



WHAT UNIQUE CONSIDERATIONS APPLY TO A TRUST THAT WILL HOLD AN INTEREST IN A FAMILY COMPANY?

The primary concern of most business owners gifting an interest in a family company into a trust is the identity of the Trustee who will exercise voting control over the shares owned by the trust. Obviously, the owner can appoint the Trustee who will exercise control over all of the trust activity, but it is sometimes difficult to find one individual who is the right person to exercise voting power with respect to the family company, manage other trust investments, communicate with family members concerning distribution decisions and ensure that the trust files income tax returns and keeps clear records. One option that appeals to many business owners is to divide the Trustee role into three distinct categories to address the different skill-sets required to handle these different responsibilities. An Investment Trustee can be responsible for managing the trust assets, which would include exercising voting power associated with the family company. A Distribution Trustee will track the circumstances of the trust beneficiaries and exercise discretion concerning distributions. Finally, an Administrative Trustee will retain trust records, ensure that the trust files income tax returns and attend to other ministerial functions.

This division of labor between different Trustee roles corresponds with another objective of many business owners who transfer an interest in a family company into a trust: asset protection planning. The complete discretion of the Trustee of a trust over distributions to trust beneficiaries makes a trust structured in that manner an unattractive target for a claim by a divorcing spouse or other creditor. This layer of protection can be further enhanced by establishing the trust in a jurisdiction which has a favorable statutory framework for asset protection planning. Appointing an Administrative Trustee based in a jurisdiction with a desirable asset protection regime is a common manner in which to gain access to additional protection from claims against family members.