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Estate Planning for the Family Business: The Non-Linear Approach

By
John W. Ambrecht, Esq.
California Trust and Estate Counselors, LLP
Santa Barbara, CA.
Ambrecht@taxlawsb.com
(805) 965-1329

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John W. Ambrecht, Esq.¹
California Trust and Estate Counselors, LLP
Santa Barbara, CA
Ambrecht@taxlawsb.com
(805) 965-1329

*“The problems we have created have been created
at a certain level of thinking, and can not be solved
at that thinking level that created them.”*

Albert Einstein

I. Introduction

Startlingly, statistics show that only 34% of family businesses will successfully pass to the second generation and only 13% of family businesses will successfully pass to the third generation². Therefore, the question must be asked, “why is this happening in a society with numerous lawyers, accountants and other professionals that specialize in estate planning?” Due to these statistics reflecting the shockingly poor success rate of family businesses passing to subsequent generations, perhaps the entire thinking process usually accepted by the estate planning community, as well as family business owners and potential family business owners, needs to move to a different level or paradigm as Einstein postulates, because these statistics are evidence that the past thinking processes simply have not worked.

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¹ The author would like to thank Dr. William D. G. Murray, Kevin Owen, Esq., Lorraine Clark, Esq., and Sandra Biesinger for their suggestions and help in preparing this paper.

² See John L. Ward, “*Keeping The Family Business Healthy*,” Jossey-Bass Inc., Publishers, (1987) at page 1.

Before suggesting an integrated way to analyze family businesses, the term “family businesses” needs to be defined. Family businesses can be defined “at the simplest level, as a pool of capital (usually, but not always, in the form of an operating, economic entity) that happens to be influenced/controlled, owned, and/or managed by: one or more members of a single family; one or more branches of an extended family, one or more unrelated families; and/or some combination thereof.”³ Family businesses can thus be defined to include jointly owned assets, such as real estate or other capital assets, even when active management is not required, or to include assets where simply different family members are required to share use and ownership, such as a family vacation house.

Different approaches to analyzing the succession are being developed in many new fields of study such as psychology and organization development. The estate planning professions of law and accounting, however, generally have not yet integrated the knowledge gained from these other fields into the more technically “tax driven” estate planning for family business that is typically utilized. Is it possible then to speculate that a share of the responsibility for the failure rate for the succession of family businesses must fall on the legal and accounting professions?

The purpose of this presentation is not to provide an analysis of the typical technical estate planning methods used to reduce estate and gift taxes such as efficient utilization of trusts, partnerships, insurance, etc., as those topics are in fact extensively and continually discussed in so many other journals, papers and treatises that the reader is referred to those sources for technical review.⁴

³ See “*Business Succession Planning and Beyond*,” by Dirk R. Dreux IV and Joe M. Goodman, Section of Real Property, Probate and Trust Law, American Bar Association 1997 at page 1.

⁴ See, for example, the annual seminar by the ABA Section of the Real Property, Probate and Trust Law Section of Taxation, “*Estate Planning for the Family Business Owner*.” Also see the many seminars sponsored by the California Continuing Education of the Bar (“CEB”) such as, “*Tax Planning for Family and Family Businesses*”, November/December 1985; or “*Planning for Succession in the Family Business*,” May/June 1995; or the presentations at the Philip E. Heckerling Institute on Estate Planning (hereinafter referred to as “Miami”) such as, “*Making Sure Your Transfer Tax Planning Doesn’t Create Income Tax Nightmares When You Sell the Family Business*” (Robinson, Miami, 2000), “*Fractionalized Equity Valuation Planning - An Egyptian Mortician’s Techniques for Preserving (Mummifying) Post-Mortem Valuation Discounts*” (Smith, Miami, 2000), “*Practical Aspects of Qualified Family Owned Business Interests*,” (Martin, Miami 2001); “*Estate Planning For The Family Business*” (Briskin, 26th Annual USC Probate and Trust Conference November 10, 2000).

Slide:

*Estate Planning for the Family Business:
The Non Linear Approach*

Only 34% of family businesses succeed to the second generation, and only 14% succeed to the third generation. Why?

Slide:

How do you plan for the succession of the family business?

II. Ferber v. American Lamp Corporation, 469 A.2d 1046 (Pa. 1983)

Slide:

*Ferber v. American Lamp Corporation
469 A.2d 1046 (Pa. 1983)*

Family Information:

- *First Generation: Benjamin and Bella Cohen*
- *Second Generation: Samuel(deceased), Harry, Isadore, Joseph, Annette.*

Slide:

Ferber v. American Lamp Corporation

Business Information:

- *American Lamp was a sole proprietorship*
- *It manufactured various lighting fixtures and sold them to various wholesale and retail stores.*
- *The company had a number of employees trusted by Benjamin.*

Slide:

Ferber v. American Lamp Corporation

Senior Generation Estate Planning Goals:

- *Benjamin also wanted to be sure that his wife, Bella, was taken care of.*
- *Harry and Isadore worked in the business, and Joseph was to join the business and help run it when he attained the age of majority.*
- *Benjamin wanted the boys to take over his business and run it when he died for as long as they wanted.*
- *Benjamin did not think that his daughter, Annette, could be in the business as she seemed interested in other things.*
- *Benjamin wanted to divide the estate, after the payments to Bella, equally among all of the children to avoid favoring any one child.*

Slide:

Ferber v. American Lamp Corporation

Final Directives to Estate Planning Attorney:

Benjamin:

“Keep the planning simple, straightforward, and as inexpensive as possible. In addition, it is vitally important that all of my children be treated equally.”

(See Rough Family Justice: Equity in Family Business Succession Planning, Ayres)

Slide:

Ferber v. American Lamp Corporation

Estate Planning Attorney’s Likely Response:

“Of course, simple documents that divide things equally are clearly the most straightforward approach, and they certainly do not need to be expensive.”

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(See Rough Family Justice: Equity in Family Business Succession Planning, Ayres Vol III, No. Spring 1990, Family Business Review)

Slide:

How would you proceed if you were the estate planning attorney for Benjamin and American Lamp?

Slide:

Ferber v. American Lamp Corporation

Will of Benjamin

“I order and direct that my present business shall be conducted by my executors, hereinafter named, their survivors or successors, and that the management and control of said business shall be under their supervision and management. I further direct that my sons, Samuel and Joseph, ...shall, if they so desire, ...manage and control the said business, it being my purpose and intention that after my decease, my sons shall carry on and conduct my business so long as they shall so elect. I direct that the profits of the business, after allowing for a sufficient working capital to carry on and maintain the purpose of the business, be divided in the following proportions:

One-third unto my beloved wife, Bella, and the balance thereof in equal shares among my children, Harry, Isadore, Joseph, and Annette.”

Slides:

Ferber v. American Lamp Corporation

What happened to the Cohen family and the estate plan?

- *Benjamin died a few years later.*
- *Harry, Isadore and Joseph took over the business.*
- *Over the years, the following occurred:*
 - *The boys incorporated the manufacturing arm American Lamp Corporation as a separate corporation.*
 - *The boys formed another corporation called Atlantic Industries, the sales arm of American Lamp.*

- *The boys ran both corporations as the officers and directors.*
- *Annette received shares in American Lamp Corporation not exactly proportionate to her ownership in the business prior to its incorporation and did not receive any shares in Atlantic Industries, Inc.*
- *Annette received dividends of \$13,553 from 1963 to 1979.*
- *The boys compensated themselves at least \$904,000 from 1963 to 1979.*

Slides:

Ferber v. American Lamp Corporation

The Court actions:

- *Annette sued the boys 16 years later in the Court of Common Pleas seeking an accounting for distributed and undistributed net income, payment of dividends, and her share of the profits under her father's will.*
- *The Court of Common Pleas awarded to Annette "\$370,000 under her father's will as her share of the profits from the family business, plus \$133,175.48 in interest."*
- *The boys appealed the Common Court's decision to the Superior Court. The Superior Court affirmed the Common Court's decision.*
- *The boys appealed the Superior Court's decision to the Supreme Court of Pennsylvania. The Supreme Court affirmed the Common Court.*

Slide:

Ferber v. American Lamp Corporation

The Supreme Court of Pennsylvania stated:

- *"(T)he trial court's perception that (Annette) has been shabbily, even shamefully treated by her brothers during the sixteen year*

period cannot be disputed...”

- *“(W)e are in full accord with the trial court’s observation that Harry, Isadore and Joseph..., while providing for themselves what may be termed luxurious compensation, have for all practical purposes, disregarded their father’s wish that their sister be provided for in some significant way from the profits of the family business.”*

III. Family Issues Are As Important As Tax Issues In Successful Family Business Estate Planning

Slide:

Reasons For Family Business Failures After the Death of the Owner

In a 1996 study of 749 family business failures in the eyes of the heirs, researchers found in general that of the top 10 reasons for failure:

- *4 were that the capital needs for death taxes and running the company were not met.*
- *3 reasons dealt with conflict among family, and non-family employees in the business.*
- *2 were that inadequate management succession planning was done, and*
- *1 was because of inadequate estate planning.*

(See, Attributes for Family Business Failure: The Heir’s Perspective, File adele., Family Business Review, IX (1996))

Slide:

In the Arthur Anderson/MassMutual American Family Business Survey ‘97, after surveying over 3,000 family businesses, the authors concluded that:

“The survey data and our experience tell us, while estate taxes are indeed burdensome, lack of planning can significantly affect whether a family business passes smoothly into a new generation. Estate plans are as critical as business plans and should be regarded as ‘living documents’ to be updated frequently.”

IV. Integrating Family Issues with Tax Issues in the Estate Planning Process: One Approach

Slide:

Family business succession planning is a complicated process that involves both family issues and tax driven solutions.

Slide:

We will briefly explore one approach to integrating the family issues with the tax driven planning solutions, and then we will apply what we learned to the Ferber case.

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Selected Definitions:

1. Family Business

- *A pool of capital (not always an operating entity but may include any passive, jointly owned assets like real estate) influenced, owned, controlled, and/or managed by some family combination.*

(See, Business Succession Planning and Beyond, Dreux. et. al., Section of Real Property, Probate and Trust Law, American Bar Association, 1997)

Slide:

2. Family System

- *A family system consists of a set of complex interpersonal relationships by and between each of the individual members of a family in such a way that each member of the family impacts the others.*
- *Frequently, family interaction will be linear in its predictability, or more frequently, family interaction will be complex, nonlinear, chaotic and not predictable.*

In other words, an individual family member's behavior may appear random and uncontrolled, but it can be understood in terms of the underlying structures and complex family systems of which he or she is a part.

Slide:

3. *The Three-Circle Model for Family Businesses: Clarify the Boundaries*

- *The family system in a family business can be divided into three overlapping subsystems: the family, the business, and ownership subsystems.*
- *Each subsystem has its own goals, objectives and structures that may conflict and change over time.*
- *Boundaries between the three subsystems should be clear and respected as part of the complex family system in the family business.*

(See, Generation to Generation, Life Cycles of the Family Business, Gersick, et. al., Harvard Business School (1997))

Slide:

Role differentiation in the family business

The Family Role

Traits:
Emotional focus
Inward orientation
Unconditional acceptance
Little change

Tasks:
To nurture
To develop self esteem

The Business Role

Traits:
Fact focus
Outward orientation
Conditional acceptance
Much change

Tasks:
To generate profits

The Ownership Role

Traits:
Concern for ROI
Transfer strategies
Taxes
Estate allocation

Slides:

Family Business Communication Rules

The following is a proposed set of ground rules for communications at all family business meetings. Recall that this meeting is a business meeting and the role of all participants is that of a business person! Please feel free to change any rule or add additional rules if you would like.

I. *Communication Ground Rules for Family Business Meetings:*

1. *Listen respectfully and don't interrupt.* (Consider utilizing active listening skills by asking the listener to repeat what you just said if you feel that it is important for you to be heard, or summarize the other person's comments if you want to make the other person feel heard.).
2. *Focus on issues, not people or personalities.*
3. *Create an opportunity at each meeting for all attending family members to address each other as peers* (Use business titles and/or first names.).
4. *It is "ok" to disagree with other family members* (Debate usually leads to better business decisions!).
5. *Offer feedback with consideration and kindness and avoid making attacks. Use language to disagree that does not cause a defensive reaction.* (e.g. *I have another view. Or, tell me more about what concerns you.*)
6. *Use "I" statements not "you" statements.*
7. *Assign a "Referee" or Time-Keeper for particularly emotionally charged discussions.*
8. *No one is always right in everything he or she suggests.*
9. *Resolution of controversies is a "give and take" process in search for the "win-win" solution. Find a middle ground that meets each person's minimum requirement for a tolerable solution (a "compromise" approach), or better yet, try to find a solution that will satisfy everyone's needs (a "collaborative approach) (e.g., How can we work it out so that your needs and my needs can both be met? Or, what will it take.....(to get the results)?*
10. *Confidentiality is important to build trust in the family* (e.g. *Ask the person for permission to share before sharing with others*).
11. *Respect each person's gifts and utilize them for the best benefit of the business* (e.g. the "zig-zag" decision model).
12. *Other family suggestions to achieve good communications:*

II. *Upon execution of this document, the undersigned hereby agree to abide by the above ground rules for communication at all family business meetings.*

(Signatures of Family Members)

Slide:

Why Business Communication Rules are Necessary for Families

“If you have family members in your business, it is likely that certain rules they have learned in the family as a child have carried over into the business. These rules may guide their day-to-day behavior. You may never have made a clear distinction when they entered the business that the business rules and family rules differ.

What is appropriate or tolerated at home may be inappropriate and cannot be allowed in the business environment.

Understanding these differences is important in heading off potential conflicts that may be hidden beneath the surface of relationships.”

(See, Passing the Torch, Mike Cohn, R.R. Donnelley & Sons Company (1992))

Slide:

4. *Trust*

- *An important condition underlying all family communications is that the family members trust each other.*
- *Without trust, communications can not really be effective.*
- *If trust between family members does not exist, that is the first step that must be accomplished before communications can be improved.*

(See, For Love & Money, Roy O. Williams, Monterey Pacific Publishing (1997))

Slide:

5. *Resistance*

- *Resistance is avoiding what you don't want which is as good as getting what you do want.*
- *Resistance to change is a part of human nature.*
- *All changes face resistance.*
- *People do not resist change, they resist pain.*

(See, The Change Leader Using A Gestalt Approach with Work Groups, H.B.Karp, Jossey-Bass Pfeiffer (1996))

Slide:

Resistance and Risk: A Direct Relationship

- *People will gladly take on new challenges that are risky but have a reasonable chance for success (lower resistance).*
- *As risk of failure increases, resistance will increase at about the same rate (higher resistance).*

(See, The Change Leader, Karp)

Slides:

Practical Aspects of Understanding Resistance: If the Planning Stalls

- *Understand that resistance is at work.*
- *Surface the resistance by making it safe and ask for all of the reasons it exists!*
- *Honor the resistance by listening, acknowledge that it is important, and reinforce the right to resist.*
- *Explore the type of resistance:*
 - *Is it focused on blocking or stopping the change?*
 - *Strategy: More discussion of the proposed estate plan is necessary by probing.*
 - *Is it pseudo resistance which has nothing to do with the estate plan but may be ground in the resistor's past (e.g., loss of control, loss of identity, fear of death, not getting the recognition that he or she feels deserved)?*

- *Strategy: Ask what would you prefer? Do not ask “Why” he or she resists as that will drive the resistance underground.*

(See, The Change Leader, Karp)

Slide:

Law of Family Involvement In Estate Planning

- *The more you can involve the family in the change process, the higher the probability that failure can be avoided.*

For example, consider writing each family member asking about his or her view of the family business in the future, whether the business should be kept or sold, if kept, the future of the business, and what role he or she would like to play in the business, etc.

In other words, if resistance can be reduced to a reasonable level and there is a reasonable level of trust, the family members will tell you what they want.

(See generally, The Change Leader, Karp)

Slides:

What are the implications at the cross-over point when power and age in the first generation becomes secondary to the power and age of the second generation?

- *Generally, a serious transition time for the family and the family business.*
- *Conflict both overt and underlying may occur between the senior generations difficulty in leaving, and the younger generations difficulty in waiting.*
- *Many family businesses fail because of the inability of the senior generation to negotiate the transition.*
- *Senior generation must deal with denial, despair, fear of losing heroic stature and heroic mission or specialness that comes with the idea of power.*

(See generally, Generation to Generation, Life Cycles of the Family Business, Gearstick, et. al.)

Slide:

Ethical Issues: Who is the client?

- *The senior generation is usually the only client (fee agreement, husband and wife conflict waiver).*
- *Notify other family members that senior generation is the only client.*
- *Obtain confidential information waivers from clients to talk to other family members, professionals, etc.*

(See generally, ACTED Rules of Professional Conduct, Rules 1.6 (Confidentiality) and 1.7(conflicts of interest), and see, California Rules of Professional Conduct, Rule 3-310 (representation of adverse interests))

V. The Client, the Family and the Estate Planner’s Lens: The Implications in the Planning Process

Slide:

A team is “an interdependent grouping of individuals organized around a process, each performing a critical function required for process success.”

(See Henry L. Thompson, High Performing Systems, Inc)

Slide:

What basic assumption does industry and government use to build better teams?

- *“Communication skills are the key relationship-building behaviors that people need to develop and utilize with their teammates.”*

(Tools for Team Excellence, Huszczo)

Why not use industry team concepts for family businesses because at some point the family will be “more or less” operating as a team?.

Slides:

A Statistically Validated Communication Tool

- *Is there a particular tool that industry (e.g., IBM) and government (e.g., Navy, FAA) use to help with communications and team building?*
- *Over 10,000,000+ have used the tool over the last 40 years or so.*
- *Over 1,000,000 new people per year use the tool.*
- *The basic theory upon which the tool is based has been extensively researched to prove its reliability, validity, and psychometric soundness.*
- *The tool works!*
- *What is the tool: The Myers-Briggs Type Indicator (R) (MBTI(R))*

Slide:

C.G. Jung's theory of personality basically holds that,

“The essence of the theory is that much seemingly random variation in behavior is actually quite orderly and consistent, being due to basic differences in the way individuals prefer to use their perception and judgment.”

“If people differ systematically in what they perceived and in how they reach conclusions, then it is only reasonable for them to differ correspondingly in their behavior.”

(See the MBTI (R) Manual, Third Edition)

Slide:

In other words, if you know the way a person perceives information and the way the person comes to conclusions, it is possible to predict that person's behavior through his or her Type.

Slide:

A basic rule of Type:

No one Type is better than any other Type.

(Gifts Differing, Isabel Myers)

Slide:

Finding the facts using the perception functions:

- *“Perception involves all the ways of becoming aware of things, people, happenings, or ideas.”
(See the MBTI (R) Manual, Third Edition)*
- *There are two ways people gather facts: the “S” or “N” functions. What are you?*

Slide:

Write your name on a piece of paper, using your other hand! What did you learn?

Slide:

You can do both, but which do you prefer?

S Preferences

*Presents info step by step
Attends to what is said or done
Wants concrete examples
Wants practical information
Wants brief responses
Goes to the bottom line
Gets right to the point
Likes action*

N Preferences

*Wants the big picture
Reads between the lines
Likes abstraction & symbols
Focuses on concepts
Likes to see patterns
Likes variety and challenge
Dislikes detail
Can be easily distracted*

(See Dick Thompson, High Performance Systems)

Slide:

Coming to conclusions using the judging functions:

- *Judgment involves all of the ways of coming to conclusions about what has been perceived.
(See the MBTI (R) Manual, Third Edition)*

- *There are two ways people come to conclusions: the “T” or “F” functions. What are you?*

Slide:

You can do both, but which do you prefer?

T Preferences

*Presents information logically
Wants consistency & validity
Prefers principles & laws
Can be analytical & critical
Clarifies by questioning
Tends to be business like
Tends to be blunt
Likes the formal approach*

F Preferences

*Comments are taken personally
Likes to talk to people
Trusts and accepts people
Responds to human values
Tends to be warm and friendly
Might overreact to feelings
Has difficulty saying no
Needs to be treated personally*

(See Dick Thompson, High Performance Systems)

Slide:

The four attitudes

Where do you get your energy?

- *“E” (outward oriented) vs “I” (inward oriented)*

Where do you deal with the outer world?

- *“J” (scheduled and organized) vs “P” (spontaneous and casual)*

Slide:

Putting it all together: Functions and Attitudes

There are 16 Possible Types:

A Type Table

	<u><i>ST</i></u>	<u><i>SF</i></u>	<u><i>NF</i></u>	<u><i>NT</i></u>
<i>IJ/</i>	<i>ISTJ</i>	<i>ISFJ</i>	<i>INFJ</i>	<i>INTJ</i>

<i>IP/</i>	<i>ISTP</i>	<i>ISFP</i>	<i>INFP</i>	<i>INTP</i>
<i>EP/</i>	<i>ESTP</i>	<i>ESFP</i>	<i>ENFP</i>	<i>ENTP</i>
<i>EJ/</i>	<i>ESTJ</i>	<i>ESFJ</i>	<i>ENFJ</i>	<i>ENTJ</i>

(See illustration attached for general description of the behavior of each Type)

Slide:

Your Mind's Lens: How do communicate with and view the world? Dominant, auxiliary, tertiary, and inferior functions:

- *As a perceiver? If yes, which function? (S or N)*
- *As a judger? If yes, which function? (T or F)*

(Review Communication Preference Questionnaire (TM) results).

(See Dick Thompson, High Performance Systems)

Slide:

What about the "GRIP"? How does stress impact a person's Type? What does this mean for a family after a death?

(See illustration of the GRIP)

Slide:

The Concept of the Communication Wheel (R) as it applies to the Cohen family

(See Dick Thompson, High Performance Systems)

Slides:

What is the point?

- *Your client's Type and your Type influence the estate planning approach used by influencing how it is:*
 - *decided what the issues are.*
 - *decided the importance of the various issues.*
 - *decided which solutions to select.*

- *decided how much the decision impacts the family.*
- *decided how quickly the planning must be completed.*
- *etc.*
- *Because each Type has its gifts and its weak points, you may want to consider the opinions of other Types that supplement the weak points of the client and yourself in developing the estate plan.*
 - *For example, consider using the zig-zag model for decision making to utilize each person's gifts.*
- *Different Types may be a significant cause of family communication breakdowns.*
- *Understanding each other's Type will enhance communications by increasing empathy there, by increasing the chances that the succession process will be successful.*

VI. Building Structures for the Family Business

Slide:

A basic precept in family business estate planning: Structure

As stated by Gearstick, et. al, in the book, Generation to Generation:

“We have observed that even minor structural changes in ownership, whether triggered by the aging of family members or by strategic decisions, can have a powerful ripple effects though each of the three circles.”

Slide:

What are the three stages of ownership in a family business:

*Owner-Manager
Sibling Partnership
Cousin Consortium*

Slides:

What are the structural implications of each stage for a family business?

Ownership Stage

Level of Structure

Owner-Manager Little formal organization

*Sibling Partnerships Requires structures to account for the complexity of family issues (e.g., shared power, role of nonemployed owners, conflict resolution processes, shared control of differing family branches, new leader selection, planting vs harvesting issues). **Key Structures:** Board of directors with at least 2 outsiders, and buy-sell agreement with a put as an exit strategy.*

Slides:

What are the structural implications of each stage for a family business?

Ownership Stage

Level of Structure

*Cousin Consortium..... Considerable structures to account for less bonding between cousins than between siblings (e.g., buy-outs, professionalize management, mentoring, family council meetings, planting vs harvesting issues). **Key Structures:** Board with two outsiders, family council meetings, Buy-sell with puts for an exit strategy.*

Slide:

Structure allows business families to deal with typical family business issues in a disciplined and safe way.

TYPICAL FAMILY BUSINESS ISSUES

“Managing Succession

- *How to identify the next president?*
- *When does the presidential transition take place (timing)?*
- *How do the current CEO and successor share planning and decision-making responsibilities during the transition?*
- *How to evaluate the next president’s performance and plan for his or her replacement?*
- *What non-business interests will keep the senior generation fulfilled during retirement?*

(See Strategic Planning for the Family Business, Parallel Planning to Unify the Family and Business, by Carlock and Ward)

Slide:

Structure allows business families to deal with typical family business issues in a disciplined and safe way.

TYPICAL FAMILY BUSINESS ISSUES

Family Business Careers

- *How to decide which family members can join the family business?*
- *How to plan management development experiences?*
- *What preparation or experience, if any, is required?*
- *How to evaluate performance and reward achievement?*
- *What if a family employee does not perform?*
- *How to encourage the contributions of non-family employees?*
- *What if a family member chooses to leave the business?*
- *Whether to permit spouses, partners or other non-blood relatives to work full or part time in the business?*
- *Whether to allow the next generation’s children to enter the business? Under what circumstances?*

(See Strategic Planning for the Family Business, Parallel Planning to Unify the Family and Business, by Carlock and Ward)

Slide:

Structure allows business families to deal with typical family business issues in a disciplined and safe way.

TYPICAL FAMILY BUSINESS ISSUES

Compensation

- *How to evaluate and compensate family members?*
- *How are bonuses determined?*
- *Who participates in stock option programs?*

(See Strategic Planning for the Family Business, Parallel Planning to Unify the Family and Business, by Carlock and Ward)

Slide:

Structure allows business families to deal with typical family business issues in a disciplined and safe way.

TYPICAL FAMILY BUSINESS ISSUES

Ownership and Governance

- *How to assure the senior generation of financial security?*
- *Who can own stock in the business?*
- *What returns and rewards do shareholders get?*
- *Whether to pay dividends?*
- *How to redeem stock to provide liquidity for shareholders?*
- *Does all stock have the same voting rights?*
- *How are members of the board of directors selected?*

(See Strategic Planning for the Family Business, Parallel Planning to Unify the Family and Business, by Carlock and Ward)

Slide:

Structure allows business families to deal with typical family business issues in a disciplined and safe way.

TYPICAL FAMILY BUSINESS ISSUES

Family Relationships

- *How to deal with conflicts between generations?*

- *How to deal with sibling or cousin conflict?*
- *How to teach young members and in-laws the business and also family traditions?*
- *How to share the family activities and customs with the next generation?*
- *How to develop and revise family agreements?*
- *How are family meetings and activities planned?*
- *How to create a process for family planning and decision-making?*
- *When to formalize the family governance by organizing a family council?*

(See Strategic Planning for the Family Business, Parallel Planning to Unify the Family and Business, by Carlock and Ward)

Slide:

Structure allows business families to deal with typical family business issues in a disciplined and safe way.

TYPICAL FAMILY BUSINESS ISSUES

Responsibility and Code of Conduct

- *How to help family members with financial, personal, or career difficulties?*
- *What responsibilities does one family member have to the others?*
- *What if there is a divorce?*
- *What if a family member breaks the law or acts in a seriously irresponsible manner?*
- *How much financial information to share with whom?*
- *How to support a family member's new business venture ideas?*
- *How to cope with the visibility and the public's expectations of successful families?*
- *What responsibility does the family have to the community?*
- *How to share credit for family achievements?"*

(See Strategic Planning for the Family Business, Parallel Planning to Unify the Family and Business, by Carlock and Ward)

VII. Application of Selected Family-Issue Solutions to the Cohen (Ferber) Family Estate Plan: What Should have the Estate Planning Lawyer Done?

Slides:

Possible Cohen Family Issues Not Considered by the Estate Planning Attorney:

- *Lack of boundaries between the business, the family, and ownership.*
- *Lack of trust over the long term.*
- *Lack of having a “safe place” for communications (i.e., no rules of communications).*
- *No communication practice sessions while senior generation alive.*
- *Too much power without independent review by outsiders (i.e., discipline in business operations and breach of fiduciary responsibilities).*
- *No use of corporate governance structures.*
- *No formal written documents (e.g., buy-sell, exit strategies, employment agreements, or performance criteria).*
- *No written strategic plan.*
- *No policies for dividend distributions.*
- *No education in fiduciary responsibilities of management.*
- *No education in being a responsible shareholder.*
- *No written family mission statement to define expectations.*
- *No dispute resolution system in place except court.*
- *etc.*

Slide:

Some Possible Structures for the Cohen Family Before Death:

- *Establish an ownership entity for structure.*
- *Ask opinion of second generation of their view of the future of the company, should the company be kept or sold?*
- *Educate family members on various roles: family, business and ownership.*
- *If American Lamp were to be sold,*
 - *prepare for the sale.*

Slides:

Some Possible Structures for the Cohen Family Before Death.

- *If American Lamp is to be kept,*
 - *Establish board with two outside advisors.*

- *Consider hiring a coach for family, business, or ownership issues, if serious (e.g. lack of trust, family employment policies, etc.).*
- *Invite all members of the second generation and spouses(?) to attend planning meetings.*
- *Convene board meetings at least every 3 months initially, with written agendas, rules of communication, adopt a form of Roberts Rules of Order, keep minutes, etc.*
- *Consider the MBTI to help family understand communication differences.*
- *Develop a strategic business plan.*
- *Develop policies on dividends versus reinvestment.*
- *Develop an exit strategy for shareholders.*
- *Develop procedures to determine compensation and job performance.*
- *Consider a written Code of Conduct for shareholders and management.*
- *Build structures into the estate planning documents to ensure the processes are continued after death (see sample attached).*

VIII. Structure in Estate Planning Documents: An Illustrative Form

Slide:

Suggested trust language for business operational procedures:

This form is intended to be illustrative only. The author makes no representation as to its validity or effectiveness for tax or other purposes and the author disclaims any liability arising from its use.

Slide:

Practical Comments relating to the suggested trust language for family business succession planning: Comments from the street?

*Rick Llewellyn, Esq
Vice President Client Administration
Whittier Trust Company*

IX. A Family-Business Succession Planning Overview For Clients

Slides:

An illustration of the family business succession process for the client to see.

X. Conclusion

Slide:

What the estate planning lawyer should have told Benjamin to keep the estate planning process simple:

“You can’t get there from here! While we all hope that any good succession plan is straightforward enough to be understood by everyone involved, it is anything but simple, and, as a result of its complexity, it is normally expensive to devise and to implement. Most important, absolute economic equality among your children is virtually impossible to achieve.”

(See Rough Family Justice: Equity in Family Business Succession Planning, Ayres)

Slide:

Given the statistics, only 34% of family businesses succeed to the second generation, something different must be done in planning for family business succession.

Slide:

Definition of Insanity

Doing the same thing and expecting a different result!

Slide:

“The problems we have created have been created at a certain level of thinking and can not be solved at the thinking level that created them.”

Albert Einstein