HD

HELEN DAVISON

BARRISTER-AT-LAW

P: 07 3063 9645 | M: 0413 107 904 | E: hdavison@qldbar.asn.au

More Chambers | Level 28 East Santos Place
32 Turbot Street Brisbane Qld 4000

ABN: 94 967 710 817

12 June 2024

# FLPA Retreat 2024

## The treatment of interests in discretionary trusts in property proceedings

Is the interest of a beneficiary in a discretionary trust considered a financial resource or property in family law property settlements? If it is property, how is the interest valued?

These were the two issues Justice Wilson in *Woodcock & Woodcock (No. 2)*[1] addressed in a discrete hearing pending the trial and what His Honour has coined a "test case".

### The facts

Mr Woodcock's grandparents set up various trusts in the 1930s to operate the G Group. It was uncontested that Mr Woodcock, the husband, received over $15 million by way of distributions in the previous five-year period. His wife, Mrs Woodcock, contended his interest as a beneficiary was matrimonial property and could be valued (see further below). Mr Woodcock disputed that the G Group was matrimonial property because the G Group was established by his grandparents and continued to be operated for the benefit of the G family.

The G Group was largely made up of the following trusts:

(a) B Trust, of which B Pty Ltd is the trustee;

(b) F Trust, of which F Pty Ltd is the trustee;

(c) E Trust, of which E Pty Ltd is the trustee; and

(d) The G Family Trust, of which C Pty Ltd is the trustee (Mr Woodcock being the sole director of C Pty Ltd),

(together, "the Trusts").

Mr Woodcock was one of seven directors of the corporate trustees of the B, F and E Trusts. Mr Woodcock was one of the primary beneficiaries of the Trusts. However, he alleged that he had no enshrined right to capital or income from the Trusts, and at best, his interest was a financial resource.

**Issue 1: Whether Mr Woodcock's equitable choses in action to due consideration and to due administration of the Trusts are "property" for the purposes of sections 4 and 79 of the Family Law Act (FLA).**

*Mr Woodcock's argument*

[1] [2022] FedCFamC1F 173.

Mr Myers AC KC, Senior Counsel for Mr Woodcock, submitted that the Trusts were established long before Mr Woodcock was even an adult, that the trust property came from and was settled by his grandparents, and that the trust property had been augmented by organic growth.

At [116], it was noted by His Honour that Mr Myers AC KC argued that the equitable entitlements of a beneficiary within a discretionary trust, pertaining to "due consideration" and "due administration," could potentially be classified as 'property' if the following three conditions were fulfilled (none of which apply in this particular case):

> (a) that a person has control of the disposition of the property of the trust;
>
> (b) the person who has control can appoint property to themselves or the other party to the marriage; and
>
> (c) the property which is subject to the trust is the property of the marriage.

*Mrs Woodcock's argument*

Senior Counsel for the wife, Mr Glick KC, argued that Mr Woodcock's influence carried substantial weight due to various factors. These factors included, amongst other things, his receipt of distributions totalling around $15 million, his role as the CEO, his presence on all boards, his ability to block decisions by reason of being a family representative, and upon the vesting date, his default as to 15.38% of the assets of the B, F and E Trusts. Mr Glick KC submitted that equity looks at substance and eschews rules that operate as qualifications to the proposition that "equity looks at everything and nothing is irrelevant".

*Finding*

Having explored in depth the High Court's decisions of *Kennon v Spry* and *Yanner v Eaton* (1999) 201 CLR 351, Justice Wilson concluded that Mr Woodcock's interest in the Trusts was "property" within the meaning of sections 4 and 79 of the FLA. His Honour held at [73]:

*"Drawing some of those threads together, it seems that according to existing statements of principle of the High Court, the equitable choses in action of due consideration and due administration under a discretionary trust of the sort illustrated by The B Trust, The F Trust, The E Trust and The Mr G (1977) Family Trust are in fact and in law "property" within the meaning of ss 4 and 79 of the Act. I say that for several reasons. In each of the four trusts, the husband retained power permissibly exercised over a certain thing, within the contemplation of Yanner v Eaton. He held what certain of the authorities describe as a "bundle of rights". The husband enjoys a position of considerable influence on the Family Council and historically the husband has received distributions of approximately $15 million. He also has the ability to block. To my way of thinking the husband enjoys a legally endorsed concentration of power over things or resources, as Professor Gray describes "property" in his Cambridge University paper Property in Thin Air."*

**Issue 2: Are Mr Woodcock's equitable choses in action of 'due consideration' and 'due administration' under the Trusts capable of being valued?**

*Mr Woodcock's argument*

Mr Woodcock's Senior Counsel argued that, even if Mr Woodcock's equitable choses in action were property, such rights could not be valued. Mr Woodcock called Mr U, an expert valuer, whilst Mrs Woodcock called Mr T, also an expert valuer.

Mr U opined that if property is not capable of being sold, which he said was the case with Mr Woodcock's rights, there will be no market value. Consequently, he opined there was no reasonable basis for estimating the expected cash flows from Mr Woodcock's rights, and as such, the value to the owner was not capable of being determined.[2]

[2] At [104].

*Mrs Woodcock's argument*

Mr T opined that Mr Woodcock's rights were capable of being valued. Mr T opined that Mr Woodcock's ongoing level of influence and past distributions provided a prima facie reasonable basis to justify the incorporation of various uncertainties into the valuation of his rights.[3]

Mr Glick KC submitted that uncertainty created by third persons did not make it impossible to value the interest. He also submitted that the valuer retained by the husband did not say that the valuation of Mr Woodcock's interests was impossible, and nor did Mr Woodcock's valuer opine that to do so would be "beyond the art of a valuer".[4]

*Finding*

Justice Wilson accepted Mrs Woodcock's contentions had real merit and that these issues warranted determination at a full trial. At [112], His Honour held:

*"It seemed to me that the wife's contentions about the deficiencies in Mr U's report were valid. Put differently, in my view, not only should the debate in this litigation about whether the husband's rights are property be fully ventilated at trial but the value of those rights should also be fully ventilated at trial. I am not willing to hold at this interlocutory juncture in this litigation that Mr U is necessarily correct when he asserts that the husband's rights cannot be valued. I take the view that there is real merit in the wife's criticism of Mr U's report in connection with valuing the husband's interest. It seems to me that this case is not a proper case to visit upon the wife the full impact of the reasoning in General Steel. In other words, in my view, the husband's contention that no arguable case can be advanced about the ability to value the husband's equitable choses in action have not been made out, at least not on this application. The case, and that issue in particular, must go to trial." (emphasis added).*

***Woodcock & Woodcock (No. 5)* [2023] FedCFamC1F 894 (*Woodcock & Woodcock (No. 5)*)**

In *Woodcock & Woodcock (No. 5)* the parties sought further orders from the Court in relation to the appointment of an expert to value Mr Woodcock's choses in action in the Trusts.

Mr Woodcock and the trustees of the Trusts (who had subsequently been joined to the proceedings by Mrs Woodcock) proposed that a single expert be appointed, the identity of whom had not been settled.

Adversarial evidence was preferred by Mrs Woodcock, to be given by Mr T, whose evidence was to be modestly updated. Mr Glick KC submitted that if adversarial evidence were permitted, the two experts would:

(a) confer in a conclave of experts prior to entering the witness box; and

(b) give evidence in a hot tub, in which the trial judge will be at liberty to ask each expert, with less formality than would be applicable if a single expert gave evidence and was cross-examined seriatim by each counsel.

A conclave is the process where two (or more) experts meet to discuss their reports and prepare a joint report. Conclaves are often convened by a facilitator, such as a mediator or, where court ordered, a registrar. At a hot tub, experts are sworn in at the same time, and cross-examination and re-examination are conducted by asking each expert a question relevant to one subject or issue at a time.

Justice Wilson noted that each proposal could be accommodated at a practical level.

At paragraph 25, His Honour agreed with Mrs Woodcock's proposal for adversarial evidence, finding:

[3] At [105].
[4] At [107].

*"In my view, this litigation is not one amenable to a single expert. Despite the desirability of such an approach when valuing say, a home, shares, or a company, this case is novel. It is not amenable to a standard single expert."*

His Honour stated he would hear from the parties on the form of the order for the appointment of each party's adversarial expert.

**Commentary**

Even prior to the landmark case of *Kennon v Spry*, courts have recognised that a discretionary trust, when controlled by a spouse in the capacity of a trustee or appointor, and when either spouse is a beneficiary, constitutes an asset in family law proceedings. However, the *Woodcock* case is unique.

The Court specifically recognised *Woodcock* as a "test case" due to the fact that the Trusts were established long before the parties' marriage and the establishment of the family council. As a result, there is no contention that Mr Woodcock maintains exclusive control over all the Trusts or that the Trusts were created as shams to hinder Mrs Woodcock from receiving a just and equitable property settlement, as is sometimes encountered or alleged. Consequently, Mrs Woodcock has been compelled to adopt an alternative approach. Instead of encompassing the entirety of the Trusts' assets as assets of the marriage, she has had to pursue the valuation and inclusion of Mr Woodcock's equitable choses in action, relating to the entitlement to "due consideration" and "due administration" of the Trusts as a beneficiary, as assets of the marriage.

This case presents a unique and pivotal situation. While the possibility of including such interests was acknowledged by Chief Justice French in *Kennon v Spry*, it should be noted that Dr Spry directly controlled the trusts in that particular case, making it distinct from the present circumstances. In Mr Woodcock's case, however, the Trusts are clearly intergenerational trusts involving third-party family members that were established in the 1930s. It had been commonly assumed within family law circles that when a spouse is a beneficiary with entitlement limited to considerations for trust income distributions (as opposed to both income and capital)[5], the spouse's rights as a beneficiary would only be considered as a mere financial resource under section 75(2) of FLA.

Other spouses married into intergenerational wealthy families have tried and failed to include a spouse's interest as a beneficiary as property. [6] Mrs Woodcock may be the first to pierce the intergenerational family trust shield.

It is important to recognise that this case represents an interlocutory decision, and the ultimate significance on family law jurisprudence will rest upon Justice Wilson's final decision at trial and any subsequent appeals. As such, family lawyers and professionals advising on trusts should closely follow the developments and final decision in this matter (including any potential appeals), as this matter holds the potential to make a lasting impact and contribute to the evolution of family law jurisprudence and, potentially, the desirability of intergenerational trust structures generally.

Helen Davison
Chambers

Notes: I previously wrote about an earlier decision in *Woodcock & Woodcock (No. 1)*,[7] where Justice Wilson reinstated subpoenas issued to the trustees of the Trusts.[8] Justice Wilson stated in that decision that "*the husband's interests under the trusts being property is arguable".*

[5] See the Full Court decision of *Pittman & Pittman* [2010] FamCAFC 30; (2010) FLC 93-430.
[6] For example, *Rigby and Kingston (No 4)* [2021] FamCA 501.
[7] [2021] FedCFamC1F 88.
[8] Refer to www.linkedin.com/pulse/woodcock-test-case-whether-beneficiarys-interest-trust-helen-davison/?trackingId=yxBQdhWVQ4OtUecpfEVdSQ%3D%3D for the article.

**FLPA Retreat, 14 June 2024**

**The treatment of interests in discretionary trusts in property proceedings by Helen Davison and Kate Roff**

**List of Authorities**

**High Court Trust Cases**

*Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226
*CPT Custodian v Commissioner of State Revenue* (2005) 224 CLR 98
*Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* (2019) 93 ALJR 807
*State Revenue (WA) v Rojoda* (2020) 268 CLR 281

**Discretionary trust cases (family courts)**

*Kennon v Spry* (2008) 238 CLR 366
*In the Marriage of Stacy* (1977) 31 FLR 34
*In the Marriage of Ashton* (1986) 11 Fam LR 457
*In the Marriage Spellson* (1989) 13 Fam LR 242
*In the Marriage of Davidson* (1990) 14 Fam LR 817
*Harris v Harris* (1991) 15 Fam LR 26
*In the Marriage of Webster* (1998) 24 Fam LR 198
*Stephens v Stephens* (2007) 38 Fam LR 149
*Stephens v Stephens (Enforcement)* (2009) 42 Fam LR 423
*Harris & Dewell* (2018) 58 Fam LR 313
*Mantel v Mantel* [2020] FamCA 157
*Woodcock & Woodcock (No. 2)* (2022) 65 FamLR 333; [2022] FedCFamC1F 173

**Other family law cases**

*Stanford v Stanford* (2012) 247 CLR 108 ('*Stanford*')
*In the Marriage of Duff* (1977) 3 Fam LR 11,211
*In the Marriage of Bailey* (1978) 33 FLR 34
*In the Marriage of Crapp* (1979) 5 Fam LR 47
*In the Marriage of Best* (1993) 16 Fam LR 937
*Carron & Laniga* [2019] FamCAFC 115
*Tomaras v Tomaras* (2021) 64 Fam LR 237

**Property cases**

*National Trustees Executors & Agency Co of Australasia Ltd v Commissioner of Taxation (Cain's Case)* (1954) 91 CLR 540
*Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9
*National Provincial Bank Ltd v Ainsworth* [1965] AC 1175
*Gartside v Inland Revenue Commissioners* [1968] AC 553

**Adversarial evidence**

*Willans & Enmore (No. 2)* [2021] FamCA 340
*Woodcock & Woodcock (No. 5)* [2023] FedCFamC1F 894 (18 October 2023)