



## HIGH COURT OF AUSTRALIA

3 December 2008

EDWIN PHILIP KENNON AND IAN CHARLES FOWELL SPRY (in their capacity as trustees of the Catharine Spry Trust, the Caroline Spry Trust and the Penelope Spry Trust) AND ELIZABETH ANNE FOWELL SPRY AND IAN CHARLES FOWELL SPRY (in their capacity as trustees of the Elizabeth Spry Trust) v HELEN MARIE SPRY, IAN CHARLES FOWELL SPRY, ELIZABETH ANNE FOWELL SPRY, CATHARINE SARAH FOWELL SPRY, CAROLINE JANE FOWELL SPRY AND PENELOPE SARAH FOWELL SPRY

IAN CHARLES FOWELL SPRY v EDWIN PHILIP KENNON AND IAN CHARLES FOWELL SPRY (in their capacity as trustees of the Catharine Spry Trust, the Caroline Spry Trust and the Penelope Spry Trust), ELIZABETH ANNE FOWELL SPRY AND IAN CHARLES FOWELL SPRY (in their capacity as trustees of the Elizabeth Spry Trust), HELEN MARIE SPRY, ELIZABETH ANNE FOWELL SPRY, CATHARINE SARAH FOWELL SPRY, CAROLINE JANE FOWELL SPRY AND PENELOPE SARAH FOWELL SPRY

The assets of a family trust established before marriage could be taken into account in property settlement orders under the *Family Law Act*, the High Court of Australia held today.

Dr Ian Spry, a retired Victorian barrister, married Helen Spry in 1978. They had four daughters, now in their twenties. In 1968, Dr Spry created the ICF Spry Trust with himself and his siblings, their spouses and their children as beneficiaries. He was the sole trustee. In 1983, he excluded himself as a beneficiary for land tax reasons. In 1998, when his marriage was in difficulty, Dr Spry further varied the trust to exclude himself and his wife as capital beneficiaries. The Sprys separated in October 2001. In January 2002, Dr Spry divided the income and capital of the trust between four trusts he set up for his daughters. Mrs Spry filed for divorce in the Federal Magistrates Court in December 2002. The divorce was finalised in February 2003.

In April 2002, Mrs Spry applied to the Family Court for orders for property settlement and maintenance. In 2005, Justice Strickland ordered Dr Spry to pay Mrs Spry an amount determined by reference to the Judge's assessment of the contributions to the couple's assets and the assets Mrs Spry already held. Justice Strickland found that the steps taken with respect to the ICF Spry Trust in 1998 and 2002 were designed to keep property away from his wife and the Family Court. Under section 106B of the Act, he set aside the 1998 variation and the 2002 dispositions of assets. Dr Spry appealed. He and Edwin Kennon cross-appealed in their capacity as joint trustees of three daughters' trusts. Dr Spry and his daughter Elizabeth cross-appealed in their capacity as joint trustees of the Elizabeth Spry Trust. The Full Court of the Family Court, by majority, dismissed the appeal and cross-appeals. Dr Spry and the joint trustees of the children's trusts appealed to the High Court against both dismissals.

The Court, by a 4-1 majority, dismissed the appeals and upheld Justice Strickland's orders. The appellants were ordered to pay Mrs Spry's costs. Dr Spry and the children argued that the assets of the trust were not part of the asset pool to be considered in making property orders. Three Justices held that without the 1998 variation and the 2002 dispositions, Mrs Spry would have had a right to due administration of the trust and to due consideration as a beneficiary. Dr Spry would have had a power to appoint to her the whole of the assets of the trust. The Court held that these rights were property of the parties to the marriage. It held that the Family Court could make orders in property settlement proceedings as if changes to property rights brought about by the divorce had not yet occurred. The High Court held that it was open to Justice Strickland to make the orders he did. One Justice supported Justice Strickland's orders by reference to section 85A of the Act providing for variation of post-nuptial property settlements.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*