Volume 73
Issue 3 *Spring 2024*

Article 5

HBO's Succession: What Can Lawyers Learn from This Family Business Story?

Spencer B. Burke

HBO'S *SUCCESSION*: WHAT CAN LAWYERS LEARN FROM THIS FAMILY BUSINESS STORY?

*Spencer B. Burke**

Table of Contents

* University of Pennsylvania, A.B., and J.D. Senior Counsel, St. Louis Trust & Family Office, St. Louis, Mo. Adjunct Lecturer in Family Business and Eugene F. Williams Jr. Family Business Executive in Residence, Koch Center for Family Enterprise, Olin Business School, Washington University in St. Louis.

Introduction

"All families are alike; each unhappy family is unhappy in its own way."[1]

This is the famous first sentence in Tolstoy's epic novel *Anna Karenina* and helps explain, by extension, why achieving success in a family business is so challenging. It is popularly referred to as the *Anna Karenina* principle.[2]

A family business is a complex social system, and many things are needed to succeed: a profitable business, purpose, growth, effective governance and leadership, family harmony, succession planning, etc. The absence of these will doom the business even if all the other success attributes are in place. Success is multi-causal, and failure is singular.

The principle has a dual application to a family business since two complex systems are in play: the business and the family. What makes a family "happy" may conflict with what is necessary for business success. The converse is also true. Doing what it takes to have a successful business may obliterate an otherwise happy family. Avoiding pitfalls in *both* complex systems over generations is necessary for success.

"Success" in this context means to last as long as possible and practicable as a family business. For some families, the desire is to have their business last for multiple generations, maybe forever. Selling the business is unimaginable. For others, an exit may make business sense or is needed to achieve a particular family or financial objective. This may lead to a considered decision to sell the business, the transfer of ownership to employees (via employee stock ownership plan (ESOP) or other transfer), or some other separation of the family from the business. An exit under these circumstances is a success of another kind and in the family's best interest.

HBO's *Succession* is the story of an unhappy family and the failure of its family business. It is a virtual textbook presentation of the many causes for the demise of a family business: warring and disgruntled family members, a toxic corporate culture and corrupt behavior, an aged patriarch and founder who will not step aside, poor governance, absence of succession planning, lack of voting control and so much more. The sale of the business was a self-inflicted failure. As such, *Succession* affords a rare educational opportunity for family business owners, their families, and their advisors: the opportunity to learn from the mistakes of others.

---

1. Leo Tolstoy, Anna Karenina 1 (Richard Pevear & Larissa Volokhonsky, trans., Penguin Books 2004) (1878).
2. Jared Diamond, Guns, Germs and Steel—The Fates of Human Societies 169 (1999).

This Essay focuses on the educational value of *Succession* to lawyers: what can they learn from the series that will help them better serve the interests of their family business clients?

This Essay will address three distinct topics:

- The essential teachings of *Succession*.
- A review of foundational family business concepts lawyers must know.
- Potential areas to emphasize in family business law practice.

I. Background

I teach family business to MBA-level students at the Olin Business School at Washington University in St. Louis. My course is entitled "Ownership Insights: The Strategic Advantages of Family and Employee-Owned Firms" and covers the evolution of founder-led firms to multi-generational family businesses. The emphasis of the course is on the behaviors and practices a family business must have to be successful over generations from a corporate finance and strategy perspective. It pays homage to the *Anna Karenina* principle.

In addition to a traditional case study approach, each class has one or more speakers from a family business present their company's story and perspectives on what is necessary to survive and thrive over generations as a family business. The presentations are the highlight of the course because the speakers and the companies they lead have experienced *both* success and failure. Scores of prominent family business owners and their offspring have spoken in this class, and the import of the *Anna Karenina* principle is on display in every session.

This past spring, I had the opportunity to teach a mini-version of this course to upper-level law students at the University of South Carolina Law School.[3] In this venue, time constraints limited my ability to have outside speakers, so I infused the *Succession* storyline into the classroom

3. Professor Benjamin Means at the University of South Carolina School of Law invited me to serve as the first guest lecturer in the family business program he leads at the law school. Professor Means is an expert in family business law and has published numerous articles on the topic. *See, e.g.*, Benjamin Means, *Nonmarket Values in Family Businesses*, 54 Wm. & Mary L. Rev. 1185 (2013) [hereinafter Means, *Nonmarket Values*]; Benjamin Means, *A Contractual Approach to Shareholder Oppression Law*, 79 Fordham L. Rev. 1161 (2010) [hereinafter Means, *A Contractual Approach*]; Benjamin Means, *Solving the "King Lear Problem"*, 12 U.C. Irvine L. Rev. 1241 (2022) [hereinafter Means, *King Lear*]; Benjamin Means, *Logan Roy as King Lear: How Not To Succeed*, 73 DePaul L. Rev. 921 (2024).

pedagogy. This was a big hit as it gave the students immediate context, much like having CEO speakers present in the classroom.[4]

This experience gave me a greater appreciation for the value of offering family business-specific programming in law schools. This is real-world content that many practicing lawyers experience daily. Learning more about it will help their careers and the clients they will represent.

Lawyers are in the *best* position to help family businesses because they *are* the professionals who deal most frequently with this form of ownership. They already do their organizational and initial tax work, provide advice on business governance and succession issues, and are regularly in contact with these clients on other legal matters. Lawyers in the same firm often advise their clients on asset protection and estate planning strategies for the owners. Many lawyers also serve on the boards of directors of their family business clients. They have earned the trust of their clients.

But can lawyers help family business owners more than they already do? According to Josh Baron and Rob Lachenauer in their book, the answer is *yes*:

> Instead, *ownership related issues have been largely left to lawyers, whose primary job is to protect assets from the government (or other family members)*. Lawyers are hugely important to certain aspects of protecting family businesses through labyrinthine legal structures such as trusts, estates, and shareholder agreements. Because of these difficult structures, *family members seldom fully understand how ownership works in their own family business.* Of course, other dimensions of ownership beyond the legal—for example, financial, tax, psychological, cultural, strategic, and political—make ownership challenging to grasp. *But the powers and responsibilities of ownership are far too important to simply leave to lawyers to map out in complex documents.* Misunderstood and misdirected, the power of ownership can destroy what your family has spent generations trying to build.[5]

Lawyers may bristle at the suggestion that ownership issues are "*far too important to simply leave to* [the] *lawyers*."[6] This, from two respected family business consultants, is a wake-up call to the legal community to consider doing more for their family business clients.

---

4. The core plot line for the series was derived from Sumner Redstone (CBS, Viacom, and Paramount) and Rupert Murdoch (Fox Corporation and News Corp.) families. Each family has experienced numerous scandals and succession challenges that have been widely publicized in the press. Other elements of the plot are derived from the experiences of Ted Kennedy (Kendall's drowning incident), Robert Maxwell (sudden death of founder), Elon Musk (acquisition of Twitter), and various others.

5. Josh Baron & Rob Lachenauer, Harvard Business Review Family Business Handbook: How to Build and Sustain a Successful, Enduring Enterprise 25–26 (2021) [hereinafter Family Business Handbook] (emphasis added).

6. *Id.* at 26 (emphasis added).

II. Key Teachings of *Succession*

Each episode of *Succession* includes behaviors or actions by the Roy family which will inevitably lead to the failure of Waystar Royco as a family business. All it takes is one of these failures to validate the *Anna Karenina* principle as applied to family businesses. Here are my top six from the series, which would be fatal to family business success.

A. Rampant Family Dysfunction

The psychological abuse dished out by Logan Roy to his children, all in the name of his self-aggrandizement and fostering a succession "competition" among them, is a surefire way to wreck a family business.

These abuses are cataloged by a *Forbes* contributor and family business consultant who concludes in his wonderfully satiric article:

> [W]hile we can laugh at how over the top his practices are, *the truth is that such behavior is far from uncommon, despite being a disaster for all involved—as well as the family business.* [*Succession*] clearly shows us the many ways that patriarchs can instigate distress and conflict. What may be good for them is a tragedy for their children. *And what's a formula for success in a TV show is a formula for failure in real life*.[7]

The dysfunctional behaviors Jaffe describes are what most viewers will remember about the series.

The good news is that family business consultants, like Jaffe, with training in organizational behavior and psychology, are on the front lines of advising families on how to deal with these situations.[8] Lawyers can play an important role by encouraging the adoption of governance and policy measures to corral and dampen the destructive impact of this kind of behavior on the business itself. Effective governance and separation of family issues from business issues are the needed antidotes.[9]

7. Dennis Jaffe, *Best Practices of Logan Roy: How to Build Conflict to Sustain a Family Business*, Forbes (Mar. 28, 2023), https://www.forbes.com/sites/dennisjaffe/2023/03/28/best-practices-of-logan-roy-how-to-build-family-conflict-to-sustain-a-family-business/?sh=46ac4fd3acc0 (emphasis added).

8. For an overview of these issues, see Manfred F.R. Kets de Vries, Randel S. Carlock & Elizabeth Florent-Treacy, Family Business on the Couch: A Psychological Perspective (2007) and Harry Levinson, *Conflicts that Plague Family Businesses*, Harv. Bus. Rev., Mar.–Apr. 1971.

9. *See* Means, *Nonmarket Values*, *supra* note 3, at 1207 ("Family businesses present distinctive challenges because they combine the values and expectations of the workplace with more intimate family bonds.").

B. Lack of a Compelling Purpose

The Roy family has an insatiable desire for power and money; succession to the CEO position is the epitome of success. There is no greater purpose for everything they do. The family members do not focus on serving anyone but themselves. Successful family businesses are not like this.

Successful family businesses have a purpose that is aspirational, and that serves as a point of pride for family members and employees. It keeps family members together as a family even when many of them do not work in the business. It motivates non-family employees to contribute to the success of the company. A shared purpose aligns the interests of owners, employees, and other stakeholders. This sense of purpose is missing in *Succession* and makes trouble inevitable.

Lawyers need to ask their clients, "What is the purpose of your ownership of the business?" "What are your objectives, what motivates you?" How else can they effectively give legal advice that is aligned with the wishes of the owner?

C. Lack of Control

Within Waystar Royco, the Roy family did not have voting control, but with an aggregate equity stake of between 26% and 36%, the family had a big say.[10] This is not enough to control the board under all circumstances. Logan, as the founder of Waystar Royco, could always be outvoted.[11]

Control of Waystar Royco is the unappreciated "elephant in the room" in *Succession*. The issues of "who has it" and "who will have it when Logan dies" are largely ignored and left shrouded in ambiguity.[12]

---

10. Louis Ashworth, *Everything You Don't Actually Need to Know About the Economics of* Succession, FIN. TIMES (Apr. 21, 2023), https://www.ft.com/content/a7ce31e0-06f0-4986-9eb9-f4322a40ffc3 [https://perma.cc/8B58-KXQC]. The shares of the Roy children, each representing 2.5% ownership in Waystar Royco, are included in the 36%. It is unclear whether Connor Roy, Logan's only child by his first wife, held this percentage of stock in Waystar Royco at any time during the series. His shares may have been re-purchased by Logan or the company to fund his ranch property and his presidential campaign.

11. This was not always the case. Prior to the sale of equity in Waystar Royco to Stewy's private equity firm in Season One, the Roys owned over 50% of Waystar Royco. This sale was made in settlement of the hostile takeover of Waystar Royco by Stewy and his partner, Sandy Furness, in an effort to oust Logan as CEO of Waystar Royco. *Id.* (discussing analogous control issues).

12. Viewers of *Succession* have every right to be confused! The specifics of who owns what shares of Waystar Royco and how they are owned (outright or in a particular trust) are not disclosed. The Roys own a holding company that directly owns the family's shares in Waystar Royco; the shares of the holding company, in turn, are owned by various family trusts. The aggregate family holdings in Waystar Royco amount to 36% in Season Four, but little is known about how the trusts are structured, who the trustees are, or the other important terms.

Fighting over management succession without knowing the answers to these questions is a futile act.

Logan worried about his lack of control of the company. It was an existential threat to everything he had achieved, and it flashed before his eyes each time an issue requiring the board of directors' approval arose.

The issue of succession in a family business is often confusing since it comes in three forms: ownership, control, and management. Typically, as in *Succession*, the term is used with reference to management succession, the process to select the next CEO or chairman. Of the three, succession of ownership and control of the business is by far the most important since the owners determine them, while management succession is a board function.

Logan's children were oblivious to this issue and its importance. As owners of less than 50% of Waystar Royco shares, they were in a precarious position should any issue (merger, board elections, etc.) come to a contested vote. A merger with GoJo was just such a situation that required a shareholder vote to move forward. Logan's death dramatically increased the risk of the Roy's being outvoted by the board.

D. Where Is the Board of Directors?

Waystar Royco, as a public company, had a board of directors, but it was essentially inert. This changed when Logan died, but too late to save the family business. With Logan no longer functioning as chair, the non-family board members were free to vote their conscience, and they did. They approved, along with Shiv, the GoJo merger and sent the other Roy children packing.

A functioning board would have managed the CEO succession process and not let it become a circus.[13] The best practices used by public companies to pick a successor CEO are well known, they typically include: retaining an executive search firm; development of a detailed job description and statement of expectations; background checks and psychological testing; and extensive vetting of the candidates by independent board members. Non-family candidates would be included in the pool.

Suffice it to say, the approach at Waystar Royco to succession planning was not like this. There was not an orderly process. Instead, viewers

13. *See* Benjamin Means, *The Value of Insider Control*, 60 Wm. & Mary L. Rev. 891, 926 (2018) (arguing that "across all forms of business association, the fiduciary duties of care and loyalty are available to regulate insider control"). Even in controlled companies in which board members are beholden to controlling shareholders, "the presence of fiduciary obligations can still shape behavior." *Id.* at 928.

witnessed the arbitrary and gut-wrenching testing and subjective evaluation of the Roy kids' competence, toughness, and seriousness by their father. All of them failed and Logan was gone before he could pronounce his judgment. Instead, GoJo, as the new owner of Waystar Royco, picked son-in-law Tom to succeed Logan Roy.

A high-performing fiduciary board might have protected the Roys from themselves by managing the succession process in a professional manner.

E. Family Members Working in the Business

A significant challenge for all family businesses is deciding who in the family is eligible to work in the business and under what conditions.[14] This challenge only increases as the family size multiplies.

Eligibility is often conditioned on meeting specified educational requirements, relevant work experience, and predictive evidence of success before joining the firm. Rules also may address what constitutes "family," including whether spouses and other relatives of family members can work in the business and under what conditions.[15]

In addition to the employment conditions, issues relating to compensation, career advancement, and the performance evaluation of family employees must be addressed.

This issue is so potentially divisive that some family businesses prohibit family members from working in the business.[16] Family members in these companies participate only at the board and ownership levels.

Success as a family business is at risk without rules addressing the family member eligibility issue. Waystar Royco did not appear to have any rules in this regard.

The benefit of having these rules in place *before* a family member seeks employment is that the business is protected from unqualified job aspirants, as in Waystar Royco, and free from the conflicts that arise when nepotism is practiced.[17] The earlier these employment rules for family members are established, the better, as the number of family members will increase over time, and issues involving family member

14. *Id.* at 898 ("The fact that a family owns a business does not prove that kinship preferences in the workplace are inevitable or appropriate.").

15. Such a rule may have prevented Tom (Shiv's husband) and Cousin Greg from working at Waystar Royco.

16. The Roy siblings acted as though a non-family CEO was not a possibility and unaware that many, very successful, family businesses have no family member "running the business."

17. Means, *supra* note 13, at 902 ("Nepotism continues to conjure an unpleasant image of patronage and of incompetent or lazy heirs trading on their family connections, eclipsing the career prospects of more qualified but less connected peers.").

employment are predictable. This is the standard operating procedure for most well-run family businesses.

Family members should *want* to join the business, not be involuntarily conscripted to join. If multiple family members join, they should like working together because of the family connection, not because they own a business together. This is not the case with the three Roy children; they did not enjoy working together on anything.

F. Mismanagement of Wealth

The Roy family's wealth is staggering. Logan has a stake in Waystar Royco worth an estimated $26 billion, each of his children has an interest worth roughly $2.5 billion,[18] and they own other valuable assets as well. They all lead bespoke lifestyles of the uber-rich and famous with all the trappings, including luxury condominiums in upscale Manhattan neighborhoods, a castle in Scotland, country estates, yachts, private jets, fleets of limousines, jet helicopters, etc.

Wealth of this scale requires extensive investment management skills, fiduciary expertise, income and estate and tax planning, and family wealth education—it is complicated, costly, and takes a lifetime to get right. The planning has both human and financial implications. Regular communication among family members is required to keep it all straight.

A family with the wealth of the Roys would typically have a family office to administer, manage, and oversee all their financial assets. Such a resource could also help all the Roy family members, including Logan, develop a healthier psychological perspective on their wealth. It is new territory for all of them and will affect the entire family for generations.[19] The existence of such an office or similar resource to serve the financial needs of the family was never mentioned.

Family and individual trusts were mentioned by the Roys throughout the series; this suggests that Logan has done wealth planning, but little is known about what it has accomplished. The Roy children (and the viewers) can only speculate about the details of this plan.

Are these trusts the source of their lavish spending? Does Logan or a trustee control the distributions from these trusts, and upon what

18. These amounts are based on the final price of $192 per share of Waystar Royco offered by Gojo. Jane Thier, *Where Would Waystar Royco from 'Succession' Rank on the Fortune 500? We Crunched the Numbers*, FORTUNE (May 28, 2023), https://fortune.com/2023/05/28/where-would-waystar-royco-succession-rank-fortune-500/ [https://perma.cc/J8ES-2P5Z].

19. Logan is a poor role model for his children when it comes to family stability. He has been married three times, and a third divorce appears imminent. Hints of him having affairs with other women occur throughout the series, including two with executive assistants working for him.

terms? Who has the power to vote Waystar Royco shares held by these trusts? What knowledge do Logan's kids have of these terms and their responsibilities under the trusts when their father is no longer around? How do the terms of Logan's will affect the future ownership of Waystar Royco? These are all critical questions, and they are left unanswered.

The terms of Logan's divorce decrees with his first two wives and of the pre-nuptial agreement he undoubtedly had with his third wife, Marcia, are also unknown. The divorce decree with his second wife, Lady Caroline, contained a clause allowing her to prevent a sale of the company without her consent. Logan skillfully negotiated the termination of this right to the surprise of his children before he told them that he was moving ahead with the sale of Waystar Royco to Gojo. Another unresolved mystery: What are the terms of Marcia's pre-nuptial agreement, and how will they affect the ownership of Waystar Royco after his death?[20]

Logan's process for selecting a successor from among his children is also troubling. A comprehensive wealth plan would address this issue and allow the Roy children to plan their lives accordingly. Instead, the process is all about his "control" of his kids, pitting one against the other and seeking their adulation and loyalty.[21] The use of wealth as a control mechanism via trusts or otherwise is predictably unhealthy.

The effectiveness of Logan's estate tax planning is also a big unknown. The current levy for the federal estate tax is 40% or a potential liability of $10 billion. Did Logan address this issue before his death? A significant estate tax liability is another existential threat to the Roy family's control of Waystar Royco because it may force the liquidation of Waystar Royco stock to fund the liability.

Curiously, *Succession* did not have an episode that included the reading of Logan's will to his children and other relatives. At that time, we would have learned how Logan's assets were being passed on to his family, and the issue of potential estate tax exposure would have been addressed.

---

20. Pre-nuptial agreements and divorce decrees are a critical element of family business hygiene. Lawyers preparing these agreements need to collaborate with family business law experts to make sure that they preserve, not disrupt, the desired ownership and control of the family's business in the future.

21. Rupert Murdoch's estate plan provides an interesting contrast to Logan Roy's. Under the terms of the Murdoch Family Trust (the entity that holds voting control of both News Corp. and Fox Corporation), designated members of the family vote together: Mr. Murdoch has four votes, and four of his children each have one vote. Upon their father's death, the four children share voting power equally. All six of Rupert's children are beneficiaries of the trust, but only the four from his first two marriages have voting power. This allows three siblings to outvote the fourth should a disagreement arise. Gabriel Sherman, *Inside Rupert Murdoch's Succession Drama*, VANITY FAIR (May 2023), https://www.vanityfair.com/news/2023/04/rupert-murdoch-cover-story [https://perma.cc/FG28-VL3H].

III. Beyond *Succession*: Key Family Business Concepts for Lawyers

Lawyers serving family business owners will benefit from knowing more about the prevalence and forms of family ownership and the unique challenges that their owners face. This is foundational information. It will help lawyers craft innovative solutions for their clients.

Succession is a useful "lens" through which to animate these topics. Here are some examples.

A. *Family Businesses Come in Many Forms*

Family businesses come in all shapes and sizes and account for an enormous share of global business activity. Within the United States, it is estimated that family businesses generate 60% of all economic activity.[22] Outside the United States, family businesses are the dominant form of corporate ownership, and their economic impact is even more significant.

Until recently, it was difficult to tabulate the number and significance of family-controlled businesses worldwide. That changed with the 2015 publication by the University of St. Gallen in Switzerland of the *Family Business Index* (Index), an interactive database that ranks the 500 largest family-controlled firms in the world, as measured by revenues, public and private.[23]

In 2022, the aggregate revenues of these firms exceeded $8.02 trillion, and they employed over 24.5 million people. According to an Ernst & Young study, the collective economic contribution from this group of companies would rank third among the largest economies in the world, after the United States and China.[24] It is especially noteworthy that 76% of the firms listed in the Index are over fifty years old, and 31% are over one-hundred years old.

The Index is a very useful resource for family business advisors because it also includes information on company age, board composition, demographics, family leadership, etc., for each of the listed companies, and is regularly updated.[25]

---

22. *See* Daniel Van Der Vliet, *Measuring the Financial Impact of Family Businesses on the US Economy*, Family Bus. (June 2, 2021), https://familybusiness.org/content/measuring-the-financial-impact-of-family-businesses-on-the-US-ec [https://perma.cc/X63G-R9R8].

23. *Family Business Index*, Univ. of St. Gallen Ctr. for Fam. Bus. (Switzerland) (Jan. 2023), https://familybusinessindex.com/ [https://perma.cc/SD5L-VHYP] [hereinafter *Family Business Index*].

24. *See* Helena Robertsson, *How the Largest Family Enterprises are Outstripping Global Economic Growth*, Ernst & Young (Jan. 16, 2023), https://go.ey.com/3Wgnq4h [https://perma.cc/K78E-RQ2B].

25. Of the companies listed in the top 500 family businesses in the world, *Family Business Index*, *supra* note 23, 24% are U.S.-based, 50% are based in Europe, and 16% are in the Asia-Pacific.

Waystar Royco is what is referred to as a publicly listed, family controlled (PLFC) company. These are companies in which a family has voting control of more than 32%. Experts consider this as a significant enough stake to exercise control over most widely held publicly traded companies.[26] In addition to these companies, there are many family-*led* and family-*influenced* public companies, in which families own less than 32% of the stock but may still have considerable sway on critical corporate decisions.[27]

There are many such companies in the United States, and they make up a meaningful percentage of S&P 500 companies. Well-known PLFC firms in the United States include Berkshire Hathaway, Wal-Mart, Ford Motor Co., Estee Lauder, The New York Times Co., and Comcast. Publicly traded family-controlled businesses are even more prevalent outside the United States.

Control stems from outright ownership of enough company shares or super-majority common stock to control shareholder votes and prevent a hostile takeover. This capital structure also gives the family or founder control of the selection of the board of directors and, therefore, the ability to dictate the business strategy of the company and designate the next CEO. Often, the voting control of the family or founder arising from ownership of super-majority stock is over 50% and is significantly greater than their actual economic interest in the company.

Many prominent tech companies today have a super-majority class of common stock that gives the company founder—e.g., Zuckerberg (Meta), Ellison (Oracle), Larry Page and Sergey Brin (Alphabet), and Bezos (Amazon)—absolute control over the board and the destiny of their companies.[28] The founder's voting power almost always far exceeds their economic ownership in these companies.

Many factors contribute to the prevalence of family business ownership globally, including estate taxation, capital markets, anti-trust laws, family structure, country culture, etc. *See, e.g.*, DENNIS T. JAFFE & JAMES GRUBMAN, CROSS CULTURES: HOW GLOBAL FAMILIES NEGOTIATE CHANGE ACROSS GENERATIONS (2017).

26. In Waystar Royco's case, the family ownership aggregates 36%. This is insufficient to control the company under all circumstances, especially if a large and influential owner opposes management. By contrast, Sumner Redstone has 80% of the voting control over Paramount and Viacom; the Murdoch family controls over 40% of the Class B voting stock of both News Corp. and Fox Corporation. *See* William D. Cohen, Opinion, *No One Can Stop Rupert Murdoch. That's Increasingly a Problem*, N.Y. TIMES (July 4, 2023), https://www.nytimes.com/2023/07/04/opinion/rupert-murdoch-fox-news-dual-class-corporate-governance.html.

27. A study in 2003 found that one-third of the companies in the S&P 500 had founding family ownership of 18% on average. Ronald C. Anderson & David M. Reeb, *Founding Family Ownership and Firm Performance: Evidence from the S&P 500*, 58 J. FIN. 1301, 1302 (2003).

28. Dual-class stock structures in founder-led firms are not without controversy. *See* S. Solomon, *Thorny Side Effects in Silicon Valley Tactic to Keep Control*, N.Y. TIMES (July 4, 2023), https://archive.nytimes.com/dealbook.nytimes.com/2013/09/03/thorny-side-effects-in-silicon-valley-tactic-to-keep-control/.

Founder-controlled public companies are not considered family-owned and, therefore, not included in the Index.

The Redstone family's control of Paramount Global, a global media and entertainment company, is an excellent example of the disparity of voting power and economic interests that often exists in a PLFC company. There, the Redstones, through a holding company structure (like the one that owns the Roy's equity stake in Waystar Royco), have 80% voting control over Paramount, but only a 12% economic interest in the company. The Redstones further "controlled" this interest in the underlying public company by placing it in an irrevocable (and perpetual) voting trust managed, initially, by individual trustees selected by Sumner Redstone. The purpose of the voting trust when it first was established was explicitly to *prevent* Sumner's daughter from succeeding him as CEO of the company. How ironic that Redstone's media empire was the inspiration for the structure featured in *Succession* which was all about *seeking* a family member to succeed Logan![29]

Privately owned family businesses also take many forms. They can be owned outright or controlled (more than 50% ownership) by one family. Voting trusts are frequently employed by families with many stockholders so that the stockholders can speak with one voice. Many family businesses also have significant employee ownership. In recent years, private equity firms have also acquired minority stakes in family-owned businesses.

B. Purpose of a Family Business

As noted earlier, family-owned firms are different from other forms of ownership because of their purpose or objective. This is best illustrated by comparing the *purpose* of a family business to that of PE-owned companies, public companies, and founder-led companies.

Non-family businesses have the distinct and relatively homogenous purpose of maximizing profits for their owners—that is their primary reason for existence. They may have other stated "purposes," but the financial motivation is primary.

Family businesses want (and need) financial success, but that rarely is the primary purpose for their existence. In fact, a non-financial purpose usually is the primary motivating force for its existence.[30] The New York

---

29. *See* Keach Hagey, The King of Content—Sumner Redstone's Battle for Control (2018); Irin Caron, *Last Woman Standing*, N.Y. Mag., July 8–21, 2019, at 2.

30. For this reason, one commentator critiques the argument that controlling shareholders' fiduciary duty requires them "to prioritize shareholder profits." Means, *supr*a note 13, at 934. This represents "an impoverished view of what corporations can accomplish." *Id.* Therefore, if "the controlling owners are not seeking to enrich themselves or their families, and merely wish to serve

Times Co.'s controlling owner, the Sulzberger family, has expressly stated its purpose of ownership as:

> to maintain the editorial independence and integrity of The New York Times and to continue it as an independent newspaper, entirely fearless, free of ulterior influence and unselfishly devoted to public welfare.[31]

Similarly, the descendants of Henry Ford, the controlling owners of Ford Motor Co., believe that family control is essential to provide a stable foundation for the long-term planning required for the continued success in the highly competitive and capital-intensive automobile industry.[32]

Many family business owners want to stay family-owned forever and have no interest in selling the company. Non-family businesses rarely think about how long they will be around—their life span is dependent on their financial success, nothing more.

If lasting forever as a family business is not possible, their owners are more likely to consider strategic alternatives that maintain the integrity of the business, protect the jobs of their employees, and continue community support, as opposed to selling for the highest price. This can be achieved by selling the company to Warren Buffett's Berkshire Hathaway or other long-term investors or directly to the employees. Non-family businesses have little interest in what happens to a company or its employees after they sell it; the highest sale price is what counts.

A great example of a "purpose-driven" family business is Patagonia.[33] Founded in 1973 by the Chouinard family, the company has achieved significant success in the outdoor sports and adventure outfitting business. In 2022, the family announced they were *donating* the company to a 501(c)(4) not-for-profit which is dedicated to the environmental causes long championed and supported by the founder.

The voting control of the company, with an estimated value of $3 billion, was transferred to a "special purpose trust" with a perpetual term, initially overseen by members of the Chouinard family and independent directors. One-hundred percent of the economic control of the company

---

as responsible business stewards for the benefit of all stakeholders, the obligation of loyalty should not be used to coerce compliance with a shareholder-maximization model of corporate governance." *Id.*

31. This language is contained in the Sulzberger Family 1997 Voting Trust. *See* New York Times Co., (Proxy Statement), at 3 (Mar. 10, 2023).

32. *See* Ford Motor Co., (Proxy Statement) (Apr. 1, 2016).

33. David Gelles, *Billionaire No More: Patagonia Founder Gives Away the Company*, N.Y. TIMES (Sept. 14, 2022), https://www.nytimes.com/2022/09/14/climate/patagonia-climate-philanthropy-chouinard.html. *See also The Patagonia Structure in the Context of Steward-Ownership*, MEDIUM (Sept. 22, 2022), https://medium.com/@purpose_network/the-patagonia-structure-in-the-context-of-steward-ownership-e9db3d260dc6 [perma.cc/92VZ-YXPY].

was vested in the not-for-profit so that all the net after-tax profits of the business (estimated at over $200 million per annum in recent years) are deployed for environmental causes. The family received no federal tax benefit from donating its business to this type of not-for-profit company.

The owners of Patagonia will not be the last to take action to preserve their business and achieve their purpose forever. Michael Bloomberg, owner of Bloomberg Financial (with an estimated enterprise value of $90 billion), is rumored to be considering a similar transaction to support his family's charitable causes. Both are examples of what is now called "steward ownership."[34]

C. Complexity

Family businesses are more complex than most other company ownership structures. This is because of the involvement of the family in the ownership and management of the company. The family and the business function simultaneously, and the same people are often involved in each.[35]

In many family businesses, ownership may also be more widely dispersed than it first appears. For example, shares may be owned in different proportions by several branches of the family. When trusts are used, the trust beneficiaries may include multiple generations of the family.[36] Other family members, such as the spouse of the business leader, may exert material influence over company policies and decisions despite not owning stock or working in the business. The way decisions are made by the family, not just one family member, is what counts.

---

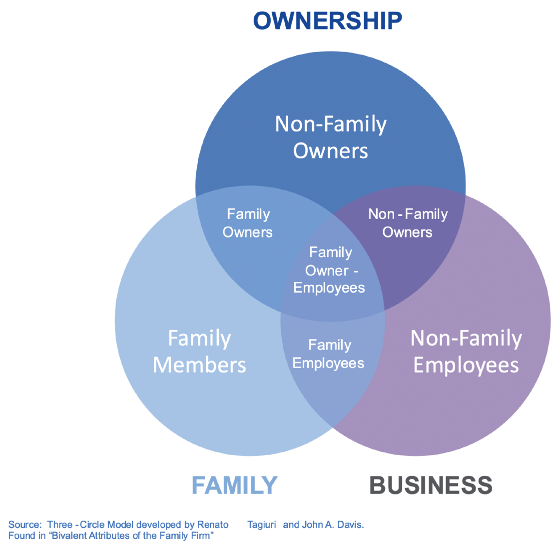
34. The Hershey Company is another example; 80% of the voting control over the company is held by the Hershey Trust Company, which the founder established in 1905 to support exclusively the Milton Hershey School (originally a school for orphans) and related entities in perpetuity. The trust has an 8% economic interest in the company; public shareholders hold 20% of the voting interest and a 92% economic interest. In 2018, at the behest of actor Paul Newman, the Federal Tax Code was amended to allow private foundations to control 100% of an operating business, subject to numerous conditions. *See* I.R.C. § 4943(g). Perpetual control of a family business via foundation ownership is much more prevalent outside the United States. Examples include Tata Group, Rolex, Robert Bosch, Ikea, Novo Nordisk, and Lego. For an overview of this form of ownership, see generally STEEN THOMSEN, THE DANISH INDUSTRIAL FOUNDATION (2017).

35. *See* Means, *Nonmarket Values*, *supra* note 3, at 1189 ("[A] successful family business must find ways to mediate the tension between expectations rooted in family life and expectations inherent to the marketplace.").

36. *See* Patricia M. Angus, *Who's in Charge? A New Model for Understanding Family Business Ownership*, TRS. & ESTS., Mar. 2019, at 49–50.

This dynamic is figuratively captured in the well-known Three Circle Model depicted below:

Figure 1: Three Circle Model[37]



Each circle represents a potential source of a "party of influence" in family business decision-making—these are owners, those that work in the business, and family members. Where the circles overlap, the individuals involved have multiple roles. Perspectives are often different depending on the placement of a particular individual in the circles.

As time passes, the various segments of the circles will be populated by more and more people and some of them will have altered their position or role. There will be many more perspectives to reconcile, and the risk of disagreement (and dysfunction) rises. This speaks to the inevitable "cumulative complexity" inherent in a multi-generational family business.

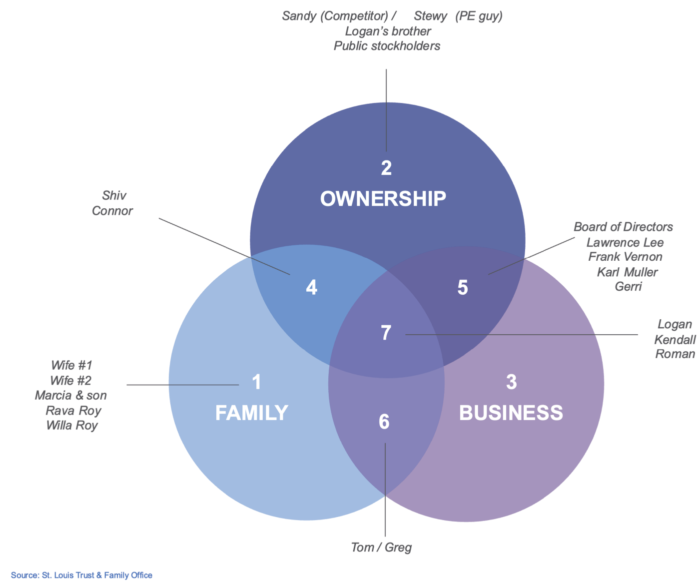
When the business is owned by a trust, which is frequently the case today, the trustees of the trust are responsible for the current *and* future beneficiaries of the trust. They must have a long-term view of ownership. This concept of "future" beneficiaries is essential as it may help the family appreciate and anticipate the ownership, control, and succession challenges that will inevitably arise. Decisions made today *will* have implications for the generations which follow, even those not yet in existence.

---

37. Renato Tagiuri & John Davis, *Bivalent Attributes of the Family Firm*, 9 FAM. BUS. REV. 199, 200 (1996).

Overlaying the characters in *Succession* on the Three Circle Model highlights the sources of many of the tensions that played out during the series. After four seasons of the show, just about everyone within the circles had a shot (or aspiration) to succeed Logan Roy as CEO!

Figure 2: HBO's *Succession* Three Circle Model



It would be interesting to know if the producers for the show had a diagram like this in the writers' room.

The sale of Waystar Royco to GoJo removed the business and ownership circles and left the Roys with just the family circle. While the sale was a failure from a family business perspective, it may have saved the family as only one of them could be CEO—what would have happened to the other two?

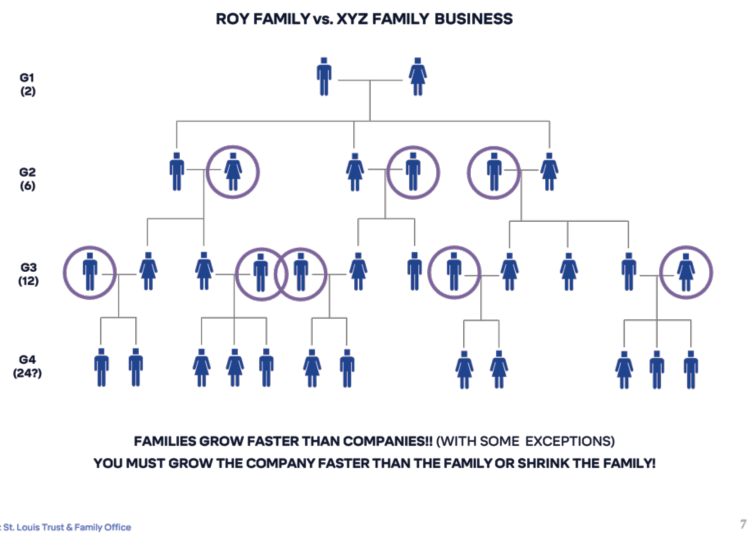
D. The Projected Family Tree

The family tree of the owner, historical and projected, is an indispensable tool to understand how family and business growth are interrelated. The owner's ability to visualize what lies ahead is critical.

Most importantly, this exercise highlights an owner's biggest challenge: can the business grow fast enough to accommodate the predictable growth of the family over time? This is *not* an idle inquiry, as most families grow faster than most businesses. If family growth outpaces the growth of the business, the owner will face several stark choices: sell the company, reduce the number of family members with an economic stake in the business, or accept the dilution of each family member's economic interest.[38]

Following is an example of the projected family tree for a family that has three children and is in its second generation of business ownership (the circles representing spouses):

Figure 3: The Growth Challenge



The addition of two more hypothetical generations to the diagram also highlights another big challenge for the future: many "choices" must be made among family members—who will run the company in the future, who can work in it, who will own it, etc.

E. Importance of Family Harmony

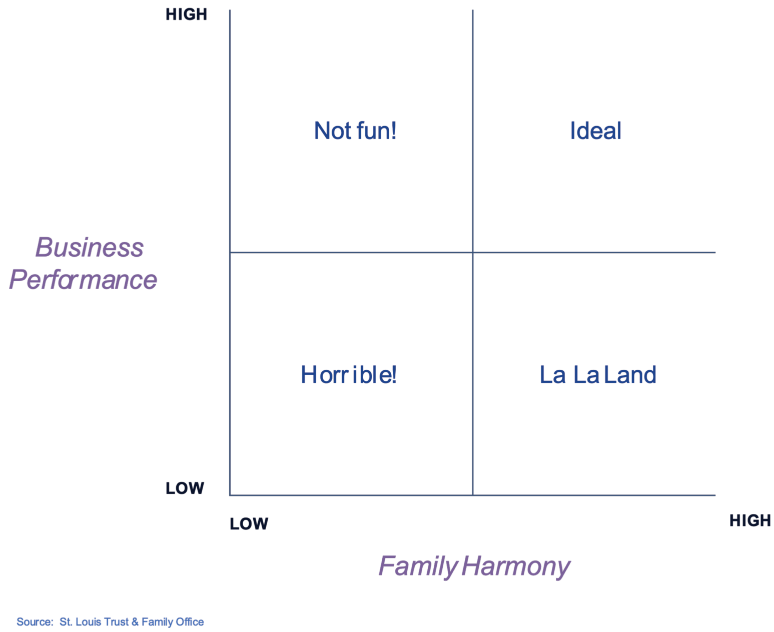
Preservation of family harmony is an essential goal in most successful family businesses. The opposite of family harmony is what we see going on in *Succession*—everyone (other than Logan) is miserable. The misery can go on for a long time but inevitably leads, as it did there, to the end of family ownership.

But the goal of family harmony needs to be balanced with sound business practices; family harmony on its own is not sufficient for success.

38. The reduction of family members who own an equity interest in the business ("pruning the family tree") can be accomplished through a buy-back program. Another approach is to restrict ownership of shares to only those family members who work in the business.

The chart below captures the trade-offs that often exist in achieving both a great business outcome and a high level of family harmony:

Figure 4: Business Performance/Family Harmony Matrix



Family business leaders may think everything is just great, but other family members often are not of the same mind and may even want nothing to do with the company. Knowing this, accompanied by effective communication among family members, can help resolve divisive issues before it is too late to do something about them.

The differences leading to family members' dissatisfaction may not be resolvable. In those cases, an exit of the unhappy family member from the business may be the optimal result. Having an established mechanism to do this on fair terms can provide the ideal resolution for the family and the preservation of family harmony.[39] Having a known exit path available often is enough to keep emotions from boiling over and give owners more time to work out the differences.

Family business leaders may make sub-optimal business decisions in the name of family harmony. A colleague of mine at the Olin School of Business coined the term *homo familicus*, a riff on the frequently

39. Valuation terms of such buy-out arrangements must conform to IRS regulations to avoid gift tax liability on the transfer. Property Subject to Restrictive Arrangements, 26 C.F.R. § 25.2703–1.

invoked term *homo economicus* by behavioral economists, to describe this otherwise inexplicable behavior.[40]

The concept is that we are "wired" to avoid taking actions that might disrupt family harmony. This leads to less than candid performance reviews of family members in the business, difficulty in making tough decisions that affect family members differently (or adversely), and a tendency to avoid confrontation with family members on essential/sensitive topics arising in the workplace.

In *Succession*, this explains much of the behavior of Lady Caroline, Logan's second wife, and mother of the three children vying to succeed Logan. She wants them all out of the business (and away from her former husband) to preserve family harmony—not an uncommon hope of spouses of family business owners when conflict arises in the business.

In estate planning, this bias in favor of "keeping everyone happy" can also lead to terrible decisions on issues such as ownership, control, and management succession in a family business. The "fair means equal" approach to planning leaves important decisions unaddressed and for the "kids to decide" after their parents are gone. This can lead to unproductive and costly disputes and, worse, the forced sale of the company.

F. Socio-Emotional Wealth

Family members involved in a successful family business often have a significant emotional attachment to the business. To many, the business is an extension of the family and its legacy and gives all family members (including those not working in or having ownership) a sense of security, well-being, belonging, identity, legacy, community connection, family connection, pride of association, etc.

Academics have identified this non-monetary value of association with a family business as socio-emotional wealth (SEW).[41] A high level of SEW is a very powerful source of strength for a family, especially in challenging economic times or when the possible sale of the business is under consideration. Successful multi-gen family businesses almost always have a high level of SEW.

The SEW effect can also cause families to make uneconomical decisions that otherwise would be inexplicable and harmful to other stakeholders. For example, it can lead to poor compensation decisions

---

40. Jackson Nickerson, *Family Business Governance Hygiene: Why do Family Businesses Fail to Adopt Good Governance Hygiene in Advance of Anticipated Dilemmas?* (Koch Ctr. for Fam. Bus., Olin Bus. Sch., Working Paper, Sept. 1, 2020).

41. For a thorough review of the academic literature on this topic, see Luis R. Gomez-Mejia, Cristina Cruz, Pascual Berrone & Julio De Castro, *The Bind that Ties: Socioemotional Wealth Preservation in Family Firms*, 5 ACAD. MGMT. ANNALS 653 (2011).

and employment practices, which objectively should not occur. In the extreme, it can lead to an unwillingness to sell the business at a fair price when that is in the best economic interests of the entire family.

In *Succession*, the Roy siblings are in awe of their father and lust over the power and wealth that a leadership role in the company with their name on the door affords. This explains the consistent urge of Kendall to oppose the GoJo deal in every possible way because its consummation will disenfranchise him. Selling the business may be in everyone else's best interest, but it is a conspicuous failure for Roy family. In this instance, SEW motivating the Roys undermines the goodwill of everyone around them and, significantly, the non-family members working in the business.

G. Evolution of Family Businesses

The objective of remaining family-owned forever is common, but not easy to achieve. That said, there are a surprisingly large number of firms in the world that are over 100 years old.[42] As noted earlier, 31% of the 500 largest family businesses listed in the Index are over 100 years old.

To achieve this level of longevity, these families have addressed the challenges that family ownership presents, chief among them is maintaining a high level of family harmony *and* achieving business success.

Waystar Royco is a founder-led or first-generation form of family business. The transition of a business from a highly successful founder-led firm to the second generation is particularly challenging. As is the case in *Succession*, founders can be domineering and have well-earned self-confidence. They are risk-takers and comfortable making all business decisions by themselves. They have a hard time "giving up the reins" to anyone. They have high expectations of their children. Governance by a board is not appealing.

Logan Roy appears to have only recently started thinking about turning Waystar Royco into a family business, hence his late-in-the-day efforts to identify a qualified family member to succeed him. His health is failing, and time is running out for him. His family members are unqualified to succeed him, and he has not groomed anyone in his inner circle of leadership to take the reins. The situation is so desperate that he seriously entertains the idea that his bodyguard and new best friend, Colin Stiles, is the right pick to run the company.[43]

---

42. A surprising number of companies around the world have been in existence for over 200 years. *See* GEOFFREY WEST, THE UNIVERSAL LAWS OF LIFE, GROWTH AND DEATH IN ORGANISMS, CITIES AND COMPANIES 405–06 (2018).

43. Founders often have trouble with succession because their expectations are so high. *See* CHRIS ZOOK & JAMES ALLEN, THE FOUNDER'S MENTALITY: HOW TO OVERCOME THE PREDICTABLE CRISES OF GROWTH (2016).

This is not unusual in founder-led firms. Founders spend a lifetime focused on *their* business and *their* importance to it. Like Logan, some feel that no one is good enough, tough enough, or serious enough to take over the business. In these circumstances, the succession process is delayed until it is too late.[44]

Family firms that want to be family-owned for the long term do not make this error. They begin early by putting in place the rules, governance, and succession planning that are essential to longevity. This effort can take years, sometimes decades, to get right. The reason: while there are myriad best practices about how to best deal with the challenges of family ownership, those best practices have to fit the unique needs of each family. It is anything but a one size fits all proposition.

In my opinion, the best way to learn about how to survive longer, perhaps forever, as a family business is to study the firms that have done so. From this, a predictable evolution of form and function in the operation of family businesses over time can be discerned—the firms that survive the longest almost all have similar characteristics. The evolution progresses as follows:

> **Founder-Led>>>Family Business>>>Business Family>>>Family Enterprise**

The path to longevity tends to be inadvertent at first, then becomes opportunistic, and then strategic. Moving across this continuum may take decades or even generations, but one thing is very clear—the movement from Family Business in the direction of Family Enterprise will improve the odds of maintaining family ownership for much longer, maybe forever.

The characteristics of each stage of this evolution are outlined below:

Figure 5: A Continuum of Behaviors

FOUNDER-LED	FAMILY BUSINESS	BUSINESS FAMILY	FAMILY ENTERPRISE
✓ *Founder First*	✓ *Family first*	✓ *Business first*	✓ *Family purpose first*
✓ *Meritocracy*	✓ *Entitlement by birth / cannot fire*	✓ *Meritocracy*	✓ *Business family in all respects*
✓ *No bureaucracy*	✓ *Ownership / management intertwined*	✓ *Ownership / management separation*	✓ *Non-family senior management*
✓ *Visionary*	✓ *Tradition-bound*	✓ *Organized; objective*	✓ *Long term time horizon*
✓ *Intense*	✓ *Compassion*	✓ *Competitive*	✓ *Emphasis on family harmony and SEW*
✓ *Autocratic*	✓ *Consensus-driven*	✓ *Governance structure*	✓ *Independent board*
✓ *Decisive*	✓ *Informal*	✓ *Formal*	✓ *Effective family governance*
✓ *Pro-active*	✓ *Procrastinate*	✓ *Succession planning*	✓ *Enterprise level planning*
✓ *Growth*	✓ *Sustaining relationships*	✓ *Financial performance*	✓ *Family and business interests in balance*
✓ *Founder's wealth*	✓ *Business is the wealth*	✓ *Wealth outside business*	✓ *Holistic approach to family wealth*

Source: St. Louis Trust & Family Office

44. *See* Means, *King Lear*, *supra* note 3 (identifying Lear's delay in succession planning as a key factor in the bloodshed that ensued).

When advising family businesses, it is helpful to identify with some precision exactly where the company is *today* on this continuum and what needs to be done to get to the next stage. It is also critical to know if all family members agree on where they are on the continuum. Until they do, progress toward the ultimate objective will be slow.

Using this framework, Waystar Royco has many of the characteristics of a founder-led company as it is dominated by its charismatic, albeit idiosyncratic, self-centered, and autocratic leader and founder. Logan Roy is at the heart of everything going on at the company, and everyone waits for his direction on all topics. The board of directors seems powerless in his presence, and decisions are made by him with informality and little process. The business is being run by and for Logan, not family. His kids are as dispensable as his wives and executive assistants.

A possible explanation for Logan's approach to succession is that he, like many masters of the universe, did not think he was going to die anytime soon. That being the case, perhaps he was thinking that whomever he picked to succeed him would be working under him as chairman of the board. This immortality theme often plays out with founders who have only one passion in their life—namely, to run *their* company forever.

Logan may have wanted a family member to succeed him, but not enough so to have started the succession process earlier or with the required discipline. He ultimately concludes that none of them are sufficiently able, which he makes clear in Season Four when he tells them, "You are not serious people."[45] Ouch.

Logan appears relieved that the Gojo deal will end his reign as CEO and free the family members to go their separate ways with their billions. His final journey to meet with Lukas Mattson (fittingly with only son-in-law Tom in tow to represent the others) would have likely yielded a sale of the company without an increase in price as sought by Kendall and Roman. Logan's support in favor of the transaction at the board meeting would have sealed the deal.

With a sale, Logan's legacy as a giant in the media industry will be preserved. He knew that Waystar Royco's business model had lost its competitive advantage, and he didn't have the energy to fix it. He also feared that the cruise line sex abuse scandal would remain an existential threat (how could it not?) to his control of the company. Selling is a relief, not a tragedy. Maybe he sees Lukas Matsson as having all the attributes missing from his own children.

Waystar Royco does not have the attributes of a Business Family or Family Enterprise as described on the Family Business Continuum

45. *Succession: Rehearsal* (HBO television broadcast Apr. 2, 2023) (Season Four, Episode Two).

shown in Figure 5. Chief among the missing attributes is an independent board, an openness to having a non-family CEO, succession planning, effective family governance, and an inspiring purpose. This means that survival as a family business for generations would have been highly unlikely, even if the Gojo sale didn't happen.

IV. Areas to Emphasize in Family Business Law Practice

With the essential teachings of *Succession* and a review of foundational family business concepts behind us, we now turn to the third topic of this Essay: the potential areas for lawyers to emphasize in family business law practice.

Lawyers already play an essential role in family business success. Company formation, tax planning, asset protection, M&A, business litigation, and corporate governance are all in the wheelhouse of their expertise. That said, there is an opportunity for lawyers to be *even more relevant* to their family business clients by homing in on this fundamental question: "What more can we do, as lawyers, to help our family business clients achieve their purpose?"

Potential answers to this question follow below, but two contextual issues need to be considered.

First, lawyers need to be aware and respectful of the other professionals who might have significant pre-existing advisory roles on family business issues with their clients. This includes accountants, specialized wealth managers, family office experts, and family business consultants. They are dealing with family business clients as their core practice.

The family business consulting industry has grown enormously over the past twenty-five years, and its support in the academic community—mainly in the leading business schools—is enormous. These advisors are experts in essential areas of family business practice that most lawyers know very little about, including specialties such as organizational behavior, psychology, family dynamics, and business strategy.

Family business educational programs covering these topics are flourishing at leading universities in the United States and abroad and are no secret to family business owners. Family business stakeholders regularly attend these programs (often for free) to learn the latest best practices and share new approaches to common problems with leading family business academics, consultants, and similarly situated families. What your client knows about this will surprise you.

These firms are ideal partners and allies for lawyers. Clients will likely welcome a team approach to avoid redundancy and conflicting advice on essential issues. A better outcome will result.

Second, lawyers from multiple specialties need to come together to serve the family business client. A general practitioner or single lawyer is unlikely to have the knowledge and expertise to address the complex problems that regularly arise in family business representation. Lawyers should proactively create a legal team with the necessary specialists.

A. Focus on Ownership

The family business consulting community focuses on the importance and power of ownership. This is how consultant Josh Baron describes this approach:

> [O]wnership is central to a *family* business. . . . *The importance of ownership has often been overlooked, even by family business experts. Instead, they have focused on family unity and developing the next generation in the business*. These efforts to organize and strive for consensus in the business family led to the creation of globally recognized, valuable approaches such as family councils, family meetings, family constitutions, and protocols. . . . These are important ideas, but they skip over the critical role of family members in making decisions *as the owners of the company. The exercise of ownership power is very different from efforts to unify and develop the family*. Most families strive to be inclusive and harmonious. By contrast, ownership decisions need to ultimately trace back to the shareholders themselves, a practice that may be imbalanced and exclusive. Some families have tried to use their family governance to make ownership decisions. This approach mixes apples and oranges and typically doesn't work. Other families focus instead on containing the family so that it does not interfere with the business. While those boundaries can be useful, they can also create a vacuum in which the power of family ownership is not exercised by anyone. *So, despite all the good work done in the name of organizing the business family, the critical role of ownership has been a particular weakness*.[46]

Baron describes the five rights of ownership as the power to:

- Design—Choose the type of ownership you want.
- Decide—Structure governance to make great decisions together.
- Value—Create an Owner Strategy to define your success.
- Inform—Use of effective communication to build trusted relationships.
- Transfer—Plan for the transition to the next generation.

This approach *empowers* owners to take responsibility for the destiny of their business and, hopefully, unite them in pursuit of a shared goal on how the business should be run.[47]

---

46. Family Business Handbook, *supra* note 5, at 24–25 (some emphasis added).

47. What makes a good owner of a business is outside the scope of this Essay. For an introduction to this topic, see Nicolai J. Foss, Peter G. Klein, Lasse B. Lien, Thomas Zellweger & Todd Zenger,

Baron is calling on owners to make a clear choice as to how they want their business to be run and be accountable for the outcomes of those choices. The goal of the exercise is to reduce the likelihood of divided ownership which, along with the associated dysfunction, can destroy a family business.

Lawyers are ideally positioned to infuse their family business practices with more focus on these rights of ownership, as suggested by Baron.

B. Hygiene versus Strategy

Family business advisory work can be broken down into two categories: hygiene and strategy.[48]

Hygiene provides the foundation for the operation of a successful family business: business structure, ownership and control mechanisms, buy-sell agreements, asset protection, income tax planning, governance, and estate planning. It will also minimize the possibility of loss of family control arising from the owner's death, disability or divorce (the "Three D's"). This work is all within the province of law firms; getting this right is the *sine qua non* of long-term survival as a family business.

Strategy issues for family business cover growth, family governance, management succession, purpose, culture, and stewardship. Advice on these topics has traditionally come from a variety of firms, including strategy and management consultants, investment professionals, and family business consultants. Much of this work is done by experts trained in psychology, organizational behavior, and sociology, with an emphasis on family systems and how they function in the context of business ownership. Not surprisingly, most of these advisors are not experts in hygiene issues.

Notably, the change of focus to "ownership," as Baron suggests, is at the intersection of the hygiene vs. strategy divide. The work in each needs to be coordinated and integrated; neither is monolithic. They are equally dependent on one another for client success.

This is an opportunity for lawyers to collaborate more directly with the family business consulting community to achieve optimal results for their clients. They can be a great ally, not an adversary.

Ownership Competence, 42 Strategic Mgmt. J. 302 (2021) and Richard Dobbs, Bill Huyett & Tim Koller, *Are You Still the Best Owner of Your Assets?*, McKinsey Q. (Nov. 1, 2009), https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our-insights/are-you-still-the-best-owner-of-your-assets [https://perma.cc/M6FJ-XRX8].

48. Danny Miller & Isabelle Le Breton-Miller, Managing for the Long Run: Lessons in Competitive Advantage from Great Family Businesses 8 (2005).

C. Governance with a Twist

The need for coordination and integration of hygiene and strategy often arises in connection with the governance of a family business. This is especially the case with multi-generational families in which family growth can outpace the growth of the business—a frequent occurrence, as noted earlier because families tend to grow faster than most businesses.[49] Even if the business is growing as fast or faster than the family, the number of family members not working in the business is likely to increase over time. In both cases, tensions will inevitably arise between those working in the business and those who are not over how to run the business.

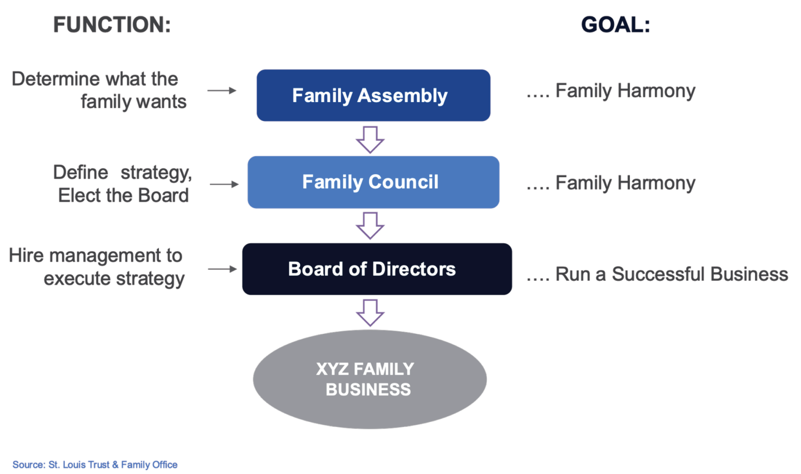
At the heart of these tensions is how "the spoils of ownership" of the business are divided among the various stakeholders. "Spoils" can include a lot of things, such as employment, seniority, leadership, compensation, dividends, community status, etc., but they are finite. How should they be divided among an ever-expanding pool of stakeholders? How do you balance the need for reinvestment in the business with the needs of owners seeking higher dividends? What is fair compensation for family members working in the business? Is the company growing fast enough to address all these issues?

The pathway that I and other leading family business consultants recommend for addressing these issues is to have two distinct governance mechanisms, one for the business, and one for the family. The family mechanism includes two components of governance—one for owners and another for family members regardless of ownership—referred to as the Family Council (owners only) and Family Assembly (all family members). Each mechanism has specific domains of decision-making to assure that the voices of the owners and the family are heard and can be reconciled. The goals of each mechanism are as follows:

---

49. This also largely explains the "rags to riches to rags" in three generations trope as applied to both family business and wealth management: you must grow your wealth (family business or investments) faster than your family grows, or eventually, there will not be enough to go around. In the United States, families tend to grow at a compound rate of 5.5% to 6%. Family business or investment growth after taxes must exceed this to maintain the same level of asset wealth in each successive generation. This is not easy to do.

Figure 6: Strategic Ownership



Families document the key principles of their ownership, aka "the rules of the road," in a so-called family constitution which details how the business will be run and what priorities will govern future decision-making by the family. This document can also include a dispute resolution mechanism. This can go a long way towards heading off controversies in the future.

Many lawyers view this approach to governance as unnecessary, not "legal," nonsense, or worse. My opinion: they don't get the importance of family harmony in the context of family business ownership and the critical need to separate family issues from business issues. Family harmony is essential for survival, and knowing the views of all constituencies represented above is important. Not all family members can be satisfied all the time, but areas of conflict need to be recognized and addressed as early as practicable.[50]

D. Optionality

The greatest service an advisor to a family business owner can provide is optionality. There are many ways to solve the challenges faced by family business owners and they need to know what they are and make a decision that makes the most sense for them. This is the essence of the owner focus described earlier—owners always have choices, and they need to make them and live with the consequences.

50. Mandatory arbitration to resolve disputes among family members in a family business is rarely specified in family business legal documentation. Given the crippling cost of the traditional litigation process today, this needs to change.

Lawyers can gain knowledge about those options by talking with their other family business clients to learn about how they have solved similar challenges. Family business owners are willing to share their experiences and insights with a professional who is trying to help other clients similarly situated. Another viable approach is to host a round-table discussion with a group of owners on their experiences with the problem at hand. Family business owners are remarkably open and transparent in such settings as long as the objectives of the discussions are known and genuine.

As noted earlier, there are many best practices for resolving most issues, but choosing the right one requires a fit with the circumstances. Frequent issues with a wide range of best practices to choose from include:

- How do we balance the desire for a meritocracy and our interest in employing family members in our business?
- How do we structure an effective governance mechanism without interference or meddling by directors or others who do not work in the business?
- How do we maintain family harmony when family growth has outpaced the capacity of the business to employ or support so many people?
- What are our succession options when we do not have family members in a position to take the reins?
- What are our strategic alternatives if we no longer desire to maintain family control of the business?
- How can we do comprehensive estate tax planning when we don't know who our successors are or whether we might ultimately want to sell the business?

Most of these questions have governance implications for the business and the family. It is essential that the range of options identified be vetted and evaluated by both the company board and the family board(s). In each case, learning about how other successful family businesses have resolved these issues is essential. An experienced family business consultant may also be helpful to include in these conversations.

E. Wealth Management and Family Business

There is no greater opportunity to integrate practice areas than among lawyers practicing wealth management law (aka private client services, trusts and estates, tax, etc.) and those advising family businesses from a corporate law perspective. The coordination needs to start with the formation of the family business and continue until the client passes on. This is not a quick fix—it may take decades, as laws, circumstances, and wishes of the owners are in constant motion. This is an essential part of good hygiene, as discussed earlier.

The issues common to the two areas were early recognized by James P. Hughes, Jr., Esq., when describing the similarities of wealthy families with business owners generally:

> Families attempting long-term wealth preservation often don't understand that they are businesses and that the techniques practiced for long-term succession planning by all other businesses are available to them as well. *A family that starts its long-term wealth preservation planning by adopting the metaphor that it is a business will begin with a wonderful psychological tool. If a family thinks it is in business to enhance the lives of its individual family members, it discovers the powerful form of preservation thinking it can do. The business metaphor further brings into a family's planning efforts of all the tools of business to be successful*. As with all metaphors, one set of ideas created for a specific purpose cannot be perfectly suited to another purpose. The ideas can, however, offer a starting point for learning and adaption to the new set of issues being addressed.[51]

Refreshingly, Hughes's approach to estate planning is always on the long-term (defined as one hundred years or more) and emphasizes the importance of planning on the preservation of all elements of a "*family's human, intellectual and financial capital to maintain the family*."[52]

Hughes's metaphor of a business does not fit perfectly with family businesses as many of them are less than ideal examples of getting everything right regarding estate planning. The most frequent failure is not doing enough planning early enough to address all the issues that "come due" at the time of the owner's death. This includes estate tax planning *and* ownership succession planning. There are several reasons for this, and they bear mentioning.

First, family business owners rarely have a level of wealth early in their journey to make extensive planning worth their time. They are young with long-life expectancies, and, at this stage, the value of their business is unlikely to be significant. The largest part of their wealth is illiquid, and its future value is often uncertain and, frequently, underestimated.

Second, owners are understandably consumed with growing a successful business and haven't yet given serious thought to its long-term future—will it be sold or remain family owned? If family-owned, who will manage, own and control the company? In many cases, the possible choices for family succession do not exist or are too young or untested.

---

51. James Hughes, Jr., Family Wealth: Keeping It in the Family 4 (1997) (emphasis added).
52. *Id.* at 7 (emphasis added).

These are issues that will take years to resolve, so it is easy to put off facing them until further down the road.

Finally, and most important, family members cannot imagine *not owning* their business outright. When advised that effective estate planning may require the transfer of *ownership* to remove their business assets from their taxable estate, this just doesn't compute to the business owner. How can they do that when the future of the business is unknown, as are the successors they will ultimately select to own, control, and operate the business in the future?

It takes a lot of convincing for an owner to become comfortable with the concept of transferring ownership of the business to a trust while still retaining *control* of the business. The separation of ownership and control is a crucial estate tax planning concept.[53]

The most important job of the family business lawyer is to get as much of this planning done as early as possible—this is an essential component of the *hygiene* discussion above—and to continue to refresh that planning over the life of the client.[54]

At formation, this means completing basic estate documents to address the death, disability, and divorce of the owners of the business—these are known risks to the owners and can result in the unexpected loss of control of the business. If the unexpected happens, powers of attorney and succession designations must be in the names of trusted experts of the owning family.[55]

The initial planning needs to be revisited periodically to determine if documents need to be updated or if more estate planning needs to be done to reflect any material change in the value of the business and other assets of the family. As the owners grow older, more attention needs to be paid to the asset disposition plan in the documents—who will become owners of the business? Who will control the business? Who will manage the business?

Trusts are frequently used to designate how the family's assets will be distributed upon the owner's death. A so-called "family trust" or "dynasty trust" may be used to do this because it can stay in effect in

53. *See* John Jennings, *What Planning You Should Do Prior to Selling Your Company*, FORBES (Dec. 2, 2022), https://www.forbes.com/sites/johnjennings/2022/11/30/what-planning-should-you-do-prior-to-selling-your-company/?sh=7d6f22c55a39 [https://perma.cc/WJ3P-WB7N].

54. Estate tax planning is not the only issue that needs updating over time. *See, e.g.*, Susan T. Bart & Lauren J. Wolven, *Human Issues in Estate Planning for the Family Business Owner*, ALI-ABA ESTATE PLANNING FOR THE FAMILY BUSINESS OWNER 15 (Aug. 2008).

55. The designation of Sumner Redstone's health agent in the event of disability was a central issue in Shari Redstone's battle to control the Redstone family business interests. *See* Irin Carmon, *Last Woman Standing*, N.Y. MAG. (July 9, 2019), https://nymag.com/intelligencer/2019/07/shari-redstone-cbs-viacom-media-empire.html.

perpetuity and assets transferred into the trust may be exempt from estate taxation forever as well.

These extraordinary benefits from effective planning need to be accompanied by thoughtful consideration of *how* and *by whom* the family business (now owned by the trust) will be operated and controlled in the future. Ideally, special provisions will be included to address business governance and succession issues that are foreseeable and mechanisms to effect ownership changes among beneficiaries should the need arise. Because it is impossible to anticipate everything that will come to pass in the future, trust documents need the flexibility to permit reasonable modification and amendment to reflect the wishes of their creators.

Trusts are not a substitute for the good judgment and values that the beneficiaries will need to sustain their family business forever. Trusts are very effective for protecting financial capital, but they have little to do with protecting the *human and intellectual capital* of the beneficiaries. This word of caution to the lawyers involved in preparing these documents is prescient in this regard:

> I strongly suggest that every planner carefully considers all the impacts the trusts may have on the lives of its beneficiaries, particularly its unintended consequences, and bring those thoughts to the attention of the trust's potential founder. By so alerting the trust's founder, the planner will be trying to eliminate to the greatest extent possible the negative impact a trust might have on these beneficiaries, and to meet the advisor's highest responsibility to the founder and the beneficiaries to do no harm. *Strangely, I often observe that in a rush to get the tax work done and the papers out, the trust's impact on the lives of its beneficiaries is never discussed*. This failure to take the time to consider these issues may be, from the founder' standpoint, given his or her intention to benefit the beneficiaries by enhancing their lives, the greatest unintended mistake. Why? Because it may lead to the creation of a trust that diminishes the lives of its beneficiaries. Should such a result occur, the founder would have been deprived by the trust's planner of the advice he or she most needed in attempting to accomplish his or her enhancement goals.[56]

These observations are especially relevant in the family business context because running an operating business is a much more challenging task than managing other asset classes.

Private client services lawyers can be especially helpful here by involving family business experts in conversations with the beneficiaries about the challenges that lie ahead.

56. James Hughes, Jr., *supra* note 51, at 200–01 (emphasis added).

Conclusion

Lawyers alone cannot "save" a company or family afflicted with all the woes of the Roy family. No amount of legal advice can overcome the damage arising from a defective culture, psychology, or purpose. Lawyers and laws just don't matter when the owners believe, as did Logan Roy and his children, that they are masters of the universe, above the law, and otherwise untouchable.

Fortunately, *Succession*, while derived from a concoction of real-life examples, is fiction and not representative of family businesses generally. Family businesses which model exemplary behavior are abundant throughout the world.

Family businesses need lawyers who have the necessary technical skills *and* who know the unique needs of a family business owner. Those who do will deliver incredible value to their clients.

The biggest favor a lawyer can do for a family business owner is to show empathy for how difficult it is to build a successful multi-generational family business. As predicted by the *Anna Karenina* principle, the challenge is to operate a successful business *and* maintain family harmony. Doing this for a hundred years or more is an extraordinary achievement.

Hygiene, strategy, and "being a good owner" are all essential for success. To most, achieving *family enterprise* status is the gold standard. A good lawyer will guide the client in this direction at every opportunity.