SMSFAdviser

Murdoch Succession:
The basics of holistic estate planning in plain view

by Matthew Burgess, Director, View Legal

The latest episode in Rupert Murdoch's succession plan has all the expected plot development techniques, for example:

1. blended family;

2. a 'chosen' one anointed by the long standing, all controlling, patriarch

3. aggrieved siblings;

4. numerous 'go-to' advisers;

5. tax aware estate planning strategies;

6. sources 'close to the family' (read as family members leaking to their trusted journalists)

7. the use of trusts; that (at least with hindsight) have proved problematic.

A few examples

In recent Australian history it could be assumed that ChatGPT has been used to generate the scripts of almost all of the high profile succession plans, which each seem to have the identical key indicia, think:

(a) Pratt (1 wife, at least 2 de factos and a bitter dispute over accessing trusts that house essentially all wealth of over $25B and various other trust related disputes, including an attempt to enforce a contract for 'mistress services' in return for Pratt seeding a trust - which was rejected by the court on the basis that the extent of the relationship was instead simply for ‘meretricious sexual services');

(b) Smorgon (ongoing attacks by 'non-close' beneficiaries to access trust records and assets);

(c) Talbot (2nd wife litigating, including via infant children and her parents, to gain a larger percentage share of trust assets, despite otherwise being entitled to hundreds of millions of dollars);

(d) Hancock (Gina Rinehart litigating for years with at least 3 of her 4 children for control of a trust with in excess of $5B in assets);

(e) Twigg (Cleanaway, where the chosen son was held to have essentially stolen the majority of over $150M in trust assets from other key family members, including his mother);

(f) McLaren (Jalna yoghurt family, where the level of tension within the family over control of the trust holding circa $65M was handed entirely to an independent trustee, which the court approved to charge their 'standard' rate of $2,000 an hour).

Arguably the key lessons from these high profile cases are universal for every adviser involved in an estate planning exercise involving any form of trust - and are deceptively simple, namely:

A. understanding that where any wealth is owned via a trust, the wills of the controllers are necessary - however never sufficient - is the underlying principle. That is, unless a holistic approach is taken to the estate plan, the wills are at best unhelpful and at worst may lead to liability for the advisers involved (Talbot being one high profile example, where the lawyer acting endured a ligation concerning his conduct spanning a number of years);

B. read the deed - having a deep understanding, particularly about the higher order consequences of the terms of a trust deed, is another fundamental principle (Rinehart being a high profile example where the relevant trust had a maximum perpetuity period of only 25 years);

C. it's always all about the tax - unless there is a deep understanding of all revenue related issues, any purported succession plan is almost certain to be at least sub-optimal; again however the higher order consequences are critical (Murdoch appears to be an example in this regard - as explained below).

Murdoch unbundled

While much of the specifics of the dispute concerning control of the Murdoch trust are unknown, the speculation supports a factual matrix that would be well understood by most holistic estate planning advisers - with the key aspects likely along the following lines:

(A) a trust created as part of an earlier family law property settlement between Rupert Murdoch and Wendi Deng, seeded with all substantive media assets owned or controlled by Rupert Murdoch;

(B) the trust designed to achieve asset protection and tax planning objectives under US laws - specifically an irrevocable grantor trust (with Rupert the grantor);

(C) as the naming protocol (ie irrevocable) implies, the terms of the trust deed being unable to be amended, other than in very limited circumstances at trust law (eg if the changes can be shown to meet the arguably nebulous criteria of being 'for the benefit' of the beneficiaries);

(D) furthermore, the grantor is prohibited pursuant to the trust deed (and by revenue laws) from transferring assets out of the trust, even to an iterated irrevocable trust;

(E) the control of the trust is regulated by mechanisms that lock in succession in a manner that cannot be easily changed nor challenged - likely:

(i) a tailored or 'bespoke' constitution for the trustee company;

(ii) a 'super vote' to the patriarch during his life time, guaranteeing full control, regardless of the views of other board members;

(iii) equal voting rights between all siblings following death or incapacity of the patriarch, with majority ruling (meaning, specifically, that Lachlan could be outvoted by his 3 siblings, despite otherwise currently being in day to day control as CEO of all major investments held by the trust);

(iv) ensuring there is no ability to remove the trustee - that is no role such as appointor, principal, guardian, nominator etc, that may have the right to unilaterally remove the trustee or otherwise oversee and be required to approve certain trustee decisions.

The current proceedings are said to be focused on achieving an outcome whereby Lachlan will essentially enjoy the same level of rights enjoyed by Rupert on his father no longer acting - that is holding a super vote that would allow Lachlan to make decisions regardless of the wishes of his 3 siblings.

A point of reference for Australian trusts

Under Australian law, as is the case in relation to many grantor irrevocable trusts in the US, there is no prohibition against the settlor being a beneficiary of the trust, provided that the settlor is not the sole beneficiary.

In the US, there is generally no tax downside with the grantor (or settlor) being a potential beneficiary of the trust.

However, in Australia, for tax purposes, section 102 of the Tax Act may have application. Under this section, the Tax Office has power to apply punitive tax to the trustee where the settlor has power to revoke or alter the trust so as to either:

(a) acquire a beneficial interest in any of the trust property or income for themself; or

(b) pay or accumulate income for the benefit of the settlor's unmarried children under the age of 18.

If the Tax Office decides to exercise its discretion, the trustee will be taxed on an amount equal to the difference between the tax actually payable by the settlor and the tax the settlor would have paid, but for the trust.

Practically, any trust established in Australia by specialist advisers will be structured to ensure the settlor (or grantor) is completely unrelated to any potential beneficiary of a trust.

History as a guide

Rupert Murdoch of course has a lifetime of success in achieving his desired objectives - including in relation to succession planning.

The manner in which he achieved full ownership and control of his father's estate; tax free, remains a go to case study for many holistic estate planning advisers.

Broadly (as explained in *Murdoch v Commissioner of Taxation* [2008] FCAFC 86) the situation was as follows:

(1) Dame Elisabeth Murdoch (Dame) had a life interest in the income of several family trusts settled by her husband in the 1930s.

(2) The remainder interest was held by one or more of the Dame's children or grandchildren.

(3) For many years, the trustee of the relevant trusts was effectively the Dame, her son Rupert Murdoch and a third party.

(4) It was however in the court decision noted that the Dame was likely influenced in her role to accept the investment decisions due to the 'very strong personality' of her son Rupert.

(5) A Reorganisation Agreement under which Dame surrendered her life interests under each of the Trusts was entered into, with the consideration a lump sum payment of more than $85m.

(6) The payment was couched as releasing the trustees from potential claims for breaches of trustee duties.

(7) In particular, the investment policy that had been adopted (apparently at Rupert's strong recommendation) was overwhelmingly weighted to shares in Murdoch family companies that produced capital growth, but comparatively minor dividend income. This investment approach essentially benefited the remainder beneficiaries, at the expense of the Dame as life tenant.

(8) The payment was said to be to help avoid the need for litigation amongst the family.

(9) Around 65% of the $85m was then gifted by the Dame to Rupert and charities she was associated with.

(10) The payment was funded by the sale of pre capital gains tax shares and was essentially received tax free by the Dame.

In confirming the extremely onerous fiduciary duties of a trustee the court confirmed that Rupert had breached his obligations, even though there was no lack of good faith or particular damage to the Dame.

The court relied particularly on the principles of the case *Phipps v Boardman* [1967] 2 AC 26, which held that this style of claim was not for a reimbursement of the income shortfall.

The payment was therefore on capital, not income, account as a claim against the profit made by Rupert and in essence a constructive trust over assets of the trust - helping to ensure the tax free result.

If history is a guide, it can be assumed that regardless of the outcome of the current proceedings, whatever Rupert Murdoch intends will be implemented.

Conclusion

Ultimately, while still true, the idiom attributed to Benjamin Franklin that 'in this world nothing can be said to be certain, except death and taxes' is arguably incomplete in modern holistic estate planning with at least 3 further certainties wherever trusts are involved, namely:

1. Trusts are the single best structure for one family unit; and - by a margin - the worst for multiple family units;

2. All key players in a dispute over control of a trust will claim it's not about the money;

3. Holistic estate planning advisory work is the closest industry to what is otherwise seen as unicorn poop - that is of being in a phase of permanent growth.