

Trusts and the Family Law Act 1975



INTRODUCTION

The *Family Law Act 1975* (FLA) and the Family Court have come a long way since the High Court decision in *Ascot Investments* (see note 1 at end) which was decided 25 years ago. However, issues about the extent of the jurisdiction of the Family Court, the ability to bring interests in trusts into the matrimonial pool and the enforceability of Family Court orders against third parties appear to remain. So what has changed over the past 25 years?

If *Ascot Investments* was the low water mark for the Family Court's jurisdiction in relation to third parties, the new ss 90AA to 90AK in Part VIII A must be the high water mark.

This article will not examine the development of the Family Court's jurisdiction between *Ascot Investments* and the new Part VIII A nor will it delve into the constitutional issues of the interface between the Commonwealth jurisdiction over marriages, third party rights generally, the law concerning trusts or the requirement for any acquisition of property to be on just terms in accordance with para 51 (xxi) of the Constitution. The purpose of this paper is to:

1. recall the findings in *Ascot Investments*; and
2. consider the new Part VIII A and how it will be interpreted by the courts.

ASCOT INVESTMENTS

The 1981 High Court was not overly disposed to the extension of the powers or jurisdiction of the Family Court. In *Ascot Investments* the High Court allowed an

appeal against the orders of the Full Court of the Family Court directing the company and its officers, including the husband, to register a transfer of shares from the husband to the wife as security for the payment of maintenance by the husband.

The majority judgments were delivered by Barwick CJ and by Gibbs J (with whom Stephen J concurred) with a very brief judgment by Mason J. All three majority judgments made reference to the fact that the transfers of shares had not actually been given to the directors of *Ascot Investments* for registration and accordingly found the court proceedings were premature. In contrast, Murphy J, in dissent, pointed out that the Full Court in its decision had recognised the issue of prematurity....“as the Full Court stated, the company and the directors were served with the application and affidavits prior to the hearing at first instance, were granted leave to intervene and the hearing proceeded on the basis of the strenuous opposition by the company to the registration of the shares”.

The primary issue in *Ascot Investments* was whether or not the court had power to direct *Ascot Investments* and those directors who were not parties to the marriage, to register a transfer of shares as ordered by the Family Court from the husband to the wife. Barwick CJ almost condescendingly noted at para 9:

“It may at once be conceded that the Family Court may make orders which are appropriate to render effective orders made by it within its jurisdiction... They cannot directly affect the rights of third parties. But it is no objection to such an enforcing order that it binds or operates upon a

stranger to the Family Court proceedings or that compliance with it may indirectly or consequentially effect substantive rights of the stranger....”

Barwick CJ noted that the mere fact that the company had become a party to the proceedings did not accrue any additional jurisdiction to the Family Court (pages 342 and 344). This still remains a relevant issue as third parties are now more likely to become or be ordered to become parties to Family Court proceedings.

Gibbs J referred to the various earlier decisions that had been advanced on behalf of the wife and noted at page 354:

“they do not establish that any such order may be made if its effect will be to deprive a third party of an existing right or to impose on a third party a duty which the party would not otherwise be liable to perform...

...but it does not follow that the Parliament intended that the legitimate interests of third parties should be subordinated to the interest of a party to a marriage, or that the Family Court should be able to make orders that would operate to the detriment of third parties...”

The latter part of this quote from Gibbs J may be relevant in identifying exactly what Parliament intended in this regard with the new Part VIII A. Gibbs J went on at page 355 to note that:

“except in the case of shams, and companies that are mere puppets of a party to the marriage, the Family Court must take the property of a party to the marriage as it finds it. The Family Court cannot ignore the interests of third parties in the property, nor the existence of conditions or covenants that limit the rights of the party who owns it.”

FAMILY LAW ACT PART VIII A A

I will not detail all of the provisions of this Part nor is there space to address all issues arising from it.

The critical sections for our purposes are:

“90 AA The object of this Part is to allow the court, **in relation to the property of a party to a marriage**, to:

- (a) make an order under s 79.....
- (b)

that is directed to, or **alters the rights, liabilities or property interests of a third party**.

.....
.....

90 AC (1)

(1) This Part has effect despite anything to the contrary in any of the following (whether made before or after the commencement of this Part):

- (a) any other law....
- (b) anything in a trust deed or other instrument.

.....
.....

90 AE.....

(2) In proceedings under s 79, the Court may make an Order that:

- (a) **directs a third party to do a thing in relation to the property of a party to the marriage**; or
- (b) **alters the rights, liabilities or property interest of a third party in relation to the marriage**.

(3) The Court may only make an Order under subsection...(2) if:

- (a) the making of the Order **is reasonably necessary**, or reasonably appropriate and adapted, to effect a **division of property** between the parties to the marriage; and
- (b) ...
- (c) the third party has been accorded procedural fairness....;
- (d) the Court is satisfied, that in all circumstances, **it is just and equitable to make the Order**; and
- (e) the Court is satisfied that the Order takes

into account the matters mentioned in subs 4.

(4) The matters are as follows:

- (a) the taxation effect...

.....

- (f) the economic, **legal or other capacity of the third party to comply with the Order**;

Example: The legal capacity of the third party to comply with the Order could be affected by the terms of a trust deed. **However, after taking the third party's legal capacity into account, the Court may make the Order despite the terms of the trust deed.**

If the Court does so, the Order will have effect despite those terms (see s 90 AC).

.....

90 AK

(1) The Court must not make an Order... if the Order...would:

- (a) result in the acquisition of property from a person otherwise than on just terms;....”

[highlighting is by the author and is not in the FLA]

There is potentially a staggering breadth to these provisions but at the same time they are limited by the words I have highlighted in s 90 AA “in relation to the property of a party to a marriage” and s 90 AE (2) (a) “in relation to the property of a party to the marriage” and 90 AE (2) (b) “of a third party in relation to the marriage.”

The impact of the words “to the marriage” is not clear. The narrow interpretation of Part VIII A A is that the hoary old issue of only making orders in respect of **property** that is already within the jurisdiction of the Family Court, means that Part VIII A A is only a machinery provision to enable the Family Court to enforce a valid order made under s 79 in respect of property. That is, because it is property of a party to the marriage it is legitimate for the Family Court to then have appropriate power to enforce its orders in respect of that property. An example of this would be an Order whereby a party to a marriage who holds property on trust could be ordered to deal with that property without breaching any obligations as a trustee.

The wide interpretation of the power under this Part is that it enables the Court to make Property Orders under s 79 which would

divest third parties of property in favour of a party to the marriage. Doubtless this issue will be the subject of detailed arguments and judgments in the Family Court and possibly other jurisdictions.

The difficulties associated with Part VIII A A were illustrated in the case of Hughes-Kempe (note 2) handed down on 21 September, 2005. Hughes-Kempe was a procedural application rather than a resolution of the substantive issues concerning the interpretation of Part VIII A A. In this case the applicant wife sought to amend her claim to obtain orders against the trustees of several discretionary trusts. In determining that application the court merely had to determine if it was appropriate to allow the amendment. The relevant test for this was not to determine whether or not the wife would be successful at trial if the Court allowed her to amend her claim, but rather, whether or not the amendment sought was “obviously futile” or “doomed to failure”. Morgan J examined Part VIII A A in detail and also made reference to a brief but very good article by Anthony Dickey QC (note 3).

In Hughes-Kempe at para 22 Morgan J specifically refers to the conundrum posed by Anthony Dickey QC in the article as to whether “a wife might properly seek an Order for the transfer of the whole interest in a former matrimonial home of which the husband and his brother are joint owners.”

I prefer the narrower interpretation of Part VIII A A. Both Anthony Dickey QC and Morgan J in Hughes-Kempe make reference to the explanatory memorandum to the Family Law Amendment Bill 2003 which introduced Part VIII A A. In respect of s 90 AE it is stated that “the provision is intended to apply only to the procedural rights of the third party. It is not intended to extinguish or modify the underlying substantive property rights of third parties” (note 4). However as noted by both Anthony Dickey QC and Morgan J, s 90 AK while limiting the exercise of power under Part VIII A A to require that any acquisition of property from a person must be on just terms, by implication accepts that there can be an order which does substantially alter the property rights of a third party, even if there must be just compensation.

Nowhere is reference made to the rights of other beneficiaries of a trust and consequently the obligations of the trustee to those other beneficiaries. Although Part VIII A A does appear to enable the Family Court to make substantive orders to alter the rights of third parties, the limitations in the wording detailed above whereby such orders must relate to the property of a party to a marriage or the property interest of a third party in relation to the marriage, indicate that this is to be a machinery provision rather than a radical alteration to the existing law concerning equities and trusts. The narrow machinery interpretation better reflects the explanatory memorandum to the bill, although, as noted by both Anthony Dickey QC and Morgan J in *Hughes-Kempe*, the Court may not necessarily have a right to consider the explanatory memorandum when giving meaning to the otherwise clear words of Part VIII A A. Until there is further judicial explanation of Part VIII A A it would seem that the jurisdiction of the Family Court will be limited to making orders against third parties to enable the Family Court orders

in respect of “property of a party to the marriage” to be carried out.

The difficulty will arise if the Family Court deems or finds that assets of a trust are the property of a party to a marriage, notwithstanding the presence of independent trustees or directors of corporate trustees and independent appointors, and then seeks to exercise the power under Part VIII A A to make orders binding those independent trustees, directors and appointors. The threshold issue seems to be what is property of a party to the marriage. While that question and the issue of making orders against third parties are often confused, the new Part VIII A A still appears to maintain the requirement that orders can only be made to bind third party trustees and appointors if the property they hold is found by the court to be “property of a party to the marriage”, or if they are holding property substantially on trust for or at the behest of a party to the marriage.

Clearly if Part VIII A A had been enacted at the time of *Ascot Investments*, then the

High Court would have upheld the Full Court’s decision requiring the other directors of *Ascot Investments* to register the share transfer. •

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Reference Notes

1. *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337.
2. *Hughes-Kempe and Kempe and Bocampe Pty Ltd & Ors* (2005) FLC 93-237.
3. “Alteration of property interests against third parties” by Anthony Dickey QC (2005) 79 ALJ 483.
4. Para 149 of revised explanatory memorandum to Family Law Amendment Bill 2003.