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What's at stake when a trust becomes 'a carefully crafted charade'?

WILLS & TRUSTS

OPINION



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One of the most interesting trust disputes in recent times – and one which is destroying his family – is Rupert Murdoch's legal battle in the Nevada courts, aimed at preserving the political focus of Fox Media after his death.

Murdoch and his son Lachlan, both political conservatives, have tried and failed to alter the purpose of a trust in a way that would effectively strip Rupert's other three children of the ability to change Fox's political bias.

The trust controls about 40% of Fox Corporation and News Corporation.

Rupert has one child from his first marriage: Prudence (Prue). He had three children from his second marriage: Lachlan, James and Elizabeth (Liz).

When his second marriage ended, Rupert agreed to transfer control of most of his assets to a trust in which each of the four children would have a 25% interest when Rupert died, or in 2030.

The purpose of this structure was to prevent one or more of the children from being favoured over the others, in the expectation that this would avoid resentment and future family strife.

As time has gone by, Rupert has changed his mind. He now wants Lachlan to have control of the media interests as he is the child most likely to preserve the current political alignment of Fox and the family's other media interests.

By contrast, Rupert has described his son James, with his more liberal political focus, as being "unsalvageable".

Rupert, who will be 94 on 11 March, fears that after he dies James, Prue and Liz, using their three votes, will collectively reposition Fox's journalism to have a more liberal focus.

As Rupert considers his media assets to be – in his words – a "protector of the conservative voice of the English-speaking world", he also considers it to be unthinkable that James and his sisters should be able to refocus Fox and News Corporation away from being the bastion of conservative reporting that they have become.

Rupert and Lachlan, with their advisers, therefore devised a way to modify the trust to strip James, Prue and Liz of the power to change the conservative focus of the Fox media interests. This was to be achieved by giving Lachlan control of the media interests.

Not a moron

James, Liz and Prue resent the way their father has attempted to strip them of their inheritance and have successfully challenged the modifications to the trust.

Liz denounced her father's scheme in strong language. When he suggested she lacked sufficient self-will and could be persuaded by James to vote as he requested, she told Rupert she was not "a f***** moron".

And when Rupert said he hoped there would be consensus among the children to favour Lachlan, Liz told him, "You think there's going to be consensus with a gun to our head? If you think that's harmony, we must be in North Korea!"

The structure that was intended to give Lachlan sole control of the media interests involved, among other elements, the engagement of two new trustee representatives.

The risks associated with the new structure were evident from the terms of an indemnity the two men contracted to receive. This involved their being indemnified not only for acts committed in bad faith but – extraordinarily – for acts of fraud that were "committed in the exercise of fiduciary duties and services" (as if acts of fraud could ever be committed "in the exercise of fiduciary duties"!).

The judge who heard the dispute – Commissioner Gorman – described the structure Rupert and Lachlan created as a "carefully crafted charade" and has set it aside.

One of the participants in the structure was William Barr, who was appointed US Attorney-General during the administration of George H W Bush and Donald Trump's first presidency.

In a 96-page opinion, Gorman held that Barr committed "an abuse of discretion and a breach of the fiduciary duties owed to the trust and its beneficiaries".

Family destruction

As a result of this litigation, a trust that was intended to create family harmony has become associated with family destruction. James has not spoken to his father for years and Rupert's two daughters strongly resent his attempt to strip them of their inheritance.

What are some lessons from this?

- As time has gone by, Rupert's wishes for the trust have changed in ways he did not predict when the structure was created. From his perspective, creating the rigid trust structure has been a disaster that has prevented his current intentions for the trust's assets from being implemented after his death. It has also been disastrous for his second wife Anna, who looks with despair at the sight of her two sons at war with each other.
- Rupert's original willingness to agree to the rigid trust structure was gained through Anna's willingness to accept a matrimonial property settlement of only half her entitlement. She did this because she was fearful that Rupert might play one child off against another – as has now happened. The substantial monetary gain Rupert made by her concession is no doubt one that he now regrets.
- From Rupert's perspective, it would have been much better to leave his estate to be managed by a competent non-family member or members, with the children having a co-equal shareholding in the business. That structure would have had a much greater chance of preserving family harmony.
- When parents decide to favour one child over another, there is a strong possibility that the unequal treatment will lead to resentment and strife.
- If sceptics believe trusts are fundamentally vulnerable to judicial modification, they may be heartened to see a court refuse to allow a trust to be amended in a way that prevents it from achieving its originally intended purpose.

Although Rupert and Lachlan have appealed Gorman's decision, knowledgeable commentators say they are not expecting the appeal to succeed.

Anthony Grant is an Auckland barrister and trustee, specialising in trusts and estates