Avoiding family disputes in trusts

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This article provides an overview of the trust law issues that typically arise in the context of family disputes involving discretionary trusts. This includes the key duties that trustees need to observe in administering discretionary trusts, the law regarding valid removals of trustees and appointors, as well as the law relating to promises and representations. The article intends to provide advisers with greater insight into these areas so that they can assist trustees to observe their duties and minimise their risk exposure.

The future of trust structures in Australia

Trusts[1] have long been a device for protecting family wealth and achieving seamless intergenerational succession change. Although they have had some modest tax benefits on the income and capital gains derived, most of these benefits are prone to exaggeration.

The truth of the matter is that trusts have, up until now, been flexible business and investment vehicles and do not encounter much of the rigidity associated with holding wealth and business assets in family companies, particularly those with individual shareholders.

In the authors' view, Treasury now proposes to impose the most detrimental tax treatment on any business or investment vehicle that can be adopted under the Australian tax laws.[2] The intent is clear in that the present federal government wants taxpayers to structure out of trusts.[3] However, no viable alternative structure is proposed.

Talk of structuring into fixed trusts is meaningless without having an appropriate structure for equity holders. Similarly, while private companies are quite an attractive business structure and – with the abolition of the 50% discount for individual trust beneficiaries – are not entirely unattractive for the holding of investment assets, private companies do not offer much of an alternative if the only way for them to be tax effective is for the company (or ultimate holding company) to be owned by individuals.

Perhaps the only solace that can be taken from the proposed taxation of trusts at 1 July 2028[4] as it currently stands is that income from primary production will not be subject to the new taxing regime. This might mean that trusts have a lesser role in most business structures, while still having a pivotal role for most primary producers.

This article is not a tax article but instead proposes to explore some of the common issues that can arise in family disputes relating to trusts. For the reasons stated above, these issues will continue to be particularly germane for primary producers. As to whether there is a mass migration of wealth out of trust structures for non-primary producers will of course depend on how harsh the proposed new tax legislation turns out to be. Certainly, if there is little departure from the present proposal as announced by Treasury, one has cause to be less than optimistic.

Disputes involving trust structures

Role of trust law

A typical discretionary trust structure will often have a pivotal role in accumulating family wealth, and for many small-to-medium enterprises in conducting business operations. It is therefore important to recognise the part that trust law plays in any family dispute and the lessons that can be learned in minimising exposure in this area.

When a family is cooperating and all is going well, one might expect there to be considerable informality in the management and practices of trustees within the group. Unfortunately, however, if a dispute arises, aggrieved parties can resort to holding the controllers of the group to a strict interpretation of trust law and creating many potential exposures for the trustees. In the authors' experience, allegations that a trust is not being properly administered for the benefit of all beneficiaries, that the trustee is not properly adhering to the trust deed or is not taking account of its duties come "thick and fast" in many family disputes.

While a comprehensive review of trust law and trustee duties is outside the scope of this article, a brief review of some of the technical issues in this area is warranted so that advisers are well-equipped to identify the issues and seek specialist legal advice where appropriate.

When it comes to administering discretionary trusts, two trustee duties are of critical importance:

- the duty of due administration; and
- the duty of due consideration (to the objects or potential beneficiaries of the trust).

Each of these is addressed below.

Trustee's duty of due administration

The duty of due administration is broad and encompasses a variety of specific duties of the trustee. However, at its core, the duty of due administration requires the trustee to act in accordance with the terms of the trust as set out in the trust deed.[5]

The duty of due administration may carry some flexibility. For instance, a trustee may act otherwise

than in accordance with the terms of the trust if all of the beneficiaries direct the trustee to do so or expressly consent to the trustee's actions.[6] In terms of amending the trust deed, it should be noted that there is no implied power for trustees to vary a trust deed.[7] Compliance with the amending power provided under the deed (if any) is therefore critical: see further under the heading "Disputes involving appointorships".

The duty of due administration also imparts a duty on the trustee to both manage and preserve the trust property for the benefit of all of the beneficiaries of the trust.[8] For most clients, trust property may be significant and include valuable capital assets. In many cases, the trustee of an asset-holding trust may not charge any rent, fee or other consideration to other entities in the group which use its assets to conduct business. However, under trust law, there is a duty of the trustee to maximise the return on its assets and a failure to charge a fee could arguably put the trustee in breach of its obligations.[9]

Again, this may not be an issue where the parties are amicable and the beneficiaries have consented or acquiesced to the informal arrangements between the asset-holding trust and the operating entity.[10] However, in the context of a dispute where the administration of the trust is under close scrutiny, this may become an issue.

Finally, the duty of due administration also captures the trustee's duty to keep proper accounts and provide trust records to beneficiaries. This duty requires the trustee to provide beneficiaries with trust documents and, on request, provide beneficiaries with explanations as to the dealings with the trust property.[11] The duty also requires the information to be provided to beneficiaries in a way that does not obstruct the beneficiaries.[12] It should be noted that the beneficiaries' right to trust records is codified in South Australia and Tasmania.[13]

The duty of due administration as set out above may be at odds with advisers' and/or clients' understanding of the administration of trusts. In this sense, the discretions and powers granted to a trustee under a trust deed appear to be (and are sometimes expressed to be) absolute. However, this does not mean that the trustee can "do as it pleases" provided it follows the trust deed — the trustee is still, at the end of the day, a trustee and subject to the underlying trust laws.[14]

Trustee's duty of due consideration

The duty of due consideration arises during the course of the trustee administering the trust, and specifically in exercising powers or discretions conferred on it under the trust deed, including in the distribution of income and capital. In broad terms, the duty requires that the trustee turns its mind to all of the potential objects of the trust who may or may not benefit from the exercise of the power or the discretion prior to exercising the relevant power or discretion.

The following passage from *Re Hay's Settlement Trusts* is instructive on the duty:[15]

> "The trustee must not simply proceed to exercise the power in favour of such of the objects as happen to be at hand or claim his attention. He must first consider what persons or classes of persons are objects of the power within the definition in the settlement or will. In doing this, there is no need to compile a complete list of the objects, or even to make an accurate assessment of the number of them: what is needed is an appreciation of the width of the field, and thus whether a selection is to be made merely from a dozen or, instead, from thousands or millions … Only when the trustee has applied his mind to the 'size of the problem' should he then consider in individual cases whether, in relation to other possible claimants, a particular grant is appropriate. In doing this, no doubt he should not prefer the undeserving to the deserving; but he is not required to make an exact calculation whether, as between deserving claimants, A is more deserving than B."

It should be emphasised that this duty does not require the trustee to ensure equal or even fair treatment of each beneficiary.[16] However, in the authors' experience, disputes relating to the duty of due consideration are more likely to arise in circumstances where little thought appears to have been given to why distributions should be unequal, where distributions follow what may appear to be an arbitrary pattern, and where the trustee has appeared to act prejudicially or with a lack of good faith.

Exercise of discretions in distributing income and capital

When it comes to the duty of due consideration in the exercise of distributions of income, the recent case of *Owies v JJE Nominees Pty Ltd* (*Owies*)[17] is particularly instructive.

In *Owies*, two of the three primary beneficiaries of a discretionary trust, Deborah and Paul, challenged distributions of income made by the controllers of the corporate trustee, John and Eva (being the parents of the beneficiaries making the challenge), in the income years ended 30 June 2010 to 30 June 2019 (inclusive).[18] John and Eva were largely estranged from Deborah and Paul.

In all years but the 2019 income year (see below), distributions were made to John, Eva and Michael (Deborah and Paul's sibling who was not challenging the distributions) in accordance with a fixed ratio of 40% (John), 20% (Eva) and 40% (Michael). In the 2019 income year, John received a distribution of 100% of the trust's income. At the time of the distribution, John was living in a residential care home full-time and had significant assets.

The basis of the challenge was that the trustee had failed to give due consideration to the circumstances of the beneficiaries when making the distributions and had therefore failed to exercise its discretionary power to make distributions in good faith.

The court held that the distributions made in each income year from 2015 to 2019 were voidable as the trustee did not take into account the circumstances of the challenging beneficiaries when making the distributions.[19]

In reaching its decision, the court observed that the trust was established for the benefit of the primary beneficiaries (ie Deborah, Paul and Michael) and the general beneficiaries, which extended only to John and Eva and other natural person relatives of the primary beneficiaries. The court also placed weight on the fact that, in default of the appointment of income, the primary beneficiaries would hold the income pursuant to an express trust in equal shares.[20]

It should be noted that the decision in this case was underpinned by strained relations between family members. In this sense, as stated above, Deborah and Paul were mostly estranged from their parents and had only limited contact with John and Eva in the relevant income years. The decision was also underpinned by the fact that the trustee had adopted a "strikingly uniform" pattern of distributions in the relevant income years in circumstances where one of the primary beneficiaries, Deborah, had a demonstratable need for income and support.[21]

While the decision in *Owies* related only to income distributions, in the authors' view, the duty of due consideration applies equally to capital distributions. This may include in specie distributions of trust assets to one or more beneficiaries.[22]

In the authors' experience, it is important that trustees turn their minds to the duty of due consideration even where relations between family members are amicable (given the risk that previous income distributions may be scrutinised and challenged at a later date). It is also important that the duty is not overlooked when a dispute is already on foot, given that the duty will apply notwithstanding the strained relations between the persons controlling the trustee and the persons who may benefit from the trust.

However, it should be emphasised that the duty is only to *consider* the beneficiaries and should not ultimately restrict the broad powers and discretions given to a trustee pursuant to the terms of the trust deed. Similarly, the exercise of the discretion will not be assessed by reasonableness or fairness — what is required is that the *process* of exercising the discretion is not arbitrary or capricious.

In order to discharge the duty of due consideration on a year-by-year basis, particularly where there is a risk that the income or capital distribution may be subject to later scrutiny, the authors recommend the following for the directors of a corporate trustee:

- the directors should have a focused discussion at the time of resolving how the trust income should be distributed, having regard to the varying circumstances of all beneficiaries. If the circumstances of a potential beneficiary are not known, enquiries should be made, particularly where the class of beneficiaries is small;[25]
- the directors should prepare a contemporaneous file note briefly summarising the considerations behind their resolution; and
- the directors should consider the range of potential beneficiaries who are capable of receiving an income distribution in the relevant income year and this should be acknowledged in the trust resolution itself.

It is not suggested that trustees document their reasoning for making (or not making) a certain distribution in their trust resolution as this itself may expose the trustee to claims. However, it is important that trustees and the advisers to groups that include discretionary trusts are alive to the above issues when addressing year-end income distributions.

Removal of trustees

In the context of a family dispute, the actions of a trustee of a discretionary trust will likely be closely monitored and scrutinised. Notwithstanding a trustee's effort to strictly adhere to the duties of due administration and consideration, one or more adverse beneficiaries may seek to have the trustee removed and an independent trustee appointed.

Unless one of the adverse beneficiaries is the appointor of the trust (ie the person with the power to remove the existing trustee and appoint a new trustee), the beneficiaries do not have an inherent power to remove the trustee. Even where a beneficiary is also the appointor, as a matter of trust law, the power of appointment conferred on the appointor is not absolute: see further below under the heading "Disputes involving appointorships". However, separately and in addition to the power of appointment, beneficiaries of trusts in any state or territory may apply to the court to remove an existing trustee and have a new trustee (including, potentially, an independent trustee) appointed in its place.[23]

The power given to the courts varies from jurisdiction to jurisdiction and is summarised in the Appendix.

It will be seen that one common theme among each jurisdiction is that there is no statutory requirement on the part of an applicant to show that the existing trustee is at fault or in breach of their fundamental duties.[24] Despite its wide ambit, however, the courts have provided that the removal of a trustee will not be "justified" unless the trust property will not be safe, the trust will not be properly administered in the interests of the beneficiaries, or it is otherwise necessary or desirable in order to advance the purposes of the trust. Specifically, in the context of family trusts, the courts have provided as follows:[25]

> "It would be unrealistic however, in the context of many family trusts, to ignore the fact that the trustee will often be imbued with the vagaries of the family dynamic, its antagonisms and alliances. Impartiality does not require the trustee to bring a blank slate to the exercise of its powers."

In this regard, the courts have indicated that friction or hostility between the trustee and the beneficiaries is not itself a sufficient ground for the existing trustee to be removed and an independent trustee to be appointed.[26]

The courts will also consider the costs that will be incurred by the trustee in appointing an independent trustee and whether the appointment would bring to an end the dispute between the parties.[27]

The above considerations make it clear that, while a vexatious application is unlikely to succeed where the trust has been properly administered and the trustee has complied with its duties, an adverse party may nonetheless cause considerable issues for the trustee by making an application to the court and forcing the trustee to respond to that application.

Disputes involving appointorships

Trust deed amendments

In recent years, court decisions have suggested that extreme care should be taken in amending a trust deed to effect a change of appointor, particularly where there may later be a family dispute between the parties involved in terms of the validity of such appointment. This is illustrated by the cases of *Mercanti v Mercanti*[28] and *Jenkins v Ellett*.[29]

In *Mercanti v Mercanti*, a deed amendment which purported to change the appointor of a trust from a father to his son as part of a succession planning exercise was found to be ineffective. The court held that the deed amendment was invalid on the basis that the amendment clause under the trust deed only empowered the trustee to vary the "trusts" created under the trust deed and not the "powers or terms and conditions" governing the trust. In this regard, the Supreme Court of Western Australia considered that the clause concerning the office of appointor (as contained in the schedule to the trust deed) was a "term and condition" and was therefore not capable of amendment under the variation clause.[30]

In reaching its decision in *Mercanti v Mercanti*, the court relied on the earlier judgment of the Supreme Court of Queensland in *Jenkins v Ellett*. The court in *Jenkins v Ellett* found that a deed of variation which purported to change the "principal" (that largely had the same role as an appointor) was invalid. The court reasoned that the amendment clause under the relevant trust deed did not allow the trustee to change the appointor and only empowered the trust to vary the "trusts declared" under the trust deed.[31] The court went further to state that allowing the trustee to amend the deed to change the appointor without an express power would be "akin to destroying the substratum of the deed", being a deed establishing a family discretionary trust for the benefit of the intended specified beneficiary.[32]

For completeness, it should be noted that there were other deed amendments considered in *Mercanti v Mercanti* that validly changed the appointor of a discretionary trust from the father to his son. It is therefore crucial that advisers are alive to the issues and seek specialist advice when advising clients on a change of the appointor.

Appointments "in favour of" the appointor

Advisers and clients should also be aware that, despite the commonly held view that the appointor of a discretionary trust has the "ultimate control" of the trust, the power of appointment is not entirely unfettered.

Some trust deeds may impose limitations on how the power of appointment may be exercised. For instance, the authors have reviewed trust deeds that provide that the appointor may not:

- appoint themselves as trustee; or
- make any appointment in their favour or for their own benefit.

The latter limitation can be quite significant and has been interpreted broadly by the courts. For instance, in *Hillcrest*,[33] the power of appointment was exercised by a father during a live dispute to remove a trustee company controlled by his son and daughter-in-law and appoint a company controlled by the father solely as trustee. The power of appointment was expressly constrained by a prohibition of it being exercised "in favour of" the appointor. Despite the father not appointing himself personally, the court held that the appointment was in favour of the father and in breach of the terms of the trust and therefore invalid as the appointment was still "in support of", "on the side of" or "to the advantage of" the father.[34]

The above limitation on the power of appointment was also considered in *Austec Wagga Wagga*.[35] In that case, the power of appointment was exercised by an ex-husband to remove a company controlled by his ex-wife as trustee and appoint a company controlled by a younger employee of the trust as trustee. The court held that the appointment was in favour of the ex-husband and in breach of the terms of the trust. While the ex-husband was not a director or shareholder of the company, the court considered that the employee had worked under the direction of the ex-husband for his entire working life.[36] Effectively, this demonstrates that appointing a "patsy" will not be condoned by the courts.

It should be noted that the trustees in the above cases did not have the opportunity to administer the trusts and their subsequent conduct was not taken by the courts in determining whether the appointment was in favour of the appointor.

Advisers should therefore carefully review the trust deed at the time that clients are seeking to exercise the power of appointment in order to ensure that any limitations on the power of appointment are not inadvertently being breached.

As a matter of trust law, there may also be limitations on the appointor making any appointment for their own benefit — even where the trust deed does not expressly say so. The rationale behind this is that, once the trustee and the appointor of a trust are in effect the same person, that person may exclude beneficiaries from benefitting under the trust and even wind up the trust.[37] However, it appears that the limitations on the power of appointment under trust law are not as burdensome as when stated in the trust deed itself. Moreover, the courts appear to accept that appointments made for the benefit of the appointor but which preserve the status quo will not be a breach of trust law.

In this sense, in *Australian Conservation Services*,[38] the court found that a power of appointment exercised by a daughter to remove a company controlled by her mother and father and appoint a company solely controlled by herself was valid. The trust in question was originally established for the benefit of the son (ie the daughter's brother) as the appointor and sole named beneficiary. However, the

daughter was selected as appointor by her brother on him becoming bankrupt.

In reaching its decision, the court considered that:

- the trust fell into a category where the power of appointment may be exercised for the appointor's benefit (given that the trust was in fact established for the original appointor's benefit);[39]
- in the circumstances, it was not reasonable or appropriate for the daughter to appoint an independent trustee;[40] and
- following the appointment of the trustee company, the daughter had conducted herself in a businesslike manner in order to identify and protect the assets of the trust and put the affairs of the trust on a proper basis.[41]

Therefore, in the absence of a specific prohibition, the door may be "left open" as a matter of trust law to make appointments ostensibly for the benefit of the appointor where the subsequent conduct of the trustee affirms that the trust has continued to be administered for the benefit of all beneficiaries.

Practical takeaways

Changing the appointorship of a trust is frequently required when undertaking a succession planning exercise for clients.

In light of the decisions reached in *Mercanti v Mercanti* and *Jenkins v Ellett*, and the increasing complexity of family relationships, advisers need to take extra care to ensure that any purported changes to the appointorships of their clients' trusts are effective at law. In preparing deed amendments to effect a change of appointor, the authors recommend that the relevant trust deed is carefully reviewed to take account of the following:

- an express power referring to the trustee's ability to amend the *trust powers or terms and conditions* of the trust, rather than merely vary the *trusts declared or created* under the trust deed; and
- the express intentions of the settlor as embodied in the terms and conditions of the trust deed. At times, the terms of the trust deed may suggest that the nomination of the appointor named under the trust deed is intended to be entrenched and not capable of being changed by subsequent amendment to the trust deed, such that any amendment affects the substratum of the trust.

The authors also recommend that the trust deed is carefully reviewed to confirm that there are no express limitations on the power of appointment and, even where there are none, that advisers engage in an active dialogue with their clients to determine the motivations behind the appointment.

Promises and representations

Observations

Another area of disputation arises in the context of the law of promises and representations.[42] Typically, this may involve representations by words and/or conduct of the older generation leading to the younger generation bringing claims which they perceive as holding the older generation to account for the representations made.

Disputes in this area often arise where younger members of the family are working on the family farm but are under-remunerated for the work done and have some perceived or actual expectation that they should ultimately own or control the family farm as the quid pro quo.

Some of the significant case law in this area is set out below.

Significant case law

Rodda

One of the most significant recent cases in this area is the decision in *Rodda v Ian Rodda Pty Ltd*.[43]

In *Rodda*, the Rodda family conducted a cropping and sheep farming business on primary production land known as Yaringa and Ocean Downs located in the Yorke Peninsula, South Australia. A discretionary trust within the Rodda group, known as the Ian Rodda Family Trust, held Yaringa and Ocean Downs.

Stuart, the claimant, was involved in the family farming operations together with his father, Ian. Stuart's work extended beyond that of a mere farm hand in that he was involved in decisions as to crop selections and rotations, machinery purchases and crop sales.[44] Many discussions took place between Stuart and Ian in which Ian requested that Stuart be at home as much as he could to work on the farm and not have time off for other activities.[45]

Stuart received a wage of $150 a week for his work, justified by Ian as all that he could afford to pay Stuart.[46]

Stuart and his wife, Shannon, lived on Ocean Downs and undertook renovations, repairs and maintenance works on their homestead. When Stuart raised questions as to his wage in conversations with Ian during Shannon's pregnancy, he was told that he needed to continue taking a lower wage to build up the farm.[47]

A holiday shack was purchased in the names of Stuart's off-farm siblings. When questioned by Stuart as to why his name was not on the title, Ian responded that Stuart was going to "take over the family farming business one day".[48]

Stuart and Ian were the sole contributors to the running of the family farming operation for over a decade up until 2012. In December 2012, Stuart was informed by Ian that he was no longer required to work on the farm and had been dismissed.[49] Ian then signed a new will in 2014 removing Stuart as a beneficiary altogether and leaving his estate to Stuart's off-farm siblings in equal shares.

Stuart and Shannon brought a claim against the trustee of the Ian Rodda Family Trust (ie the landholding trust). Stuart and Shannon's claim was founded on the fact that Ian had made representations to Stuart across the 1990s and 2000s that he would inherit the farming operations and the land which Stuart and Shannon had relied on to their detriment.

The court held that Ian's conduct and words encouraged Stuart to believe that he was working towards, at some time

in the future, taking over the family farming business and the ownership of Yaringa and Ocean Downs, and that Stuart relied on Ian's conduct and words to his detriment.[50]

After finding that Stuart had detrimentally relied on and was entitled to equitable relief, pending further submissions, the court proposed that either:

- the Ian Rodda Family Trust held Ocean Downs on constructive trust for Stuart and Shannon and that the trust and Ian were jointly liable to pay equitable compensation of $1.5 million to Stuart and Shannon;[51] or
- the Ian Rodda Family Trust and Ian were jointly liable to pay equitable compensation of $4.75 million to Stuart and Shannon.[52]

Ultimately, the court made orders consistent with the first option set out above (ie the Ocean Downs land was held on constructive trust for Stuart and Shannon and that the trust and Ian were jointly liable to pay equitable compensation).[53] The court also required the trustee for the Ian Rodda Family Trust to transfer Ocean Downs to Stuart and Shannon within 28 days of the orders being made.[54]

Other cases

Another case that deals with the issues of estoppel is the decision in *Q v E Co*.[55]

In *Q v E Co*, a father (referred to in the case by the pseudonym of Q) was appealing the decision reached in a lower court as to the entitlement of his three sons (referred to in the case by the pseudonyms A, B and C, respectively) to equitable relief on the grounds of proprietary estoppel.

Q began having discussions with his children and his advisers as to how to pass his wealth to A, B and C and specifically to transfer the assets used in his livestock business to a structure owned and controlled by him and his children jointly. It was ultimately agreed that, for now, only the business would be transferred to a company of which A, B and C were shareholders (ie E Co).

Q's children worked in the business for over a decade to varying degrees. However, the relationship between Q and his children broke down when Q's children became aware of matters which resulted in Q being convicted of a serious criminal offence and serving a four-year jail sentence. While serving his sentence, Q served a notice of termination of lease on E Co for the use of the farm land and signed a new will leaving his entire estate to a discretionary trust controlled by Q's sister.

A, B and C brought a claim against Q. The claim was founded on the fact that Q had made representations to his children that he would hold the farm land for A, B and C during his lifetime and would leave either the land or proceeds from the sale of the land to his children on his death (which Q's children relied on to their detriment).

A, B and C were successful and the court declared that Q held the farm land on constructive trust for his children and had an obligation to transfer the land to A, B and C within 28 days. This decision was upheld on appeal.

An additional, and to some extent contrasting, case is the decision in *Hildebrandt*.[56]

In *Hildebrandt*, Markela and Charlie Papakonstantinou had purchased a primary production property in the 1970s. Markela and Charlie's daughter, Gina, lived on a portion of the property with her family from 2001 and made significant improvements to the property at her own expense, including building a house.

Gina and her husband, Kit, relied on verbal assurances from Markela and Charlie that they would inherit the southern half of the farm, with Gina's sibling, Arthur, to inherit the northern half of the farm. However, it was always understood between the parties that Gina and Arthur would only inherit on the death of the survivor of Markela and Charlie.

Gina and Kit brought a claim against Markela and Charlie.[57] The court ultimately rejected Gina and Kit's claim. This was on the basis of the court's finding that Markela and Charlie had not resiled from their assurances and there was no representation made that Gina and Kit would receive the southern half of the farm at any time before the death of the survivor of Markela and Charlie.[58]

Lessons learned …

What may be said of these cases concerning representations or promises made from the older generation to the younger generation?

Clearly, the older generation should exercise care as to the accuracy of statements they make in relation to handing down ownership or control of the family assets. Even where there is a definite plan to hand down control, this should not comprise of an unqualified, unconditional or "blanket" promise. Circumstances can very much change over time in family owned enterprises and caution is therefore urged.

Depending on the circumstances, it may also be useful to put in place employment contracts between the trading entity and the next generation which reflect the substance of the work performed.

Final observations

It can be seen that, while trusts presently represent a useful vehicle for protecting family investment and business assets and engineering effective succession planning, they need to be carefully managed having regard to the potential for family disputes.

While family relations are harmonious and everyone is cooperating, the strict observance to trust law may often seem unnecessary. However, as has been demonstrated, a disgruntled family member has many potential avenues to attack the actions of the ostensible controllers of a trust.

Advisers, who often will be the tax advisers to the trust controllers, can add value here by educating their clients to ensure that trustee duties, adherence to the trust deed, and other obligations imposed under the trust law are observed as much as is practicable.

The authors hope that this article will assist tax advisers in highlighting some of the significant issues so that they

may guide their clients in minimising any exposure to family disputes.

The age-old maxim that you should not "put your trust in money" but instead "put your money in trust" may still hold for families which exercise due care and take sound advice in using trust structures to protect their assets and plan for intergenerational change. Of course, time will tell as to whether trusts will remain the mainstay of family and private structures in light of the proposed taxation of trust changes.

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References

1 The use of the term "trusts" in this article is confined to discretionary trusts used in a private or family context. Of course, the term has a much wider use under Australian law.

2 Australian Government, Budget 2026–27, *Budget paper no.1: Budget strategy and outlook*, pp 30–31 and 162; Australian Government, Budget 2026–27, *Budget paper no. 2: Budget measures*, p 22; Treasury, *Minimum tax on discretionary trusts*, consultation paper, 8 July 2026 (Treasury consultation paper).

3 Treasury consultation paper, p 2.

4 As proposed under the Federal Budget 2026–27 paper no. 2, p 22, and the Treasury consultation paper, pp 2 and 5.

5 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 at 498; *Attorney-General v Downing* (1767) Wilm 1 at 23.

6 *Re Dumbell; Ex parte Hughes; Ex parte Lyon* (1802) 6 Ves 617. Note, however, that this is practically impossible in the context of a discretionary trust with a wide range of objects.

7 *Mercanti v Mercanti* [2015] WASC 297 at [81].

8 *Cotton v Dempster* (1918) 20 WALR 14; *Byrnes v Kendle* (2011) 243 CLR 253 (*Byrnes*).

9 *Byrnes* at 291–292; *Miller Street Pty Ltd v Porter* [2007] FCA 1830 at [22].

10 *Byrnes* at 278–280.

11 *Mandie v Memart Nominees Pty Ltd* [2014] VSC 290 at [94]; *Spellson v George* (1987) 11 NSWLR 300 at 315–316.

12 *Yates v Halliday* [2006] NSWSC 1346.

13 S 84B of the *Trustee Act 1936* (SA); s 28 of the *Trustee Act 1898* (Tas).

14 *Elovalis v Elovalis* [2008] WASCA 141 at [63].

15 [1981] 3 All ER 786 at 793.

16 *Edge v Pensions Ombudsman* [1998] Ch 512.

17 [2022] VSCA 142.

18 Noting that the trial judge held that the challenge in relation to the resolutions in 2010 to 2012 (inclusive) were statute barred.

19 The 2018 resolution was only voidable in relation to one challenging beneficiary.

20 *Owies* at [113].

21 *Owies* at [120].

22 See, for example, *Karger v Paul* [1984] VR 161, which concerned a husband who, as one of two trustees of his wife's deceased estate and as the sole beneficiary of that estate, requested and effected a distribution of all of the capital to himself. Noting that, if a beneficiary chooses not to respond, this can be relied on later if necessary: see *Telstra Super Pty Ltd v Flegeltaub* [2000] VSCA 180.

23 *Pope v DRP Nominees Pty Ltd* [1998] SASC 6933 at [57].

24 This is expressly provided for in SA: see s 36(1)(b) of the *Trustee Act 1936* (SA).

25 *Owies* at [154].

26 *Benson v Doloraine Pty Ltd* [2015] TASSC 41 at [105].

27 *Blong Ume Nominees Pty Ltd v Semweb Nominees Pty Ltd (No. 2)* [2021] SASC 22 at [62], referred to with approval in *Melrob Investments Pty Ltd v Blong Ume Nominees Pty Ltd* [2022] SASCA 29 at [177].

28 [2015] WASC 297.

29 *Jenkins v Ellett* [2007] QSC 154.

30 *Mercanti v Mercanti* at [98]–[105].

31 *Jenkins v Ellett* at [16] and [17].

32 *Jenkins v Ellett* at [19].

33 *Hillcrest (Ilford) Pty Ltd v Kingsford (Ilford) Pty Ltd (No. 2)* [2010] NSWSC 285 (*Hillcrest*).

34 *Hillcrest* at [42].

35 *Austec Wagga Wagga Pty Ltd v Rarebreed Wagga Pty Ltd* [2012] NSWSC 343 (*Austec Wagga Wagga*).

36 Noting that the ex-husband became the sole signatory for the business bank account (ie the employee was not a signatory).

37 *Hillcrest* at [33].

38 *Australian Conservation Services Pty Ltd v Liladel Holdings Pty Ltd* [2017] ACTSC 162 (*Australian Conservation Services*).

39 *Australian Conservation Services* at [21] and [22].

40 *Australian Conservation Services* at [38].

41 *Australian Conservation Services* at [38].

42 Specifically, the various equitable doctrines of estoppel as misrepresentation in its various forms.

43 [2015] SASC 95 (*Rodda*).

44 *Rodda* at [106].

45 *Rodda* at [27], [100] and [112].

46 Stuart's response to this was, "… I suppose we're building up for the future of the farm": see *Rodda* at [29] and [104].

47 *Rodda* at [119].

48 *Rodda* at [122]–[126].

49 *Rodda* at [66].

50 *Rodda* at [281] and [294].

51 *Rodda* at [322].

52 *Rodda* at [323].

53 *Rodda v Ian Rodda Pty Ltd (No. 2)* [2015] SASC 128 at [79] (*Rodda appeal*).

54 *Rodda appeal* at [79], item 9.

55 [2020] NSWCA 220.

56 *Hildebrandt v Papakonstantinou* [2024] NSWSC 1181 (*Hildebrandt*).

57 Noting that Charlie had passed away shortly after the claim was brought. Pursuant to Charlie's will, Charlie's interest in the property was to pass to Markela on his death. Markela gave an undertaking during the course of the trial to not deal with the property in dispute or to amend her will.

58 *Hildebrandt* at [199]–[206.

59 S 70(2) of the *Trustee Act 1925* (NSW).

60 S 70(3) of the *Trustee Act 1925* (NSW).

61 S 70(3) of the *Trustee Act 1925* (NSW).

62 S 70(3) of the *Trustee Act 1925* (NSW).

63 S 70(4) of the *Trustee Act 1925* (NSW).

64 Definition of "patient" in s 3 of the *Mental Health and Wellbeing Act 2022* (Vic).

65 S 80(2) of the *Trusts Act 1973* (Qld).

66 S 80(2) of the *Trusts Act 1973* (Qld).

67 S 80(2) of the *Trusts Act 1973* (Qld).

68 S 80(2) of the *Trusts Act 1973* (Qld).

69 S 80(2) of the *Trusts Act 1973* (Qld).

70 S 77(2)(a) of the *Trustees Act 1962* (WA).

71 S 77(2)(b) of the *Trustees Act 1962* (WA).

72 S 77(2)(c) of the *Trustees Act 1962* (WA).

73 S 77(2)(d) of the *Trustees Act 1962* (WA).

74 S 77(2)(e) of the *Trustees Act 1962* (WA).

75 S 77(2)(f) of the *Trustees Act 1962* (WA).

76 S 36(1a)(a) of the *Trustee Act 1936* (SA).

77 S 36(1a)(b) of the *Trustee Act 1936* (SA).

78 S 36(1b) of the *Trustee Act 1936* (SA).

79 S 70(3)(a) of the *Trustee Act 1925* (ACT).

80 S 70(3)(b) of the *Trustee Act 1925* (ACT).

81 S 70(4) of the *Trustee Act 1925* (ACT).

Appendix. Power of courts to remove trustees of discretionary trusts

Jurisdiction	Provision	Requirements	Requirement of fault on trustee's part?
New South Wales *Trustee Act 1925*	70(1)	Expedient to appoint new trustee and inexpedient, difficult or impracticable for trustee to be appointed without the assistance of the court.[59] Trustee convicted of a serious indictable offence.[60] Natural person trustee is bankrupt[61] or corporate trustee in liquidation or dissolved.[62] In the case of any charitable trust — on such evidence as the court deems sufficient.[63]	No express provision
Victoria *Trustee Act 1958*	48(1)	Expedient to appoint new trustee and inexpedient, difficult or impracticable for trustee to be appointed without the assistance of the court. Trustee is convicted on indictment of any offence. Natural person trustee is a "patient".[64] Natural person trustee is bankrupt or corporate trustee in liquidation or dissolved.	No express provision
Queensland *Trusts Act 1973*	80(1)	Expedient to appoint new trustee and inexpedient, difficult or impracticable for trustee to be appointed without the assistance of the court. Trustee desires to be discharged.[65] Trustee convicted of a crime or misdemeanour.[66] Natural person trustee is bankrupt[67] or corporate trustee under official management, in liquidation or dissolved.[68] Court is satisfied for any reason whatsoever that it is undesirable for trustee to continue.[69]	No express provision
Western Australia *Trustees Act 1962*	77(1)	Expedient to appoint new trustee and inexpedient, difficult or impracticable for trustee to be appointed without the assistance of the court. Trustee desires to be discharged.[70] Trustee has been held by the court to have engaged in misconduct in administration of trust.[71] Trustee is convicted of an indictable offence[72] or is a person of unsound mind.[73] Natural person trustee is bankrupt[74] or corporate trustee has ceased to carry on business, is in liquidation or is dissolved.[75]	No express provision
South Australia *Trustee Act 1936*	36(1)	Court is satisfied the order is desirable: • in the interests of the beneficiaries (whether identified or not);[76] or • to advance the purposes of the trust.[77]	No[78]
Tasmania *Trustee Act 1898*	32(1)	Expedient to appoint new trustee and inexpedient, difficult or impracticable for trustee to be appointed without the assistance of the court. Trustee is convicted of a crime of such nature that the court considers that trustee should be removed. Natural person trustee is bankrupt. Trustee is incapable, by reason of mental disorder, of exercising the functions of trustee.	No express provision
Australian Capital Territory *Trustee Act 1925*	70(1)	Court considers it appropriate: • in the interests of the beneficiaries (whether identified or not);[79] or • to advance a purpose of the trust.[80]	No[81]
Northern Territory *Trustee Act 1893*	27(1)	Expedient to appoint a new trustee and inexpedient, difficult or impracticable for trustee to be appointed without the assistance of the court. Trustee is found guilty of an indictable offence or is insolvent.	No express provision