Wills and estate planning in private wine and vineyard enterprises

MANY WINERIES are small family-owned and closely held businesses. Several generations may be involved in the running and financing of the winery.

This kind of structure raises many issues concerning business succession and transfer of ownership that necessarily involve a number of interrelated estate planning issues.

LEGAL ASPECTS OF BUSINESS SUCCESSION

There are many legal ramifications of passing along a family-owned winery or vineyard. The most important to consider are the taxation consequences.

Commonwealth and state taxes:

- Capital gains tax consequences and exceptions;
- Stamp duty on transfer of assets; and
- Gift duty.

BUSINESS RAMIFICATIONS OF TRANSFERRING YOUR WINERY

Many wineries are family-owned businesses that involve many different people.

An extremely important part of business succession planning is determining how to keep all of the key players, family members and non-family members alike, happy and working.

As a winery owner, you must consider several ownership and compensation aspects before attempting to plan for your business succession.

TWO WAYS TO PASS ON YOUR BUSINESS

There are really two ways to pass your business to your family:

- First, it may be done as an *inter vivos* transfer (between living people). This means that your successor would take control during your lifetime;
- If this is your choice, you must consider how much you want to participate in the business after the transfer, if at all;
- You should also consider how financing would be affected by this kind of transfer; or
- Alternatively, you could arrange for the business to transfer after your death; and
- If you pass the business when you are no longer alive, you must consider how prepared your successor is to continue the business without your help.

> One of the most important issues in business succession planning is your family and their feelings. You will have a more successful plan if the family and key players are involved in as many aspects of the planning as possible.

OWNERSHIP

Many people involve their children or other family members in the business.

If this is true for your situation, you must consider who will take over the winery when it is passed down:

- Do you want your children to own and operate the winery?
- The choice of how you set up the business could be very important. In some forms, the winery will not continue in operation at the death of the founder;
- Are some of your children more involved in the business than others?
- If so, should they all share equally or do you wish to compensate the other children in other ways?
- This is very important for both a 'during lifetime' transfer and a bequest under your will, because there are issues of family and fairness;
- You may wish, if feasible, to leave some of the children an alternative bequest from a will or a trust, instead of stock or shares in the business;
- Do you have key employees who are non-family members?
- If so, how do you plan to keep them happy after the business has changed hands?
- This is extremely important if the business will be passed at your death;
- Do you wish to leave them a cash bequest in a will or from a trust?
- Do you want to make them partial or total owners of the business? This could be done by a stock bonus arrangement, a buy-sell agreement, or by gift; and
- This may keep the winery functioning if your family is not interested in taking over.

FAMILY INVOLVEMENT

One of the most important issues in business succession planning is your family and their feelings.

You will have a more successful plan if the family and key players are involved in as many aspects of the planning as possible:

- Consider family investors and possible desires to sell out or gift shares back into the business;
- It is important for them to know and understand what will happen when the business passes;
- If a family investor wishes to give up part of the business, he or she should consider making lifetime gifts and bequests in a will or from a trust to avoid taxes;
- Consider your children. Do they wish to continue the winery? Do they

need more liquid assets to continue operations?

- You may want to utilise a life insurance policy to ensure that your successors have enough cash to keep the winery functioning and meet estate tax obligations; and
- If you plan an inter vivos transfer you will also need to consider sources of funding.

INTESTATE SUCCESSION (NO WILL OR PLAN)

Without business succession planning, and estate planning in general, your estate will pass according to the rules of intestate succession.

This could lead to unexpected and disastrous results:

- If you are survived by both a spouse and descendants, the spouse receives all of your property;
- If there are surviving children but no spouse, the children will equally share the funds;
- If there are no surviving children or a surviving spouse, the property will go first to surviving parents, or if none, to their descendants;
- If there is no family, all property will go to the state (after payment of any creditors); and
- You should be aware that this could well lead to the liquidation of the winery.

BUSINESS SECESSION PLANNING – A CHECKLIST

1. Buy/Sell Agreements

i. Maintains control and ownership and orderly liquidation mechanism upon agreement of shareholders;
ii. Sets expectations of shareholders;
iii. Events causing sale of shares and transfer of control:
- Disability;
- Retirement;
- Other.

iv. Funding of shareholder or company payment obligations;
v. Mandatory or optional purchase.
vi. Valuation mechanism;
vii. Other provisions.

2. Reconsider Entity Structure

i. Taxes in connection with transfer of ownership;
ii. Recapitalisation or restructure of ownership interests;
iii. Reorganise management.

3. Retention of Key Employee

i. Management buyout or equity compensation to non-owner or minority-owner management;
ii. Incentives.

4. Considerations for Sale to Unrelated Buyer

i. Existing management does not want to take over winery after founders retire;
ii. Children of founders are not interested in assuming ownership or management of the company;
iii. Evaluation continued viability of the business in anticipation of founders' retirement.

GET LEGAL ADVICE

This is a complicated topic requiring proper advice and careful deliberation.

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