

How do I transfer control of my family company?

Estate Planning Client Guide

If you hold assets in a family company, or operate a business through a family company, have you thought about what will happen to the company in the event of your death?

A family company can continue to operate well beyond your death. The assets in the company are not part of your estate, but your Will should direct who will inherit your shares in the company, as this may affect how the company is controlled after your death.

A separate legal entity

A variety of ownership structures can be used by a person during their lifetime to assist with protection of assets, tax effective distribution of income and transfer of control of assets. Family businesses are often operated through a private company structure in which the shares are issued to family members and the office holders are family members.

It is important to remember that a family company is a legal entity separate to its shareholders. Although the issued shares in the company are owned by the shareholders, they do not own any of the assets held by the company.

As a shareholder in your family company, this means that the company's assets do not form part of your estate and cannot be left in your Will.

When determining how you will transfer control of your family company in your estate, you need to take into account how a private company is structured and governed. These matters are established by the company's constitution (also known as memorandum and articles of association) when the company is incorporated, but the constitution may have been amended since incorporation by special resolutions of the shareholders.

Issued shares

A company can have several classes of shares on issue. The classes of shares may carry different voting rights and different rights to receive dividends and participate in the liquidation of the company.

Shares in a family company may generally be left to beneficiaries in your Will. When planning how your estate will be distributed, you need to consider who will gain control of the family company upon your death, either by becoming the majority shareholder or through ownership of a class of shares with additional voting rights.

However, you should also be aware of any rules in the company's constitution regarding the transfer of shares. If there is a conflict between your Will and the company's constitution, the constitution will prevail. For example, the constitution of your family company could give the surviving shareholders the right to purchase the shares of a deceased shareholder. In this case, the constitution will override a direction in your Will as to the beneficiary of your shares.



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Company officers

The directors and secretary of a company are its officers. They need not be shareholders of the company. Directors are responsible for managing the company and the secretary keeps the company's records and arranges meetings. Many companies have at least two directors and one secretary, but single director companies are also common.

As company officers are appointed by shareholders, a shareholder who has a majority of the votes has ultimate control over the appointment of those who run and manage the company. When planning your estate, you should ensure that the beneficiary of a controlling stake in your family company is someone you trust to make appropriate appointments.

Loans

During the operation of a family company, you may have deposited personal funds into it, creating a loan from you to the company. Loans may also exist between the company and its shareholders if dividends have been allocated to shareholders but have not been paid by the company.

Although the assets of your family company do not form part of your estate, loans by you to the company are an asset of your estate. When your Will is prepared, care must be taken ensure that your death will not create a sudden need for the company to sell significant assets in order to repay the loan to your estate.

If you have withdrawn funds from a family company as a loan, this will be a liability of your estate and will be repaid to the company following your death.

Would you like further information?

For further information please contact your AET Estate Planner on 1800 882 218.

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