



Family Business News

A newsletter for the family business sector

Introduction

Welcome to the tenth edition of Family Business News.

Family Business News addresses issues relevant to the family business sector including communication, change management, employment and issues surrounding the transfer of the business to the next generation.

This edition focuses on the importance of detailed estate planning, various succession planning strategies, the results of the Family Business Australia State Awards and important events for 2008.

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Estate planning for family trusts

Jane McMahon, McMahon Clarke Legal

Family trusts enable ownership of businesses to be passed down to the next generation in a tax effective manner. The success of this process depends on managing individual expectations through careful and detailed planning. There are various trust funds available and choice of fund depends on personal requirements.

Discretionary trusts have increased dramatically as the preferred investment vehicle due to their asset protection features and general flexibility. From an estate planning perspective the existence of trusts as part of the investment landscape gives rise to some important issues.

Only assets which are 'owned' by an individual form part of their estate and are able to be dealt with under their Will. This should not be confused with assets that are 'controlled' by an individual but legally owned by another entity. The most common example of this is a discretionary (or family) trust.

Legal ownership of trust assets vests in the trustee, which, in many cases is a company. Therefore, it would be easy to assume that it is the ownership of shares in the trustee company which will determine who controls the trust assets in the future. This is almost always not the case.

In almost all cases, the terms of the trust will nominate a 'guardian' 'principal' or 'appointor' who has the power to remove and appoint a new trustee (this is referred to as the power of appointment). This effectively makes the shareholdings of the existing trustee worthless because the trustee can be removed at any time. It is the power of appointment which is most critical in terms of estate planning for family trusts.

Example

A business owner (the patriarch) conducts his business via a discretionary trust. He has two children and intends to give control of the family business to his son who he has been grooming as

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his successor for many years. He receives advice that the way to pass control of the trust to his son is to simply transfer the shares in the trustee company to him, which he does. The patriarch then prepares a Will gifting all of his personal assets to his daughter (the wisdom being the trust which owns the business and his personal assets are of roughly of equal value).

The patriarch dies and the solicitor handling the estate reads the trust deed which provides that on the death of the patriarch, control of the trust can be passed by deed or via the will of the original appointor (the patriarch). Because the patriarch (mistakenly) believed he had already passed control of the trust (and business) to his son, he did not make any provision in his Will or in a separate deed to pass control of the trust to his son. Worse still, because the daughter is the sole beneficiary of the estate, she is also named as sole executor of the Will. The result is that the daughter inherits the control of the trust and all of her father's personal fortune. Her brother is left with nothing and is dependant on the good grace of his sister to carry out their father's wishes.

The point is that it is imperative that the terms of the trust deed are reviewed as part of the estate planning process to ensure the control of the trust passes to the intended successor.

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How to handle multiple successors?

In cases where a testator wants more than one person to benefit from the discretionary (or family) trust, the issue becomes how to effectively share control between successors.

This is particularly relevant in cases where control is being passed to children who have different views on how the trust should be run and the trust assets managed. Often it is valuable for the trust deed to include dispute resolution provisions which provide a mechanism for resolving disputes between trustees and appointors to be resolved out of court. However, this is not the only solution.

Example

Bob is a widower who has two children, Amy and Sam, who live in different countries and have a somewhat strained relationship. Bob is reviewing his estate plan and wants to treat both Amy and Sam equally and has made the appropriate arrangements under his Will. However, a substantial amount of Bob's wealth is held in his family trust, of which he is the sole appointor.

Possible solutions are as follows:

1. The existing trust could be split immediately into two identical trusts. Half the assets of the original trust could then be transferred to the new trust so both trusts were of equal value. It may be possible in certain circumstances to transfer these assets without any capital gains tax consequences and in some jurisdictions, without incurring any stamp duty. Bob can continue to control both trusts during his lifetime and on his death, he can pass control of one trust to Amy and the other to Sam. This removes the need for them to manage assets together.
2. Bob could direct the trust be wound up on his death with the assets to be distributed to his estate or equally between Amy and Sam. This is likely to trigger capital gains tax and stamp duty consequences.
3. Bob could nominate Amy and Sam as joint appointors of the trust on his death. However, if he were to do this, then he should make sure the trust deed includes comprehensive dispute resolution provisions to limit the potential for litigation between the appointors in the future. Bob might also consider nominating an independent person (e.g. a trusted adviser) as a third appointor to provide expert advice to Amy and Sam and also to encourage Amy and Sam to work together in managing the trust.

For more information in relation to estate planning for private clients, then please call Sean McMahon or Jane McMahon on 07 3931 8999.

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Author profile

Jane McMahon is Senior Associate with McMahon Clarke Legal. Her expertise is in wills, estate planning and succession law. In 2007, Jane was one of only five solicitors to be appointed an Accredited Specialist in Succession Law by the Queensland Law Society. A regular contributor to the Retirement and Estate Planning Bulletin and key note speaker at events for accountants and advisory groups addressing topical issues on estate planning and business succession planning.

Family Business State Awards wrap up

BDO Kendalls is proud to support the Family Business Australia State Awards which were held throughout the month of May around the nation. Family businesses play an important part of our community, with more than three quarters of family businesses in Australia being family-owned.

The awards recognise family businesses' hard work and dedication and provided an opportunity for family businesses to showcase inspirational stories about their contribution to the community.

The Family Business Awards were judged in accordance to length of time the businesses had been operating, with first, second, third and fourth generation categories, with additional awards being presented in some State's such as the Jason Lee (for Entrepreneurship), Growth and Sustained Growth Awards.

The below table provides a summary of the State winners of the Family Business Awards.

CATEGORY	QLD	NSW/ACT	WA	VIC	SA	TAS
1st Gen	Pronamics Pty Ltd	Easycare Landscapes (ACT)	Globetrotter Corporate Travel	Pantalica Cheese Company	Delta Environmental Consulting	Bruny Island Charters
2nd Gen	Schulte's Meat Tavern	Southern Engineering Services (NSW)	Sebastian Butchers	Cutri Fruit	Adam Internet	Petuna Seafoods
3rd Gen	Porters Plainland Hotel	Sharpe Bros. (NSW)	Kuyan Apiaries	David Shave Human Resources		
4th Gen	Hawkins Family Group	Akubra Hats (NSW)		Murphy's Transport Solutions	Oliver's Taranga Vineyards	
Jason Lea Award			Sebastian Caltanisetta, Sebastian Butchers			Robert Pennicott, Bruny Island Charters
Growth Award		Swish Events (NSW)	Australian Timber Products			Entrepreneurial Award - Robert Pennicott
Sustained Growth Award		Hills Transport (NSW)				



Mauri Mucciacciaro of BDO Kendalls (WA) presenting BDO Kendalls Growth Award to Michael Rowney of Australian Timber Products.



Succession planning

Question

Our family is involved in a very successful business that was established by my parents some 15 years ago. I have two brothers and one sister but our parents who have provided the drive and direction for the business are losing their enthusiasm. They are not sure whether to sell the business or pass it to their children.

Answer

There are two key issues that your parents must address before they can decide on what to do with the business. Firstly, without doing anything, do they have the financial resources to enable them to live the quality of life they have become accustomed to living? Secondly, if they sell or transfer the business in succession, what roles, if any, are they going to play? Generally, these two questions take a great deal of time to resolve and must not be taken lightly. Once they have concluded their own desires they can then address the other key issue ie sell the business and/or work out an Ownership and Management Succession Plan.

Clearly, succession is a significant process and will not be resolved quickly. Part of the answer will be provided when they have resolved their needs – both financial and personal. As in most cases, the business comprises a significant part of their wealth then it is important that they optimise their value for it. Therefore a trade sale may be their best option. On the other hand, if they have evaluated their range of candidates for Management Succession including family members and they can see potential, then they need to determine the length of the transition period and nominate who their Successor/Successors will be.

Ownership Succession may take a little more time but control will be important whilst they are gauging the effectiveness of their Succession Plan. They may agree to sell small tranches of equity to family members at full value to ensure the commitment of those interested family members. Communication will be important and, finally, a Succession Plan will need to be documented and implemented.

We want to hear from you

Your feedback is important to us. If there are any topics or issues that you would like addressed in Family Business News, please send your request through to marina.skinner@bdo.com.au

Diary dates

MBA of the street - 18th June 2008 (NSW)

Family Business matters series - 19th June 2008 (VIC)

Maximising Federal Government R&D export concession
- 11th July 2008 (QLD)

Tips from the experts - 29th July 2008 (ACT)

NAB Economic Outlook - 7th August 2008 (QLD)

FBA national conference & gala awards
- 7th, 8th & 9th August 2008 (Cairns)

7 deadly sins of marketing a family business - 15th September 2008 (SA)

Please contact your state representative for more information on 1300 138 991

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