

Protecting your assets

How to develop a comprehensive and coordinated estate plan **Interviewed by Sue Ostrowski**

You've worked hard to build your business, making sacrifices to create a successful enterprise. But what's going to happen to it and all the assets you've worked so hard for after you're gone?

While business owners focus on the day-to-day tasks of running their companies, many fail to plan for the future of the business, says Loma L. Swett, a partner in Stark & Knoll's Estate Planning & Probate Group.

"You've spent a considerable amount of time building a successful business, and you need to ensure that when you're no longer able to run your business that there is a plan in place to effectively help the business and your loved ones," says Swett. "Having a will is not enough; you need to have an estate plan in place and to coordinate your assets so the business can continue into the future."

Smart Business spoke with Swett about how to develop a comprehensive and coordinated estate plan.

What happens if a business owner dies or becomes disabled, and there is no estate plan?

Consequences range from potentially paying estate taxes that wouldn't have had to be paid with proper planning, to your heirs being forced to sell your business.

For example, there was a gentleman in his fifties who was the sole owner of a company. One morning he didn't wake up. His estate plan consisted of a simple will. As a result, the business went through a probate court administration process, its value was available for the public to learn and the business had to be sold at a dramatically reduced value. Upon his spouse's death, there will be estate taxes due that, with planning, could have been avoided.

In addition, those surviving you don't know if you intended for your spouse to take everything, including your business interest. Maybe you have a business partner you wanted to pass your business interest on to, but that won't happen without at a minimum a will, or, better yet, a buy-sell agreement to the partner or setting up an automatic redemption of your interest back to the company.

Also, what happens if you become disabled, or lose mental or physical capacity? What happens to the business if there is no financial power of attorney in place and no advanced directives for someone to help with financial and health care decisions for you? It leaves everyone at a tremendous disadvantage during an already stressful time.



Loma L. Swett

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How can a will and other estate planning documents help preserve your business?

In addition to a buy-sell, there are things you can do through estate planning, such as gifting, setting up a trust with transfer of assets over time or at your passing, or entering into a close corporation agreement so that when you are gone other co-owners of the business don't have to rely on your family members, who don't understand the business.

A will is only effective for assets that are in the individual's name exclusively. The above-mentioned contractual arrangements or beneficiary designations and accounts held jointly with right of survivorship override a will and bypass the probate process.

A will only controls those assets that go through probate court. And through probate, the value of those assets are open to the general public in an inventory that must be filed and an accounting, which will give a prospective purchaser information of the ongoing viability of the business. Those are things that can be avoided with proper estate planning.

What steps can a business owner take to preserve wealth for heirs, or begin to transfer the business?

Taxes will have to be paid if they are due, but there are ways to reduce estate taxes.

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There are ways to transfer assets during your lifetime, outright or in trust, that are below the threshold of having to pay tax now. There is also the possibility of taking advantage of any discounted valuation of the business available with appropriate planning.

If you don't have assets that are liquid and have no estate plan, an heir may have to sell your business to pay estate taxes. However, if you are insurable you can have insurance purchased in an irrevocable life insurance trust and the proceeds will be outside of your estate for tax purposes. That provides liquidity for your heirs if estate taxes are due.

As mentioned above, to begin transitioning the business, you can enter into a close corporation agreement between you, as the controlling owner, and someone who is not. It's a transfer of the business, but with restrictions on some things that can't occur without the consent of all parties, guarding against future uncertainty. For example, if you transfer the business directly to your son, he could then sell the company without your consent. A close corporation agreement can be drafted to prevent that from happening. This protects the owner, who has always had an income stream from the business and wants to ensure that the income continues into the future.

It's one way to transition the business effectively, without animosity or the need for an adversarial setting.

Can a business owner develop a plan on his or her own?

I would strongly advise someone to consult with an expert to gain an understanding of the things that need to be addressed, as opposed to simply going online and filling out a will.

In an initial meeting with an estate planning attorney, he or she will review your assets and listen to your intent, not only for your family members but for your business interests as well. Ideally, that person will also work with your CPA or broker, creating a team to assist you with a comprehensive plan of what you want to happen. Be prepared to discuss your concerns, how you see the business operating without you and what you want to pass on to your family members in light of the time and energy you've put into the business.

Once the plan is in place, it should be reviewed every few years to see if your intent or assets have changed and if you need to make revisions. <<

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