SUPREME COURT OF QUEENSLAND

CITATION:	*Kneipp v Annunaka Pty Ltd* [2015] QSC 359
PARTIES:	**WENDY GUINEVERE HEIDI KNEIPP** **(Applicant)** **v** **ANNUNAKA PTY LTD ACN 051 633 062** **(Respondent)**
FILE NO:	S21/15
DIVISION:	Trial Division
PROCEEDING:	Application
INITIATING DOCUMENT:	Originating application filed 7 May 2015.
ORIGINATING COURT:	Townsville
HEARING DATE:	7 December 2015
DELIVERED ON:	11 December 2015
DELIVERED AT:	Townsville
JUDGE:	North J
ORDERS:	1. Application dismissed
CATCHWORDS:	TRUSTS – TRUSTEES – POWERS OF APPOINTMENT AND REMOVAL – INTERPRETATION OF DEEDS AND INSTRUMENTS – DECLARATIONS – DISCRETION WHETHER TO EXERCISE POWER TO MAKE DECLARATION
LEGISLATION:	*Acts Interpretation Act* 1954 *Family Law Act* 1975 (Cth) *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) *Succession Act* 1981 *Trusts Act* 1973
CASES:	*Eberstaller v Poulos* (2014) 87 NSWLR 394 *Fell v Fell* (1922) 31 CLR 268 *Forster v Jododex Australia Pty Ltd & Anor* (1972) 127 CLR 41

French & Anor v NPN Group Pty Ltd [2008] QCA 271

Kennon v Spry (2008) 238 CLR 366

Khytense v Hope (2007) 1 NZLR 245

Montevento Holdings Pty v Scaffide (2012) 246 CLR 325

P T Bayan Resources TBK v BCB Singapore Pte Ltd [2015] HCA 36

Re: Bostocks' Settlement [1921] 2 Ch 469

Re: Mayne (1928) 28 SR (NSW) 157;

Re: McPhillamys Trusts (1989) 10 SR (NSW) 42;

Re: Norris (1884) 27 Ch D 333

Re: Whitehouse [1992] Qd R 196

Thorne Developments Pty Ltd v Thorne [2015] QSC 156

COUNSEL:	Mr Moon for the applicant
	Mr Land for the respondent
SOLICITORS:	Guides & Elliott for the applicant
	Lee & Co for the respondent

[1] By originating application the applicant seeks a declaration that she has been on and from 28 November 2014 the duly appointed trustee of the H.H. & H. Kneipp Family Trust. The respondent has been, since the trust's creation, the trustee of the trust and opposes the application.

[2] The applicant and Henry Harvey Kneipp married on 21 November 1976. There were two children of the marriage, Henry (Junior) and Patrick. By a deed dated 12 April 1991 the trust was created and the respondent was appointed trustee.[1] At the time of creation of the trust the applicant and Henry Kneipp were the sole directors and shareholders of the respondent. In 1995 the applicant and Henry Kneipp divorced and they entered into an agreement by way of a consent order with respect to the disposition of the matrimonial property.[2] To the extent relevant concerning the respondent and the trust the consent order contained the following:

> "11. That upon receipt of the cash payments referred to in paragraph 8, and of the Title Deeds to the Rollingstone property, (where not captured) together with such releases and/or discharges as may be required to release all encumbrances and all Guarantees given by the wife on behalf

[1] See exhibit WGHK2 to the affidavit of the applicant filed 7 January 2015.
[2] Exhibit WGHK1 to the affidavit of the applicant filed 7 January 2015.

of ANNUNAKA PTY. LTD. which shall have been duly released including the guarantee to FNQEB, the wife shall in exchange deliver to the husband, all documentation necessary to give effect to and the wife shall:-

(a) Resign as a Director and any other office held by her in the company ANNUNAKA PTY. LTD.;

(b) Transfer to the husband or to the husband's nominee any and all shareholding the wife may have in and to the company ANNUNAKA PTY. LTD.

(c) Assign to the husband or the husband's nominee any indebtedness which the company ANNUNAKA PTY. LTD. may have to the wife; and

(d) Not purse (sic) any claim which the wife may have against the company ANNUNAKA PTY. LTD.

Such resignation, transfer and assignment to take effect as and from the date of receipt of those monies and deeds referred to herein, the husband to be responsible for all costs associated with the resignation and transfer of the wife's interest in the company as aforesaid, and further:

…

13. That the husband assume sole liability for the payment of all moneys and liabilities due and owing or that may become due and owing from time to time in respect of the companies ANNUNAKA PTY LTD and RAPIDCROFT PTY LTD and all trusts including THE KNEIPP TRANSPORT UNIT TRUST and the H H & H KNEIPP FAMILY TRUST including any taxation liability of the wife arising from any distribution of income from the said companies or trusts for the 1994/95 and any previous financial years.

…

15. That, in consideration of paragraph 14 hereof, the wife cooperate with the husband in the proper completion (including the provision of any necessary information and documents to accountants) of the company tax returns for the 1994/95 financial years for the companies ANNUNAKA PTY LTD and RAPIDCROFT PTY LTD.

16. That the husband procure the wife's release from and always indemnify and keep her indemnified in respect of all loans, charges, guarantees (whether sole or joint) or liabilities of any kind or description (including all trade creditors) given by the wife at any time in connection with the companies ANNUNAKA PTY LTD and RAPIDCROFT PTY LTD and all trusts including THE KNEIPP TRANSPORT UNIT TRUST and the H H & H KNEIPP FAMILY TRUST or in respect of any taxation or other liability that has arisen or may arise in the future.

…

NOTATION 1

It is noted that it is the intention of the husband and the wife that these Orders shall, as far as practicable, finally determine the financial relationship between them pursuant to section 81 of the Family Law Act 1975.

…

FAMILY LAW ACT 1975

CONSENT TO ORDER IN PROPERTY MATTERS

This is a consent intended to be filed in the Family Court of Australia pursuant to Order 9A of the Family Law Rules. It is the intention of the parties that this order shall give full force and effect to the provisions of Section 81 of the Family Law Act."

[3] Before his marriage with the applicant, Henry Kneipp had been married to Sheila Robertson. There were two children of that marriage, Wendy Mackay and Paul Kneipp. On 28 June 1995 the applicant, pursuant to the consent order made in the Family Court of Australia, resigned from her office as director and secretary and principal executive officer of the respondent and on that day Wendy Mackay became the director, secretary and principal executive officer, which position she has held continuously since then.

[4] Henry Kneipp was for a number of years been in dispute with the Australian Taxation Office concerning his tax affairs. On 22 February 1999 Henry Kneipp resigned as a director of the respondent with the consequence that Wendy Mackay has been the sole director of the respondent since the resignation. He was declared bankrupt on 17 August 2007 and he died on 6 May 2014.

[5] In or about 2009 Henry commenced a relationship with Carolyn Gâté but they did not marry. Under his last will dated 21 April 2010 Henry Kneipp appointed Carolyn Gâté his sole executrix and trustee of his will and gave to his "friend and partner" the entirety of his estate.[3]

[6] The respondent advanced essentially four arguments in opposition to the declaration sought. It submitted that a declaration should not be made in the exercise of the discretion of the court because it concerned matrimonial property and being a matter involving such property the proceeding should have been commenced in the Family Court of Australia as a more convenient forum.[4] Alternatively it was submitted that a declaration should not be granted because it was apparent from the evidence that the applicant was intending to make payments from the trust fund in breach of trust. Alternatively it was submitted that the power found in clause 10 of the trust deed could not be lawfully exercised because of the effect of s 10 of the *Trusts Act* 1973[5] or alternatively that in the premises on the proper construction of clause 10 of the deed the power was not exercisable by the applicant either jointly with Ms Gâté or on her own behalf. It is convenient to deal with the latter two submissions before the first two submissions.

[7] Clause 10 of the deed of 12 April 1991 provided:

> "10. The said HENRY HARVEY KNEIPP AND WENDY GUINEVERE HEIDI KNEIPP shall during their lifetime jointly have the right and after the death of any of them the surviving spouse of such deceased person together with the other survivor shall have the right during their lifetime and after the death of both spouses (in the case of either family) such person or person as the surviving spouses (in the case of each family) may either jointly or severally appoint by

[3] Exhibit WGHK4 to the affidavit of the applicant filed 7 January 2015.
[4] *Forster v Jododex Australia Pty Ltd & Anor* (1972) 127 CLR 41 per Walsh J at 427 and per Gibbs J at 436 & 437-8.
[5] Relying upon some observations of Mullins J in *Thorne Developments Pty Ltd v Thorne* [2015] QSC 156.

Will, shall have the right such right to be exercised jointly in the case of more than one person so appointed by any Will or Wills:

(i) to increase or reduce the number of trustees.

(ii) To remove any trustee for any reason whatsoever.

(iii) To appoint new and/or additional trustees in the event of an increase in the number of trustees for the time being, or in the event of removal or retirement of any trustee.

(iv) To fix the remuneration from time to time payable to a trustee for his services as such trustee.

PROVIDED FURTHER that the right to appoint a successor or successors to exercise such rights as are hereinbefore set out may in itself be passed on from one donee of such rights to another."

[8] For reasons not entirely explained the consent order of 8 August 1995 did not expressly deal with the applicant's power of removal and appointment provided in clause 10. By deed dated 28 November 2014 the applicant, acting jointly with Carolyn Gâté, purported to remove the respondent as trustee of the H.H. & H. Kneipp Family Trust and to appoint herself as trustee in place of the respondent.[6]

[9] The respondent submitted that notwithstanding s 4(4) of the *Trusts Act* 1973 the effect of s 10 was that the power of any person nominated or authorised under any instrument creating a trust to appoint a new trustee was limited to the circumstances provided in s 12(1) consistent with the reasoning of Mullins J in *Thorne Developments Pty Ltd v Thorne*.[7] So far as I am aware notwithstanding that the ambiguity occasioned by the inclusion of s 10 has troubled text writers her Honour's judgment is the first determining this point.[8] However I note that when discussing this issue, the learned authors of "Jacobs' Law of Trust in Australia" say:

> "In Queensland the reverse applies, and powers conferred by the trust instrument can only operate to broaden statutory powers, not diminish them."[9]

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[6] See exhibit WGHK5 to the affidavit of the applicant filed 7 January 2015.
[7] (2015) QSC 156 at [41].
[8] Perhaps because most of the contentious removals and appointments have been made purportedly under s 12(1), see for example *Re: Whitehouse* [1992] Qd R 196 at 199.
[9] See Heydon & Leeming, "Jacobs' Law of Trusts in Australia" 7th ed LexisNexis, Butterworths at [1504] pg 317.

[10] If the construction contended for by the respondent is correct the only power residing in those authorised by clause 10 of the trust deed to appoint a new trustee or trustees in substitution for the respondent corporation arose in the circumstances provided in s 12(1)(h) such as liquidation or dissolution.

[11] In my view there is much to be said for the operation of s 10 suggested by the authors of "Jacobs' Law of Trust in Australia", that is that the powers contained in the instrument in clause 10 operate to broaden the statutory powers rather than diminish them. Some support for this interpretation can be found in context for example s 12(3) which refers to a power of removal under a power contained in an instrument. The work done by s 10 in context is to prevent, for example, an instrument authorising the appointment of more than four trustees[10] but permit the power to remove and appoint so long as the circumstances authorised in the deed neither contradict and express provision of Part 2 of the Act nor seek to constrain their circumstances for appointment to those narrower than provided for in s 12. But it is not necessary for me to further consider this issue, in light of the conclusions I have reached upon other contentions raised by the respondent, it is not necessary for me to express a concluded view.

[12] The respondent's second submission concerning the construction of clause 10 of the trust deed proceeded upon the primary proposition that a power for removal and appointment contained within such an instrument should be construed strictly in accordance with its terms applying the natural and ordinary meaning of the terms used except for a term used in a technical sense[11] a proposition that is repeated within a number of leading texts.[12] With this in mind the respondent drew attention to clause 10 and submitted firstly that the power exercisable under clause 10 could only be exercised by two persons in the circumstances variously provided relying or focussing upon certain of the words contained in the clause including "jointly", "together" and other words and phrases implying a plurality and the phrase "with the other survivor". Further, it was submitted, that in the circumstance that Henry Kneipp had died the applicant could only exercise the powers found in clause 10 together with the "surviving spouse" of Kneipp. The respondent submitted that in the circumstance that Kneipp died unmarried, notwithstanding that he may have been in a de facto relationship, Ms Gâté, was not a "spouse" within the meaning of that term as used within the deed.

[13] In the application Ms Gâté swore an affidavit which, on its face, indicated that she began a relationship with Henry Kneipp in about 2009, one which had the hallmarks of establishing her as a "de facto partner" of Henry Kneipp within the meaning of that term as used in s 32DA of the *Acts Interpretation Act* 1954. Further the evidence suggests that the relationship continued until his death thereby satisfying s 5AA of the *Succession Act* 1981.[13] In an affidavit filed in response Ms Mackay drew attention to some circumstances apparently designed to contest this issue but Ms Gâté, when cross-examined about some of the circumstances applying when the relationship

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[10] See for example s 11.

[11] Referring to and citing *Re: Norris* (1884) 27 Ch D 333 at 339; *Re McPhillamys Trusts* (1989) 10 SR (NSW) 42; *Re Mayne* (1928) 28 SR (NSW) 157; *Montevento Holdings Pty v Scaffide* (2012) 246 CLR 325 at [22] & [25]; *Khytense v Hope* (2007) 1 NZLR 245 at [41] – [47].

[12] See Dal Pont, "Equity and Trusts in Australia" 6th ed, Thomson Reuters at 21.55; "Seddon on Deeds", The Federation Press 2015 at 5.2 and c.f. fn 10 referring to Dal Pont, "Powers of Attorney", 2011 LexisNexis, Chapter 6 for the proposition that powers of attorney are strictly interpreted.

[13] See paras 6 to 16 and 19 to 21 of the affidavit of Carolyn Gâté filed on 30 September 2015.

commenced was not challenged upon this issue. It may be accepted that as evidenced by the legislative provisions that have come into force in the years and decades since 1991 there is a basis for submitting that in accordance with common understanding today, the term "spouse" might include a de facto partner who had enjoyed a relationship of the nature which would meet the tests provided under the relevant legislation.

[14] Nevertheless the respondent submitted, and I think correctly, that the time the deed was entered into and the trust was created on 12 April 1991 the term "spouse" in its technical legal meaning referred to a husband or wife married in accordance with the law applying or recognised at the time. The respondent submitted that the proper approach to the interpretation of deeds and instruments required that technical or legal terms be given their technical or legal meaning.[14] It is well established that the rules of construction that apply to contracts apply to deeds[15] thus leading texts on the interpretation of contracts have said:

> "There is a presumption that a contract must be interpreted as at the date when it was made; that the words must be given the meaning which they bore at the date, and where the meaning has changed, evidence is admissible to prove the original meaning. However, in the case of a contract intended to endure for a long time the presumption may be rebutted."[16]

These principles are consistent with the well-established objective approach to the construction or interpretation of contracts.[17]

[15] In the circumstance that Ms Gâté was not the surviving spouse of Henry Kneipp within the meaning of that term in clause 10 as it would have been understood as at 12 April 1991 I hold that she was not authorised by clause 10 of the trust deed to act as an appointor or to exercise any of the other powers contained within clause 10. Further in the circumstance that clause 10 on its proper construction required that the applicant act jointly with a surviving spouse of Henry Kneipp or with another person authorised in terms of clause 10 I hold that she was not empowered to act unilaterally either to remove the respondent as trustee nor to appoint herself.

[16] The foregoing is sufficient to dispose of the application for a declaration against the applicant but because of the significance of the issues to the parties and the detail of the submissions made I shall make brief reference to the other grounds agitated before me.

[17] The deed that established the H.H. & H. Kneipp Family Trust contains provisions fairly typical of a discretionary trust the beneficiaries of which are family members or persons related. Under the trust the primary beneficiaries were Henry Kneipp and the applicant and the two children of Henry and the applicant, Henry (Junior) and Patrick. Among the

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[14] Refer to *Re Bostocks' Settlement* [1921] 2 Ch 469 at 480 and to *Fell v Fell* (1922) 31 CLR 268 at 273.
[15] See "Seddon on Deeds", the Federation Press, 2015 at para 5.2.
[16] See Lewison, "The Interpretation of Contracts", Sweet & Maxwell, 5th ed, para 5.15 and see Lewison & Hughes, "The Interpretation of Contracts in Australia" Thomson Reuters, 2012 at para 5.15.
[17] As to which, see for example Seddon & Ors "Cheshire & Fifoot; Law of Contract in Australia" LexisNexis, 10th Australian edition at para 10.31.

various categories of secondary beneficiaries there are included any child or children of one of the primary beneficiaries including an adopted child, any grandchildren of any of their primary beneficiaries and the husband or wife of any of the primary beneficiaries excluding Henry and the applicant. The class of persons within the category of secondary beneficiaries may not be closed though the trust deed provides that such persons must be living or, as the case may be, have married as at the date of distribution.[18]

[18] The respondent submitted that statements of intent by the applicant revealed in her affidavits concerning her desire to make payments from the trust to certain persons gave rise to the prospect that the applicant would act in breach of trust were her appointment to be confirmed. It was submitted that statements that she proposed to repay a debt owing to Ms Gâté by Henry Kneipp. The applicant now acknowledges that Ms Gâté is not a beneficiary of the trust and that any payment to her from the trust fund would be a breach of the trust because she is not a beneficiary entitled to a distribution. The applicant has taken advice from her solicitor who in turn has considered the contention advanced by the respondent's solicitor that such a payment would be in breach of trust.[19] In light of the applicant's evidence, which I accept, I am not persuaded that were she to be confirmed as trustee she would act as she may have contemplated.

[19] The second basis for the submission that the applicant might act in breach of trust arises from her stated desire that her sons, who are primary beneficiaries, receive some benefit from the trust, in the circumstances that the applicant maintains that Henry Kneipp did not meet his obligations to maintain and support his sons under the terms of the Family Court order. I paid close attention to the applicant when she gave evidence before me and under cross-examination. She impressed me as an intelligent and sensible woman. I can readily understand that she may have a sense of grievance arising out of the apparent failure of her former husband to have met his obligations towards his sons. Whatever the applicant may have had in mind or in contemplation it is apparent that in recent times she has had the benefit of legal advice concerning her rights and obligations as a trustee. I have not overlooked that a trustee of a discretionary trust can make distributions in accordance with the terms of a trust to beneficiaries in the exercise of an unfettered discretion. Whatever might be the circumstances applying at a particular time in the future and the competing interests of other beneficiaries at that time is uncertain. I am not satisfied that what the applicant had in mind to do would have been an act in breach of trust. I am not satisfied in the state of the evidence that were the applicant to be confirmed as a trustee she would act in breach of trust were she ultimately to make distributions to her sons. I do not uphold the respondent's contention on this ground.

[20] The respondent contended that the declaration should be made because the subject matter of the application involved a clause of the trust deed governing the trust which was the subject of orders made in the Family Court of Australia on 8 August 1995. In those circumstances it submitted that the appropriate forum for the agitation of the issue of the applicant's standing to remove or appoint trustees was that court and for that reason a declaration should not be made in the exercise of a judicial discretion.[20] As an aspect of the submission reliance was placed upon certain statements by the Court of Appeal in

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[18] Clause 2(d) noting also the inclusion of the requirement than any husband or wife to be a secondary beneficiary must lawfully marry such primary beneficiary before the distribution date.

[19] T1-11 l 12-24 & T1-17 l 45.

[20] *Forster v Jododex Australia & Anor* (1972) 127 CLR 421 per Walsh J at 427 and Gibbs J at 436 & 437-8.

New South Wales in *Eberstaller v Poulos*[21] as a consequence of which it was submitted that the subject matter of this dispute fell within the exclusive jurisdiction of the Family Court of Australia.

[21] It is not entirely clear to me that a decision of the Court of Appeal in New South Wales has the effect ultimately contended by the respondent. *Eberstaller v Poulos* is certainly authority confirming the proposition that an appeal from a single judge of a State Supreme Court does not lie to the State Court of Appeal where the subject matter determined below involved an aspect of federal jurisdiction covered by s 7(5) of the *Jurisdiction of Courts (Cross-vesting) Act* 1987. In that case an appeal lies exclusively to the Full Court of the Federal Court or the Family Court as the case requires. And it may well be that s 4(1) of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 authorises a judge of the Supreme Court of a State to exercise federal jurisdiction.

[22] Indeed there is a deal of weighty authority that, depending upon the circumstances, a trust's property can be treated as "property" of the husband to a marriage thus authorising the Family Court to make orders in respect of that property in the exercise of its jurisdiction. The circumstances relevant to such enquiry involve who has control of the trustee and who has power over the appointment and removal of a trustee.[22]

[23] Therefore it seems likely that, given the references in the order to the trust and to the effect the orders had upon the trust and any potential interest the applicant might have had in the trust, the parties who negotiated the consent order and the court which made the order in 1995 treated the trust as relevantly property of the husband Henry Kneipp. If that be the case then to the extent to which I might be asked to make orders concerning the trust or the powers of appointment contained within the trust deed I am asked to exercise federal jurisdiction within the meaning as that concept is understood.[23]

[24] If it be the case that if the trust and the property of the trust was in regarded by the Family Court of Australia when the consent orders were made as property of the late Henry Kneipp then it is distinctly arguable that the applicant's rights and privileges including her powers contained within clause 10 merged in the consent orders that were made.[24] I hesitate to make it plain that in what I have said I am not finding that the applicant's rights merged in the orders made in the Family Court of Australia merely, that on the evidence before me, it is an arguable proposition. This observation brings me back to the submission made by the applicant that in the exercise of my discretion I should decline to make any declaration in favour of the applicant because the subject matter in the controversy is a matter that should be determined by the Family Court of Australia in the exercise of its jurisdiction.

[25] In the view I take the proper forum for the determination for any dispute between the applicant and the respondent as to whether the applicant has any powers of removal or appointment under clause 10 of the deed is the Family Court of Australia. My reasons for

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[21] (2014) 87 NSWLR 394 at [1] & [2]

[22] See for example *Kennon v Spry* (2008) 238 CLR 366 per French CJ at 387-389, [52]-[57]

[23] See for example *P T Bayan Resources TBK v BCB Singapore Pte Ltd* [2015] HCA 36 (14 October 2015) at [51]-[55].

[24] As to an example for a discussion of this principle see *French & Anor v NPN Group Pty Ltd* [2008] QCA 271 at [46]-[48].

this conclusion are: the proper forum for determining whether the trust and the property the subject of the trust was property of the husband at the time of the orders is the Family Court of Australia which made the orders concerning matrimonial property; the proper court for determining whether the orders affected the rights of the applicant (who was a party before that court) to exercise powers of appointment and removal under the deed is the Family Court of Australia and the proper court for determining whether the applicant's powers contained in the trust deed merged in the orders made in the Family Court is that court. In the circumstances I uphold the respondent's contention, and in the exercise of my discretion in the event that I was of the view that the applicant was otherwise entitled to lawfully remove the respondent and appoint herself as trustee, I would decline to make the declaration for this reason.

[26] The application should be dismissed. I will hear submissions as to costs.