LEGACY LAW

Protecting the assets in your family tree

Murdoch case re Project Harmony

The recent Murdoch family stoush in Nevada is a reminder to people who have set up trusts to not let a Court be an arbiter of family issues if at all possible. “Project Harmony” turned out to be an ironic name.

I say this but, in my experience, it will likely be ignored again - this is not news and the law has not changed. Maybe people will take this as a cautionary tale. This was an entertaining news story which shone a light on the world of trusts. We consistently see that people think they know what “trust” and “equity” mean but their views are subjective and unlikely to be what the law finds.

You may not have the same wealth as the Murdochs but it is a mistake to think that two or more adult children (likely in their 50s before they get an inheritance) and their spouses will be happy to share a collection of assets in a discretionary family trust. Someone is likely to say, “just give me my fair and equal share”. In Australia, people are inclined to be biased that our family will avoid problems and think that somehow “she’ll be right mate”. Lawyers are failing to properly warn their clients of what is likely to happen when a trust passes to the next generation or the clients are not listening.

At Legacy Law, we crave impact and want our clients to avoid predictable problems down the line that could perhaps have been avoided by having some “grown up” conversations in advance. For our retainer clients, we challenge them to do more in order to get the outcomes they want.

We understood that Rupert build phenomenally successful businesses inside trusts and wanted to be in control of the rules applying to them. But once a trust owns something it is subject to trust rules. In fairness to them, there were attempts at discussions to buy James out but they were far too late so that Rupert’s life expectancy and that of the trust (2030) could be used against him for negotiation purposes.

Even if you disagree with the decision in this case, the legal approach was correct. Trust rules are honoured in the breach in the real world. Not many trustees are totally independent and

not many decisions are taken in the best interests of all the beneficiaries. Still, people set up trusts every day without realising that they are agreeing to rules in a trust deed that they rarely read (until there is a problem, when a lawyer reads it for them) and hundreds of years of case law (to which this case is a recent addition).

It is like making a blind bet or marrying someone at first sight – which I am told people do, and sometimes on TV!

Your future trust dispute may not make it into international newspapers or TV but it will be heard in open Court in Australia and the decision will be found on the internet. The Murdoch's latest case was in closed Court but the transcripts and evidence all made their way to the internet anyway. Some of the findings are below in an extract from a recent New York Times article:

Commissioner Gorman would serve as judge and jury, weighing all the evidence before making his recommendation, which would then be reviewable by a district judge and the Nevada Supreme Court. He filed his decision on Saturday, Dec. 7, denying Rupert's attempt to change the trust in an opinion that was both categorical and withering. In his judgment, Rupert and Lachlan had acted in bad faith. They had not been motivated solely by the interests of the trust's beneficiaries; rather, Gorman wrote, their newly appointed managing directors — Barr, Roberson and O'Donnell — had been enlisted into "a carefully crafted charade" to "permanently cement Lachlan Murdoch's" control of the empire and to secure Rupert's legacy by ensuring that his companies "continue to be alternative, conservative voices in media after he dies."

Gorman dismissed the alleged evidence of a sibling plot against Lachlan — including the Claridge's meeting and the Succession Memo — as unconvincing, characterizing the discussions held by James, Liz and Prue about the future of the companies as "at most casual and inchoate." He did, at least, seem charmed by Rupert's disarming, if ultimately self-defeating, candor. Gorman wrote that he "showed himself at trial to be neither a victim of his infirmities nor lacking in mental vigor," noting that he testified with "appropriate recall and, at times, sharp wit." In the end, Gorman found him to be "the least coached (and perhaps the least coachable) and, by and large, one of the more credible witnesses to appear in this case."

He had a very different view of Lachlan. Gorman seemed especially disturbed by what he characterized as Lachlan's misleading testimony about the recombination of the two companies, calling it "an example of Lachlan Murdoch's lack of candor with the parties and on the witness stand."

Gorman was even more scathing when it came to the new managing directors. He concluded that Barr's failure to disclose the Bank of America report was a sign of bad faith and that the three "did not act impartially" when they approved the changes to the trust — an act that he described as "an abuse of discretion and a breach of the fiduciary duties owed to the trust and its beneficiaries."

Rupert and Lachlan promptly moved to appeal Gorman's decision — and Barr has also filed his own challenge to it — but it's unlikely to be overturned. The Top Hat Amendment and Project Family Harmony are probably finished. Rupert and Lachlan, it appeared, had taken their shot and missed. If they want to lock in Lachlan's leadership and secure Rupert's legacy,

they will need to find another way, probably by returning to the negotiating table with Prue, Liz and James. But the objecting children now hold all the leverage. As things stand, they have the power to change the editorial direction of Rupert's companies after he's gone. Or they can simply cash out to someone outside the family when the trust dissolves in 2030.

Gorman seemed to get caught up in the drama of the case himself as he neared the end of his 96-page opinion, breaking out of his legal and factual analysis with a rhetorical flourish worthy of one of Rupert's own tabloids. "The effort was an attempt to stack the deck in Lachlan Murdoch's favor after Rupert Murdoch's passing so that his succession would be immutable," he wrote. "The play might have worked; but an evidentiary hearing, like a showdown in a game of poker, is where gamesmanship collides with the facts and at its conclusion, all the bluffs are called and the cards lie face up."

Our advice has been consistent to clients with trusts – take the governance rules into your own hands and tailor them to what is agreed by your family. Then meet regularly to test the rules work in practice, tweak those which don't and observe the players as a team. Bring in mentors and build trust over time. The process will either bring you together and get used to making decisions and dealing with different views or smoke out a family member who would prefer to be separate. By war gaming an exit in particular, there are no surprises and people can plan. It may be that the process leads to the conclusion that a financial separation is inevitable and that is something that can be digested and managed with a result that family relations continue long after the assets. A good result for most families.

Most people want a quick outcome but the dirty truth is that the process cannot be fast-tracked without the risk that there is not real engagement, understanding and consensus. The other truth is that it is better to start early and review regularly so that the agreement has the benefit of longevity and having been tried and tested. They can operate as pre-nups for families!