



DRAFTING TIPS FOR WILLS THAT INCLUDE AN OPTION TO PURCHASE CLAUSE

By Suzana Popovic-Montag - July 2024

When assisting clients who own a business, it is important for estate planning documents to address how that business will be handled after the client dies. In an ideal world, the client will have an opportunity to retire; however, in case the client dies unexpectedly, before a succession plan has been created for the business, let alone executed, it is advisable to include the client's instructions for their business in their will.

An option to purchase is a type of will clause that a client can use to provide a specific beneficiary or beneficiaries an option to purchase the client's business or business assets. In addition to specifying *who* may purchase the deceased's business, an option to purchase clause may also include terms for the sale, including the sale price.

It is important to draft an option to purchase will clause with care, to minimize the risk of future estate litigation. Not only is it possible for other beneficiaries to challenge an option to purchase under a will, but depending on how the clause is drafted, it may also be necessary to seek the court's advice regarding the interpretation of the clause. The following tips could prove helpful for minimizing future court involvement.

Tip 1: If possible, do not refer to how a business is currently being operated.

If the will clause references how the business currently operates, it could be argued that the option to purchase is conditional on the business being carried on the same way after the testator dies and conversely, is no longer effective if the business operates differently at the time of death. For example, in *VanSickle Estate v VanSickle*,¹ the deceased's will directed that "the farming business carried on by me" be sold to one of her sons. Litigation followed as to whether the clause was effective, as the deceased was renting out the farmland when she passed away and was not farming it herself. On appeal, the court concluded that the clause was effective. However, had the will simply included an option to purchase the farmland and farm equipment, without referencing the deceased's farming business, the litigation in this case may have been avoided.

Tip 2: Be mindful of the business' market value if the clause includes a purchase price.

If the client's will includes an option to purchase clause that permits the deceased's business or a business asset to be sold for a price much lower than the asset's current market value, other beneficiaries may be more inclined to challenge the clause. For example, in *VanSickle Estate*, the purchase price for the deceased's farmland was significantly lower than the current market

¹ 2022 ONCA 643, rev'g *Fletcher and Vansickle v Vansickle*, 2021 ONSC 5665; leave to appeal refused *Joan Pizzey, et al. v Howard Vansickle, et al.*, 2023 CanLII 24515.

value of the land. Had the option to purchase clause been ineffective, the other beneficiaries of the estate would have received more funds from the sale of the business. With this in mind, it may be advisable to use a formula to set the purchase price, rather than specifying the price in the will, to ensure that the sale price can fluctuate in accordance with changes in the market value of the business or business asset.

Tip 3: Consult a professional when creating a formula to set the purchase price.

If the client wishes to include a formula for determining the sale price in an option to purchase clause, it would be wise to consult with a financial professional who specializes in business valuations before the clause is finalized, to ensure that the formula is clear. Otherwise, if part of the formula is unclear, making it possible to calculate more than one purchase price, it may be necessary to seek direction from the court. In *Muchmaker Estate*,² for example, the parties proceeded to court for direction as to how to apply the formula included in the deceased's will, as the will used (without defining) the term "earnings" and it was unclear whether the earnings of the business were to be "normalized" when setting the purchase price. The parties' dispute over the price was considered to be *bona fide*, as three competent accountants/business valuers had arrived at three different figures for the purchase price using the same formula set out in the will.³

Summary

For clients disposing of a business under their will, an option to purchase clause can be an excellent tool for ensuring that the business ends up in good hands. To prevent such a clause from becoming the subject of litigation or a court application, however, it could be handy to keep the following suggestions in mind:

1. When drafting an option to purchase clause for a business or business asset, do not refer to how the business is currently being operated unless the client only intends the bequest to be effective *if* the business is still being operated in the same manner at the time of death.
2. Ensure that the purchase price for the business correlates in some way with its fair market value. Otherwise, with the passage of time, the purchase price attached to an option to purchase may end up being far below the fair market value of the business, giving other disgruntled beneficiaries reason to challenge the clause.
3. If an option to purchase clause includes a formula for setting the purchase price, consult a professional business valuator or accountant to ensure that the formula is clear.

² 2019 ONSC 59, *aff'd Loran v Weissman*, 2019 ONCA 962.

³ *Ibid* at para. 21.