Bond
INFORMATION MEMO
TRUST AND ESTATE
SEPTEMBER 2016

Family Feud — Hollywood May Call It Entertainment But It Is No Laughing Matter for Family Businesses

Part I: An Analysis of Business Succession Planning from the Perspective of Maintaining Family Harmony

By Eric A. Manterfield, Esq. Patrick L. Emmerling, Esq.

INTRODUCTION

There are over five million family owned businesses operating in the United States.[1] The Small Business Administration has indicated that over 90% of all businesses operating in North America are family owned.[2] Furthermore, almost 35% of Fortune 500 companies are family-owned and such businesses account for 57% of the nation's gross domestic product.[3] Additionally, 78% of new job creation comes from family owned businesses.[4] Based upon the above, the strength of the economy in the United States depends in large part on the existence and profitability of both small and large family-run businesses.

Further, the American dream in part consists of the ability in this country for an individual, regardless of family ancestry, to use his or her skill and ingenuity to create a product or service and begin a business of his or her own with the hope of becoming financially independent from the profits of such business. As entrepreneurs who have successfully developed a business get older and after they have poured their hearts into the operation of such business for their lives, many of them want their businesses to continue long after they die. Understandably, the business naturally becomes a legacy to pass on to their children and future generations.

Yet the statistics show that most family owned businesses fail after a generation or two. Specifically, only 32% of family-owned businesses survive the transition from the first generation to the second.[5] Furthermore, only 12% survive the transition from the second generation to the third.[6] Only 3% of family-owned businesses remain in the same family after the third generation.[7] Why are so few family-owned businesses successfully transitioned from one generation to the next? After all, isn't owning and operating a family business a dream for many Americans?

The fact that so few family-owned businesses survive from one generation to another is especially curious since there are thousands of professionals who hold themselves out as knowledgeable persons who may be retained to assist a business owner develop a succession plan. These professionals include certified public accountants, attorneys, life insurance agents, certified financial planners, and other business consultants. With all these professionals available to assist a business owner pass on a legacy that represents the fruit of his or her life's work, why is it that so few family businesses last beyond a generation?

In certain cases, it is likely that the family business fails to transition to the next generation because the family agrees that it is in the family's best interest that the business be sold to an unrelated third party. In other cases, although probably not many, estate taxes due at the death of the founding owner have caused the next generation to be forced to sell the business to generate the necessary liquidity to pay such taxes. What about the remaining cases?

The purpose of this article is to discuss why family businesses fail to transition from one generation to the next besides having to satisfy an estate tax burden. There are numerous articles and papers written about the available strategies to pass on a family business in a way that minimizes the estate tax cost. These articles include very technical discussions about grantor retained annuity trusts, sales to intentionally defective grantor trusts, marital trusts, credit shelter trusts, dynasty trusts, qualified subchapter S trusts, electing small business trusts, family limited partnerships, and numerous other strategies. Yet the statistics still show that most family businesses fail to transition from one generation to another. The fact that so much emphasis is placed on estate planning strategies and still so few family-owned businesses are successfully transitioned from one generation to another seems to indicate that something else must be at the root cause of such failure.

Business clients often seek the assistance of an attorney to develop or modify a business succession plan along with implementing an estate plan. When an attorney counsels business clients in such matters, it is important to draw a distinction between estate planning and business succession planning, although the two have intertwining aspects. Estate planning is the process of deciding how a person's entire wealth will be transferred to the next generation or to other beneficiaries. It involves deciding when certain property should be transferred and to whom. It also involves deciding how the property should be transferred and how much control over wealth should be given to children and to others. Business succession planning involves the family business itself and how to transition the operation of the business to the next generation so that the business stays intact and profitable after the founder retires or dies. Business succession has two components. The first is the transfer of the ownership of the business to the next generation. The second is transitioning the management of the business to a new leader or leadership team. A part of this second component is transitioning to the new leadership the goodwill that the current management has with its vendors, customers, bankers, and others. The new leadership would be starting from scratch without such transition of goodwill.

Both aspects of business succession are difficult to successfully achieve because with such transition of ownership and management, it is easy for the needs of a business to become out of sync with the desires and wishes of the new generation of owners or managers. For example, a business needs capital to fund its operations. However, the next generation of owners may want to take too much capital out of the business either through compensation of active owners, but more likely, by non-active owners in the form of dividends or redemption proceeds. The withdrawal of excessive capital for whatever reason jeopardizes the stability of the business.

Attorneys will encounter several different circumstances while advising business owners in regard to business succession planning. For example, there will be families with a senior owner who wants the business sold to a third party upon his or her death. Another family may have the senior generation owner that owns 100% of the business and intends to pass on the ownership of such business to the next generation. In those situations all of the senior's children are sometimes actively involved in the business. In other cases, while the senior generation wants to pass on the ownership of the business to all of his or her children, only one or a few children are actively involved in the operations of the business. There may also be families in which the senior generation owner will have certain key non-family individuals who are actively involved in the operations of the business with his children. Perhaps the owner wants to sell some of his interest to his key non-family managers. Finally, attorneys will encounter cases in which the senior generation owner does not own all of the business but is a co-owner with non-family members. Sometimes in such situations the owner will want to retire in his seventies and intends to sell his ownership interest to his partners during his life pursuant to a buy-sell agreement. Perhaps the senior generation owner will want to hold onto his ownership interest until his or her death and pass his ownership interests to his children. All of the above described circumstances require careful planning, and each has unique obstacles to work through that do not involve taxes. Business succession planning takes thoughtful planning over a significant period of time. It certainly involves an analysis of taxes and strategies to minimize such taxes. However, business succession planning is much more than that.

Often, as illustrated in this article, family dynamics are at the root of issues that place a strain on the continuation of a family business. There are personality issues, sibling rivalry issues, in-law issues, compensation issues, operational control issues, dividend policy issues, nepotism issues, and work ethic issues to name a few. Nevertheless, proper planning may help avoid some of these non-tax issues from adversely affecting the business or possibly causing the business to fail altogether.

We, as advisors, need to recognize that there may be non-tax obstacles in the way of our clients successfully transitioning a business to the next generation and discuss such issues with our clients. A very technically correct and efficient plan to minimize estate taxes could include elements that result in creating more friction among the next generation due to unknown family dynamics thereby adding fuel to the fire that ultimately cause a business to fail. Given the statistics as to how few family businesses pass from one generation to the next, advisers need to counsel clients on the importance of such planning and factor non-tax obstacles into the planning process. If the emphasis is limited to a discussion about tax strategies, business owners may lose interest in moving forward with a plan given the complexities of the tax law and their limited knowledge of it.[8]

This article is published in two parts. Part One is published in this volume. Section II of this part analyzes what are common root cause issues that get in the way of a business successfully transitioning to another generation. It identifies certain causes and then provides one or more examples of famous wealthy families that have had such root cause adversely affect their own business. If extremely wealthy families and large companies go through succession issues that involve very basic family dynamic issues, it is likely that much smaller companies go through similar issues. By studying the cases that involve very large companies with facts that are in the public domain, we can learn how we can advise our clients whose businesses may be smaller but who may have the same issues.

Part Two of this paper will be published in the next volume of this journal. Part Two will discuss how advisors may assist a family in identifying the stress factors that are likely to negatively impact a particular business and advise a client about instilling a family culture that promotes the same goals and virtues. Such unity of values and virtues will help a family successfully operate a business. Part Two will also discuss how an advisor may be involved with instituting a proper organizational structure of the business to anticipate and minimize family disputes. While not diminishing the tax expertise we bring to our clients, as wealth preservation and business succession advisors, we also need to analyze the family dynamics that are involved so that a proper structure may be put in place to minimize the stress and disputes that might arise over time so that the family can focus on operating the business in a unified manner. Finally, Part Two will discuss the professional responsibility traps and pitfalls that often come into play for attorneys whose practice includes estate and family business succession planning.

NON-TAX OBSTACLES TO ACHIEVING A SUCCESSFULLY IMPLEMENTED FAMILY BUSINESS SUCCESSION PLAN

A family-run business has powerful competitive advantages. A family-operated business has owners with a shared family history. The love, commitment, trust and unique sense of solidarity among the owners may provide a powerful and emotional drive to succeed against stiff competition.[9] It is likely that a number of the family members had their first job in the business. The memories of beginning a working career at the business can bring strong, positive emotional attachments.[10] The business may become not just a bundle of assets but a heritage or a legacy that instills pride in its members. "Most successful family businesses use their image and reputation as a 'family-firm' to gain a competitive advantage and exploit an established position in the market."[11] There have been studies indicating that family businesses can outperform non-family counterparts at various stages of a business, from small or newly formed to mature privately owned or publicly traded businesses.[12]

However, a family owned business may also bring strong emotional sentiments that divide a family and lead to disputes that adversely affect the operation of a business. The memories of beginning a working career at the business can bring strong negative emotional attachments as well as positive ones. Also, it is not unusual that second generation family members heard what was going on with the company at the dining room table or the living room as they grew up.[13] Not all of such memories will be positive. The family business could also be viewed by a child of the founder as a competitor for the parent's time and attention.[14] A family business could serve as a wedge between the two parents as well as between the parents and the children. Thus, the emotional sentiments carried deep inside an individual in regard to a family business (like any relationship) may be positive or negative. Regardless of the direction, the sentiments will likely be very strong.

Obstacle Number 1 — Sibling Rivalry

Siblings may have a tremendous amount of love, loyalty and companionship among them that could be very fruitful in a business relationship. But it is also not uncommon for one sibling to hold deep emotional sentiments against another sibling that may wait until both are adults before such sentiments are shown. Psychologists tell us that sibling rivalry may originate when the first born initially receives all of the attention of the parents. With the birth of the second child, the first born child must share that parental attention. As the children get older there may remain competition among the siblings for the attention of the parents. As more children are born, the competition for the parents' attention and approval heightens.

A certain amount of competition among siblings for the time and attention of parents may be typical in any sibling relationship.[15] However, as siblings become adults, such continued rivalry may not be healthy or productive. Rather, as siblings become adults and mature, they should seek less and less approval and attention from their parents.[16] They should also begin to see their siblings in a different light. Rather than having a destructive rivalry among siblings, it is healthy for siblings who competed aggressively against each other when they were young to cease that strong competition as they grow older. Ideally, the sibling relationship should develop into a mature relationship full of loyalty and friendship.[17] An immature or unchecked rivalry among siblings could be very destructive. One such destructive attitude toward a sibling would be an attitude of refusing to be subordinate to another sibling in any way. A family with strong unhealthy sibling rivalries that also owns a business may easily have significant and difficult issues in successfully transitioning the business to the next generation simply because the siblings remain connected to each other after becoming adults and the uncontrolled and unhealthy rivalry carries over into the business.

Even if sibling rivalry is not carried over from childhood, sibling tension may develop as a result of certain siblings having more financial resources outside of the business than other siblings. Those who have less resources outside the business will want to increase compensation or other distributions from the business to address their financial needs. This may be in conflict with the objectives of other family members who are not in need of a distribution and who want to plow the profits back into the growth of the business.

Sibling harmony may also be destroyed or harmed if a business has too lax a standard or policy over hiring family members. Siblings with no children in the business may resent the hiring of nephews or nieces or cousins who are not as educated or who do not have the same level of experience or intelligence as other candidates for the same position.

Another source of conflict among siblings may have, at its root, the spouses of other siblings. For example, a spouse who is not employed in a family business may only hear about the problems at work from his or her spouse upon returning home each night.[18] The shareholder spouse may complain about how little work a sibling does. There may also be complaints over inequities in the compensation of family members or other perks. It does not matter if such complaints have any factual basis. The spouse hears the complaints from his or her spouse which over time may create jealousy or resentment with the brother-in-law or sister-in-law. As a result, in-laws may be a source of tension that pulls families apart.

Let's examine two famous families with significant wealth who have had their harmony disrupted with one of the root causes being siblings who were not able to get along. The purpose of discussing these cases is to illustrate that sibling rivalry may be the root cause of family disharmony in any business, even for those who have very significant wealth. We can learn from such real life cases to better advise our clients on the hurdles that they must overcome in transitioning a business from one generation to another.

KOCH BROTHERS

The Koch brothers are an example of how sibling rivalry may adversely affect a family who owns a business together. In the 1920s, Frederick Koch, Sr. started a company in Wichita, Kansas to develop a refining process that increased the amount of gasoline that could be produced from crude oil. Various oil companies thereafter sued Frederick Koch, Sr. for patent infringement. At such time Frederick Koch, Sr. then moved to the Soviet Union to build oil refineries there.[19] As he lived in the Soviet Union, he learned to distain communism after what he witnessed and experienced under Stalin. This experience in the Soviet Union molded his political views against a government getting too involved in the lives of its citizens. He later moved back to the United States to expand his oil business and founded Koch Industries.

Frederick Koch, Sr. had four sons, namely, Frederick Koch, Jr., Charles Koch, David Koch, and William ("Billy") Koch.

Billy Koch always lived under the shadow of his older brothers. Billy once told a writer for the New York Times Magazine that of the four Koch brothers, he was the "family nerd."[20] As a child, Billy was not as skilled at playing basketball as his brothers, Charles and David, and they would intentionally exclude Billy from playing basketball with them.[21] By the time Billy was six years old he was resentful of Charles to such an extent that his mother had to send Charles (who was eleven at the time) to boarding school. Mary Koch later told the New York Times that "[w]e had to get Charles away because of the terrible jealousy that was consuming Billy."[22]

Frederick Koch, Sr. died in 1967. Thereafter, Charles took over control of the family business but all four children owned shares of stock in the company. Billy eventually began working in the family business but Charles wasn't satisfied with his job performance. Conversely, Billy was not pleased with how Charles used company funds to donate to certain political causes, molded as he was by Frederick, Sr.'s political ideas.[23]

A family conflict became public in 1980 when Billy and his older brother Frederick, Jr. secretly but unsuccessfully attempted to oust Charles from the board of directors. Billy also sued Charles and David for corporate mismanagement.[24] Thereafter, Charles and David sued Billy for libel. In 1983, Billy and Frederick, Jr. sold their shares of the company to Charles and David for a purchase price of $470 million.[25] Following the buyout, Billy continued his fight with Charles by bringing a lawsuit alleging that he should have received more money from the sale of his stock.[26] Later, when the company was being investigated by Congress for allegedly stealing natural resources from Native American Indians, Billy joined the battle against the family business.[27] Finally, in 2001, Billy and Koch Industries settled their outstanding lawsuits.

This appears to be a case, according to at least one commentator, of childhood resentments that continued into adulthood and provided a source of motivation to use family business assets to hurt an older sibling.[28] While neither brother has become poor in the process, the case illustrates that sibling rivalry can be very costly in terms of family harmony. Perhaps Frederick, Sr. foresaw the family grievances that would unfold as Frederick Sr. begged his children when he was older to be "kind and generous to each other."[29] Obviously, Billy and Charles did not heed their father's advice.

This case demonstrates that a family business managed by siblings who carry grudges against each other will likely see such grudges manifest itself within the business. While Koch Industries was large enough to survive the infighting, a smaller company may not be able to withstand the emotional turmoil within the organization that results from sibling fighting.

AMBANI FAMILY

The Ambani family is another example of sibling rivalry causing friction in a family business. Dhirajlal Hirachand Ambani, an Indian business tycoon, established the Reliance Industries empire during his life.[30] Initially, he began by entering into a partnership with his second cousin to import polyester yarn and export spices to Yemen.[31] The partnership ended in 1965 when Dhirajlal started a business of his own. It appears that Dhirajlal and his cousin had different temperaments and a different vision as to how to operate a business. His cousin was a conservative trader and was hesitant to build up yarn inventories. Dhirajlal was a risk taker and believed in taking on a greater amount on inventory whenever he anticipated a price rise in his raw material.[32] Dhirajlal Hirachand Ambani's business flourished. At one point he brought his son, Mukesk, into the business. In 1983, Dhirajlal's second son, Anil, also entered the business. Both sons were highly educated in the United States.[33]

Dhirajlal died in 2002 without leaving a will.[34] According to the law of India, Dhirajlal's assets were distributed to his wife, their two sons and their two daughters. As a result, the management of the companies fell upon his two sons. Both sons were very ambitious and competitive, and neither son intended to be subordinate to the other. Initially, the two brothers shared the company leadership. However, a feud began to grow in 2002 when the two brothers disagreed over the financing of a business venture initiated by Mukesk. The dispute reached new heights in 2004 when the company's board of directors passed a resolution that gave the leading role of Executive Chairman to Mukesk. This move by the board was done without Anil's knowledge or approval and left him playing second fiddle to his older brother. During an interview in 2004, Mukesh admitted to having a dispute with his brother over ownership issues.[35]

The rift between the brothers culminated in 2005 when ownership in the Reliance group of companies was divided among the two brothers, their mother and their sisters.

In this case the company assets were large enough to successfully divide the company into separate businesses for each son to operate separately. However, many family businesses are not large enough to undergo such corporate restructuring. Therefore, a sibling dispute within a smaller company could cause the business itself to fail over time or be forced to be sold at a price that is lower than it otherwise would have brought absent the sibling fighting.

Obstacle Number 2 — Tension Between Passive and Active Owners

Another root cause of tension in family businesses is an ownership structure that has non-active owners with different needs and viewpoints than the active owners of the company. In many such cases, non-active family members would like more distributions from the company in the form of dividends or would rather see the entire company sold and completely separate themselves from the family business. Also, the non-active members may believe the active members are withdrawing too much money from the business through salary, bonuses or other benefits. This tension grows much stronger when the company issues no dividends and the active members are neither transparent in the operations of the business nor transparent with the company's financial results.

The active members of the family may take a hostile view towards any distribution of funds from the company being made to non-active members. After all, it is the hard work and energy of the active members that generated the profits in the first place. Furthermore, the success of a business often requires that profits be reinvested back into the business. Another potential source of conflict may occur in the amount of compensation being paid to the active members. For example, consider a situation where two siblings become owners of a family business but only one sibling is actively involved. The non-active member may believe that half of the active sibling's compensation is coming out of his or her share.

Let's again examine two well-known families with significant wealth who have had its harmony disrupted over business disputes with one of the root causes being shareholders who are not involved in the business and who have different objectives than those who are involved in the business.

PRITZKER FAMILY

The Pritzker family is an example of how active business owners who benefit from working in the family business may have an attitude of not sharing the family wealth with others. Such family disharmony cannot only break apart the family but the business as well.

Nicolas Pritzker began a law firm in 1902.[36] Nicolas' three sons, Harry, Abram and Jack all joined the family law firm but his son, Abram, spearheaded the family investments into real estate. Abram had three sons, Jay, Robert and Donald.[37] Jay Pritzker was a sharp businessman who had an ability to find undervalued companies to purchase. Abram's other son, Robert Pritzker, became an engineer and was put in charge of turning around unprofitable companies that Jay purchased to make them profitable. Jay and Robert diversified the family holdings in various business interests ranging from Braniff Airlines to casinos.[38] One of the most famous businesses that Jay purchased is now known as the Hyatt Hotel chain.

Jay had five children but only one of them, namely, Tom Pritzker, was interested in carrying on the family business. Jay was also impressed with the business skills of his uncle Jack's son, Nick, and brought him into the business along with his niece, Penny.[39] As a result the family members involved in the business at such time were Jay, Tom, Nick, and Penny. The family business grew tremendously as did the family wealth.

In 1995, Jay Pritzker initiated a family meeting.[40] Those in attendance included his children, his brother, Robert, his cousin, Nick, and six of Jay's nephews and nieces. In this meeting Jay explained to the family how the family wealth would be dispersed following his death. In a written memorandum, Jay explained that most of the family assets had been placed in a trust fund. Further, he directed that the family wealth was not to be viewed as a source of individual wealth. Rather, the structure was put in place to preserve wealth so that it may be used for family business endeavors and to uphold the family tradition of giving back to society through various charitable endeavors. Jay also announced that Tom Pritzker was the chosen successor to run the family business.

The division over the structure of the family wealth was visible right from the beginning as two of Jay's children indicated at the initial meeting that they were against Tom being the chosen successor to lead the family business and that they would like to receive their interest in cash.[41] Jay did not grant them their wish. Another cause of family division was that Jay established a bonus program that would reward those family members who were involved in the business and who produced positive results for the business.[42]

After Jay died in 1999, various family outsiders confronted Tom, Penny, and Nick demanding that their concerns over the way the family wealth was being administered be addressed. Their complaint was that the insiders received excess compensation and that there was no transparency in the way the business was operated. There were threats to bring a lawsuit alleging a breach of a fiduciary duty, self-dealing, and conflicts of interest. Eventually a settlement was reached that involved dividing up the family assets among all of them whether an insider or an outsider. The settlement agreement also involved putting a more formal structure in place for the business entities so that all of the owners may be kept informed.

The restructuring of the family businesses took nearly 10 years. A recent article in The Wall Street Journal reported Tom Pritzker reflecting upon the breakup of the business structure and how different branches of a family have different viewpoints. In the article, Tom Pritzker states that "[f]amilies consist of different people with different interests and they're less connected to legacy businesses. It is important to be respectful of it, [a]nd we didn't have transparency."[43]

As shown in this case, non-active family members may put a strain on the operations of a business by demanding more distributions from the family business or asking to be bought out. Naturally, they will be at odds with active family members. Therefore, it is important that active family members be as transparent as possible with non-active family members and, if possible, consider buying out those inactive family members who wish to cash out.

CHANDLER FAMILY

The story of the Chandler family begins with General Harrison Gray Otis who was a Civil war veteran. He and his wife, Eliza, purchased an interest in the Los Angeles Daily Times in the year 1882.[44] Eventually, they became the majority owners of the paper and turned it into a successful publication. One of the reasons that the business prospered was because of the hiring of Harry Chandler.[45] Mr. Chandler's business acumen was quickly noticed and he began to be promoted within the company. Harry Chandler married Emma Marian Otis, the daughter of Harrison Gray and Eliza Otis.[46]

Harry eventually took over as publisher of the newspaper and was a strong leader who made significant developments in the family business. Harry's son, Norman, became the chosen successor to his father. Norman managed the newspaper in a way that mainly adhered to the status quo.[47] As time passed, the mantle of leadership then passed to Norman's son, Otis. Unlike his father, Otis had the skill, ambition, and vision to manage the newspaper to greater prosperity and eventually brought the stock to a public offering.[48] In 28 years, Otis had grown the profits of the newspaper from three million dollars to $100 million. Following Otis' death, one commentator stated: "No publisher in America improved a paper so quickly on so grand a scale, took a paper that was marginal in qualities and brought to it excellence as Otis Chandler did."[49]

However, while Otis Chandler served as the publisher of the newspaper, there was no family member who was mentored to be his successor. Further, many non-active family members became reliant on dividend distributions from the company and dependent on family trust funds to sustain their lifestyle.[50] By the time Otis attained the age of 52 years, the drive that spurred him to lead the newspaper with such skill began to recede. In 1980, with no family member apparently ready to assume responsibility, Otis turned over the management of the newspaper to a non-family member. It was the first time in four generations that a family member was not leading the company.

Thereafter, management of the newspaper displayed less vision than the vision Otis provided and consequently the profits of the business began to decline. Over time the Chandler family was no longer close enough to the business to provide any clear leadership and direction. The family eventually lost control over the newspaper and, in the year 2000, the company merged with the Chicago Tribune.

The lesson to learn from this case is that a family business as it passes from one generation to another must not only pass on the ownership of a business to a succeeding generation but, to continue to compete and succeed, a family must also pass a sense of legacy or family pride to assure family control over management of the business. A family may certainly hire non-family members to manage a business. However, the family must keep their fingers on the pulse of the business to properly supervise the way it is being managed. A lethargic attitude in regard to overseeing the management of the business may, over time, cause the business to fail to be competitive.

Obstacle Number 3 — Family Members with No Descendants or Unequal Number of Descendants

The motivation of growing a business in order to pass it on to a child does not exist for a shareholder who has no children. Therefore, when siblings own a business together and one branch of the family does not have any descendants to inherit an ownership interest, pressure by the children/shareholders to enjoy the fruits of their labor may force the sale of the business. Family disputes may also result when one sibling has more children involved in the business than the number of children his or her sibling has involved in the business. The emotional ties and the desire to pass on wealth that people have for their children are certainly greater than they have for their nephews or nieces. Therefore, a business owner may seek to have an organizational structure that provides their children with a greater share of the business profits.

For a case illustrating this obstacle, let's examine the Waxman family.

WAXMAN FAMILY

Isaac Waxman started a business in the early twentieth century trading in used rags, bottles and scrap metal.[51] This business ultimately focused its operations on selling metal. Isaac's sons, Morris and Chester, joined their father's business when they became adults and eventually took over control.[52] Morris was a reserved and quiet person while his brother, Chester, was much more outgoing.[53] Therefore, Morris became involved in the operations of the business while Chester was in charge of business development. Chester had three children, namely, Bobby, Warren, and Gary, join the family business. Morris' children decided to go to college and initially showed no interest in joining the family business. However, Morris' sons, Michael and Douglas, later became owners of a business that was spun off from the family business.

After Isaac died, the two brothers became 50/50 owners after a dispute over the inheritance of their father's shares was resolved. Underlying this initial dispute was Chester's failure to disclose to his brother the consequences of signing certain corporate documents which Chester asked his brother to sign. Morris had always trusted his brother to such an extent that he would not read the documents that Chester gave him to sign. This initial dispute over their father's estate was a foreshadowing of much bigger disputes in the future. Nevertheless, over the years, the two brothers turned their father's business into one of the largest metal recycling businesses in Canada.

Eventually, as Chester's children became more involved in the business, Chester realized that ultimately Morris' children would own a controlling interest in the business and his sons would be minority owners. After the company lawyer suggested an estate freeze that would pass taxes on the increase in value of the company to the next generation, Chester proposed to Morris to structure a succession plan so that the ownership of the family business would be divided in equal shares among their five children so that each child would own 20% of the business.[54] Morris rejected this proposal.[55]

In response to Morris' rejection of his proposal, Chester decided to change the current compensation system of the business and arranged to have significant bonuses paid to his children. In this way, Chester could extract value out of the business in favor of his children.[56]

This bonus arrangement still did not satisfy Chester, and he later arranged to take control of the company by having Morris unknowingly sign documents that sold Morris' half of the business to Chester's side of the family. The meeting in which Morris signed the documents transferring his ownership interest in the company to Chester took place while Morris was ill with heart problems and was scheduled for surgery within weeks. Morris signed the documents believing they were covering routine matters rather than transferring ownership of his shares to Chester. After obtaining control over the company, Chester sold a significant portion of the business assets but secured employment from the new owner for himself and his sons. Morris and his family were not included in this employment arrangement.[57]

Ultimately, Morris brought a lawsuit against his brother claiming Chester took control over the family business by tricking him. Morris won this lawsuit which included a judgment ordering Chester to pay Morris a sizable sum in compensation.[58]

In this case, a sibling wanted to secure more business wealth for his descendants rather than working with his brother to share the business profits equally among both branches of the family. The case demonstrates the emotional pressure or tendencies that may occur when there are differences in the number of family members in the various branches of the family.

Obstacle Number 4 — The Senior Generation Unwilling to Give up Control

Sometimes senior generation members, founders, or successor owners, are unwilling to give up leadership responsibilities, even when they have children or other family members willing and able to assume leadership roles in a business. Those junior family members who have the skill, vision and enthusiasm to manage a business may get weary of waiting for their chance and may decide to leave the family business and strike out on their own. Thereafter, there is no one willing and able to take on a leadership role when the senior generation members finally give up control either through retirement or death.

For a case illustrating this obstacle, let's examine the Bata Shoe Company. This organization is still going strong with over 40,000 employees in 69 countries. Nevertheless, it has seen disputes regarding ownership aired in various courts over the years and has had severe leadership succession issues over the years that have adversely affected the competitive standing of the company. The story of the Bata Shoe Company illustrates a common obstacle in business succession when the senior generation is unable to give up control of the management of the company to such an extent that causes the next generation of management to quit rather than fight with the senior generation as to how to manage the company.

The story of Bata Shoe has a happy ending in so far as in 2001, a descendant of the founder once again took over control of the management of the business.

BATA SHOE

Tomas Bata along with his brother, Antonin, and his sister, Anna, founded a shoe business in 1894 in a town in Moravia in the modern day Czech Republic.[59] In the summer of 1895, Tomas experienced financial distress and to overcome his difficulties, he decided to sew shoes from canvas instead of leather.[60] This type of shoe became popular and helped grow the company during its early years. Four years later, the company introduced its first steam-driven machines ushering in a period of modernization. The business grew substantially during World War I due to significant military purchases.[61] In the 1920s, Tomas began incorporating in the various countries of its newly established business sites. Such new corporations were then owned by a holding company.

However, following World War I, the economy took a downturn and sales of shoes dropped. Tomas responded to the downturn in the demand for his products by lowering the price.[62] He arranged to have his workers take a substantial cut in pay but also introduced one of the first profit sharing programs with his employees. The decline in the price of his shoes forced many of his competitors to close which correspondingly increased the demand for his shoes.[63]

Tomas Bata died intestate in 1932 leaving a son by the name of Thomas Bata, Sr. At the time of his death, Tomas was the owner of the entire enterprise. When his father died, Thomas Bata Sr. was only 17 years of age. With Thomas Sr. being so young, the control of the company fell upon Thomas' half-brother, Jan Bata.[64]

Thomas was a hard worker and determined that he would control the management of the company someday in the footsteps of his dad. However, Jan refused to give up control over the business when Thomas became an adult. Thomas took the fight over control of the business to the courts and ultimately succeeded in obtaining title to the company's stock.[65]

Thomas, Sr. married Sonja Wettstein and she eventually became very active in the business, including assisting her husband with starting a brand new Bata Shoe company in Canada.[66] Both Thomas, Sr. and Sonja had very dominating personalities and were very vocal in managing the family business. As time passed, Thomas, Sr. and Sonja also raised a family. They had four children, the oldest being a son, Thomas Bata, Jr., followed by three daughters, Christine, Monica, and Rosemarie.

Thomas, Jr. was raised and educated to take over the leadership of the business. He worked several years in a competitor's shoe company and earned an MBA from Harvard. Thereafter, Thomas, Jr. joined his parents' company and quickly rose up the ranks. In 1984, Thomas, Jr. became the President and CEO of the holding company, Bata, Ltd.[67] His parents, however, remained on the board and were still very much a part of the family business. Therefore, even though Thomas, Jr. had the title of President and CEO, Thomas, Sr. and Sonja were unwilling to give up their strong influences within the management of the company.

Thomas, Jr. wanted to step out of the shadows of his parents' leadership and begin to lead the company forward according to his own vision. However, this was not possible as the strong personalities of his parents continued to overshadow him by often disagreeing with the direction in which he wanted to take the company. For example, Thomas, Jr. wanted to spend more money on marketing endeavors and also bring in some public equity. The members of the board including his mother, Sonja, resisted both strategies. Eventually, Thomas, Jr. resigned as President and CEO, although he remained on the holding company's board, and moved to Switzerland where he became a venture capitalist. He could not bear working under the constant authority of his parents with no room to foster and implement his own ideas.[68]

Following Thomas, Jr.'s departure, the company hired a non-family member by the name of Stan Heath to serve as President. Mr. Heath developed a new strategy for the company to move forward but received strong resistance from local managers and had no support from Thomas, Sr. and Sonja. Heath too left the company after he realized that he would never receive the support he needed to move the company forward in a direction he believed appropriate.

After Stan Heath left the company, the company had other non-family members placed in charge as CEO but each of them failed to generate the support that was necessary. Finally, in November of 2001, Thomas, Jr. was able to convince his parents that certain structural ownership changes were essential to get the company on a path of recovery. With a new corporate structure, the shoe company was once again managed by the Bata family and able to move forward with a shared vision and common purpose.

Obstacle Number 5 — Divorce

The divorce rate in the United States exceeds 50%. During a divorce proceeding, depending upon applicable state law, a business asset may be claimed as community property, or as marital property subject to equitable distribution, whether because the business was started during the marriage or because of the efforts and sacrifices made by one of the spouses to make the business interest more profitable. As a result, a business interest may have to be divided up or may be required to be sold.

FRANK AND JAMIE McCOURT

This case involves a dispute over the ownership of the Los Angeles Dodgers. Frank McCourt and Jamie McCourt met as undergraduates at Georgetown University and were married in 1979.[69] Frank pursued a career in real estate while Jamie went to law school at the University of Maryland.[70] She practiced law for five years before becoming General Counsel for the McCourt Companies.[71]

In 2004, Frank purchased the Los Angeles Dodgers baseball team, including Dodgers Stadium and the surrounding 276 acres, from News Corp. for $421 million while he and Jamie were residents of Massachusetts.[72] After purchasing the Dodgers, they became residents of California.

Frank and Jamie signed a Post Nuptial Marital Property Agreement in 2004 after 25 years of marriage.[73]

Frank and Jamie separated on July 7, 2009,[74] and Jamie filed for divorce on October 27, 2009.[75] Frank claimed sole ownership of the Dodgers pursuant to the Post Nuptial Marital Property Agreement. Under California law, upon divorce the "community" property of a couple is divided equally between them and each spouse retains his or her separate property. Community property includes property acquired during the marriage by either or both spouses. Additionally, under California law, it includes the "marital" property which a couple brings with them when they relocate from a separate property state (such as Massachusetts) to California since such marital property would have been community property if they acquired it when they resided in California ("Quasi Community Property").[76]

The Post Nuptial Marital Property Agreement was intended to convert the Quasi Community Property into the separate property of Frank. However, during the divorce proceeding it was discovered that the attorney draftsman substituted pages in three of the six signed originals which identified Frank and Jamie's separate property.[77] The attorney's conduct resulted in the Post Nuptial Marital Property Agreement being declared invalid.

As a result, the disposition of the ownership interest in the Dodgers became an issue in the divorce proceeding. In 2013, the McCourt's reached a settlement in which Frank paid Jamie $131 million. Five months later, Frank sold the Dodgers for $2.15 billion. Jamie McCourt thereafter requested the court to throw out the divorce settlement alleging that she was misled about the value of the Dodgers. The court ruled against Jamie McCourt and said that Jamie had no legal basis to force Frank to share his profits from the sale.[78]

Thus, the McCourt divorce proceeding gave Jamie an interest in the Dodgers, but one that yielded approximately only 6% of its value to her.

HAROLD AND SUE ANN HAMM

In 1967, Harold Hamm founded Continental Resources, Inc., a multibillion dollar oil and gas company based in Oklahoma.[79] In 1988, Harold married Sue Ann without a prenuptial agreement. In 2012, after 26 years of marriage, Sue Ann filed for divorce. The shares of Continental Resources, Inc. belonged to Harold. However, under Oklahoma law, any increase in value to stock after the date of a marriage that is due to the efforts of either spouse is considered "marital property" in which the other spouse may share. In 1987, Continental Resources, Inc. was valued at nearly $50 million.[80] Harold's ownership in Continental Resources, Inc. was worth approximately $18 billion at the time the divorce trial began. Sue Ann argued that the increase in value was attributable to her husband's leadership. Harold, on the other hand, argued that the increase in value of the company was attributable to market forces and not his leadership.

During the divorce proceeding there was speculation that Harold would be required to sell a significant amount of his shares if the court agreed with Sue Ann as to "marital" portion of the value of Continental Resources, Inc. Ultimately, Harold was ordered to pay nearly $1 billion to Sue Ann which did not require him to sell any of his shares of Continental Resources, Inc.

These two cases illustrate the importance of pre-nuptial planning especially when business interests are at stake.

Obstacle Number 6 — A Sibling Controlling the Voting Shares Through a Family Trust

A founder of a business may inadvertently cause dissension in his family if he appoints one child to serve as both CEO and as trustee of the family trusts into which he transfers his voting stock. The CEO will then control both the operations of the company and, as trustee, will be able to use the trusts' voting shares to elect the board of directors. When selecting a trustee for a family trust, it is important to consider the issues that arise when an individual serves in two different roles. One role being the trustee with the duty to follow the terms of the trust; the other being the decision maker for the operations of the business. These two roles can conflict with one another and may have different fiduciary standards. The business judgment rule may apply while reviewing a decision of a leader of a company. However, a trustee is a fiduciary to the trust beneficiaries and is held to a high standard of conduct and must act with undivided loyalty for the benefit of the beneficiaries of the trust.

Let's examine a few cases dealing with a sibling or other related party making decisions in more than one capacity.

ESTATE OF GEORGE HALAS

This case does not involve a sibling controlling the shares of a family trust but rather the father of the decedent controlling shares of stock held in a trust. George Halas, Sr. was the founder of the Chicago Bears, which was originally incorporated in the state of Illinois. His children, George, Jr. and Virginia McCaskey, were active in managing the team. George Halas, Sr. owned a 49.35% interest in the Bears. His son, George Halas, Jr. owned a 19.68% interest in the Bears. The balance of the shares were owned by others.

After George Halas, Jr. died in 1979, his father was appointed executor of his son's estate and trustee of certain trusts to be administered for the benefit of the children of George, Jr. Those trusts received shares of stock in the corporation that owned the Bears. During the administration of the estate of George Halas, Jr., a guardian ad litem appointed by the court to represent the children of George Halas, Jr., arranged to have the probate court issue an order that required George, Sr., as executor of his son's estate, to provide notice to the guardian ad litem prior to selling, conveying, mortgaging, encumbering, hypothecating or, in effect, redeeming of any of the shares of stock issued by Chicago Bears Club, Inc. that were owned by the estate and to be distributed to the trusts. Subsequent to the death of George, Jr., his father, in his individual capacity and as fiduciary under his son's estate, along with other shareholders reorganized the corporation that owned the Bears to achieve certain tax savings. The reorganized entity was incorporated in the state of Delaware. As part of the reorganization, certain restrictions were placed on the transfer of the stock. George, Sr. failed to provide the required notice to the guardian ad litem when the plan of reorganization was being considered.

George, Sr. died in 1983. The successor executors of his son's estate brought suit against George Halas, Sr. alleging that George, Sr. violated his fiduciary duties to the beneficiaries by participating in the reorganization because of the adverse effect the restriction placed on the transferability of the shares, and consequently on their value, and because of his failure to notify the guardian ad litem of the reorganization.[81]

The court concluded that while George, Sr. failed to notify the guardian ad litem of the reorganization, the language of George, Jr.'s will provided authorization for the reorganization in order to save estate taxes and that such action taken was not a violation of his fiduciary duties. The court noted that the will waived the duty of undivided loyalty. The trustee was given the power to elect himself as a member of the board of directors of the Chicago Bears and the trustee could transact business in his individual capacity or as a director and officer of the bears with himself as executor of his son's estate or as trustee of the trust created under the will for the benefit of his children.

The court found that George Sr. did not act in bad faith, as he intended to treat all of his grandchildren equally and he sought to save taxes by freezing the value of the stock so that more money would eventually pass to his heirs at his death.

This case illustrates that language similar to the language used in George Halas, Jr.'s Will should be included in any will when nominating someone as executor or trustee who will also serve in other roles as an officer of a company in which the testator has an equity interest. The case also illustrates the need to anticipate conflicts over the actions of a trustee who controls the voting stock of a family business with the desires of the beneficiaries of the trust.

THE ROLLINS FAMILY

This case is similar to the Halas case in that it involves trustees of certain family trusts who also serve as officers and directors of family business entities.

It begins with O. Wayne Rollins, the patriarch of the family, who purchased various businesses during his life including Orkin, the pest control company. Over the years his fortune grew. As he got older, he reviewed his estate plan and decided he did not want his descendants to waste the money that he worked so hard to accumulate. Therefore, in 1968 he established the Rollins Children's Trust for the benefit of his grandchildren and great-grandchildren. Under the terms of the trust agreement, a portion of the trust principal as determined by a certain formula contained in the trust agreement, was to be distributed to his grandchildren on their 25th and 30th birthdays. The Rollins Children's Trust terminates when the last of the nine grandchildren dies with the remainder going to the next generation. The trustees are authorized under the trust agreement to invade principal at their discretion for the grandchildren's benefit. The trustees are also authorized to distribute the income of the trust or accumulate such income. The trustees of this trust are Wayne's sons, Gary and Randall, and a family friend.

In 1986, Wayne also set up nine Subchapter S trusts, one trust for each grandchild. The trusts were established with tax savings in mind and were funded with interests in one of the family businesses. Gary Rollins was the sole trustee of four of the trusts. The terms of the Subchapter S trusts required all of the trust income to be distributed at least annually to the current trust beneficiary but gave discretion to the trustee to determine what constitutes income and principal. Each Subchapter S trust terminates when the income beneficiary attains the age of 45 years, at which time all of the remaining assets of the trust are to be distributed to the income beneficiary.

The value of the trusts was substantial as the value of the assets inside the family businesses totaled several billion dollars.

In 1988, Wayne also established a partnership, Rollins Invest Fund, and all of the Subchapter S trusts were partners, along with Wayne, Gary, and Randall.

Gary Rollins and Randall Rollins also served as corporate directors, officers, and managing partners of the business entities. They later restructured the business entities and established new rules in regard to the manner in which distributions from the entities would be made to the trusts. Gary also decided to install eligibility requirements in order for a trust to receive a distribution from the entities. The policy also required that a beneficiary had to be engaged in meaningful pursuits in order to be eligible to receive a trust distribution. In 2010, Gary and Randall attempted to further restrict access to the assets in the trust.

The new restrictions caused some of the trust beneficiaries to challenge the rules imposed to restrict access to the trust funds. They alleged that, after Wayne died, the trustees made various changes in the structure, holdings, and distribution methods used within the family business entities that are held within the trusts. The beneficiaries also argued that the trustees shifted power away from the beneficiaries to themselves and established non-pro rata distribution systems in contravention of the trust agreements. Essentially, by holding trust assets through business entities and restricting the distributions from such entities, the trustees were able to control the distributions to the grandchildren in a way that was not permitted by the terms of the trusts. They also demanded an accounting in regard to the operations of the family businesses.

The trustees of each of the family trusts argued that they were not required to account at the trust level for actions and decisions at the business entity level since each trust held a minority interest in the family businesses and therefore did not own enough shares to control the entities.

The trial court granted a motion for summary judgment in favor of the trustees of the various family trusts. The Court of Appeals of Georgia[82] disagreed and held that since all of the trusts in the aggregate owned enough shares to control the business, the trustees were required to account at the trust level for activities occurring at the business entity level. The Court of Appeals of Georgia also held that, while the actions in restructuring the businesses were corporate level transactions and made by the trustees in a different capacity, nevertheless, such decisions and transactions will be reviewed under the laws applicable to fiduciaries.

The court of appeals decision was appealed to the Georgia Supreme Court. Georgia's highest Court, the Supreme Court, reversed the decision in part and vacated in part and remanded the case back to the court of appeals.[83] The Georgia Supreme Court held that when it comes to trusts, the trial court is a court of equity. Thus, when it comes to deciding whether a trustees' accounting is sufficient under a given set of circumstances, an appellate court must consider whether a trial court properly exercised its equitable discretion and the trial court's decision ought to be sustained as long as the trial court did not abuse its discretion. The Georgia Supreme Court ruled that the court of appeals did not give any consideration to the trial court's discretion to require or excuse an accounting of the activities of the business entities. For that reason, it was remanded back to the court of appeals.

As to the issue of whether trustees who serve as officers, directors, or managing partners of business entities will be held to the fiduciary standards applicable to trusts rather than to corporate standards, the Georgia Supreme Court reversed the decision of the court of appeals. The court, citing Miller v. McCaskey,[84] ruled that it is necessary to look to the intent of the Settlor of the trust. The court found that the Settlor took great pains to ensure that the trustees could not take actions at the family business entity level to benefit the trust beneficiaries unless those actions were in the interests of the other shareholders. The court concluded that the Settlor could not have intended for the trustees to be held to a higher standard under trust law when performing corporate or partnership duties. The court also stated that when under the terms of a trust a trustee is put in control of a corporate entity in which the trust own a minority interest, the trustees should be held to a corporate level fiduciary standard when it comes to his or her corporate level duties and actions.

The corporate-level standard required the directors and officers "to act with the highest degree of good faith as to all matters connected with the property committed to their care."[85] It also requires the directors and officers to act as they believe "in good faith in the best interests of the corporation[,] and [w]ith the care an ordinarily prudent person in a like position would exercise under similar circumstances."[86]

On remand, the court of appeals determined that there were still outstanding questions of fact in regard to whether Gary and Randall were serving as trustees or as officers, directors, or managing partners when certain decisions were made. Consequently the court of appeals remanded the case back to the trial court.[87] The Supreme Court of Georgia, after granting certiorari with respect to this court of appeals decision, held that it was not necessary for a jury to decide in what capacity Gary and Randall made certain decisions about the restructuring of the business entities and restricting distributions of cash to the trusts.[88] Some decisions were clearly made in a business capacity and some were made in a trustee capacity.

In the latest decision in this case, the court of appeals held, in a decision dated July 15, 2016,[89] that Gary and Randall were required to adhere to a fiduciary duty applicable to trusts, in light of the terms of the trust and the Settlor's intent, when they made decisions in their capacity as a trustee. Furthermore, Gary and Randall were required to adhere to a standard of care applicable to officers, directors, or managing partners when they made decisions in those capacities. The Georgia Supreme Court also reversed the trial court's summary judgment decision stating that there are issues of fact to be determined as to whether Gary and Randall adhered to the applicable standard of care with respect to the decisions concerning the restructuring of the business entities and concerning the restrictions imposed on distribution decisions from the entities to the trusts. The court remanded the case back to the trial court. With respect to the issue of whether Gary and Randall needed to account for the transactions of the business entities in addition to the transactions at the trust level, the court also concluded that the trial court must review its decision that denied the requirement of an accounting at the business-entity level after a jury decides the factual questions presented.[90]

This case illustrates the need for estate planning attorneys to be conscious of the potential for conflicts of interests that may arise when a nominated trustee of a trust that will own an interest in a family business will also serve as an officer or other decision maker in the family business. It is critical that the settlor's or testator's intent as to whether the trustees may serve under various capacities be clearly authorized. Furthermore, trustees who also serve as officers, directors, or managing partners of entities, the ownership of which are held by a trust, must make sure they make decisions consistent with the appropriate fiduciary standard depending upon the capacity in which they make such decisions.

Obstacle Number 7 — No One Qualified (or Interested) in the Next Generation to Lead the Company

Any business needs skilled and effective leaders to be successful. At times, the founder of a business will not have any children who are interested in carrying on the family business. Alternatively, the child who is designated as the successor leader may not have the skills to actually manage the business. It is easy for a founder to choose a successor based upon emotional reasons rather than clear and objective factors. The choice of the successor could result in the business being substantially damaged. The founder may also not be able to anticipate the skills that his or her successor will need in the future to make sure the business adjusts to the competitive changes in the industry.

Finally, maybe the family realizes that it would be far better off if the company was sold and have the proceeds pass to the next generation at the death of the founder rather than risk a loss of its value by having the next generation try to maintain or attempt to grow the value of the business. The founder's children may not have the skills required to competently carry on the family business legacy.

Obstacle Number 8 — Employee Morale

A business needs loyal, honest, and hardworking employees to carry out the vision of management. Any transition of ownership or management must take into account the views of the employees. The business succession will be even more difficult to successfully accomplish without buy-in from the employees. It is also not uncommon for some founders to want to share some of the business interest with certain key non-family employees.

Let's examine Market Basket for a case that shows how employee morale along with customer's loyalty and local lawmakers' actions may adversely affect the operations of a business when there are changes in the leadership of a company.

THE DEMOULAS FAMILY

Athanasios (Arthur) Demoulas started a small store in Lowell, Massachusetts in 1917 which sold lamb and fresh vegetables from a farm and slaughterhouse he owned.[91] He later sold the store to his sons, Mike Demoulas and George Demoulas, for $15,000.[92] The two sons co-managed the business through the 1950s and 1960s and expanded it into a chain of stores under the trade name of Market Basket. George died in 1971.

Mike remained in control over Market Basket and promised to take care of George's family. However, Mike used his leadership position to steadily divert $1 billion or so of the company's assets into new companies that he controlled.[93]

In the 1990s, George's family sued Mike's family alleging fraud. George's family eventually won the lawsuit and the court found that Mike defrauded George's branch of the family by $500 million. As a result, the court awarded 50.5% of Market Basket's stock to George's family as well as attorneys' fees and about $200 million in lost dividends.[94] The judge also ordered all of the assets of the other companies controlled by Mike Demoulas and his family be transferred to Market Basket.

Nevertheless, even with a change in the control of the company, in 2008 Mike's son, Arthur T. Demoulas, became the Chief Executive Officer of Market Basket, primarily because Rafaele Evans, the widow of George's son, Evan, voted for Arthur T. Demoulas because she was not pleased with the other son of George, Arthur S. Demoulas, after he attempted to gain control of the trust that controlled her daughter's shares. Arthur T. Demoulas quickly developed a reputation as a person who cared about the 25,000 employees of the company. During Arthur T. Demoulas' tenure as CEO, the company was known for worker-friendly policies, like good health insurance coverage and promotions from within the company rather than hiring from the outside. Consequently the employees became very loyal to him.

In 2013, Arthur T. Demoulas' cousin, Arthur S. Demoulas, gained control of the board of directors and was able to remove Arthur T. Demoulas as CEO when Rafaele Evans switched loyalties. But Arthur S. Demoulas did not have the same positive reputation as his cousin.[95] With the removal of Arthur T. Demoulas as CEO, workers at every level rebelled and stock clerks refused to restock shelves until Arthur T. Demoulas was reinstated. Furthermore, 17 lawmakers endorsed the workers and urged customers to boycott the chain.[96] The employees essentially shut down the company to protest the firing of the company's much beloved CEO.

After the protests, in August 2014, the state attorney general and the governors of Massachusetts and New Hampshire met with Arthur T. Demoulas and Arthur S. Demoulas to work out an agreement.[97] The parties thereafter announced a $1.5 billion buyout in which Arthur T. and his family would get control of the company while Arthur S. and his family receive cash to end the long disputed battle over control of the food chain.

However, the family feud was very costly with a collective $583 million in lost sales.[98]

CONCLUSION

Transitioning the ownership and management of a family-owned business from one generation to the next is difficult and requires careful planning. While tax planning is important, as illustrated in this article, it is also critical to focus on the non-tax obstacles that may prevent or hinder a client's business from successfully transitioning to the next generation. The second part of this article, which will appear in the November volume of this journal, will discuss how advisors may assist a family in identifying the stress factors that are likely to negatively impact a particular business and advise a client about instilling a family culture that promotes the same goals and virtues. Part Two will also discuss how an advisor may be involved with instituting a proper organizational structure of the business to anticipate and minimize family disputes. Finally, Part Two will discuss the professional responsibility traps and pitfalls that often come into play for attorneys whose practice includes estate and family business succession planning.

ENDNOTES

1 *See Family Business Alliance*, http://fbagr.org/index.php?option=com_content&view=article&id=117&Itemid=75.

2 Karl Bareither & Tom Reischl, *Planning a Family & Business Legacy: A Holistic Approach to Wealth Transfer Planning for Entrepreneurs, Business Owners & Family Members* 20 (2003).

3 *Id.* at 20. *See also Family Business Alliance*, n. 1 above.

4 Karl Bareither & Tom Reischl, n. 2 above, at 20.

5 *Id.* at 20.

6 *Id.* at 20.

7 *Id.* at 20.

8 A recent survey found that 56% of family business owners are either unhappy with their succession plan or do not have one at all. *See* Gene Marks, *How One Family Business Is Solving the Succession Problem*, http://Inc.com/gene-marks/how-one-family-business-is-soling-the-succession-problem.html.

9 Grant Gordon & Nigel Nicholson, *Family Wars* 8 (2008).

10 Stephanie Brun de Pontet, Craig E. Aronoff, Drew S. Mendoza & John L. Ward, *Siblings and the Family Business* 20 (2012).

11 Avi Z. Kestenbaum, *Avi Z. Kestenbaum & the Family Business Succession Panning Crisis: A Call to Action*, http://www.leimbergservices.com.

12 Gordon and Nicholson, n. 9 above, at 2.

13 Brun de Pontet, *et al.*, n. 10 above, at 20.

14 Bareither & Reischl, n. 4 above, at 24.

15 Brun de Pontet, *et al.*, n. 10 above, at 22.

16 *Id.*

17 *See* Gordon & Nicholson, n. 9 above, at 21.
18 Craig E. Aronoff, Stephen L. McClure & John L. Ward, *Family Business Succession: The Final Test of Greatness* 82 (3d ed. 2011).
19 Gordon & Nicholson, n. 9 above, at 38.
20 Lisa Rab, *The Other Koch Brother*, Village Voice, Aug. 24, 2011, http://www.villagevoice.com/news/the-other-koch-brother-6432894.
21 *Id.*
22 *Id.*
23 *Id.*
24 *Id.*; Gordon & Nicholson, n. 9 above, 40.
25 Rab, n. 20 above.
26 *Id.*; Gordon & Nicholson, n. 9 above, 40.
27 Gordon & Nicholson, n. 9 above, at 41.
28 *Id.* at 41.
29 *Id.* at 39.
30 *Id.* at 42.
31 Wikipedia, *Dhirubhai Ambani*, http://en.wikipedia.org/wiki/Dhirubhai_Ambani (last visited Aug. 29, 2015).
32 *Id.*
33 Gordon & Nicholson, n. 9 above, at 44.
34 *Id.* at 45.
35 *Id.* at 48.
36 *Id.* at 171.
37 *Id.* at 171.
38 Anupreeta Das, *Inside the Breakup of the Pritzker Empire*, Wall St. J. (Nov. 26, 2013), http://wsj.com/articles/SB10001424052702304281004579220162619539146.
39 *Id.* at 173.
40 *Id.* at 173.
41 *Id.* at 175.
42 *Id.*
43 *Id.*
44 Gordon & Nicholson, n. 9 above, at 181.
45 *Id.*
46 *Id.*
47 *Id.*
48 *Id.* at 183.
49 David Shaw & Mitchell Landsberg, *Otis Chandler: A Lion of Journalism*, L.A. Times (Feb. 28, 2006) http://www.latimes.com/local/la-me-otislong28feb28-story.html (*quoting*, David Halberstam in *The Powers That Be* (1979)).
50 Gordon & Nicholson, n. 9 above, at 184.
51 *Id.* at 118.
52 Steve Arnold, *He Was the True Measure of a Man: Friends, Family, City Mourn Morris Waxman*, The Hamilton Spectator (May 27, 2015) http://www.thespec.com/news-story/5644742—he-was-the-true-measure-of-a-man-friends-family-city-mourn-morris-waxman/.
53 Gordon & Nicholson, n. 9 above, at 119.
54 Morris rejected this proposal. 55
54 Wayne Lilley, *The Scrap of Their Lives*, The Globe and Mail, (Jan. 30, 2004), http://www.theglobeandmail.com/report-on-business/rob-magazine/the-scrap-of-their-lives/article18258614/?page=all.
55 Gordon & Nicholson, n. 9 above, at 120; Wayne Lilley, *The Scrap of their Lives*, n. 54 above.
56 Gordon & Nicholson, n. 9 above, at 120.
57 *Id.* at 121.
58 *Id.*
59 *Id.* at 90.
60 Wikipedia, Bata Shoes, http://en.wikipedia.org/wiki/Bata_Shoes (last visited Aug. 29, 2015).
61 *Id.*
62 *Id.*
63 *Id.*
64 *Id.*
65 Gordon & Nicholson, n. 9 above, 91.
66 *Id.*
67 *Id.* at 92.
68 *Id.* at 94.
69 Stephen J. Dunn, *Why the McCourt Marital Agreement Failed*, Forbes (Dec. 14, 2011), http://www.forbes.com/sites/stephendunn/2011/12/14/why-the-mccourt-marital-agreement-failed/.
70 *Id.*
71 *Id.*

72 *Id.*
73 *Id.*
74 *Id.*
75 *Id.*
76 *Id.*
77 Drew Combs, *Error at Home*, Am. Law. (Mar. 1, 2011), http://www.americanlawyer.com/id=1202482350512?keywords=drew+combs&publication=TAL+2008.
78 Bill Shaikin, *Jamie McCourt Loses Bid to Throw Out Dodgers Divorce Deal*, L.A. Times (Sept. 9, 2013), http://articles.latimes.com/2013/sep/09/sports/la-sp-dn-jamie-frank-mccourt-dodgers-divorce-20130909.
79 Joshua Schneyer and Brian Grow, *Special Report: In Oil Baron's Divorce, Company Lawyer Plays Star Role*, Reuters (Nov. 6, 2014), http://www.reuters.com/article/us-continental-hamm-divorce-specialrepor-idUSKBN0IP2GG20141106.
80 *Id.*
81 *Miller v. McCaskey*, 568 N.E.2d 170 (Ill. App. Ct. 1991).
82 *Rollins v. Rollins*, 741 S.E.2d 251 (Ga. Ct. App. 2013).
83 *Rollins v. Rollins*, 755 S.E.2d 727 (Ga. 2014).
84 *Miller v. McCaskey*, 568 N.E.2d 170 (Ill. App. Ct. 1991).
85 *Rollins v. Rollins*, 766 S.E.2d 162 (Ga. Ct. App. 2014) (citing *Hanson v. First State Bank & Tr. Co.*, 385 S.E.2d 266 (Ga. 1989), n. 4.
86 OCGA §14-2-830(a)(1)(2) (director); OCGA §14-2-842(a_(1)(2) (officers).
87 *Rollins v. Rollins*, 766 S.E.2d 162 (Ga. Ct. App. 2014).
88 *Rollins v. Rollins*, 780 S.E.2d 328 (Ga. 2015).
89 *Rollins v. Rollins*, No. A12A2516, 2016 BL 228055 (Ga. Ct. App. July 15, 2016).
90 *Id.*
91 Hollie Slade, *Inside The Billionaire Family Feud That Nearly Killed Market Basket*, Forbes (Sept. 10, 2014), http://forbes.com/sites/hollieslade/2014/09/10/inside-the-billionaire-family-feud-that-nearly-killed-market-basket/.
92 *Id.*
93 *Id.*
94 *Id. See also* Kate Cox, *Forty-Year Family Feud Leads To Empty Shelves at 70 Supermarkets, Protest In Two States*, Consumerist (July 22, 2014), http://consumerists.com/2014/07/22/forty-year-family-feud-leads-to-empty- shelves-at-70-supermarkets-protest-in-two-states.
95 Slade, n. 91 above.
96 *Id.*
97 Anne Mostue, *A Look Back at the Family Feud That Nearly Ended Market Basket*, WGBH News (Dec. 30, 2014), http://wgbhnews.org/post/look-back-family-feud-nearly-ended-market-basket.
98 Slade, n. 91 above.

Authors

Eric A. Manterfield, Esq. (Retired)*, Krieg Devault LLP, Indianapolis, Indiana
Eric A. Manterfield is a retired partner in the Indianapolis, Indiana law firm of Krieg DeVault LLP, where he concentrated his practice in estate planning, family business succession planning, charitable planning and probate and tax litigation. Eric is an Indiana Board Certified Trust & Estate Lawyer by TESB. Eric is a magna cum laude graduate of Denison University (Phi Beta Kappa). Eric received his law degree from the University of Michigan Law School in 1972. He was identified in 2009 by Worth magazine as among the top 100 estate planning attorneys in the United States. Eric is listed in "The Best Lawyers in America," "Indiana's Best Lawyers," and "Indiana Super Lawyer."

Patrick L. Emmerling, Esq., Bond, Schoeneck & King PLLC, Buffalo, New York
Patrick L. Emmerling, is a member of Bond, Schoeneck & King, PLLC and concentrates his practice in estate planning, family business succession planning, charitable planning and estate administration. He is also a certified public accountant. He received his B.S. (summa cum laude) from Canisius College and a J.D. (magna cum laude) from the University of Notre Dame. Patrick is listed in "Best Lawyers in America" and "New York Super Lawyer."