quarantining property through maintenance

During bankruptcy, bankrupts are required to contribute to their debt a proportion of their income which exceeds the statutory amount. However, under s 139N *Bankruptcy Act 1966*, sums of money that the bankrupt is liable to pay under maintenance agreements or Family Court orders are exempt from the calculations of how much income the bankrupt is required to contribute. The amount that may be exempt from such calculations is capped at the maximum amount otherwise payable under the *Child Support Assessment Act*.

Maintenance agreements made through a Binding Financial Agreement (BFA) are now excluded from the definition of 'maintenance agreement' for the purpose of s 139N *Bankruptcy Act 1966*. Therefore maintenance payable under BFAs will not be exempt from contribution calculations; so maintenance must be provided under family court orders to utilise s 139N *Bankruptcy Act 1966*.

Therefore, family court orders for maintenance may result in a decrease in the bankrupt's contribution to their debt, and may secure the NBS' maintenance is paid where the bankrupt may otherwise not have afforded this after making contribution to their bankruptcy.

However, as outlined below, creditors may apply to set these orders and BFAs for maintenance aside in certain circumstances. Therefore court orders and BFAs regarding maintenance should only be entered on a genuine basis and with consideration to its effect on creditors.

### Quarantining property by transferring it

The trustee in bankruptcy can increase the bankrupt's assets by setting aside transfers in the five years prior to the bankruptcy that were made by the bankrupt to another for less than market value consideration. This includes transfers made between the bankrupt and their spouse.

However, if the transfer was made pursuant to Family Court orders, it can only be set aside if the trustee applies to the Family Court under s 79A *Family Law Act*

1975 and can show that, for example, there has been a miscarriage of justice or that circumstances have changed to make the order impracticable (see more below).

If the transfer was made pursuant to a binding financial agreement (which does not require that the parties be separated), it can only be set aside if the third party creditor applies to the Family Court under s 90K(1) of the *Family Law Act 1975* and can show that this was made with the purpose of defeating creditors. Therefore if bankruptcy is likely for a party and they wish to transfer property to their spouse, the transfer will be more protected if executed through Family Court orders or a BFA, rather than privately. However, as outlined below, this may be overturned by the Court upon application by creditors.

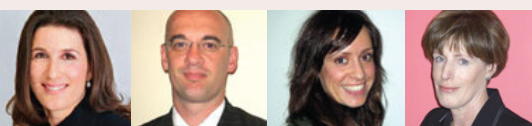
### Creditors' ability to challenge property transfer orders and agreements

While the above may be useful mechanisms for quarantining property from bankruptcy proceedings, it is important to note that creditors are able to challenge these on certain grounds:

- Binding Financial Agreements: section 90K(1) of the *Family Law Act* now allows third party creditors and government agencies acting in the interests of a creditor to apply to the Family Court to set aside BFAs on the grounds that they were made for the purpose of defrauding or defeating creditors, or with reckless disregard to the interests of creditors.
- Family Court Orders: section 79A of the *Family Law Act* allows third party creditors who may not be able to recover their debt because of a court order has been made to apply for the court order to be set aside. To do so, the creditor must show that there are circumstances such as a miscarriage of justice by reason of fraud, duress or suppressed or false evidence, or that circumstances have changed to make the order impracticable. As outlined below, failing to disclose existence of evidence may constitute miscarriage of justice under *Official Trustee in Bankruptcy v Bryan*.
- If creditors suspect debtors are using maintenance or property transfers to avoid paying bankruptcy debts, they may be able to challenge the orders or agreement providing for the maintenance.

If parties are going to transfer property or pay maintenance through a BFA, and they or their spouse is bankrupt or likely to become bankrupt, they must ensure this transaction does not appear to be for the purpose of defeating a creditor.

Property transfers and maintenance payments made under Family Court orders are more protected from challenge by creditors; however may be set aside for



exceptional reasons listed in 79A *Family Law Act*.

### Duty to give Court notice of debts

As the above shows, Family Court property orders will be quite difficult to reverse. Accordingly it is imperative that the Family Court is aware of all third party creditors and debts before making orders, to ensure creditors are given adequate consideration. This issue was raised in the case of *Official Trustee in Bankruptcy v Bryan* (2006) FLC 93-258. In this case, the husband and wife entered consent orders in 1992 that which provided that the husband must transfer his interest in jointly owned real estate to the wife. At this time both parties were aware that the husband had two substantial creditors, but did not disclose this to the Court.

The creditors had lodged a caveat on the property, however this lapsed in 1997 and the parties executed the transfer after this date.

The husband was eventually made bankrupt by petition of his creditors. The Trustee in Bankruptcy applied for the 1992 consent orders to be set aside, arguing that the failure to disclose the existence of the creditors constituted a miscarriage of justice for the purpose of s79A *FLA*.

The Court held that there was a deliberate and intentional suppression of evidence by the parties, and that this caused a prejudice to unsecured creditors. The Court concluded such failure to make full and frank disclosure will ordinarily amount to a miscarriage of justice, and that it did so in this case.

The Court consequently ordered that the 1992 consent order be set aside to the extent that it related to the husband's transfer of interest in the real estate.

Client's involved in Family Court proceedings must be fully aware of, and fully disclose to the Court, all of their creditors. If they fail to do so and subsequently become bankrupt, the Trustee in Bankruptcy may apply to the Court to have the orders set aside under s 79A.

### Bankruptcy and resulting trusts

Where a party's contribution to the purchase of a property is not reflected in legal title to the property, they may claim that they have a beneficial interest through a resulting trust. For example, if a wife contributes 50% of the purchase price of a property but it was registered solely in the husband's name, the wife could claim that the husband holds the property on trust for both himself and the wife in equal shares.

Moreover, case law has recognised parties' contributions to property may be in forms other than supplying the purchase price. In *Cummins*, the High Court found that it is often incidental who makes payments for the property in a marriage, as the

nature of a marital relationship often means incomes are pooled and then applied to bills and purchases arbitrarily. The High Court accordingly found that assets in a marital relationship can be presumed to be held on trust for both parties in equal shares, despite who holds legal title and who made direct contribution to the purchase price.

This may mean that where the property is held solely in the bankrupt's name, the NBS may be considered to be entitled to one half of this under a resulting trust... therefore quarantining this half from vesting in the bankruptcy trustee.

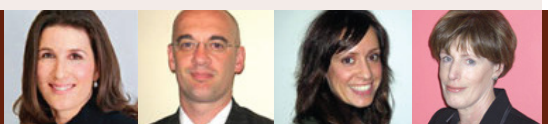
On the alternative, it may mean that where the property is held solely by the NBS, the bankruptcy trustee may claim that this is held on trust for the bankrupt as well, so the bankrupt's creditors are entitled to one half of this.

## Family trusts in Family Court property disputes: *Kennon v Spry*

The High Court made a significant decision in the case of *Kennon v Spry* to find that in determining property settlement disputes, the Family Court can approach the parties' property interests as if changes made to these as a result of the divorce had not yet occurred. In particular, the court found that where a family trust includes 'spouses' as a class of beneficiary, the court can choose to include a former wife within this class despite divorce orders meaning she is no longer technically a spouse.

The majority decision also found that, even though there are several beneficiaries besides the married couple, the assets of a family trust could be treated as property of the marriage where the wife was a beneficiary and the husband the trustee with the power to distribute all of the trust's assets to the wife. The case involved a family trust (the ICF Spry Trust) that had been established by the husband, Dr Spry, 10 years before he married Mrs Spry. Dr Spry was the sole trustee, and he, his siblings, their spouses and their children were beneficiaries of the trust. Mrs Spry and their four daughters were later added as beneficiaries. In 1983 Dr Spry removed himself as a beneficiary for land tax purposes, and appointed Mrs Spry as trustee upon his death or resignation.

In 1998 the Sprys encountered problems with their marriage, and Dr Spry excluded himself and his wife as capital beneficiaries from the trust. He appointed the two eldest daughters as trustees upon his death or resignation instead of Mrs Spry. The Sprys subsequently separated in October 2001. In January 2002, Dr Spry set up four trusts for his daughters, and



divided the income and capital of the ICF Spry Trust between these.

In April 2002, Mrs Spry made application for property and maintenance orders in the Family Court. At first instance, Justice Strickland found that Dr Spry's dealings with the trust in 1998 and 2002 were for the purpose of quarantining property from his wife and Family Court orders. His Honour therefore set aside the 1998 variation and 2002 disposition of assets under s 106B of the *Family Law Act 1975* as they were made to defeat any anticipated future Family Court orders. Justice Strickland found that the Spry's divorce in February 2003 was not a supervening event that defeated this. Therefore, his Honour found that the Trust's assets could still be included in the asset pool of the marriage.

Dr Spry appealed this decision, and further cross-appealed together with Kennon and his daughter Elizabeth in their capacity as joint trustees of the Spry's daughters' various trusts. The appeals were dismissed by the Full Family Court, so Dr Spry and the joint trustees appealed to the High Court.

In a 4-1 majority, the High Court dismissed the appeals, upheld Justice Strickland's orders and ordered the appellants to pay Mrs Spry's costs. French CJ and Gummow and Hayne JJ found that when it is just and equitable to do so, the Family Court can make orders in property settlement proceedings as if changes to property rights otherwise caused by the divorce had not occurred. This meant that Mrs Spry could be treated as beneficiary to the family trust, even though the parties' divorce removed her from the class of trust beneficiaries.

Their Honours found that Justice Strickland's findings regarding the purpose of Dr Spry's dealings with the Trust in 1998 and 2002 supported his orders to set aside these under s 106B. Moreover, their Honours considered that once these transactions were set aside, the assets of the trust should be included as property of the marriage for the purpose of family law proceedings. In the leading judgment, French CJ found this was because:

- the husband held legal title to the trust
- the husband had absolute power to appoint the whole of the fund to his wife at his discretion (thus distinguishing it from charitable or non-discretionary trusts)
- as a beneficiary, the wife held equitable rights of due consideration and due administration in the trust. French CJ and Gummow and Hayne JJ found that these rights could be taken into account as part of Mrs Spry's property when considering the property of the marriage. In doing so, French CJ noted that there may be difficulties in determining the value of these property rights, although actuarial arts may be able to value the right to due consideration.

French CJ found that the treatment of the trust as property belonging to the parties was also supported by other factors, including that the Trust assets were largely acquired during the marriage, there were no other equitable interests in them, and the husband was under no obligation to apply any of the assets to any other beneficiary.

This case sets precedent that if a party's assets are largely held in a family trust and they enter family law property proceedings, the court may order that the assets of the trust be divided between the party and their spouse if the above circumstances exist... even if the party is the trustee but not a beneficiary of the trust.

