Article Information

Author: Donna Benge
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Preserving the fruits of business: sole directors & shareholders

The need for a Will and business succession planning, especially for those with complex business structures, has never been more important. Numerous complications can arise when a sole director and shareholder of a company dies, but particularly when the deceased dies intestate i.e. without a will.

- *Who can continue the day to day operation of the business?*
- *Who can pay creditors and employees' wages?*
- *What if there is a requirement for the company to have specific compliance obligations to operate or to satisfy service contracts?*

The latter example may include professional practices such as a sole practitioner law firm, a real estate agency who operates a trust account or a service provider to government that requires by regulation a qualified manager to operate in a particular sector, such as transport or construction.

If a deceased left a valid Will, it is generally clear who the executor is. The executor may, as the deceased's legal personal representative carry on these roles for the deceased, if the company constitution provides for it.

If a deceased dies intestate, no person has specific authority to act in place of the deceased, particularly to exercise any rights the deceased may have had to appoint a director to operate a company. That will be the case until such time as the court has issued an eligible person with a grant of letters of administration of the deceased's estate.

Locating the information required to apply for a grant of letters of administration may take many weeks or sometime months, and if so an urgent application to the Supreme Court may be required for a limited grant of letters of administration to protect the estate assets (a grant *ad colligenda bona defuncti*). Such a grant protects the estate or specific assets, where the delay in obtaining a common form grant may jeopardise the interest in or the value of the estate's assets. A limited grant can extend to any act which may include appointing a director to carry on the usual business of the company.

The leading authority in New South Wales on this issue is the case of *Re Estate of the Late Assim* [2015] NSWSC 337. In this case, the deceased was a sole signatory of a trust account for a real estate business. When Mr Assim died, there was no one else with authority to pay trust money due to his clients. Mr Assim's daughters applied to the court for an order authorising them to appoint a director of the company, who in turn could be added as the signatory to the company's trust account. At that time the daughters could not satisfy the regulatory requirements to operate a trust account of that nature but sought to appoint a third party who was. Mr Assim's daughters were successful in obtaining a order with very limited powers to appoint a director of the company and to protect the assets of the business, pending a full grant being made by the court.

Piper Alderman's Private Client Services Team has recently been required to apply this authority in an urgent application to the Supreme Court of NSW where a sole company shareholder and director unexpectedly died, and did so intestate.

These applications are inevitably costly to the estate and are extremely stressful for the deceased's loved ones as they are required to act urgently and often in difficult circumstances to protect valuable business interests and the company falling into rapid default of its obligations to stakeholders. It is important that sole directors/shareholders give priority to preparing and keeping their estate planning documents up to date to avoid these complications and manifold costs that far

exceed the preparation of a professionally drawn Will.

For additional information on our Wills & Estate Planning service, please click here.