HEARSAY The legal podcast

Episode Summary

Episode number: 112
Episode name: *To Trust or Not to Trust? The Power of Appointors in Family Trusts*
Guest(s): John Wojtowicz

What area(s) of law does this episode consider?

Appointors in family trusts.

Why is this topic relevant?

Family trusts are a popular vehicle for wealth, asset, and tax management. Understanding how they work, and the players within them, is a key skill for Australian lawyers.

So we're going to explore the intricacies governing appointors in family trusts. Including their role in the trust, their responsibilities to beneficiaries, and the potential liabilities of the role - as well as how their decision making impacts other trust players like the beneficiaries and trustees.

What legislation is considered in this episode?

Income Tax Assessment Act 1936 (Cth)

What cases are considered in this episode?

Skeats v Evans [1889] 42 Ch D 522

- A trust established post-marriage outlined property benefits for the wife and, after her death, for the children. Existing trustees attempted self-appointment as successors, but the court, emphasising fiduciary duty and universal principles, deemed it improper.

Brady Street Developments Pty Ltd v M E Asset Investments Pty Ltd [2013] NSWSC 1755

- A party alleged breach of fiduciary duty. The court upheld the fiduciary duty breach. It emphasised the fiduciary responsibilities of an appointor in a discretionary trust, expressing concern over conflicts of interest.

Re Owies Family Trust [2020] VSC 716

- *Re Owies* highlights the importance of understanding the limitations of variation powers. Despite prior attempts to amend the Owies Family Trust, the court ruled that certain modifications, particularly involving specific roles involved in the trust, were impermissible.

Karger v Paul [1984] VR 161

- The beneficiary of a trust contested the trustee's transfer of an estate to a third party without considering her contingent interest, claiming breach of trust. The court concluded the trustees acted in good faith.

Jenkins v Ellett [2007] QSC 154

- A trustee sought to replace himself as principal of the family trust. However, after his death the court invalidated the attempt, emphasising that the variation authority only applied to the initial trust declaration.

Mercanti v Mercanti [2016] WASCA 206

- *Mercanti* involved the validity of variations to the MMF Trust and FW Trust. A family patriarch initiated a family succession plan, appointing his son as the appointor. While the court ruled that while the MMF Trust variation was valid, the FW Trust variation exceeded the granted power, rendering it ineffective.

Kearns v Hill (1990) 21 NSWLR 107

- The trust deed expressly allowed variation of any provision. The court highlighted that terms may implicitly allow adding beneficiaries, especially when individuals capable of joining are mentioned.

Crichton v Crichton [1930] HCA 14

- The plaintiff disputed ownership of Commonwealth bonds intended for his wife and son. The court considered the completeness of the gift and the need for a written trust. It concluded that a release of equitable interest can be done without a deed, finding that it is effective without consideration or a seal.

What are the main points?

- Family trusts are widely used in Australia for asset protection and tax planning.
- Appointors of family trusts have various powers and responsibilities, including the power to replace trustees. These powers and responsibilities are becoming an increasingly significant legal focus.
- Traditionally, the appointor is the person who establishes the trust. It is common for a family trust to have a corporate trustee.
- A popular benefit of using a trust for business is the ability to distribute income to any desired beneficiary and limit damage in case of business failure.
- However, a common mistake is using one family trust for a partnership, resulting in complications with tax legislation. It is advisable for each family group to have their own trust and then form a partnership with those trusts.
- An appointor's role is potentially fiduciary in nature, although this can depend on the trust deed's terms.
- A corporate appointor could be used for succession planning of the appointor role.
- Changes in tax law and rulings, such as the treatment of unpaid present entitlements (UPEs), influence how family trusts must operate.
- The trustees' power to vary the deed is dependent on whether the trust has a narrow or broad variation clause.
- Estate planning considerations including forgiveness or release of loans or UPEs, and associated tax consequences, are important in family trusts management.

What are the practical takeaways?	• It's crucial to regularly review family trust deeds, especially appointor provisions, in light of changes in law and family circumstances.