THE ROLE OF THE APPOINCTOR
- AND HOW THIS IMPACTS ASSET PROTECTION IN A FAMILY TRUST

The role of the appointor in a family trust is one of the most important considerations when deciding on an appropriate structure.

The position of an appointor of a trust is not one which is required in the context of general trust law principles, but it is a creation of the particular trust deed. As such the powers conferred on the appointor of a discretionary trust will depend on the trust deed.

As a minimum a good deed will usually provide for the position of an appointor and confer upon them the power to appoint or remove the trustee. Certain protective powers may also be conferred on the appointor, such as the appointor’s prior consent may be required before the trustee exercises its powers on appointments of capital, appointing a vesting date, amending the trust deed or to add or exclude beneficiaries. Alternatively the appointor may be given a power of veto over the decisions of the trustee.

An alternative to the above is that a number of roles (e.g. Guardian, Principal, Protector) may be created within the trust deed with any one or more of these powers rather than providing all of the powers to the appointor. This therefore separates the various controlling and protective mechanisms within the trust deed so that no one person may be seen as in “control”. Various restrictions on distributions from the trust fund may also be imposed upon the persons that take these roles to further enforce the argument that a person does not have “control”.

The position of appointor in the context of appointing and removing a trustee is however recognised in each of the states and territories legislation\(^1\), such that although a trustee may be appointed pursuant to legislation, it will always be subject to the terms of the instrument creating the trust. If the trust deed nominates a person with the power to appoint the trustee, the trust deed must be complied with, and the nominated person is able to make that appointment.

As the trustee of the trust is the one that determines to whom and in what proportion the capital and income of the trust will be distributed, the role of appointor is one of the most, if not the most important role in a family trust, as they are the person who ultimately controls the assets of the trust. Generally, the appointor will also have the power to appoint other people or entities to replace them as the controlling person or entity of the trust and its assets.

Given that the provisions in the trust deed dealing with the appointor are arguably the most important provisions in the trust deed, this should be one of the first clauses looked at by professional advisors.

**What Appointor provisions should a deed contain?**

The trust deed of a family trust should contain succession provisions for the appointors of the trust as well as a mechanism for the appointor to resign and appoint another person or entity in their stead. Further, the ability to have joint appointors can be a very important provision in many circumstances.

**Appointor Succession**

At the very least the trust deed for a family trust should provide a succession provision stating that in the event that the appointor dies, his personal representatives or executors will step into his or her shoes as appointor of the trust. Whilst this provides a mechanism for the role of appointor to automatically continue, it does also assume that the appointor has a current Will as at the date of death (or an appropriate Enduring Power of Attorney in the event of loss of capacity) and is subject to the probate timeframe, which can create issues.

A better approach is to combine this automatic succession provision with the ability for the appointor to nominate their successor specifically, either at the commencement of the trust, or during the lifetime of the trust. In this case the nominee would automatically become appointor of the trust upon the death of the nominator without a time lag.

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1. s.41(1)(a) Trustee Act 1958 (Vic), s.6(4)(a) Trustee Act 1925 (NSW), s.7(1) Trustees Act 1962 (WA), s.14(1) Trustee Act 1936 (SA), s.12(1) Trusts Act 1973 (Qld), s.13(1)(a) Trustee Act 1898 (Tas), s.6(4)(a) Trustee Act 1925 (ACT), s.11(1) Trustee Act 1907 (NT)
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The ability to change the Appointor during the lifetime of the Trust

A well drafted family trust deed will also enable the appointor to resign their position and appoint a replacement in their stead. This is particularly important for relationship breakdowns where one party may wish to continue the trust without the involvement of the other.

The deed should also provide that the appointor’s position is vacated in the event of incapacity, bankruptcy and during a “family breakdown period”. Where one of these situations is only temporary the role is only vacated whilst that circumstance exists and they may resume that position once it has ended.

Joint Appointors

In some circumstances, it may be pertinent to appoint more than one appointor in the trust, so the ability to provide for joint appointors in the trust is also an important one. Where more than one appointor is nominated the powers are generally to be exercised “jointly” and should provide for both the option that either survivorship principles will apply to this role (i.e. so that only the survivor of the joint appoint is the remaining appointor) or alternatively each appointor may nominate their own successor, much like the tenants-in-common position of land holdings.

Obviously where there is more than one appointor there is a high chance that a dispute may arise during the term of the trust, whether during the life of the initial appointors or once the succeeding appointors take over the position so a dispute resolution provision is important to enable the resolution of disputes outside of the courts.

Appointors and Asset Protection

Both the Federal Court and the Family Courts’ reach on discretionary trusts is a developing area of law and therefore where asset protection is a concern the position of appointor is one to be considered with care.

A “power” over assets does not itself constitute “property” and those assets cannot therefore be said to be part of the insolvent’s estate. However in the context of the Family Court there is a different approach due to the court discretion to take into account other factors which may be considered equitable and just.

Marital breakdown

Under section 79 the Family Law Act 1975 (Cth), property is part of the matrimonial pool of assets and subject to division in a property settlement; whereas a financial resource remains a resource of the party and is taken into account in the court’s consideration of the respective parties’ future needs in the overall determination of what is deemed by the trial judge to be a just and equitable division of the property pool.

The lead case on whether the Family Court will treat a discretionary trust as property or a financial resource is the High Court case of Kennon v Spry [2008] HCA 56, which established that where, on the evidence, a party has legal or de facto control of a trust, then that party’s interest in the discretionary trust forms part of the matrimonial property pool.

In Harris v Harris [2011] FamCAFC 245 the case specifies the evidence required for the court to be satisfied that a party has de facto control of a discretionary trust. The scenario in this case was that a husband’s mother, son and a friend where the appointors of the trust. The Full Court of the Family Court found that the husband did not indirectly control the trust as in this instance it could not be proved that the mother was a “puppet”. The assets of the family trust were not included in the matrimonial property and it was only a financial resource available to the husband.

The role of appointor is one of the most, if not the most, important role in a family trust

In a more recent family law case of Morton v Morton [2012] FamCA 30 it was again found that the discretionary trust was not the property of the husband but merely a financial resource available to him. In this more elaborate scheme:

1. the husband and his brother were joint appointors of the trust;
2. the husband and his brother were directors and equal shareholders of the corporate trustee;

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3. the trust owed a significant liability (unpaid present entitlement) to a corporate beneficiary;
4. the husband’s brother was the sole director and secretary of the corporate beneficiary;
5. the sole shareholder of the corporate beneficiary was the corporate trustee of the trust.

Depending on the use of the trust in a party to a marriage, trust assets these days would be AT LEAST be taken as a financial resource available to the major beneficiary that the Family Court would take into account in finding what is just and equitable.

Where a party to a marriage breakdown IS NOT involved as an appointor, defacto control by such party may still be argued if the asset of the trust fund is specifically connected to the individual, (e.g. a business which is a result of substantially the personal excursion of the individual) or where the they could be seen as mere “puppets”.

Further if you do not want to be an appointor, finding the right parties may also be a hurdle. If relationship with the parties was to break down, income and capital from the trust may be distributed to other beneficiaries.

Where a party to a marriage breakdown IS involved, whether on their own or with another, it is more likely that they would have control, or defacto control over the trust and therefore trust assets would be “property” of the party (although note Morton v Morton case above) and therefore not likely that income and capital would be distributed other than with the consent/direction of the player.

**Bankruptcy**

In terms of the Federal Court’s reach on the a trust in bankruptcy proceedings, asset protection practitioners are acutely aware of the decision of Justice Robert French in the matter of *Richstar Enterprises Pty Ltd v Carey (No 6) [2006] FCA 814* and the possible far reaching implications of that decision on the security and protection to assets held in a trust.

The Richstar case involved a request by the Australia Securities and Investments Commission (ASIC) for the appointment of a receiver in relation to assets in the defendants discretionary family trust. French J accepted the argument by ASIC that the defendants had a contingent interest in the discretionary trusts as in all practical terms they controlled the trust.

He described three scenarios where he stated he would be willing to consider extending the receivers orders to cover “expectant interests” in a trust such that it would be considered property for the purposes of the definition of property in *section 9 of the Corporations Act 2001 (Cth)*, and therefore, would be available to the receivers.

These were:

1. A trust where the defendant is a beneficiary and a director and secretary of the corporate trustee and the trust confers a discretion to distribute to targeted beneficiaries to the exclusion of others.
2. A trust where the defendant is a trustee and beneficiary where the defendant has a discretion to distribute income or capital to a targeted beneficiary.
3. A trust where the defendant is a beneficiary and has the power to remove or appoint trustees.

It is clear that the locked door of asset protection previously offered by trusts has a crack in it as a result of this decision. It is arguable as well that the principles enunciated in this case will cause a chip in the corporate veil of protection previously enjoyed by company directors.

In truly risky environments actions which might be taken are:

1. The risk exposed person might be excluded as a direct beneficiary of the trust. An indirect benefit might be obtained through another discretionary trust brought into the beneficiaries clause through the spouse or children

2. the risk exposed person might be only one of a number of directors of the corporate trustee and the decisions need genuinely to be made jointly

3. the risk exposed person would not be the appointor or, if an appointor, is one of a number of such persons and does not have a casting vote. A vacation of office provision may also be appropriate.

**Summary**

The challenge is to get the right combination of persons as trustees, directors, shareholders, appointors and beneficiaries and, in appropriate cases, to customise the terms of the trust deed and possibly also, the terms of the constitution of a corporate trustee in order to minimise attacks on the assets of the trust without compromising the flexibility and control of the trust.
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from the point of view of asset protection, taxation, business succession and estate planning.

When considering who the appointor of the trust is, careful attention to the trust deed from the outset may still provide the asset protection that discretionary trusts have been well known for. It is important to consider what powers are given to them and whether more than one person should be appointed to this position or whether more than one role should be created (e.g. appointor, Guardian, Principal and/or Protector) with different powers conferred on different people or combination of people.

The Topdocs Family Trust

Deed

The Topdocs family trust deed has, as standard, extensive Apppointor provisions that include:

- The ability to nominate joint appointors
- Automatic appointor continuation provisions on death (with the power given to the Legal personal representative)
- The ability for single and joint appointors to nominate specific successor appointors
- The ability of the appointor to resign and appoint replacement or additional appointors
- Comprehensive dispute resolution mechanisms in the cases of joint appointors

Our expert lawyers at Topdocs Legal Pty Ltd can also prepare tailored family trust provisions including specific tailored appointor provisions for your client’s particular circumstances, and provide documentation and advice in relation to estate and business succession planning.