LAFRENIÈRE SANNA
ESTATE LAW
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Succession Planning for Small Business

You've worked hard to build up a business that supports you and your family. Have you thought about what will happen when you die? Have you thought about how your family will be taken care of?

An estate plan can allow you to maintain control over the operation of the business during your lifetime, while ensuring that your children will eventually inherit the business.

Death triggers estate administration taxes (generally referred to as "probate fees") and income taxes. If your business has been successful, your estate will probably be paying capital gains tax. From Canada Revenue Agency's (formerly Canada Customs and Revenue) perspective, there is a deemed sale of the business upon death. Due to possible tax impact, this often results in significantly less money for your family when they need it most.

Lessening Tax

It is possible to reduce taxes by ensuring that your business takes full advantage of tax rules which allow privately-owned corporations to pay out income or capital to family members. It is also possible to take advantage of capital gains exemptions which, for qualifying small business corporations, is $750,000. It is best to use up this exemption while it is still available. By crystallizing capital gains you ensure that there is less tax to pay in the future.

Estate Freeze

If you own a business that you expect will grow over the years and you currently have another income stream, you can "freeze" the value of your business so that any future capital gains will be your children's. Using this strategy, a business owner can transfer the future value of the company to his or her children. This gives family members a stake in the future growth of a commercial enterprise. If a complete freeze is not viable because you will continue to depend upon the business as an income stream, a partial freeze may be a better option.

The main advantage of an estate freeze (full or partial) is that it defers capital gains tax liability which would normally be paid upon the death of the business owner, or upon gifting shares of a business to children.

Family Law

As a business owner, it is essential to make sure that a domestic contract is drawn up between you and your spouse. Otherwise, upon death, your spouse has statutory rights which, if exercised, could upset the plans that you have made for the business.

Discretionary Family Trust

Setting up trusts for children gives you control over your family's wealth. Family trusts are a good option if you want to "freeze" your business for estate planning purposes but you are concerned about your children being responsible enough to manage a business.

To solve this problem, a trust can be established in which your children are the beneficiaries and you are the trustee. The benefits of such a trust include:

- sheltering assets from creditors and from your children's spouses who may make claims under the Family Law Act;
- preventing a child who is not committed to the family business, or does not want to be

active in the family business, from gaining control;

- making optimum use of lifetime capital gains exemptions and income-splitting techniques.

Saving Probate Fees

Shares in a private company do not require probate. To avoid paying probate fees on such shares, it is possible to sign two Wills — one for the administration of assets which are subject to probate and a second Will which deals with any shares of a private company. As shares in a private company can be transferred without probate, the second Will does not need to be probated and the result can be a significant savings in probate fees. For example, company shares having a value of $1,000,000 could be subject to probate fees as high as $15,000. Through the proper use of multiple Wills, no probate fees would be paid on the shares.

Will Provisions

Your Will should specify who is going to control your business and it should permit estate executors to manage the business as a going concern. If you do not make specific provisions for its continuation, the executors of your estate may be forced to sell the business. Additionally, if an owner is transferring shares of a company to his children, he or she may want to specify which children are to receive these shares, and in what proportion.

It may also be a good idea to include a condition which requires children who do not wish to be active in the company to sell their shares to the remaining children.

Version: 20230109