



BUSINESS SUCCESSION

There *is* a Better Way

Don Sihota, Business Lawyer

Clark Wilson LLP

Is a Will the Way?

2012 - Vol 1

Business Succession Planning is a complicated process. It involves careful consideration of the best way to successfully transition ownership of a business, while anticipating and avoiding the many traps that await the unwary. Unfortunately, some business owners confuse the process of Business Succession Planning with the process of Estate Planning. This can be a mistake and in this report I will explain why distributing your shares by Will can have serious negative consequences for your heirs, for your business and (if you have any) for your business partners.

If you are thinking about disposing of shares by your Will, you should think very carefully about the consequences of taking this approach. Disposition under a Will means your heirs will receive shares, not cash on your death. A private company has no pre-determined value for its shares. With no pre-determined selling price for your shares, no pre-determined buyer and no funding mechanism, your heirs and the business can be thrown into turmoil. The result can be the value of the business significantly declining in the months after your death. If this occurs, the shares owned by your beneficiaries will also decline in value and your heirs may get pennies on the dollar. I know this because I am aware of cases where this very situation occurred.

The following are some of the likely events that will occur when shares are distributed under a Will rather than by a carefully crafted Business Succession Plan:

1. There are often long delays to complete the transmission of title to the beneficiaries. This creates uncertainty about who owns or will own the company.
2. During the time for administration of the estate, the company has no leadership, creating uncertainty as to what will happen to the company and its business.
3. If beneficiaries under the Will are not emotionally connected to the company, they will simply want to cash out and will not be concerned about the interests of the company.

This newsletter contains general information, not legal advice, and may not apply to you. Examples are purely fictional and any similarity to persons living or dead is merely coincidence. Legal advice is imperative in Business Succession Planning – inquiries or comments should be directed to Don Sihota.

© Don Sihota

Using your Will for Business Succession Planning can set in motion circumstances that can lead to a “fire sale” of the company.

4. During the time when the company is leaderless, competitors will initiate plans to take business from the company.
5. Similarly, during the time when the company is leaderless, competitors will initiate plans to solicit employees, who may be more inclined to leave due to the uncertainty.
6. Disposition by Will does not provide any funding mechanism, such as life insurance, to allow for the purchase of the shares and to pay the taxes due on a deemed disposition on death.
7. A person can revoke or modify a Will very easily, creating uncertainty as to the ultimate shareholders until after death.
8. Wills are subject to the *Wills Variation Act* which leaves open the possibility of a dispute over the shares and how they are distributed under the Will.

The foregoing are only some of the reasons why using a Will as a substitute for a carefully crafted Business Succession Plan is not a good idea. Using your Will for Business Succession Planning can set in motion circumstances that can lead to a “fire sale” of the company. The result can be destruction of the company, with the beneficiaries receiving much less than they would had a proper Business Succession Plan been implemented. This is not the situation most business owners wish to leave as their legacy.

As you can see, when it comes to Business Succession Planning, a Will is not the way! There is no substitute for a carefully thought out Business Succession Plan that will ensure retention of value and continuation of your legacy for years to come. This is possible but only with advice from professional advisors who understand your ultimate objectives and have the experience to know and avoid the risks that you face in achieving those objectives.

CLARK WILSON LLP

BC's Law Firm for Business

For further information contact:

Don C. Sihota, Partner
Clark Wilson LLP
800 - 885 West Georgia Street
Vancouver, BC V6C 3H1

Tel: 604.643.3123
Fax: 604.687.6314
dcs@cwilson.com