<u>THE FAMILY BUSINESS...WHO WILL INHERIT IT?</u>

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Many business owners today are so busy running their business that they do not take the time to address the future of their family business. Many owners are focused on growing and operating the business, that issues involving retirement, death or disability are not on their radar screen.

Often times there are too many difficult questions to be asked and answered and it is easier for the business owner to push these questions aside than to address them. Many owners do not anticipate any family conflict so they do not see the need to discuss any business or succession planning. In fact, like most of us, most business owners just assume that they will live forever and they never plan ahead. In the end, there is no written indication of who will be in charge of running the family business in the event of the business owner's death or disability.

With any business, there are always difficult business questions to answer. But with a family business, there are both emotional family and business questions to answer. Some of the difficult questions that my clients face are as follows:

1. Has the child who is active in the business (hereinafter referred to as the "active child") earned the right to receive the business based on "sweat equity"?

2. At death, are the business owners intending to treat the active and non-active children "equally" rather than "fairly"?

3. Do the business owners fear resentment by the children who are not actively involved? Often there is very little display of resentment while the business owners are alive, but upon their death there is always the risk that hidden resentment will surface.

4. Have the business owners acquired other assets that can be used to "equalize" the inheritance to other children who are not active in the business? Many times a life insurance policy or retirement assets can be left to the non-active children.

5. Who would oversee the business in the event of disability of the business owner? Many business owners are unwilling to relinquish control because the business is their life. As a result of this need to retain all control, they tend to ignore issues related to their future retirement or potential incapacity.

6. How do you provide for the active child to run the business without interference from other children who may have certain expectations of how the business should be run or how it should be divided at the death of the business owner?

For many business owners, these questions are never addressed because they have not consulted with the key financial and legal advisors who have the expertise to help them answer these questions. Estate planning can help answer all of these questions and many more.

While the typical estate plan will cover worst-case scenarios such as death and disability, an estate plan can also address the business owner's succession plan and the division of assets at death. An integrated succession and estate plan can provide various scenarios depending on the business owners anticipated current and future involvement in the business.

For example, if the business owner(s) died today, would a transfer of the business to an active child be different than if the business owner died ten years from now? Has the active child put in enough time or sweat equity to leave them the business outright or should the active child be required to buy out the other beneficiaries? Does the active child have sufficient assets to buy out the other beneficiaries? Most families assume that everyone will get along. The reality for most families is that each child is in a different financial situation and each has different needs and expectations. If a child is relying on an inheritance to put them ahead in life financially, that non-active child can only create problems for the active child if succession planning at death is not clearly addressed and outlined.

As you can see, estate planning creates the opportunity to discuss all of these questions and determine if your contingency business and estate plan protects the active child, while preserving an inheritance for the other beneficiaries. Even if equality in inheritance is desired, in most cases where there is an active child in the family business, absolute equality is not really achievable. Perhaps rough equality should be the business owner's goal.

You should also keep in mind that the concept of "family" is also changing. The traditional American family has disappeared and has been replaced by a variety of hybrid families. In fact, in many instances key employees may seem more like family to the owner than his/her children.

PLANNING FOR INCAPACITY

Many business owners run the business on their own for so long that they never stop to think about who would step in should they become mentally or physically disabled or incapacitated. For many business owners, they are not only the owner, they are also the bookkeeper, the banker and the administrative assistant all in one. In addition to the succession planning that needs to be addressed should the business owner die, plans also need to be made in the event of an illness or disability. Without the right legal documents in place, your active child may be forced to petition the Probate Court for permission to handle the business finances. (For more information see article on Disability Planning for the Older Generation)

A simple Durable Power of Attorney can eliminate some of the crisis that occurs when a family member becomes incapacitated. A Durable Power of Attorney is a legal document that allows you to name an agent to act on your behalf should you become unable to handle your own personal or business affairs. A Durable Power of Attorney can be general or it can be limited to performing only certain financial tasks. (For more information see article on Different Types of Powers of Attorney)

DIVISION OF ASSETS AT DEATH

Regardless of what planning you have done during your lifetime and in how organized you have been, if you do not taken the time to set up a Will or a Trust you have missed an opportunity to direct how your asset are to be divided at your death.

When an individual dies, the first thing the family looks for is a Will. Many individuals complete a simple Will when their children are minors and even after their children are full grown they have never updated that part of their estate plan. Many of the assets that a business owner holds are individually owned. Such assets include their actual business or corporate interest, real estate that is part of the business or includes their personal home, personal and business bank accounts and investments. When the business owner dies, all of those individually owned assets will have to be Probated. A process that is controlled by the Probate Court. (For more information see article on What is Probate).

Even though individually owned assets will go through Probate with a simple Will, at least the owner may have identified how the assets are to be divided and who is to be in charge as the Personal Representative. Unfortunately, if this simple Will is extremely outdated, it may not take into account a change in family dynamics, assets acquired after the Will was signed and it may not take into account an active child in the business. In fact, a truly outdated Will in some situations can almost feel like no estate plan was done at all.

Unfortunately, a lot of business owners have not even completed a simple Will. Dying without a Will or a Trust is called dying "intestate". The intestate laws in Michigan outline how your money is to be divided at the time of your death. In other words, the State of Michigan has decided that if you do not take the time to specifically state how your assets will be divided, the State of Michigan will make these decisions for you. The problem with dying intestate is that the intestate succession laws may not reflect how you would have divided up assets between a surviving spouse, active children and non-active children. In fact, in an intestate succession situtation the surviving spouse may not inherit all of the assets or if you have a family business with an active child, you may force the active child to share the business with siblings or spouse who have never been involved in the business and knows nothing about the operation of the business.

With a family business or with any business, a thorough estate plan or succession plan is extremely important. The best way to accomplish a business succession plan is by using a Living Trust. A Living Trust is a legal document that allows you to identify who will be in charge of your finances at the time of death and it identifies how the assets will be divided when you are deceased. Because of the nature of the Trust and how the assets are owned by the Trust during your lifetime, assets held in a Trust pass pursuant to the terms of the Trust and they do not pass through the Probate Court. Since the Living Trust clearly outlines your wishes with regard to distribution the intestate succession laws are not a factor.

With a Living Trust you can clearly outline how your business is to be run or divided; It can provide a stream of income to a surviving spouse without leaving outright ownership of a business or other assets to the surviving spouse; it can allow an active child in the business an opportunity to buy the business over time; or it can provide for the sale of the business at death.

In other words, a Living Trust can answer all of the previous questions about the transfer of a business and it can specify who will be in charge of your entire estate at the time of death. A Living Trust, by far, gives you more control than a simple Will and with a Living Trust your affairs can all be handled privately.

As a business owner, taking the time to get your affairs in order during your lifetime and planning for your death will ultimately simplify and smooth out the transition of both your business and personal assets at the time of your incapacity or death. Your failure to address any of these issues while you are alive and competent can only insure that you are going to leave your family, your business and your employees one big mess.