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## Advising Family Businesses in the Twenty- First Century: An Introduction to Stage 4 Planning™ Strategies

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“All happy families are alike, each unhappy family is unhappy  
in its own way.”<sup>1</sup>

### INTRODUCTION

Family businesses are ubiquitous in the United States—about 5.5 million U.S. businesses are family businesses, and they are responsible for the creation of seventy percent of all new jobs.<sup>2</sup> Yet, in spite of their importance—to our economy,<sup>3</sup>

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1. LEO TOLSTOY, ANNA KARENINA 1 (Rosamund Bartlett trans., 2014) (1877).

2. *Family Enterprise USA Appoints New Executive Director*, PR NEWswire (Sept. 17, 2013), <http://www.prnewswire.com/news-releases/family-enterprise-usa-appoints-new-executive-director-224082351.html>.

3. These businesses account for sixty-four percent of the U.S. GDP. *Id.* Further, sixty percent of publicly owned businesses in the United States are controlled by families. *Id.* In total, as many as ninety percent of all businesses in

to our workforce,<sup>4</sup> to our culture,<sup>5</sup> and, so, to countless families<sup>6</sup>—family businesses have received woefully insufficient attention from the legal profession with respect to their unique planning needs.<sup>7</sup> For example, in our

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the United States have been family-owned or controlled. W. GIBB DYER, *CULTURAL CHANGE IN FAMILY FIRMS: ANTICIPATING AND MANAGING BUSINESS AND FAMILY TRANSITIONS* 3 (1986). Family businesses represent the vast majority of all businesses in other countries as well and play a key economic role. Seventy-five percent of Spanish businesses are family-owned, accounting for sixty-five percent of Spain's gross national product. INT'L FIN. CORP., *IFC FAMILY BUSINESS GOVERNANCE HANDBOOK* 11 (2008), [http://www.ifc.org/wps/wcm/connect/159c9c0048582f6883f9ebfc046daa89/FB\\_English\\_final\\_2008.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/159c9c0048582f6883f9ebfc046daa89/FB_English_final_2008.pdf?MOD=AJPERES).

In Latin America, family businesses are responsible for sixty percent of the region's gross national product. *Id.* These trends are consistent all over the world. *See About*, ATT'YS FOR FAMILY-HELD ENTERPRISES, <http://www.afhe.com/index.php/about-jb-br-jb-i-afhe-jb-i> (last visited Mar. 27, 2017) ("Family businesses are essentially the same around the world in their contributions to the long-term financial and social stability of their communities and their nations.").

4. Family businesses range in size from very small ("Mom and Pop" companies) to some of the largest, multi-national companies in the world, including Salvatore Ferragamo and Fiat Group in Italy, L'Oreal and Michelin in France, Samsung and Hyundai Motor in South Korea, BMW in Germany, and Ford Motor Co. and Wal-Mart in the United States. INT'L FIN. CORP., *supra* note 3, at 11.

5. The wide-ranging cultural influences of family businesses are impossible to measure, but consider the social impact of their philanthropy: family business philanthropy operates at the intersection of family, business, and society and is of crucial importance to social goods such as education, health, and humanitarian aid around the world. For instance, corporations and foundations in the United States, many of which are family-owned, donate over \$67 billion per year. In the UK, the top 100 family businesses and foundations contribute £908 million per year to societal causes, and in Germany, family foundations donate around €490 million every year to philanthropic projects. EY FAMILY BUS. CTR. OF EXCELLENCE, *FAMILY BUSINESS PHILANTHROPY: CREATING LASTING IMPACT THROUGH VALUES AND LEGACY* 1, [http://www.ey.com/Publication/vwLUAssets/2016-Filantropie-studie/\\$FILE/REPORT%20-%20Family%20Business%20Philanthropy%202016.pdf](http://www.ey.com/Publication/vwLUAssets/2016-Filantropie-studie/$FILE/REPORT%20-%20Family%20Business%20Philanthropy%202016.pdf) (last visited Mar. 27, 2017).

6. We adopt the notion of "family" proposed by James E. Hughes Jr., who defined a family as "two or more people who by either genetic lineage *or bonds of affinity* consider themselves related to each other." JAMES E. HUGHES, JR., *FAMILY: THE COMPACT AMONG GENERATIONS* 3 (2007) (emphasis added).

7. Notwithstanding their commonality in economies around the world, a "common definition" of a family business has not yet emerged. Some of the definitions that have been used over the years include

informal survey, we were unable to identify any law school whose curriculum includes a course devoted to family business.<sup>8</sup> Another informal survey of resources made available to attorneys through bar associations, legal publications, and continuing legal education programs, reveals a principal emphasis on estate planning, tax planning, insurance planning, and buy-sell agreements for family businesses.<sup>9</sup> While we acknowledge the importance of

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(1) businesses in which multiple members of the same family are involved as major owners or managers, either contemporaneously or over time; (2) businesses in which the family controls the business through involvement in ownership and management positions, typically measured as a function of the percentage of equity held by family members and the percentage of a firm's managers who are also family members; and (3) an economic venture in which two or more family members have an interest in owning and continuing the enterprise.

THE FAMILY FIRM INSTITUTE, INC., *FAMILY ENTERPRISE: UNDERSTANDING FAMILIES IN BUSINESS AND FAMILIES OF WEALTH* 12 (2013) (citations omitted). In this Article, an enterprise will be considered a family business if decision-making control rests with either the natural person(s) who established the business and/or their spouses, parents, child, or children's direct heirs.

8. The curricula surveyed were at the following law schools: Harvard, Yale, Stanford, the University of Chicago, the University of Pennsylvania, Georgetown, the University of Virginia, and Cornell. A search of the schools' websites in 2016 revealed that while some law schools are beginning to incorporate courses on psychology (for example, Harvard's Extension School offers PSYC E-1870 Law and Psychology, a course that compares legal and psychological approaches to human behavior in topics like criminal confessions, the insanity defense, eyewitness identification and testimony), the importance of psychology in legal theory and practice has been sadly under-appreciated as it relates to the needs of business organizations, including family businesses. *See also* Eric A. Chiappinelli, *Stories from Camp Automotive: Communicating the Importance of Family Dynamics to Corporate Law Students*, 34 GA. L. REV. 699, 710 (2000) ("[C]orporate law casebooks are astonishingly devoid of any systematic consideration of family dynamics.").

9. *See generally, e.g.*, JAMES JOHN JURINSKI & GARY A. ZWICK, *TRANSFERRING INTERESTS IN THE CLOSELY HELD FAMILY BUSINESS* (2002); LOUIS A. MEZZULLO, *AN ESTATE PLANNER'S GUIDE TO FAMILY BUSINESS ENTITIES: FAMILY LIMITED PARTNERSHIPS, LIMITED LIABILITY COMPANIES, AND MORE* (3d ed. 2010); LOUIS A. MEZZULLO, *AN ESTATE PLANNER'S GUIDE TO BUY-SELL AGREEMENTS FOR THE CLOSELY HELD BUSINESS* (2d ed. 2007); SENIOR LAWYERS DIV., AM. BAR ASS'N, *THE ABA PRACTICAL GUIDE TO ESTATE PLANNING* (Jay A. Soled ed., 2011); WILLIAM P. STRENG, *ESTATE PLANNING* (2016); AM. BAR ASS'N, *BUSINESS VALUATION BASICS FOR FAMILY LAW LAWYERS* (2015); Michael Schlesinger, *Transferring the Family Business*, TAXES MAG., Jan. 2015, at 39-45; Douglas W. Stein, *The Leveraged*

each of these subjects, their primary focus is on money—how to maintain its maximum value for family members by minimizing their respectively applicable federal and state taxes, and then deciding who gets how much of what’s left over—not on people. In particular, professionals have paid insufficient attention to strategies and plans designed to help individuals, the entire family, and the team of people working collectively in their organizations enjoy life, enjoy each other and, by working together effectively in business, succeed together—to flourish.<sup>10</sup>

While family businesses can achieve great economic prosperity and outperform their non-family firm counterparts,<sup>11</sup> the emphasis on “financial planning” without comparable attention to “people planning” often comes at great costs. While impossible to measure accurately due to the private and confidential nature of most family business affairs, some authorities continue to cite statistics suggesting that approximately seventy percent of family businesses fail to successfully complete a transition to the second generation, and as high as a staggering ninety

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*Family Business CLAT*, PROB. & PROP., Sept.–Oct. 2007, at 1–3.

10. The term “[t]o flourish means to live within an optimal range of human functioning, one that connotes goodness, generativity, growth, and resilience.” Barbara L. Fredrickson & Marcia F. Losada, *Positive Affect and the Complex Dynamics of Human Flourishing*, 60 AM. PSYCHOLOGIST 678, 678 (2005); see also Barbara L. Frederickson, *Updated Thinking on Positivity Ratios*, 68 AM. PSYCHOLOGIST 814, 816 (2013) (“Following ancient philosophies articulated by Aristotle and others, hedonic well-being captures individuals’ global satisfaction with life alongside their pleasant affect, whereas eudaimonic well-being encompasses their sense of purpose and meaning as well as their resilience and social integration.”).

11. Several studies have shown that family-owned companies outperform their non-family counterparts in terms of sales, profits, and other growth measures. For example, Thomson Financial created an index to track performance of both family and non-family businesses in several countries and, tracking those firms over a ten-year period, found that, in Germany, the family index climbed 206%, while the non-family stocks increased just 47%; in France, the family index climbed 203%, while the non-family firm index rose only 76% with similar results found in Switzerland, Spain, Britain, and Italy. HANDBOOK OF RESEARCH ON FAMILY BUSINESS 553 (Panikkos Zata Poutziouris et al. eds., 2006).

percent of family businesses fail to complete a transition to ownership by the third generation.<sup>12</sup> The commonality of family business struggles is often expressed through the well-known proverb, “shirtsleeves to shirtsleeves in three generations”—a proverb that seems to have a counterpart in every country with family businesses.<sup>13</sup> While the accounts

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12. George Stalk & Henry Foley, *Avoid the Traps that Can Destroy Family Businesses*, HARV. BUS. REV., Jan–Feb. 2012, at 25, 25; see also Claudio Fernández-Aráoz et al., *Leadership Lessons from Great Family Businesses*, HARV. BUS. REV., Apr. 2015, at 84, 84 (“[O]nly 30% of [family businesses] last into the second generation, 12% remain viable into a third . . .”); see also PAT B. ALCORN, SUCCESS AND SURVIVAL IN THE FAMILY-OWNED BUSINESS 2 (1982) (“Family businesses usually fail in the first 10 years of operation; if they escape the grasp of this statistic, they are likely to be successful for an average of 24 years. It is more than a coincidence that the average time between the start of a family operation and the death of the founder is 24 years.”).

13. For example, in China: “Fu bu guo san dai” or “[w]ealth never survives three generations,” and in Scandinavian countries: “[C]logs to clogs.” ROY WILLIAMS & VIC PREISSER, PREPARING HEIRS: FIVE STEPS TO A SUCCESSFUL TRANSITION OF FAMILY WEALTH AND VALUES 17 (2003); see also HUGHES, *supra* note 6, at 14 (“Sometimes the wording was ‘clogs to clogs,’ sometimes ‘rags to rags,’ and sometimes ‘rice paddy to rice paddy’ . . . . In fact, the proverb is culturally universal. Somehow, when a family amasses financial wealth, that wealth will disappear within three generations of its accumulation.”) We are aware that the private nature of many family businesses makes accurate data on this subject difficult to acquire, and some researchers suggest that the oft-cited data referenced in note 12, *supra*, overstates the problem. Consider, for example, the following observation in the *Family Business Review*:

More recent research suggests successful families often experience “transgenerational entrepreneurship,” in which one generation inspires the next generation of entrepreneurs, but often in new ventures. This far more useful framework suggests a new way to look at how families succeed in business. Though the sample size for this more recent study is also small (only 118 participants), it casts new light on what we might consider family success. The families in this study currently controlled 3.4 companies on average but acknowledged control over an average of 6.1 companies in the family history. This would suggest they were responsible for 2.7 “failed” companies on average, because they had not continued to transfer ownership to family members. This seems like a ridiculous conclusion in light of the families’ success; more likely, these divestments reflect a thoughtful progression of the family wealth strategy.

The next time you hear the 70% failure statistic, be aware of the inaccuracy. Further, it might be worth considering whether the person citing the statistic is making an innocent mistake or is using it as a scare tactic

of what comprises these statistics will often be known only to the family members and their advisors, many of whom serve under professional obligations of confidentiality, there are nevertheless seemingly endless published accounts of prominent families in business together, including the Gucci, Guinness, and Gallo families, whose infighting has become known through the public litigation process.<sup>14</sup>

Beyond what these inherently imprecise statistics and anecdotal published reports reveal is the tragic human toll taken as a result of family business dysfunction: parents, children, and siblings who no longer talk to each other, sometimes as a result of intra-family litigation,<sup>15</sup> sometimes, in our experience, even as a result of physical altercations and fisticuffs. These disputes inevitably spill over and impact

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with an ulterior motive. The important factor is not survival, but entrepreneurship.

Robert Holton, *A Critical Look at 'Survival' Statistics*, FAM. BUS. MAG. (May–June 2016), <https://www.familybusinessmagazine.com/critical-look-survival-statistics> (citations omitted). Whatever the “real data” might be, we believe that most professionals working with family businesses agree that the challenges are, nevertheless, great. Existing strategies remain imperfect, and so conflict remains an unacceptably high risk for their clients.

14. See generally, e.g., ROGER FRITZ, WARS OF SUCCESSION: THE BLESSINGS, CURSES AND LESSONS THAT FAMILY-OWNED FIRMS OFFER ANYONE IN BUSINESS (1997) (generally discussing conflicts in family business succession); GRANT GORDON & NIGEL NICHOLSON, FAMILY WARS: THE REAL STORIES BEHIND THE MOST FAMOUS FAMILY BUSINESS FEUDS (2010) (describing conflicts within famous families, including Ford, Gucci, McGain, Guinness, Gallo, and Redstone); Karen E. Boxx, *Too Many Tiaras: Conflicting Fiduciary Duties in the Family-Owned Business Context*, 49 HOUSTON L. REV. 233, 266–85 (2012) (detailing the Winston family litigation and other various, contentious family cases).

15. See, e.g., Leslie Wayne, *Brother Versus Brother; Koch Family's Long Legal Feud Is Headed for a Jury*, N.Y. TIMES (Apr. 28, 1998), [http://www.nytimes.com/1998/04/28/business/brother-versus-brother-koch-family-s-long-legal-feud-is-headed-for-a-jury.html?\\_r=0](http://www.nytimes.com/1998/04/28/business/brother-versus-brother-koch-family-s-long-legal-feud-is-headed-for-a-jury.html?_r=0) (the four Koch brothers of Koch Industries battled for years in vicious litigation over their family's billion dollar estate); Nick Carbone, *Top 10 Family Feuds: Adidas vs. Puma* (Aug. 23, 2011), [http://content.time.com/time/specials/packages/article/0,28804,2089859\\_2089888\\_2089889,00.html](http://content.time.com/time/specials/packages/article/0,28804,2089859_2089888_2089889,00.html) (describing the fascinating account of how two of the world's largest shoe companies—Adidas and Puma—were reportedly established by two brothers, Adolf and Rudolf Dassler, as a result of miscommunication).

non-family employees and the broader community.<sup>16</sup> Indeed, we suspect that any attorney who works with family businesses on a regular basis has his or her own personal experience involving family business dysfunction and crisis.

In spite of endless seminars, articles, websites, and other information designed to help families in business together, not much has changed. Far too many families, many of whom expend substantial resources designed to secure them the most advanced contemporary planning techniques, continue to experience dysfunction, and the “failure statistics” cited above appear to remain as predictable as they are consistent. The legal profession’s failure to develop new and improved planning strategies is particularly troubling given the typically critical role such strategies play in counseling family business clients. This Article begins by describing historical planning strategies, which we refer to as Stage 1, Stage 2, and Stage 3, and then introduces a new planning paradigm based on the application of new insights from social neuroscience and positive psychology to family business planning, what we refer to as Stage 4 Planning™.

#### I. STAGE 1 PLANNING™: WHO GETS WHAT? ESTATE PLANNING

We believe the disproportionate attention given by family business owners and their advisors to answering the following two questions—(1) “who shares in the wealth?” and (2) “how much do they get?”—is, to some extent, a by-product of the abolition of the feudal tradition of primogeniture in the nineteenth century, which allowed latter-born children to share an estate with the oldest child.<sup>17</sup> We refer to the work

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16. See, e.g., DAVID BORK ET AL., WORKING WITH FAMILY BUSINESSES (1996) (“When things do not go smoothly, life for family members and employees alike can be a living hell. Parent is pitted against child, sibling against sibling. Nonfamily employees and advisors can get caught in the middle. All the while, the company may be held hostage by the family’s failure to resolve differences. Family relations deteriorate, leading to deep feelings of hurt, misunderstanding, or estrangement.”).

17. Primogeniture is a system of inheritance dating back to feudalism and

involved in answering this question, historically most typically through the use of wills and trusts, as Stage 1 Planning™.

While primogeniture can help explain the longevity of some of the world's oldest family businesses,<sup>18</sup> this tradition soon came under attack from several quarters in the colonial United States, in part because of a growing resistance against the privileges of the landed aristocracy, in part because of a desire to release land into the open market, and, in part, because it was inconsistent with the United States' emphasis on equality.<sup>19</sup> By the end of the nineteenth century, the general rule in the United States was that children shared equally in intestate property, subject only to varying rights of survival provided to a husband or wife.

While the merits of a feudal tradition that legislated inequality could be fairly criticized as a “business strategy”

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the Middle Ages in Europe that made its way to Colonial America, through which the first-born son would, upon his father's death, inherit his father's entire estate, forcing the younger sons to find other careers. *See, e.g.*, Richard B. Morris, *Primogeniture and Entailed Estates in America*, 27 COLUM. L. REV. 24, 24–25 (1927).

18. For example, the tradition of bequeathing estates to the eldest son remains common in Japan, a country that boasts some of the oldest family-owned businesses in the world. *See, e.g.*, JAPANESE CULTURE: ITS DEVELOPMENT AND CHARACTERISTICS 34 (photo. reprint 2004) (Robert J. Smith & Richard K. Beardsley eds., 1963) (describing Japan's system of descent as patrilineal primogeniture); Emily Tamkin, *Why Are So Many of the World's Oldest Companies in Japan?*, SLATE (Oct. 20, 2014), [http://www.slate.com/articles/business/continuously\\_operating/2014/10/world\\_s\\_oldest\\_companies\\_why\\_are\\_so\\_many\\_of\\_them\\_in\\_japan.html](http://www.slate.com/articles/business/continuously_operating/2014/10/world_s_oldest_companies_why_are_so_many_of_them_in_japan.html) (listing many of the world's oldest business that are located in Japan, including Kongo Gumi, a temple building firm that was “the oldest continuously operating family business in the world” until being absorbed into a subsidiary company in 2006).

19. *See generally* Morris, *supra* note 17, at 27 (discussing a colonial conception of primogeniture as less democratic); *id.* at 32–34 (discussing the impact of primogeniture on the alienability of land); Lee J. Alston & Morton Owen Schapiro, *Inheritance Laws Across Colonies: Causes and Consequences*, 44 J. ECON. HIST. 227, 281 (1984) (discussing the landed aristocracy as advocates for maintaining the system of primogeniture). For a general history on the law of inheritance in the United States, see CAROLE SHAMMAS ET AL., *INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT* (1987).



on a variety of grounds,<sup>20</sup> the system, at least, served as a clear and efficient approach to what, in contemporary times, is referred to as “succession planning.” As a result, attorneys and other trusted professional advisors needed to bring stronger focus to assisting families in determining how to most appropriately allocate their estates through the now familiar use of wills, trusts, and over time, other increasingly complicated estate planning instruments (herein referred to as Stage 1 Planning).

We suspect that neither our early American legislators nor owners of businesses fully appreciated the multi-dimensional impact that resulted from an approach through which wealth was spread among more than one child. Consequently, less attention seems to have been given as to how multiple heirs, who as a result of their shared ownership in a business, would constructively reconcile differing perspectives on the multitude of decisions every business faces that inevitably results from their individuality. As discussed below, because of such challenges, attorneys developed another aspect of Stage 1 Planning—conflict resolution mechanisms.<sup>21</sup> Today, attorneys routinely include “dispute resolution” mechanisms when drafting legal agreements between and among family members, often selecting mediation, arbitration, or litigation as the stipulated mechanism to resolve disputes if and as they

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20. Research published by the Centre for Economic Performance at the London School of Economics and McKinsey suggests that the best way to ruin a family business is to give it to an eldest son. The study found that primogeniture not only precluded the selection of a potentially more qualified CEO from a broader pool of candidates, but could also diminish a family member’s motivation to work hard, safe in the knowledge of a job guarantee. *See* CTR. FOR ECON. PERFORMANCE, LONDON SCH. OF ECON. AND POLITICAL SCIENCE, POLICY ANALYSIS: INHERITED FAMILY FIRMS AND MANAGEMENT PRACTICES: THE CASE FOR MODERNISING THE UK’S INHERITANCE TAX 2 (2006), [http://cep.lse.ac.uk/briefings/pa\\_inherited\\_family\\_firms.pdf](http://cep.lse.ac.uk/briefings/pa_inherited_family_firms.pdf).

21. We do not suggest that healthy families can be defined by their lack of conflict. Indeed, conflict can often be an important catalyst for change. Instead, the health of a family can be better measured by its ability to successfully manage and resolve conflict.

might occur.<sup>22</sup> Unfortunately, however, this particular aspect of Stage 1 Planning has proved insufficient for the larger challenges at hand—sustaining family relationships and their business—since, by the time a dispute among family members has escalated to the point where it is being addressed by one of these approaches, it is often “too little, too late.”<sup>23</sup>

## II. STAGE 2 PLANNING<sup>TM</sup>: MAXIMIZING HOW MUCH CAN BE GIVEN? ESTATE AND GIFT TAX PLANNING

For most of its history, the United States did not generate revenue by taxing transfers of wealth, whether made during one’s lifetime or upon death. That changed in 1916 when the federal government enacted an estate tax,<sup>24</sup> and to address a planning loophole, it added a gift tax in 1932.<sup>25</sup> Even today, the IRS continues to modify the tax code, seeking to close other loopholes utilized by crafty planners.<sup>26</sup>

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22. See, e.g., Richard Lutringer, *Business Divorce Mediation*, N.Y. DISP. RESOL. LAW., Fall 2009, at 64 (discussing mediation as a tool to help ease the pain of a contentious “business divorce”). For a more general discussion on family business conflict resolution, see KENT RHODES & DAVID LANSKY, *MANAGING CONFLICT IN THE FAMILY BUSINESS: UNDERSTANDING CHALLENGES AT THE INTERSECTION OF FAMILY AND BUSINESS* (2013).

23. Since there are numerous excellent resources available on Stage 1 Planning, we don’t further discuss it here.

24. See Revenue Act of 1916, ch. 463, §§ 200–212, 39 Stat. 756, 777–80.

25. For example, crafty planners avoided the estate tax by making inter-vivos gifts, often on a grantor’s deathbed, forcing the government to enact a gift tax in 1932. See Revenue Act of 1932, ch. 209, §§ 501–531, 47 Stat. 169, 245–59; William C. Warren, *Correlation of Gift and Estate Taxes*, 55 HARV. L. REV. 1, 2 (1941).

26. For example, in order to address transferors who would try to avoid the estate tax by gifting assets to a second generation in a trust or similar arrangement, Congress imposed a generation-skipping transfer tax in 1976 on transfers to a beneficiary in a generation more than once removed from the transferor. See Tax Reform Act of 1976, Pub. L. No. 94-455, § 2006, 90 Stat. 1520, 1879–90 (1976) (codified as amended at 26 U.S.C. § 2601 (2012)); see also Joseph M. Dodge, *Three Whacks at Wealth Transfer Tax Reform: Retained-Interest Transfers, Generation-Skipping Trusts, and FLP Valuation Discounts*, 57 B.C. L. REV. 999, 1011–21 (2016) (discussing the history and counter-productive outcomes of the generation-skipping transfer tax and proposing possible alternative policies). For a broad history of the estate tax, see generally Darien

These new laws created an incentive for families in business together to engage in planning exercises designed to reduce, if not eliminate, such taxes.

Loopholes remain in the federal estate and gift tax system, which is amended from time to time. As a result, different families in similar circumstances often pay different taxes, depending upon the extent to which they take advantage of creative planning opportunities. Estate and gift tax planning requires a high degree of technical competence, especially when assets (or an estate) consist largely of a family-owned business and the tax laws keep changing.<sup>27</sup> Over the generations, many family business owners have—understandably—sought the help of attorneys and other professionals to plan their estates and preserve family wealth that, in many cases, includes family businesses. We refer to this work as Stage 2 Planning™.

While planning to minimize otherwise applicable taxes serves a purpose, an accumulating body of data suggests that only a very limited percentage of family business failures are attributable to estate and financial planning (i.e. Stage 1 Planning and Stage 2 Planning) and in fact, most failures are more appropriately attributed to intra-family mistrust and miscommunication.<sup>28</sup>

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B. Johnson et al., *The Estate Tax: Ninety Years and Counting*, STAT. OF INCOME BULL., Summer 2007, at 118.

27. For example, as this Article was being prepared, the United States Treasury Department released proposed regulations under section 2704 of the Internal Revenue Code that, among other things, would discontinue valuation discounts for interests in closely held businesses, including family businesses, for lack of marketability or lack of control. The regulations would change how family businesses are valued for purposes of calculating federal estate, gift and generation-skipping transfer taxes. If the proposed regulations that were published in the Federal Register on August 4, 2016 are enacted as final regulations, the tax cost of transferring (by gift, sale, or upon death) an interest in any family controlled entity will be significantly increased. *See* Estate, Gift, and Generation-Skipping Transfer Taxes; Restrictions on Liquidation of an Interest, 81 Fed. Reg. 51,413 (Aug. 4, 2016) (to be codified at 26 C.F.R. pt. 25).

28. *See, e.g.*, WILLIAMS & PREISSER, *supra* note 13, at 35–36, 48–49 (in a survey of 3500 families, only about five percent of family business failures were attributable to poor tax and financial planning, with the balance of failures being

### III. STAGE 3 PLANNING<sup>TM</sup>: PLANNING FOR BOTH BUSINESS AND FAMILY GOVERNANCE

The inadequate training and resources made available to the legal profession<sup>29</sup> reflects its historical underappreciation for the unique qualities of a family business. For example, every business needs to consider such issues as how to generate more revenue than expenses incurred, how to grow, and how to compete. Only family businesses, by contrast, are controlled by two or more individuals who, to work together well, must also figure out how to smartly reconcile the conflicting roles and responsibilities that inevitably arise as a result of the frequent incongruity between traditional “family values” and “business values.”<sup>30</sup> Without appreciating the distinct attributes of a family business, too many families and their professional advisors have failed to sufficiently consider how family members might work together, presumably trusting that family members would naturally support other family members and work well with each other. In our experience, however, families seem to take for granted that goodwill and trust will

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attributable to intra-family mistrust and miscommunication); HUGHES, *supra* note 6, at 22 (“Of the many families I’ve observed over the years who owned enterprises that failed, and sadly there have been many, most failed because they spent 80 percent of their time together on management issues and on questions of who within the family would enter management and less than 20 percent on matters of ownership and teaching their members how to be great owners. The paradox is that the ratio should be reversed.”).

29. See *supra* notes 8 and 9, and accompanying text.

30. For example, families and businesses often have diverging values. Without training, lawyers may not consider the resulting conflicting decision-making implications for a client who might simultaneously have diverging concerns as a family member (including, potentially, a spouse, parent, and/or sibling) and as a participant in a business (including, potentially, as a board member, executive, officer and/or employee). See ALEXANDER KOEBERLE-SCHMID ET AL., GOVERNANCE IN FAMILY ENTERPRISES 29 (2013) (noting that CEOs of family businesses perceive their family and business differently from others based on their familial relationships); INT’L FIN. CORP., *supra* note 3, at 21 (emphasizing that family governance structures are critical for managing “different ideas and opinions” on the business’s governance); *infra* note 55 and accompanying text (describing corporate values).

continue without effort when, in fact, failure to structurally enforce open lines of communication is a primary cause of failure.<sup>31</sup>

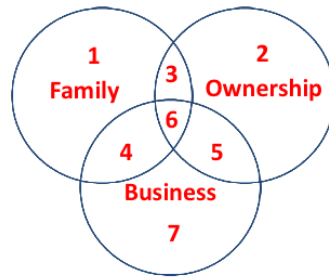
These considerations generally received inadequate attention until sometime in the 1970s when the field of family business consulting is traditionally considered to have been established,<sup>32</sup> principally by psychologists and social workers. The field continues to develop, and as a result, there are no licensing requirements to counsel clients, no commonly accepted understanding as to what training consultants should have, what they should be doing, how they should do it, nor what is reasonable for their clients to expect. Many family business consultants, however, strive to help family businesses by developing processes and structures that are designed to enhance the quality of interpersonal relationships and the quality of decisions that impact the future of the business, including seeking to align values, vision, and mission, and developing plans and policies that are informed by those core principles. Such efforts, that we refer to as Stage 3 Planning™, are often informed by helping families to better appreciate the intersection of three roles that individuals might have in a

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31. See Steven C. Bahls, *Judicial Approaches to Resolving Dissension Among Owners of the Family Farm*, 73 NEB. L. REV. 14, 21–22 (1994) (noting that disagreements over business decisions can be devastating to both the business and the family relationships); DAVID BORK, FAMILY BUSINESS, RISKY BUSINESS 23 (1993) (“Family businesses are different from other forms of enterprise . . . [but] the fact is not generally understood . . .”).

32. Dr. Leon Danco is often considered the founder of the family business consulting field. For an example of his well-known work, see generally LEON DANCO, BEYOND SURVIVAL: A GUIDE FOR BUSINESS OWNERS AND THEIR FAMILIES (2003). There are, of course, some attorneys who continue to inform their practices—and improve their services—through the application of insights and strategies from ancillary professional fields. For example, Attorneys for Family-Held Enterprises, a non-profit association, was established to promote an interdisciplinary approach to assisting family businesses, and serves as a “resource for the on-going advancement, collaboration and education of practicing attorneys and other professionals who provide intra-disciplinary counsel to family-held enterprises.” See ATTORNEYS FOR FAMILY-HELD ENTERPRISES, <http://www.afhe.com> (last visited Mar. 6, 2017).

family business: roles within the family, roles as owners of the business, and/or roles as employees of the business, as traditionally reflected in the three circle model developed by Harvard Professors Renato Tagiuri and John Davis in the 1980s.<sup>33</sup> See Figure 1.



Key:

1. Family Members who neither work in, nor own an interest in, the business
2. Non-Family Members who have an ownership interest
3. Family Members who are "Passive Owners"
4. Family Members who work in the business without an ownership interest
5. Non-Family Members who own an interest in, and work in, the business
6. Family Members who both work in, and own an interest in, the business
7. Employees and "stakeholders" involved in the business but who are neither owners nor Family Members

**Figure 1.** <sup>34</sup>

After clarifying these differing roles and accompanying responsibilities, many consultants seek to help their clients by introducing them to planning tools designed both to promote more harmonious relationships and thoughtful business operations. Because of their importance to effective planning for family businesses, and because these tools may be less familiar to attorneys, particularly in the family business planning context, we consider below how these three circles are used to advance planning along with some

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33. See Renato Tagiuri & John Davis, *Bivalent Attributes of the Family Firm*, 9 FAM. BUS. REV. 199, 199-02 (1996). The 3-Circle Model is discussed in one of the best-known family business resource publications: KELIN E. GERSICK ET AL., *GENERATION TO GENERATION: LIFE CYCLES OF THE FAMILY BUSINESS* 5-7 (1997).

34. Infographic inspired by GERSICK ET AL., *supra* note 33, at 6.

of the most important tools.<sup>35</sup>

A. *Professionalizing Business Governance: Establishing a Board of Directors (or Advisors)*

One of the most common Stage 3 Planning strategies is to “professionalize” the family’s business governance by constituting a board of directors that includes thoughtful, experienced, independent (i.e. non-family) members.<sup>36</sup> Most family business consultants, lawyers and other professionals believe that including non-family participants on the board of directors can be helpful in (1) attracting and retaining high quality employees, who may be concerned with whether their employer is likely to remain viable over time; (2) providing additional informed perspective on material decisions facing the business;<sup>37</sup> (3) helping to mediate disputes between family members by providing objectivity; and (4) helping manage the succession process, including selecting and

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35. The family business consulting field has developed numerous tools and approaches over the years that are beyond the scope of this Article. For example, another tool commonly used by many family business consultants is to develop a family genogram to “enable family members to develop sufficient objectivity about themselves and their entire ‘cast’ to accurately identify the strengths and vulnerabilities of each player. Then all of them will be better able to predict the outcomes and *even write their own ending* to the family business play.” BORK, *supra* note 31, at 46 (emphasis in original). For an overview of some of the most influential articles in family business research over the past several decades, see generally FAMILY BUSINESS (Joseph H. Astrachan et al. eds., 2008).

36. See, e.g., CRAIG E. ARANOFF & JOHN L. WARD, FAMILY BUSINESS GOVERNANCE: MAXIMIZING FAMILY AND BUSINESS POTENTIAL 25 (1996) (“As the business grows, families need to understand the value of a transition to professional management.”). According to PricewaterhouseCoopers, “an independent board is one of the main pillars of good corporate governance,” such that “nearly two-thirds (64%) of [companies surveyed] now have nonfamily members on their boards.” PWC, PROFESSIONALIZE TO OPTIMIZE: US FAMILY FIRMS ARE NO LONGER WINGING IT 24 (2015), <http://www.pwc.com/us/en/private-company-services/publications/assets/pwc-family-business-survey-us-2015.pdf> (last visited Mar. 29, 2017).

37. See Jeremy A. Woods et al., *Escalation of Commitment in Private Family Businesses: The Influence of Outside Board Members*, 3 J. FAM. BUS. STRATEGY 18, 24 (2012) (noting that outside board members can be extremely vital in providing objective input when family board members are emotionally invested in decisions and strategies, because of their long-term commitment to the company).

mentoring a successor who is capable of leading the business while maintaining and nurturing the family's trust and confidence.<sup>38</sup> Unfortunately, many families have been reluctant to add non-family members to the company's board of directors out of a fear of losing control and/or a fear of exposing family problems.<sup>39</sup>

### B. *Professionalizing Family Governance: Establishing a Family Council*

Another common Stage 3 Planning strategy involves “professionalizing” governance of the family by establishing a family council: a platform designed to help ensure that the entire family is integrated, to some extent, in the business.<sup>40</sup>

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38. Decisions made by (or with the endorsement of) respected independent board members can alleviate concerns that a child was selected as a business' next leader by a biased and partial parent, whether or not the child was well qualified to assume that role.

39. Some families find it useful to form an informal “advisory board” rather than a formal board of directors. See Ralph Ward, *The Fundamentals of a Family-Business Advisory Board*, INC. (July 1, 2000), <http://www.inc.com/articles/2000/07/19779.html> (“Advisory boards are growing popular at family-held companies, where a ‘guidance but not governance’ role is well suited to dealing with family owners.”). Practically functioning much like boards of directors, advisory boards are often comprised of three to five independent (i.e. non-family) members who are trusted because of their business-savviness, relevant expertise, a willingness to challenge management's ideas and, as important as anything, interpersonal skills that mesh well with family members and company employees. See André Morkel & Barry Posner, *Investigating the Effectiveness of Corporate Advisory Boards*, 2 CORP. GOVERNANCE, no 3., 2002, at 4, 4–9 (“[Advisory boards] can provide the CEO and management the benefits of experience, expert knowledge, contacts and credibility.”).

40. Family councils are formal bodies that meet on a regular basis and represent different branches or generations of the family, and thus may prevent or at least help to resolve various family-related conflicts. See Marta M. Berent-Braun & Lorraine M. Uhlaner, *Family Governance Practices and Teambuilding: Paradox of the Enterprising Family*, 38 SMALL BUS. ECON. 103, 107–08 (2012). Family councils focus on family and ownership matters, the same way that the board of directors focuses on business matters. While the structure and operation of every family council is unique, it is quite commonplace for councils to focus on three sets of plans: (1) plans for individuals that are designed to support each member's personal and/or professional goals; (2) plans for the family that clarify and establish overall goals of the family—and the resources needed to achieve those objectives; and (3) plans that guide how family members relate to the



A family council is traditionally designed to (1) provide family members with a forum to communicate, including to learn about the business and ask questions; (2) facilitate the flow of information, among family members, and from the family to leaders of their business, and, in so doing, helping forge a shared consensus; (3) educate new generations about the business, while serving as a lifelong learning forum for more senior family members who are less active or inactive in business operations; (4) provide a forum to decide on family philanthropy; and (5) organize “family fun” to help nurture high quality relationships and counteract the natural tendency for family bonds to diminish as families grow and the sheer quantity of social contacts among family members decrease.<sup>41</sup>

A family council, whether formal or informal, can be particularly helpful as the number of family members grows and relationships become more distant, or when some family members relocate to new homes away from company headquarters and, as a result, are at risk of losing contact. Just as corporations establish by-laws to ratify operating procedures, families that form councils should consider establishing something similar that will help organize how they will function,<sup>42</sup> including eligibility requirements for

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business, addressing such issues as ownership, management control, family involvement in the business, and long-term strategic direction of the business. *See generally, e.g.*, CRAIG E. ARONOFF & JOHN L. WARD, FAMILY MEETINGS: HOW TO BUILD A STRONGER FAMILY AND A STRONGER BUSINESS (1992).

41. A growing number of scholars emphasize the importance of family councils in family business governance. *See, e.g.*, Berent-Braun & Uhlener, *supra* note 40, at 107–08; Julia Suess, *Family Governance—Literature Review and the Development of a Conceptual Model*, 5 J. FAM. BUS. STRATEGY 138, 142–43 (2014).

42. *See* Scott E. Friedman, *Creative Uses of LLCs for Family Owned Businesses*, N.Y. ST. B. ASS'N J., Dec. 1996, at 20, 20–21 (explaining that incorporating rules for a family council in an operating agreement can be helpful when forming an LLC).

membership,<sup>43</sup> operating rules,<sup>44</sup> policies and rules,<sup>45</sup> and how to coordinate with the family's business.<sup>46</sup> The council, however, is not intended to micro manage the family's business.

There are two functions of a family council that deserve particular attention. One is to help mediate family disagreements constructively before they become destructive conflicts that could negatively affect the business.<sup>47</sup> As discussed below, another critical function a family council can serve is to help confirm that there is sufficient "common

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43. For example, some families limit membership to adults over eighteen years old. Others may limit membership to "blood relatives" (i.e., excluding in-laws). The purpose of a council, however, is generally best served by favoring inclusiveness of responsible family members, whether they are blood relatives or not, and whether they are active in the business or not. *But see* Carolyn M. Brown, *7 Rules for Avoiding Conflicts of Interest in a Family Business*, INC. (Feb. 18, 2011), <http://www.inc.com/guides/201102/7-rules-of-conduct-for-family-businesses.html> (cautioning that the more dysfunctional a family is, the more helpful it might be to start with a smaller group, expanding membership to include other family members as relationships improve).

44. For example, every council should decide how often to meet (with some benefiting from monthly meetings, others from quarterly or annually), who sets the agenda, who "chairs" the meeting, etc. *See id.*

45. For example, family councils might consider establishing liquidity policies if certain family members do not want to participate in the business, conflict resolution policies, etc. *See, e.g.*, INT'L FIN. CORP., *supra* note 3, at 23–28 (noting the importance of establishing policies in a family businesses).

46. *See* GERSICK ET AL., *supra* note 33, at 250 (recommending that family councils consider how to collaborate with the company's board of directors). Families without a history of meeting together might be well served by getting going with comparatively "non-controversial" agenda items such as, for example, meeting to discuss and agree upon philanthropic priorities.

47. This purpose might be accomplished simply by providing a forum to keep family members informed and thoughtfully engaged. On those occasions, however, where disagreements remain unresolved, the council might have a dispute resolution mechanism such as (1) designating the Council Chair or other Council Member(s) as a mediator; (2) selecting a trusted third party advisor (e.g. an attorney, accountant, consultant) to serve as a mediator; (3) establishing "tie-breaking rules," such as rotating the decision among the parties. In our experience, the most important factor is that family members adopt some mechanism—and consistently apply it—before disputes get out of hand. For a general overview of conflict resolution in the family business context, see *THE FAMILY BUSINESS CONFLICT RESOLUTION HANDBOOK* (Barbara Spector ed., 2003).

ground” among family members, by discussing, clarifying, and confirming in writing their shared values, vision, and mission, and through that process and those guiding principles, reach further agreement on plans and policies that are particularly important to the family.<sup>48</sup>

*C. Professionalizing the Business: Clarifying and Embracing Guiding Principles*

Operating any business in today’s global, wired, and dynamic economy is not easy. Every business, small and large, must make countless and endless decisions to survive and flourish. What markets to focus on? What innovations to invest in? Who does what? And when? Beyond the “expected” issues that must be addressed are the “unexpected” issues that inevitably arise and must be dealt with, often without much time to reflect on what course to take. How, for example, to handle an irate customer, the failure of a new product to work as expected upon launch, or whether it makes sense to pursue—or pass on—an “opportunity.” Many businesses find themselves unprepared and, in ad hoc fashion, answer such questions as they arise. They “fire fight[].”<sup>49</sup>

Well known management consultant, Stephen R. Covey, in describing the importance of “principle based” actions, observes that “[c]orrect principles are like compasses: they are always pointing the way. And if we know how to read them, we won’t get lost, confused, or fooled by conflicting

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48. Kelin E. Gersick & Neus Feliu, *Governing the Family Enterprise: Practices, Performance and Research*, LANGSBERG GERSICK & ASSOCIATES, <http://www.lgassoc.com/governing-family-enterprise-practices-performance-research> (last visited Mar. 30, 2017) (“[F]amily meetings can help families achieve consensus regarding family mission, family values, and the raison d’etre [sic] for the sustainability of the family business over generations.”) (internal citations omitted).

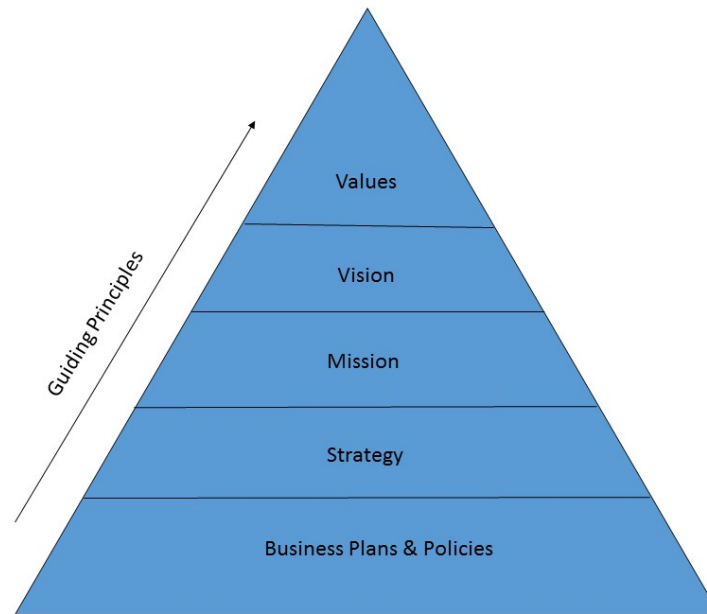
49. Roger Bohn, *Stop Fighting Fires*, HARV. BUS. REV., July–Aug. 2000, at 83, 83–84.

voices and values.”<sup>50</sup> One of the most effective Stage 3 strategies that can help an organization transform itself into a thoughtful, strategic, and effective organization is to establish a cohesive set of (1) core principles; (2) plans; and (3) policies that, together, serve as a compass to guide behavior.<sup>51</sup> See Figure 2.

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50. STEPHEN R. COVEY, *PRINCIPLE-CENTERED LEADERSHIP* 19 (1990); see also John Greathouse, *Decision-Making 101—Defining Your Values Makes Most Decisions Easy*, BUS. INSIDER (July 29, 2011) <http://www.businessinsider.com/decision-making-101-defining-your-values-makes-most-decisions-easy-2011-7> (“It’s not hard to make decisions when you know what your values are.”) (quote attributed to Roy Disney, American Entrepreneur); *Our Corporate Culture*, AMELIORA WEALTH MGMT., <http://www.ameliorawealth.com/en-us/philosophie/werle.aspx> (last visited Mar. 30, 2017) (“Set your expectations high; find men and women whose integrity and values you respect; get their agreement on a course of action; and give them your ultimate trust.”) (quote attributed to John F. Akers, former CEO of IBM). Indeed, the recognition that bottom line profitability correlates with culture suggests that families would be well served by attending to a different “P/E ratio” that we developed for our clients (not simply the traditional “Price/Earnings ratio”): that of the number of “principled” actions and decisions to “expedient” or “ad hoc” actions and decisions. The goal is to function in an entirely principled manner or what we refer to as “P/E Max.” Decisions and actions that are inconsistent with core principles are referred to as “P/E Low.” Articulating core principles can serve as a decision-making compass, often helping insure that families are not making ad hoc choices that are (inconsistently) based on “family only values” and, alternatively, on “business only values.”

51. There are a variety of plans that are commonly developed to help build high performance businesses, including strategic plans, business plans, estate plans, retirement plans, and financial plans. All such plans are, of course, key to a company’s success but, since they are generically relevant to any business, family or otherwise, they are not considered here. Instead, attention is focused below on succession planning, compensation planning, and capital allocation planning, three challenging—and traditionally contentious—considerations for many family businesses.



**Figure 2.**<sup>52</sup>

### 1. Core Principles

There are three aspects to becoming a “principle-based organization” that are so critical that they are often referred to as “core principles”: (1) a statement of core values; (2) a vision and mission statement; and (3) a code of conduct.

### 2. Statement of Core Values

As discussed above,<sup>53</sup> operating a family business can be particularly problematic because of the inherently contradictory nature of certain family values and business

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52. Infographic inspired by Andrew McFarlane, *Defining Your Organizations* [sic] *Purpose: The Importance of Vision, Mission and Values*, CARMICHAEL CENTER: KNOWLEDGENET (Aug. 31, 2012), <https://knowledgenet.carmichaelcentre.ie/articles/defining-your-organisations-purpose-importance-vision-mission-and-values>.

53. See *supra* note 30 and accompanying text.

values. For example, families tend to want to make sure everyone is treated equally; businesses generally want to make sure that everyone is treated based on the quality of performance and individual contributions. Families tend to adhere to traditions, making them somewhat resistant to change; businesses succeed by innovating and adapting. Families, where membership is “life-long,” tend to make more emotional decisions that are intended to keep family relations intact; businesses, however, see members coming and going—hired, fired, and retired—and, tend to make decisions based on reason and logic.<sup>54</sup>

Determining, prioritizing, and memorializing a family’s core values<sup>55</sup> can be an important means to help families thoughtfully integrate and reconcile their “family values”

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54. See CRAIG E. ARANOFF & JOHN L. WARD, FAMILY BUSINESS VALUES: HOW TO ASSURE A LEGACY OF CONTINUITY AND SUCCESS 22 (2001) (“Parents may want their children to lead the business, reap the biggest paychecks, and be handed the best opportunities. Business needs to operate as a meritocracy. The family may need high dividends to thrive, while the business needs capital reinvested. The family may want all members included in the business, while the business needs to exclude unqualified employees. The business may need to fire a family member, a prospect that horrifies the family. The business may need to take on debt to grow, clashing with the family’s desire for security and stability. The business may need a single CEO, while the family wants sibling or cousins to share power equally.”); MANFRED F.R. KETS DE VRIES ET AL., FAMILY BUSINESS ON THE COUCH: A PSYCHOLOGICAL PERSPECTIVE 9 (2007) (“[I]n a business family, normal family goals may come into conflict with the business’s economic goals because an important theme within the family system is to meet the human and psychological needs of its members rather than to arrive at the best economic return.”). In general, the values of family-owned businesses tend to differ from those of non-family-owned businesses. See Lucía Ceja et al., *The Importance of Values in Family-Owned Firms* 33 (IESE Bus. Sch., Univ. of Navarra, Working Paper No. WP-875, 2010), <https://core.ac.uk/download/pdf/6259595.pdf> (“[T]he values of family-owned businesses are more oriented toward people, emphasize collectivity more than individuality, and support a long-term perspective and a sense of stewardship and responsibility toward the future of the family and the community in which the business operates.”).

55. The literature on corporate values is extensive and has been described in many ways, sometimes being used to include such concepts as “family” or “brand.” In this Article, we use the following definition: “Values a) are concepts or beliefs; b) pertain to desirable *objects*, end states, or behaviors; c) transcend specific situations; d) guide selection or evaluation of behavior, things, and events, and e) are ordered by relative importance.” Ceja et al., *supra* note 54, at 8.

and “business values” to minimize or eliminate actions where their divergence would otherwise become problematic. The importance of clarifying values for family-owned businesses has been repeatedly described by authorities in the field, including in this observation from Claudio Fernández-Aráoz, Sonny Iqbal, and Jörg Ritter in the *Harvard Business Review*:

[I]n the family businesses we studied, values seem to be the acid test. When we reviewed the transcripts of our interviews, we found a 95% overlap in the language that each firm’s family members and nonfamily executives used to describe their corporate ethos: words such as *respect, integrity, quality, humility, passion, modesty, and ambition*. “We are working on the same page, in the same way, and he understands my commitment to bring the company forward,” the nonfamily CEO of a German retailer said, referring to the group CEO. The family chairwoman of a Chinese consumer company reported: “We have the same values, the same vision. We trust each other.”<sup>56</sup>

Core values are intended to be enduring and consistent and, over time, to become deeply ingrained in a family’s and business culture.<sup>57</sup> There are, however, no “right” or “wrong,” “better” or “worse” values; rather they should simply be “authentic” and “relevant” so that they are honored and respected in practice.<sup>58</sup> Once identified, values must be

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56. Fernández-Aráoz et al., *supra* note 12, at 86; *see also* BORK ET AL., *supra* note 16, at 38 (“The family and the business, while containing many of the same people, are vastly different worlds. Each has its own priorities, goals, and expectations. One world involves emotional acceptance; the other demands rationality and results. The challenge for a family business is learning how to shift the relationship as family members move between the two systems. Rules, expectations, and behaviors must all shift.”).

57. *See* ARONOFF & WARD, *supra* note 54, at 10 (“As values come to life in a business culture, they take on a self-renewing energy. People who are drawn to work in a business typically share its values; so do people who are promoted to leadership positions. That is a powerful source of efficiency. If a business has the right values for success, it tends to employ and attract people who will achieve it.”).

58. In our experience, we frequently see values such as integrity, humility, entrepreneurship, stewardship, servant leadership, ethical conduct, respect, and fun in successful family businesses. For example, in a survey of 100 family-owned company websites, the most common values mentioned were “generosity,

communicated through the family and its business, and continually re-enforced by making decisions that are always consistent with core values.<sup>59</sup>

### 3. A Vision and Mission Statement

A vision statement is an articulation of what an ideal (realistically achievable) future for the family business looks like. A shared vision helps bond organizational members together through a common desired future, directing organizational energy in a positive manner that can help inspire an organization to improve performance, provide direction to strategic planning, and motivate employees.<sup>60</sup> Through the effort of clarifying and committing to a shared vision, families can achieve a clearer level of consensus that helps unite them in the pursuit of exciting future goals, thereby helping reduce the likelihood of debilitating conflict

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humility, communication, service, quality, excellence, creativity and entrepreneurship.” Ceja et al., *supra* note 54, at 32; *see also* Wegmans Food Markets, Inc., GREATPLACETOWORK, <http://reviews.greatplacetowork.com/wegmans-food-markets-inc> (last visited Mar. 31, 2017) (listing Wegmans’ core values as “Caring, High Standards, Making a Difference, Respect and Empowerment”); *Opportunity & Advancement*, WALMART, <http://corporate.walmart.com/our-story/working-at-walmart> (last visited Mar. 31, 2017) (listing Walmart’s core values as “Service to the Customer, Respect for the Individual, Strive for Excellence and Act with Integrity”); *The Five Principles*, MARS, <http://www.mars.com/global/about-us/five-principles> (last visited Mar. 31, 2017) (listing Mars’ core values as “Quality,” “Responsibility,” “Mutuality,” “Efficiency,” and “Freedom”).

59. There are a variety of ways that values can be transmitted, including formally at family meetings, informally through storytelling, and perhaps most importantly, through leading by example. While “success” is never guaranteed, we have developed a formula in our consulting practice that enhances its likelihood:  $C1 + C2 = E$ , where C1 is “clarity of values,” C2 is “commitment to those values in practice,” and E is “maximum effectiveness.” Although beyond the scope of this Article, values can also be usefully transmitted inter-generationally through ethical wills, in addition to a traditional will, as part of an estate plan to help insure not only the thoughtful transfer of material assets and possessions, but intangible assets like advice, values, etc. *See, e.g.*, Scott E. Friedman & Alan G. Weinstein, *Going Beyond the Will: A Primer on Legacy Planning for Attorneys*, N.Y. ST. B. ASS’N J., Oct. 2007, at 30, 32 (“[Legacy planning is] one of the surest tools available to transfer wisdom, values and emotional expression.”).

60. John E. Neff, *Shared Vision Promotes Family Firm Performance*, FRONTIERS IN PSYCHOL., May 2015, at 1, 5.



in the future.

A shared vision can be particularly important in a family business context, and studies have found having one to be an important factor in determining the continued success of a family business from one generation to the next.<sup>61</sup> Interestingly, the study also found a strong correlation between positive work culture and the creation of a shared vision, concluding that family business owners “would be wise to spend as much time fostering a positive family climate . . . as they do on creating and executing a successful business strategy if their goal is to pass the business from one generation of family owners to the next.”<sup>62</sup> To help insure that a vision statement is realistic, it is often framed around what the business hopes to accomplish in increments of five to ten years.

Families also benefit from separately articulating their core purpose, which is designed to help distinguish that which is important to focus on (“mission critical”) from that which is not and, in so doing, serves as another “decision-making compass.” Mission statements generally describe the business’ target customers, the products or services that will be offered, in which markets such products or services will be offered, and what makes the company’s products or services unique.<sup>63</sup> Unlike core values, which are intended to

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61. For example, results from a quantitative study of 100 next-generation family firm leaders and 350 family and non-family leaders and employees found a positive correlation between the development of a shared vision and effective next-generation leaders, which, in turn, increased the “multigenerational survival rate” of family-owned businesses. Stephen P. Miller, *Next-Generation Leadership Development in Family Businesses: The Critical Roles of Shared Vision and Family Climate*, FRONTIERS PSYCHOL., Dec. 2014, at 1, 10; see also UNC Kenan-Flagler Bus. Sch., *The Importance of Shared Vision in a Family Business*, YouTube (Sept. 10, 2015), <https://youtu.be/ienfwTuKSv0>.

62. Miller, *supra* note 61, at 1.

63. The mission statement should guide the actions of an organization, spell out its overall goal, and provide a strategic framework for the company. See generally, e.g., JEFFREY ABRAHAMS, THE MISSION STATEMENT BOOK: 301 CORPORATE MISSION STATEMENTS FROM AMERICA’S TOP COMPANIES (1995); Linda C. McClain, *Family Constitutions and the (New) Constitution of the Family*, 75

be relatively fixed over time, missions are intended to change as new products and services are integrated into the business. As a result, family businesses are well served by reconsidering their mission, from time to time, to insure its continuing relevance.

#### 4. A Code of Conduct

A family code of conduct is intended to help insure civility, collegiality, and nurturing, and to reinforce trust within the family and its business by setting standards and providing guidance on how family members treat one another, interact with company management, and conduct themselves publicly.<sup>64</sup> While families are well served by developing, together, their own code that is relevant and authentic, such codes often include provisions that restrict “bad mouthing” or “tattling” on each other to third parties, promote honesty and mutual respect, and provide guidance on what type of information should be kept confidential, discussed with family members only, or disclosed to others. In addition, a code of conduct can be helpful in encouraging family members to support and collaborate with one another,

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FORDHAM L.R. 833 (2006). For example, Delaware North, a global family-owned business, has the following mission statement:

Through our valued associates (employees), we will accomplish our vision by foreseeing and exceeding customer and client expectations, leveraging our unique perspective and experience gained over nearly a century, and using our core competencies revolving around customer service and prudent management. We will foster our culture of integrity, efficiency and adaptability. We will look for opportunities that meet our parameters for returns and stability, and will use the synergy among our business units to explore and capitalize on new opportunities.

*Vision & Mission*, DELAWARE NORTH, <https://www.delawarenorth.com/about/vision-and-mission#sthash.RxfMZ26w.dpuf> (last visited Mar. 31, 2017).

64. Numerous authorities advocate the adoption of ethical and behavioral codes of conduct. See, e.g., Wendy Plant et al., *Ethical Practices and Regulatory Context of Family Businesses*, J. ACAD. & BUS. ETHICS, Oct. 2009, at 1, 2 (“There are good business and family reasons for codes of ethics . . . .”); see also Gwen Moran, *How Sargento Foods Creates Principled Profit*, FAM. BUS. MAG. (Oct. 1, 2015), <https://www.familybusinessmagazine.com/sites/default/files/articles/2015/10/01/valuese3852.html>.

as well as provide guidance on how to respectfully and professionally handle disagreements with one another (e.g., behind “closed doors,” after a “cooling off” period, etc.). Some families may also benefit from including provisions in their codes of conduct that clarify how media relations will be handled (e.g., agreeing who will be the “point person”), outline expected work habits, recommend appropriate dress code, and provide parameters around inter-office romance.

### 5. Critical Plans

As with any business, a family business and its owners would benefit from developing any number of thoughtful plans to guide decisions and actions, including a strategic plan, financial plan, retirement plan, estate plan, etc. While a discussion of most such plans are beyond the scope of this Article, there are three types of plans that deservedly receive particular attention in many Stage 3 Planning initiatives for family businesses because of their importance to thoughtfully trying to manage the complex intersection of running a business effectively while, at the same time, seeking to promote family harmony plans to rationally determine: (1) who assumes leadership responsibility upon a current leader’s retirement, disability, or death (a “Succession Plan”); (2) how money generated through the business gets distributed to owners and family members employed by the business (a “Compensation Plan”); and (3) how excess capital generated through the business gets used, whether as distributions to owners, reinvestment into the business, or, more typically, both (a “Capital Allocation Plan”).

### 6. Succession Planning

Succession planning is a formal process for selecting and developing new leaders to replace current leaders upon their retirement, disability, or death in order to help insure a

smooth transition of leadership.<sup>65</sup> Without planning, family businesses can be put at great risk because of survivors competing to fill the resulting vacuum in leadership without sufficient support and/or capable successors. For that reason, perhaps no subject has received more attention in family business literature than succession planning. Notwithstanding all of this attention, succession planning remains imperfect and most families follow an informal process and rely on a senior family member's judgment and intuition.<sup>66</sup>

Succession planning in a family business can be very difficult because of the variety of issues, concerns, and complexities that are implicated. Unlike traditional (Stage 1) estate planning that focuses on considering to whom ownership should be transferred, effective succession planning involves addressing such issues as:

- What should the family do if no one in the family is interested in leading the business?
- What happens if there is more than one family member who would like to lead the business?
- What should the family do if no one in the family is capable of leading the business?
- What, if anything, can be done if the current leader

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65. Unlike estate planning, the principle concern of which is the allocation and distribution of wealth, succession planning is principally concerned with the transition of control. Succession planning must, therefore, not only integrate business, financial, tax, wealth (and liquidity) considerations, but family dynamics as well, in order to achieve an overall plan that is workable both for current operational needs, as well as for the long range planning goals of a family and its business. *See generally, e.g.*, CRAIG E. ARANOFF ET AL., FAMILY BUSINESS SUCCESSION: THE FINAL TEST OF GREATNESS 1 (2010); EDWARD F. KOREN, NON-TAX CONSIDERATIONS IN FAMILY BUSINESS SUCCESSION PLANNING (2011), <http://www.americanbar.org/content/dam/aba/events/taxation/taxiq-fall11-koren-non-tax-paper.authcheckdam.pdf>.

66. In spite of its importance, research suggests that only approximately sixteen percent of family firms have a discussed and documented succession plan in place. *Key Findings*, PWC, <http://www.pwc.com/gx/en/services/family-business/family-business-survey/key-findings.html> (last visited Mar. 31, 2017).

is unwilling to relinquish authority in spite of deteriorating health and age?

- If continued ownership of business by the family doesn't make sense, who should the business be sold to?
- Who should be included in the planning process?

Creating an effective succession plan generally requires involving an appropriately wide team of participants to enhance the prospect that the results from the planning efforts are widely accepted. Without such acceptance, affected parties are more likely to reject the plan and its implementation, which is likely to lead to family feuding. Because working through issues such as those identified above can be complex and time consuming, succession planning is generally considered a “process,” not an “event,”<sup>67</sup> that ideally takes place over years and includes ongoing education, training, and development. As management consultant Peter Druckers notes, “[t]he final test of greatness in a CEO is how well he chooses a successor and whether he can step aside and let his successor run the company.”<sup>68</sup>

While there is no single “right way” to plan for

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67. See Wendy C. Handler, *Succession in Family Business: A Review of the Research*, FAM. BUS. REV., Summer 1994, at 133, 134 (“Succession is not simply a single step of handing the baton; it is a multistaged process that exists over time, beginning before heirs even enter the business.”); see also ARANOFF ET AL., *supra* note 65, at 3 (“[A] great succession is one hardly anybody notices. It is a non-event, an evolutionary process arising from careful planning and artful management of expectations over a period of years. By the time the baton is finally passed, the word around the business should be, ‘Oh, that’s what everybody expected.’”).

68. ARANOFF ET AL., *supra* note 65, at 3. Much work remains to be done to better understand how to motivate families with business interests to engage in succession planning. Some families are fortunate to have founder/successor CEOs that drive the succession process; other families may move forward as a result of being “pushed” by a potential successor; other families simply wait until a founder/CEO is unable to serve due to disability or death and, so, are forced to address this subject in “crisis” mode. See, e.g., Alexandra Burns, *Succession Planning in Family-owned Businesses 10–12* (May 2014) (unpublished M.A. thesis, University of Southern Maine).

succession, there are a number of helpful guidelines to consider, including: (1) establishing relevant and appropriate selection criteria in advance; (2) communicating the criteria to the entire family well in advance of selecting a successor to help ensure process fairness; (3) assessing the competence of potential successors against that criteria; and (4) using independent advisors to provide objectivity (as well as the appearance of objectivity).<sup>69</sup> Perhaps as important as anything, families are generally well served by selecting a successor who not only has an appropriate level of education and relevant experience but the emotional intellect to handle the authority that is to be conferred with a sense of responsibility and graciousness that helps prevent the individual from succumbing to, and being corrupted by, power.

### 7. Compensation Planning

Another contentious issue facing family businesses is who gets paid by the family business, and how much, as those “active” in the business often think their contributions are under-valued while it is not unusual for their “passive” counterparts to believe such contributions are being over-valued and, as a result, draining capital that could otherwise

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69. Research suggests that “firms that are family-owned but not managed by family members [e.g., Wal-Mart] are typically well managed.” The London Sch. Econ. & Political Sci., *Inherited Family Firms and Management Practices: The Case for Modernizing the UK’s Inheritance Tax* 1, [http://cep.lse.ac.uk/briefings/pa\\_inherited\\_family\\_firms.pdf](http://cep.lse.ac.uk/briefings/pa_inherited_family_firms.pdf) (last visited Mar. 31, 2017). By contrast, families that also manage their business tend to experience more challenges as a result of (1) selecting a CEO from among the small pool of family members that has the effect of restricting access to the right talent; and (2) letting family members know too early that they will get to run the business can lead them to work sub-optimally at school, safe in the knowledge of a guaranteed family job. *Id.* at 2. As a result, families might be well served by not only communicating relevant qualifications (e.g. a good education, good experience, the right temperament, etc.) but by advising family members that they aren’t “guaranteed” a leadership role. See Alex Stewart & Michael A. Hitt, *Why Can’t a Family Business Be More Like a Nonfamily Business? Modes of Professionalization in Family Firms*, 25 *FAM. BUS. REV.* 58, 59 (2012) (finding that family-owned businesses should professionalize and function more like non-family businesses to succeed).

be distributed through dividends. Similar stress can arise when determining what benefits are provided to family employees. Family members pay close attention to how much others are receiving and make their own interpretations of the fairness of these benefits. As relationships become more distant with each passing generation, the differing perspectives are at risk of become exponentially more complicated.

Having a clear compensation policy that is understood and agreed upon by all family members will help eliminate perceived bias and potential resulting conflict.<sup>70</sup> There are a variety of ways to advance the goal of ensuring everyone feels that compensation decisions are fair, including clarifying and defining job descriptions, job requirements, performance goals, how to provide objective feedback, base salaries based on market rates, and incentive compensation that helps attract, retain, and motivate family and key non-family employees.<sup>71</sup>

#### 8. Capital Allocation Planning

One common reason family businesses struggle is the failure to develop a thoughtful plan to balance, on the one hand, the business' need for capital to allow it to grow with, on the other hand, family members' need (or interest) in getting cash distributions to fund their lifestyles.<sup>72</sup>

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70. See generally, e.g., CRAIG E. ARONOFF ET AL., FAMILY BUSINESS COMPENSATION (2010).

71. See generally *id.*; see also KOREN, *supra* note 65, at 46 ("Compensation for family members must be realistic. Those working in the business should neither be overly compensated nor paid minimum wage (unless that is appropriate to the job) . . . The compensation should be appropriate for the job being done; if it is too low, the family member may be drawn elsewhere, but if [sic] is too high, they will be trapped, and may experience a disincentive to truly being productive . . . Above all, compensation should not be tied to need; if a family member is in need of other funds, those should be loaned or gifted, but not funneled through compensation avenues, for this will undermine the business nature of the entire enterprise.").

72. This interest is, understandably, often more important for family members who, inactive in the business, don't receive a salary. See KOREN, *supra*

Developing a plan to allocate capital for both purposes can help address this subject. There is no “single” best approach, and every family must consider what makes the most sense for its members and business interests. For example, some families choose to pay relatively low dividends, reinvesting profits without diluting ownership by issuing new stock or assuming debt; others decide to bring in private equity as a way to inject growth capital.<sup>73</sup> Some families provide formulaically-determined mechanisms by which family members who would like to liquidate their interests can do so by selling to those family members who would like to remain in the business.<sup>74</sup> To avoid making “expedient” decisions that, with the perspective of time, might result in unforeseen problems, families should consider establishing a capital allocation plan that might include provisions that address (1) how to address capital requirements to execute a business plan; (2) requirements to fund an ownership transition plan, including estate and retirement plans; (3) how to insure planning is “tax efficient.”<sup>75</sup>

### 9. Key Policies

In addition to clarifying core principles and critical plans, companies can benefit from clarifying expectations around opportunities and behaviors as a matter of policy so that everyone feels fairly treated. Some of the most important policies<sup>76</sup> that can help families in business

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note 65, at 10.

73. Such transactions can add value, but at the cost of diluting family control.

74. Family shareholders who want to sell are generally required by the terms of a “buy-sell” agreement to first offer their ownership interests to other family members or the business pursuant to a right of first refusal. Payouts can be funded over a lengthy period of time to avoid creating a cash crunch. KOREN, *supra* note 65, at 54.

75. For additional information, see generally FRANCOIS M. DE VISSCHER ET AL., *FINANCING TRANSITIONS: MANAGING CAPITAL AND LIQUIDITY IN THE FAMILY BUSINESS* (1995).

76. The number—and type—of policies that a family might find useful is a function of the family’s unique family and business dynamics. *See, e.g.*, CRAIG E. ARONOFF ET AL., *DEVELOPING FAMILY BUSINESS POLICIES: YOUR GUIDE TO THE*



minimize unhealthy disagreement and allow them to flourish over the generations include: (1) an employment policy;<sup>77</sup> (2) a communication policy;<sup>78</sup> and (3) a pre-nuptial policy.<sup>79</sup>

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FUTURE 4 (1998) (“The policies you need and their ultimate content depend on many factors, including the stage of your business, its corporate culture, the values and background of your family, and whether you are a family who puts family first or a family who puts business first.”). Some policies that we have found helpful include a vacation home policy, and a travel and entertainment policy, a policy about use of company “perks” (such as tickets to events), dress code, etc.

77. Beyond providing guidance on succession and compensation, families benefit from establishing a policy that provides rules for whether and how family members may be employed by the family business, and how such employment might be terminated. Effective policies generally include minimum educational and experience requirements, a clear application process, advancement criteria, and a disciplinary and termination process. Families might also consider providing that they will not artificially create jobs simply to accommodate family members. It can be helpful to require some employment experience outside the family business to help bring new ideas to the business, to help family members mature and instill a sense of self-confidence, and to help instill a sharper sense of appreciation for the family’s business. Once those requirements are satisfied, family members should fill a position that is needed by the business, and be paid in accordance with an established compensation plan. *See, e.g.,* KOREN, *supra* note 65, at 45 (discussing training requirement policies in succession planning).

78. Communication policies establish certain basic ground rules to ensure that communication is candid, respectful, and robust. Such policies should include the formalization of a regular meeting schedule, and efforts should be made to encourage open and candid communication and to reflect (and promote) company culture and values. *See The Family Business Golden Rule: Open and Honest Communication*, THE FAM. BUS. CONSULTING GROUP, <https://www.thefbcg.com/The-Family-Business-Golden-Rule--Open-and-Honest-Communication> (last visited Feb. 24, 2017). Beyond traditional communication policies, many families are finding particular benefits to developing policies to regulate the use of social media. *See generally* Margaret Weigel, *Social Media in the Workplace: Research Roundup*, JOURNALIST’S RESOURCE, <http://journalistsresource.org/studies/society/social-media/social-media-workplace-research-roundup> (last updated Apr. 11, 2013).

79. Some families have found it helpful to establish a policy that requires a pre-nuptial agreement as a condition to owning an interest in the family business. Having a formal (written) policy not only helps to safeguard a family’s ownership and control of its business in the event of a marriage breakup, but makes it easier to depersonalize the subject. ARONOFF ET AL., *supra* note 75, at 50.

### 10. Integrating Core Principles, Plans and Policies: The Family Constitution

While attorneys and other advisors often prepare a buy-sell agreement as part of traditional Stage 1 and Stage 2 Planning, for their family business clients, consultants who assist with Stage 3 Planning traditionally help their clients prepare a repository for its core principles, plans, and policies, often referred to as a “family constitution.”<sup>80</sup> The process of preparing a family constitution, and its component parts, can be a valuable experience that contributes to building shared understandings and family bonds. Moreover, having access to key agreements in a single document that can be referenced as needed can help create and nurture a sense of fairness, and, in turn, harmony. While every family can decide for itself, most families who create family constitutions do not intend the document to have legal consequences; they are, however, intended to be “morally enforceable” and become a meaningful piece of a family’s culture.<sup>81</sup>

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80. Best-selling author Stephen R. Covey describes a family constitution as “the literal constitution of your family life,” which “can be the foundational document that will unify and hold your family together for decades—even generations—to come.” STEPHEN R. COVEY, *THE 7 HABITS OF HIGHLY EFFECTIVE FAMILIES* 102 (1997). Referring to the family’s repository as a “constitution” as opposed to a mere “agreement” serves as an expression of the family’s commitment to certain fundamental values, from generation to generation. See Kelin E. Gersick & Neus Feliu, *Governing the Family Enterprise: Practices, Performance and Research*, in *THE SAGE HANDBOOK OF FAMILY BUSINESS* 211, 212 (Leif Melin et al. eds., 2014) (“The recent increase in interest in family constitutions may be in response to the maturation of a large cohort of entrepreneurial post-World War II nuclear families through sibling and multi-generational partnerships to complex, geographically-dispersed family networks.”).

81. One legal scholar, noting the increasing use of family constitutions as a “prescribed remedy for the high failure rate of family businesses,” observes that “[s]uccessful families are bound together more by strong values and purpose than by shared business ownership. Shared values [and mission] are the glue that keeps family businesses going across generations.” McClain, *supra* note 63, at 866. For more information, see generally DANIELA MONTEMERLO & JOHN L. WARD, *THE FAMILY CONSTITUTION: AGREEMENTS TO SECURE AND PERPETUATE YOUR FAMILY AND YOUR BUSINESS* (2010).

#### D. *The Limits of Stage 3 Planning*

We credit many family business consultants with having made important contributions to their clients—and the field—through Stage 3 Planning initiatives by seeking to focus on critical inter-personal issues, and providing important perspectives to those traditionally offered by lawyers, accountants, and financial advisors.

Notwithstanding these important contributions, many families in business together continue to struggle, and available data noted above suggests such initiatives remain inadequate for the task(s) at hand.<sup>82</sup> There are undoubtedly a variety of factors that contribute to the suboptimal results of contemporary family business planning including, for example, the lack of strong commitment to the process because of the ongoing press of business, the unwillingness of some family members to engage in the process with a requisite level of enthusiasm, or, frankly, the lack of business acumen by some family members.

We believe the most important reason contemporary family business consulting strategies fail to accomplish their objectives, however, are because such strategies—whether Stage 1, Stage 2, and/or Stage 3 strategies—are too often informed by outdated assumptions that date centuries back to economists like Adam Smith and John Stuart Mill, who posited that individuals are “rational” and act on the basis of complete knowledge and the desire to maximize economic

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82. See *supra* notes 12–13 and accompanying text; see also, Wayne Rivers, *Family-Owned Business Planning Done WRONG*, FAM. BUS. INST. (Nov. 4, 2015), <https://www.familybusinessinstitute.com/family-owned-business-planning-done-wrong> (“We get to see the output from dozens if not hundreds of business advisors each year. Some of the work is pretty darn good, some of it is laughable, and most is, by definition, average. It’s amazing that today, 40 years after Leon Danco first recognized and wrote about the family business as a system facing unique challenges and demanding unique interventions, most advisor solutions still tend to be narrowly focused and ignore a great many of the needs of either the family or the business.”).

returns and wealth.<sup>83</sup> Such planning fails to appreciate insights from new fields of study, such as neuro-economics<sup>84</sup> and behavioral economics<sup>85</sup> that, for example, are demonstrating our propensity to acquire rewards and avoid losses, the role of emotions in decision-making, strategic decisions and social decisions, etc.<sup>86</sup> Consequently, traditional planning fails to address considerations such as family members (1) not being nearly as rational and

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83. See, e.g., JOHN STUART MILL, UTILITARIANISM 2–3 (1901) (“All action is for the sake of some end, and rules of action, it seems natural to suppose, must take their whole character and color from the end to which they are subservient.”); ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 311–12 (New York, Augustus M. Kelley 1966) (1759) (“The prudent man always studies seriously and earnestly to understand whatever he professes to understand, and not merely to persuade other people that he understands it . . . .He neither endeavours to impose upon you by the cunning devices of an artful impostor, nor by the arrogant airs of an assuming pedant, nor by the confident assertions of a superficial and imprudent pretender: he is not ostentatious even of the abilities which he really possesses. His conversation is simple and modest, and he is averse to all the quackish arts by which other people so frequently thrust themselves into public notice and reputation.”).

84. See, e.g., Paul J. Zak, *Neuroeconomics*, 359 PHIL. TRANSACTIONS ROYAL SOC’Y LONDON: BIOLOGICAL SCI. 1737, 1737 (2004) (“Neuroeconomics is an emerging transdisciplinary field that uses neuroscientific measurement techniques to identify the neural substrates associated with economic decisions.”).

85. See generally, e.g., RICHARD H. THALER, MISBEHAVING: THE MAKING OF BEHAVIORAL ECONOMICS (2015) (describing how the study of human miscalculations reveals that we all succumb to biases and make decisions that deviate from the assumed standards of rationality, often resulting in serious consequences in our lives and businesses).

86. “The traditional view in economics is that individuals respond to incentives, but, absent strong incentives to the contrary, selfishness prevails. Moreover, this ‘greed is good’ approach is deemed ‘rational’ behavior.” Paul J. Zak, *The Neuroeconomics of Trust*, in RENAISSANCE IN BEHAVIORAL ECONOMICS: ESSAYS IN HONOR OF HARVEY LEIBSTEIN 17 (Roger Frantz ed., 2007). Nevertheless, in daily interactions and in numerous laboratory studies, a high degree of cooperative behavior prevails—even among strangers. “A possible explanation for the substantial amount of ‘irrational’ behavior observed in markets (and elsewhere) is that humans are a highly social species, and to an extent value what other humans think of them.” *Id.* at 18.

unbiased as assumed;<sup>87</sup> (2) having imperfect memories;<sup>88</sup> or (3) retaining a “fight or flight” response that, today, generates overreactions due to “fear based” thinking.<sup>89</sup> Equally important, such planning fails to take into account recent findings on the neuroscience of trust, purpose, engagement and happiness.<sup>90</sup> We believe that, over time, the

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87. See, e.g., GARY MARCUS, *KLUGE: THE HAPHAZARD CONSTRUCTION OF THE HUMAN MIND* 15 (2008) (“Mainstream evolutionary psychology tells us much about how natural selection has led to good solutions, but rather less about why the human mind is so consistently vulnerable to error.”); RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS* 37 (2008) (“The picture that emerges is one of busy people trying to cope in a complex world in which they cannot afford to think deeply about every choice they have to make.”). As a result, for example, the failure to constitute a board of directors or an advisory board that includes non-family members can result in poor decisions by families without sufficient experience and expertise to make thoughtful judgments, as well as decisions that, fairly or not, are perceived as biased and favoring one family member, or branch of a family, over another. See KOREN, *supra* note 65, at 36.

88. As a result, the failure to reduce agreements on important subjects to writing can create diverging recollections as to what was agreed to. See Michael J. Conway et al., *The Family Owned Business*, *GRAZIADO BUS. REV.* (2007), <http://gbr.pepperdine.edu/2010/08/the-family-owned-business> (noting the dangers for family businesses that fail to reduce agreements to writing). For a general discussion of memory issues, see generally DANIEL L. SCHACTER, *THE SEVEN SINS OF MEMORY: HOW THE MIND FORGETS AND REMEMBERS* (2001).

89. See *infra* note 110 and accompanying text. Failing to develop thoughtful and consistently applied principled policies and plans can lead to the perception, whether accurate or not, that decisions and actions are driven by bias and self-interest, diminishing intra-family trust and a shared commitment to the family’s success.

90. See, e.g., Paul J. Zak, *The Neuroscience of Trust: Management Behaviors that Foster Employee Engagement*, *HARV. BUS. REV.*, Jan.–Feb. 2017, at 86 (“In my research, I’ve found that building a culture of trust is what makes a meaningful difference. Employees in high-trust organizations are more productive, have more energy at work, collaborate better with their colleagues, and stay with their employers longer than people working at low-trust companies. They also suffer less chronic stress and are happier with their lives, and these factors fuel stronger performance.”). While beyond the scope of this Article, insights from positive psychology hold great promise for lawyers, law firms, and the legal profession. See, e.g., Anne Brafford, *Building the Positive Law Firm: The Legal Profession at Its Best* (Aug. 1, 2014) (unpublished M.A. thesis, University of Pennsylvania), [http://repository.upenn.edu/cgi/viewcontent.cgi?article=1063&context=mapp\\_capstone](http://repository.upenn.edu/cgi/viewcontent.cgi?article=1063&context=mapp_capstone) (suggesting that a positive psychology approach can help law firms and lawyers perform better and more

failure to account for such considerations, combined with often naturally differing perspectives on (1) vision, mission, values; (2) who is capable and qualified to fill positions (and who is not);<sup>91</sup> (3) how to effectively reconcile disagreements or resolve disputes before they get out of hand;<sup>92</sup> or (4) simply how to compete in an increasingly competitive market, erodes intra-family trust as family members come to view each other as unreliable, insincere, and incompetent.<sup>93</sup> In such circumstances, the collaboration required to work together successfully in business is virtually impossible and the resulting negative emotions and behaviors can lead to incivility in the workplace and, from there, to infighting. Research convincingly demonstrates that incivility and infighting, in turn, result in wasted time and resources, decreased productivity, and diminished bottom lines.<sup>94</sup> The combined impact of these challenges, highlighted in Figure 3, below, show the seemingly inexorable path to failure for too many family businesses.<sup>95</sup>

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profitably).

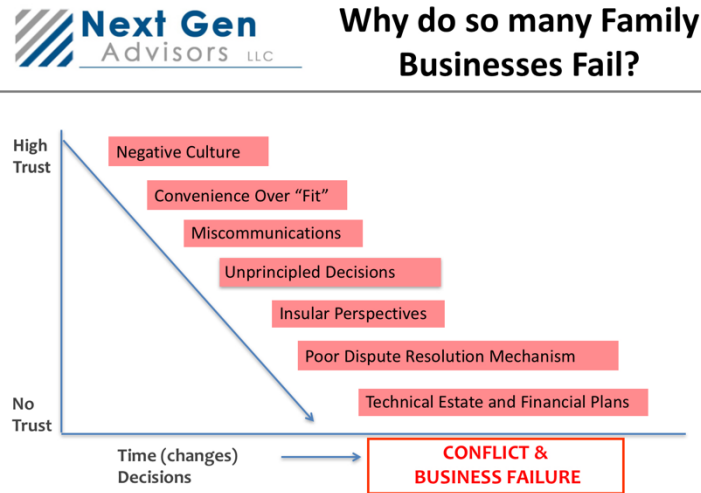
91. In our experience, family members too often wind up working in a family business because it is “convenient,” “expected,” or “lucrative,”—not necessarily because it is a good “fit” based on interests, talents, passion, etc. *See infra* Section IV.E.

92. *See infra* Section IV.F.

93. *See WILLIAMS & PREISSER, supra* note 13, at 1 (most family business failures are attributable to mistrust and miscommunication, not to poor tax and financial planning).

94. *See, e.g.,* Christine Porath, *The Hidden Toll of Workplace Incivility*, MCKINSEY Q., Jan. 2017, at 12 (the costs of incivility include settling scores with offenders, decreasing time spent working, reduced interest in collaborating with colleagues, diminishing commitment to an employer, employee turnover, etc.); Susan Sorenson & Keri Garan, *How to Tackle U.S. Employees’ Stagnating Engagement*, GALLUP (June 11, 2013), [http://www.gallup.com/businessjournal/162953/tackle\\_employees\\_stagnating\\_engagement.aspx](http://www.gallup.com/businessjournal/162953/tackle_employees_stagnating_engagement.aspx) (finding that actively disengaged employees cost the United States up to \$550 billion in lost productivity per year).

95. Perhaps most importantly, although beyond the scope of this Article, such negative emotions may have untold and attendant resulting personal costs, including depression, frustration, and anger that, in turn, results in significant health risks, including high blood pressure, heart attacks, and strokes.



**Figure 3.**

We believe that families, assisted by their professional advisors, can—indeed must—thoughtfully consider how to apply new insights from these and other scientific disciplines<sup>96</sup> in order to inform and, when appropriate, create plans, policies, and structures that both help nurture interpersonal relationships while enhancing a business’s bottom line.<sup>97</sup> We refer to this approach as Stage 4 Planning™. In combination with Stage 1, Stage 2 and Stage 3 Planning strategies, families in business have good reason to be optimistic that their members, and their business interests,

96. Famed Judge Learned Hand anticipated the need for new planning strategies based on science when he remarked: “How long we shall continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows; but all fair persons not conventionalized by provincial legal habits of mind ought, I should think, unite to effect some such advance.” *Parke-Davis & Co. v. H.K. Mulford Co.*, 189 F. 95, 115 (C.C.S.D.N.Y. 1911), *aff’d in part, rev’d in part*, 196 F. 496 (2d Cir. 1912).

97. See generally SHAWN ACHOR, *THE HAPPINESS ADVANTAGE: THE SEVEN PRINCIPLES OF POSITIVE PSYCHOLOGY THAT FUEL SUCCESS AND PERFORMANCE AT WORK* (2010).

can flourish over the generations.

#### IV. STAGE 4 PLANNING™: APPLYING SCIENCE TO FAMILY BUSINESS PLANNING

Insights and advances in science, particularly from the fields of social neuroscience and positive psychology, suggest new planning strategies for lawyers and other professionals working with family businesses. Many of these insights have become well known through bestselling books written by preeminent scholars and researchers, resulting in increased accessibility to lay audiences.<sup>98</sup> Some researchers and scholars have brought particular focus to how such insights can be applied to business, discussing their findings and strategies in a variety of publications, including prestigious journals like the *Harvard Business Review*.<sup>99</sup> As a result of ongoing cutting edge research that has already built a compelling body of knowledge supported by empirical data, strategies informed by positive psychology have become increasingly familiar to, and applied by, business leaders into actionable ideas, plans, and strategies that nurture culture and enhance an organization's success.<sup>100</sup>

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98. See generally *id.*; CAROL S. DWEK, MINDSET: THE NEW PSYCHOLOGY OF SUCCESS (2006); BARBARA L. FREDRICKSON, POSITIVITY (2009); MARTIN E.P. SELIGMAN, AUTHENTIC HAPPINESS: USING THE NEW POSITIVE PSYCHOLOGY TO REALIZE YOUR POTENTIAL FOR LASTING FULFILLMENT (2002); Garrison Kitchen, The Long and Winding Road from Positive Psychology Theory to Corporate Application (Aug. 1, 2016) (unpublished Master's thesis, University of Pennsylvania) (on file with the University of Pennsylvania Scholarly Commons), [http://repository.upenn.edu/cgi/viewcontent.cgi?article=1103&context=mapp\\_capstone](http://repository.upenn.edu/cgi/viewcontent.cgi?article=1103&context=mapp_capstone).

99. See, e.g., HARV. BUS. REV., Jan.–Feb. 2012 (featuring the iconic yellow “smiley face” and the title: *The Value of Happiness: How Employee Well Being Drives Profits*).

100. See, e.g., MARGARET GREENBERG, PROFIT FROM THE POSITIVE: PROVEN LEADERSHIP STRATEGIES TO BOOST PRODUCTIVITY AND TRANSFORM YOUR BUSINESS 98 (2013) (stating that companies like Google, Zappos, and Amazon use positive psychology as a low cost strategy to increase productivity); Zak, *supra* note 90 at 86 (“Consider Gallup’s meta-analysis of decades’ worth of data: It shows that high engagement—defined largely as having a strong connection with one’s work and colleagues, feeling like a real contributor, and enjoying ample chances to learn—



Shockingly, however, while these strategies continue to gain increasing recognition in “non-family” business settings,<sup>101</sup> it remains a virtually undeveloped planning paradigm for family businesses and there is an unfortunate dearth of material on how family businesses could benefit from science.<sup>102</sup> As a result, we are excited to introduce Stage 4 Planning™ strategies and explain how these insights can be applied in practice to help family businesses.<sup>103</sup>

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consistently leads to positive outcomes for both individuals and organizations. The rewards include higher productivity, better quality products and increased profitability.”) In addition, as of this writing, LinkedIn identifies twenty-five profiles of “Chief Happiness Officers,” some at well-known companies such as Hewlett Packard. *Chief Happiness Officer*, LINKEDIN, <https://www.linkedin.com/title/chief-happiness-officer> (last visited Apr. 3, 2017).

101. The relevance of positive psychology in the practice of law has already been recognized in some other contexts. *See generally, e.g.*, Clare Huntington, *Happy Families? Translating Positive Psychology into Family Law*, 16 VA. J. SOC. POL'Y & L. 385 (2009).

102. Though these strategies are still underutilized in family business planning, some resource do exist. *See generally* SCOTT E. FRIEDMAN, FAMILY BUSINESS AND POSITIVE PSYCHOLOGY: NEW PLANNING STRATEGIES FOR THE 21ST CENTURY (2014); Donella Caspersz & Jill Thomas, *Developing Positivity in Family Business Leaders*, 28 FAM. BUS. REV. 60 (2015); Scott E. Friedman & Eliza P. Friedman, *Family Business and Positive Psychology: A New Planning Paradigm*, N.Y. ST. B. ASS'N J., Jan. 2014, at 44; Eliza Friedman & Andrea HusVar, *New Strategies for Family Businesses*, BUFF. L.J. (Jan. 5, 2015), <https://www.bizjournals.com/buffalo/blog/buffalo-law-journal/2017/01/new-strategies-for-family-businesses.html>.

103. There is a substantial amount of research that suggests strategies that tend to help individuals live happier, more fulfilling lives could also be applied to benefit individual family members and their family business because emotions are “contagious.” For example, fifty years of research by Gallup scientists, in partnership with economists, psychologists, and other scientists, suggests certain common elements of wellbeing that transcend cultures: (1) career wellbeing (i.e., simply liking what you do every day); (2) social wellbeing (i.e., having strong relationships in your life); (3) financial wellbeing (i.e., effectively managing your economic life); (4) physical wellbeing (i.e., having good health); and (5) community wellbeing (i.e., feeling engaged in the area where you live). *See, e.g.*, Tom Rath & Jim Harter, *Exercise, Sleep, and Physical Wellbeing*, GALLUP (Oct. 21, 2010), <http://www.gallup.com/businessjournal/127211/Exercise-Sleep-Physical-Wellbeing.aspx>; Tom Rath & Jim Harter, *Your Spending and Your Financial Wellbeing*, GALLUP (Sept. 16, 2010), <http://www.gallup.com/businessjournal/127193/Spending-Financial-Wellbeing.aspx>; Tom Rath & Jim Harter, *Your Friends and Your Social Wellbeing*, GALLUP (Aug. 19, 2010), <http://www.gallup.com/businessjournal/127043/Friends-Social-Wellbeing.aspx>;

A. *Understanding Family Business Problems Through Science*

In his best-selling book, *Thinking, Fast and Slow*, Nobel Prize Winning author and professor Daniel Kahneman observes that “[b]y and large . . . the idea that our minds are susceptible to systematic errors is now generally accepted.”<sup>104</sup> Professor Kahneman’s observation about the susceptibility of our brains to make systematic errors extends in numerous directions and is the subject of a growing body of scholarly books and articles on our complex human nature, including, for example, our systematically irrational behavior,<sup>105</sup> the on-going tug-of-war between reason and impulse,<sup>106</sup> our propensity for making snap decisions,<sup>107</sup> how we actually pay less attention than we

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Tom Rath & Jim Harter, *Your Career Wellbeing and Your Identity*, GALLUP (July 22, 2010), <http://www.gallup.com/businessjournal/127034/Career-Wellbeing-Identity.aspx>; Jennifer Robison, *Wellbeing Is Contagious (for Better or Worse)*, GALLUP (Nov. 27, 2012), <http://www.gallup.com/businessjournal/158732/wellbeing-contagious-better-worse.aspx>.

104. DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 10 (2011).

105. See, e.g., DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS*, at xix–xx (2008) (“Although a feeling of awe at the capability of humans is clearly justified, there is a large difference between a deep sense of admiration and the assumption that our reasoning abilities are perfect . . . . [W]e are not only irrational but *predictably irrational* . . . our irrationality happens the same way, again and again.”) (emphasis in original).

106. See, e.g., DAN ARIELY, *THE (HONEST) TRUTH ABOUT DISHONESTY: HOW WE LIE TO EVERYONE—ESPECIALLY OURSELVES* 113–14 (2012) (“Being human and susceptible to temptation, we all suffer in this regard. When we make complex decisions throughout the day (and most decisions are . . . complex and taxing), we repeatedly find ourselves in circumstances that create a tug-of-war between impulse and reason. And when it comes to important decisions (health, marriage, and so on), we experience an even stronger struggle. Ironically, simple, everyday attempts to keep our impulses under control weaken our supply of self-control, thus making us more susceptible to temptation.”).

107. See, e.g., MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 85 (2005) (“We don’t deliberately choose our unconscious attitudes . . . [O]ur unconscious attitudes may be utterly incompatible with our stated conscious values.”).

believe we do,<sup>108</sup> and how imperfect our memories are.<sup>109</sup>

Perhaps as problematic for family-owned businesses as any other systematic error that our minds make is our propensity to react—and overreact—in “fight or flight mode,” an immediate and automatic response that natural selection imbued our ancestors with when faced with true existential (and perceived) threats where delaying could be fatal. While modern civilization has thankfully reduced or eliminated many such threats, our brains continue to overreact in fight or flight mode to even petty annoyances, perhaps angering us when someone takes “our spot” in a crowded parking lot, or the concern we might feel if someone fails (for whatever reason) to respond promptly to a text or email. Dr. Dan Baker describes this phenomenon in his best-selling book *What Happy People Know*, writing:

The forces of evolution, by their very nature, endowed [our neurological] fear system with tremendous power, because in the brutal early epochs of mankind, it alone kept us alive. It gained us the hair-trigger capacity to spring into action at the first hint of threat. The automatic fear response became faster than the process of rational thought, faster than experiencing the feeling of love, faster than any other human action. . . . Unfortunately, in modern life, what is good for survival is often bad for happiness and even for long-term health.<sup>110</sup>

Our “fight or flight” response trains our brains to spot the negative, to focus on—and often fear—mistakes, failures, and criticism. Such fears can manifest themselves in

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108. See, e.g., CHRISTOPHER CHABRIS & DANIEL SIMONS, *THE INVISIBLE GORILLA: AND OTHER WAYS OUR INTUITIONS DECEIVE US* 38 (2010) (“For the human brain, attention is essentially a zero-sum game: If we pay more attention to one place, object, or event, we necessarily pay less attention to others. Inattention blindness is thus a necessary, if unfortunate, by-product of the normal operation of attention and perception.”).

109. See, e.g., SCHACTER, *supra* note 88, at 4 (“I propose that memory’s malfunctions can be divided into seven fundamental transgressions or ‘sins,’ which I call *transience*, *absent-mindedness*, *blocking*, *misattribution*, *suggestibility*, *bias* and *persistence*.”) (emphasis in original).

110. DAN BAKER, *WHAT HAPPY PEOPLE KNOW* 6–7 (2002).

counter-productive, fear-based behaviors, including greed,<sup>111</sup> anger,<sup>112</sup> turf-ism,<sup>113</sup> lying,<sup>114</sup>

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111. See, e.g., Richard Taflinger, *Taking Advantage: The Biological Basis of Human Behavior*, WASH. ST. UNIV., <http://public.wsu.edu/~taflinge/biology.html> (last visited Apr. 3, 2017) (“Biologically, for any organism that is successful greed is good. . . . Greed is one organism getting a larger piece of the pie, more of the necessary resources, than other organisms. . . . Again, as for self-preservation and sex, greed is an instinctive reaction. When presented with resources, the instinct is to grab them, use them, take advantage of them. This isn’t a conscious decision. An animal, when starving, wants more food; when thirsty, more water. If it means taking it from another animal, that’s what it does if it can.”).

112. Psychologist Deborah Khoshaba explains the dynamic between fear and anger:

There is a strong relationship between anger and fear. Anger is the *fight part* of the age-old fight-or-flight response to threat. Most animals respond to threat by either fighting or fleeing. But, we don’t always have the option to fight what threatens us. Instead, we have anger. Words are the civilized way that we get to fight threat. And, some words, as you know, are meant to sting as deeply as a stab wound. Anger is one of the ways that we help our body to prepare for potential danger. Anger stimulates adrenaline to rouse the brain and body to fight or flee a threatening situation. Of course, in more primitive days, the things that angered us centered solely on threats to our survival (a basic need for food, shelter, water, or land). Today, we are civilized; we’ve formed identities of preferences and values of living that make us complex and psychologically defensive. Assaults to your principles, beliefs, and needs and wishes are the basis for your anger, now. And, you will protect your identity as strongly as if you were defending your right to food, shelter, water or land.

Deborah Khoshaba, *Masks of Anger: The Fears That Your Anger May Be Hiding*, PSYCHOL. EVERYDAY LIFE (May 29, 2012), <http://www.psychologyineverydaylife.net/2012/05/29/masks-of-anger-the-fears-that-your-anger-may-be-hiding>.

113. See, e.g., Donna Flagg, *Turf Wars at Work*, PSYCHOL. TODAY (June 6, 2010), <https://www.psychologytoday.com/blog/office-diaries/201006/turf-wars-work> (“Turfism. It’s one of those annoying things that end up creating big problems in the workplace. Conceptually, people know that it’s bad and damaging, yet for whatever reason, there are those who can’t seem to help themselves. They feel the need to guard their territory and protect (sometimes with a vengeance) what they perceive to be *theirs*. . . . [I]nvisible walls go up which ultimately hinder communication and infect the culture with a lack of cooperation among people and departments.”).

114. Lying can be thought of as the result of one’s fear that “telling the truth” will create a problem. See, e.g., Tomas Chamorro-Premuzic, *How and Why We Lie at Work*, HARV. BUS. REV. (Jan. 2, 2015), <https://hbr.org/2015/01/how-and-why-we-lie-at-work> (“Although every society condemns lying, it is still a common

and cheating.<sup>115</sup> Inside a family business, stakeholders might experience other insidious and destructive “modern day forms of fears,” such as a fear of being under appreciated (and, perhaps, under-compensated), a fear that someone else is unduly appreciated (and, so, perhaps, overcompensated), a junior family member’s fear of not garnering sufficient control, or a parent’s fear of losing control.

Fortunately, scientists continue to learn more about our brain’s capacity to manage (when appropriate)<sup>116</sup> counterproductive fear based emotions.<sup>117</sup> We have the ability to choose what to focus on and to choose how to explain our world, even by reprogramming our brains to change how we filter, interpret, and react to the world. We can learn to override “fear” and, in doing so, appreciate not just problems, but possibilities too—to see not only our challenges but our blessings.<sup>118</sup> As individuals, we can learn

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feature of everyday life. Research suggests that Americans average almost two lies per day, though there is huge variability between people. . . . [M]ost people lie when they are under pressure (e.g., anxious, afraid, or concerned) . . .”).

115. Cheating can be thought of as the resulting fear that one will miss an important opportunity, or be disadvantaged, unless they ignore the applicable rules of conduct. *See, e.g.*, Colm Healy & Karen Niven, *When Tough Performance Goals Lead to Cheating*, HARV. BUS. REV. (Sept. 8, 2016), <https://hbr.org/2016/09/when-tough-performance-goals-lead-to-cheating> (“[E]ven people with low moral justification were more likely to engage in some types of unethical behavior when faced with a specific, challenging performance goal.”).

116. We should note that not all fear based emotions and reactions are inappropriate or counterproductive. Common examples include forensic accountants who need to have a degree of skepticism, or flight controllers who need to be concerned about air traffic, when doing their jobs. The problem is that we are at risk of losing control of when to respond appropriately because of our biological instincts.

117. Research shows that, simply by engaging regions of our frontal lobes, we can promote “higher order thinking” that can help us live good lives while helping us keep our worst impulses in check. *See, e.g.*, JOHN B. ARDEN, REWIRE YOUR BRAIN: THINK YOUR WAY TO A BETTER LIFE 73 (2010), <http://brainmaster.com/software/pubs/brain/Rewire%20Your%20Brain.pdf>.

118. Dan Baker, describing this opportunity, writes:

Luckily, we have been blessed with an almost magical source of compensation: the human neocortex. The neocortex is the primary area of intel-

to be happy, and, as organizations, we can learn how to flourish. The following Section introduces some of these findings and explains how families in business can benefit from their application.

### B. *Positive Psychology & Social Neuroscience*

Positive psychology<sup>119</sup> is the scientific study of how people and organizations flourish.<sup>120</sup> This now fast-growing field developed out of a concerted effort to counterbalance psychology's traditional focus on deficits and problems—i.e., what's wrong with people and how can those problems be fixed?<sup>121</sup> Without disregarding the existence or importance of

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lect in the brain, located in the cerebrum. It is creative, intuitive, intellectual, and spiritual. It is the physical site of happiness.

With our wonderfully redemptive neocortical abilities, we can override the limitations of evolution and free ourselves from the fears that thwart happiness.

Fears will keep coming up—always, always. But we can rise above them. This is our evolutionary gift—our way out of darkness of the past, into light.

BAKER, *supra* note 110, at 7.

119. Depending on one's perspective, the field of positive psychology could be traced, in the West, to Aristotle and, in the East, to Confucius and Lao-Tzu. *See generally, e.g.*, Katherine Dahlsgaard et al., *Shared Virtue: The Convergence of Valued Human Strengths Across Culture and History*, 9 R. GEN. PSYCHOL. 203 (2005). More modern contributors might include William James and Viktor Frankl. Martin E.P. Seligman is generally credited with being the "father" of modern positive psychology. *See* T.S. Srinivasan, *The 5 Founding Fathers and A History of Positive Psychology*, POSITIVE PSYCHOL. PROGRAM (Feb. 12, 2015), <https://positivepsychologyprogram.com/founding-fathers>.

120. The field has, at times, been thought of as the scientific study of happiness. A number of leaders in the field, however, have sought to move away from the term "happiness" as not reflecting the disciplined scientific approach that distinguishes work in this area from pop psychology (as well as philosophy and religion). *See, e.g.*, MARTIN E.P. SELIGMAN, *FLOURISH: A VISIONARY NEW UNDERSTANDING OF HAPPINESS AND WELL-BEING* 9 (2011) ("I actually detest the word *happiness*, which is so overused that it has become almost meaningless. It is an unworkable term for science . . .").

121. The field of positive psychology now reaches in numerous directions, from helping individuals learn to be happier, students learn to be more successful, and members of our military learn to become more resilient to the horrors of war. For a sampling of some of the positive psychology-inspired

“real” problems,<sup>122</sup> positive psychology seeks to broaden inquiry and perspective by bringing increased focus to the scientific study of individual and organizational strengths, skills, and talents—as well as considering what can be done to nurture and promote those individuals and organizations to help them flourish.<sup>123</sup>

Importantly, while its findings may be consistent with certain insights and guidance offered by religion, philosophy, or otherwise, positive psychology differentiates itself in that it relies upon scientific methods to understand the factors that allow individuals and organizations to flourish.<sup>124</sup> The field has become increasingly relevant to individuals, businesses, and organizations who have come to appreciate the scientifically established correlation between “culture” and the “bottom line.”<sup>125</sup>

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initiatives, see, e.g., POSITIVE PSYCHOL. CTR U. PA., <http://ppc.sas.upenn.edu>.

122. Barbara Frederickson, a leading positive psychologist, explains that [n]obody in positive psychology is advocating full-time, 100 percent happiness. The people who do best in life don't have zero negative emotions. In the wake of traumas and difficulties, the people who are most resilient have a complex emotional reaction in which they're able to hold the negative and the positive side by side. . . . There's no escaping loss, grief, trauma, and insult.

Angela Winter, *The Science of Happiness: Barbara Frederickson on Cultivating Positive Emotions*, POSITIVITY RADIO, <http://www.positivityratio.com/sun.php> (last visited Apr. 4, 2017) (interview by Angela Winter of Psychologist Barbara Frederickson).

123. See SELIGMAN, *supra* note 120, at 13 (“I used to think that the topic of positive psychology was happiness, that the gold standard for measuring happiness was life satisfaction, and that the goal of positive psychology was to increase life satisfaction. I now think that the topic of positive psychology is well-being, that the gold standard for measuring well-being is flourishing, and that the goal of positive psychology is to increase flourishing.”).

124. For example, many of the world's great religions emphasize the importance of forgiveness—a subject that is being researched at leading academic institutions like Stanford University. See *infra* note 139, and accompanying text.

125. For example, studies have found that positive psychology inspired approaches have helped “accelerate the growth of the United Nations Global Compact for sustainability . . . to 8,000 of the world's largest corporations,” improved energy efficiency that resulted in “nearly 9 billion [dollars] of benefits for residents and businesses” in the Commonwealth of Massachusetts,

While this developing field continues to suggest countless opportunities to improve family business dynamics,<sup>126</sup> we focus here on introducing four strategies that we believe particularly helpful for family businesses: (1) seeking to intentionally create and/or nurture a positive culture; (2) new strategies designed to enhance the quality of inter-personal communication; (3) helping family members pursue interests, whether or not related to the family's business, because of interest, aptitude, and "fit," and not because an opportunity might be lucrative, convenient, or expected; and (4) when necessary, using new strategies informed by game theory to help family members more constructively reconcile differing perspectives before situations erupt into full blown conflict.

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"[t]ransformed a mining company that was once referred to as 'dune-rapers' into a [highly respected] corporate citizen while still growing their profits," and helped "the dairy industry to reduce green house gas emissions by 25% in 2 years whilst increasing farm business value by more than \$230 million." Michelle McQuaid, *Can We Create a Flourishing World? Discover the Strengths-Based Change Approach Sought Out by World Leaders*, PSYCHOL. TODAY (July 10, 2015), <https://www.psychologytoday.com/blog/functioning-flourishing/201507/can-we-create-flourishing-world>; see also Shawn Achor, *The Happiness Dividend*, HARV. BUS. REV. (June 23, 2011), <https://hbr.org/2011/06/the-happiness-dividend> ("A decade of research proves that happiness raises nearly every business and educational outcome: raising sales by 37%, productivity by 31%, and accuracy on tasks by 19%, as well as a myriad of health and quality improvements."); see *infra* note 127.

126. For example, an increasing number of companies—including law firms—are innovating new mindfulness programs for employees as studies show that spending just a few minutes a day on such exercises gives people greater focus and calm. See, e.g., Rhonda V. Magee, *Educating Lawyers to Meditate?*, 79 UMKC L. REV. 535, 548–55 (2011); Emma Seppala, *How Meditation Benefits CEOs*, HARV. BUS. REV. (Dec. 14, 2015), <https://hbr.org/2015/12/how-meditation-benefits-ceos> ("The research on mindfulness suggests that meditation sharpens skills like attention, memory, and emotional intelligence."). Programs related to meditation include yoga, tai chi, and exercise. Others are studying and applying new strategies to thoughtfully raise children who were privileged to be born into a family with a successful family business that provides both opportunities and challenges. See, e.g., Carlos Arbesú, *Parenting, the Last Frontier of Family Business Management*, CARLOS ABRESU (Feb. 25, 2014), <http://en.carlosarbesu.com/2014/02/25/parenting-the-last-frontier-of-family-business-management>. Many great resources on these and other related subjects are widely available and, so, beyond the scope of this Article.



### C. *Creating or Nurturing a Positive Culture*

A large and growing body of research demonstrates that a negative, high pressure, “eat what you kill” environment is harmful to productivity and the “bottom line,” while a positive and nurturing environment in which employees feel valued, secure, supported, and respected, provides numerous benefits to employees, employers, and the “bottom line.”<sup>127</sup> For example, researchers at the Queens School of Business and the Gallup Organization found that disengaged workers had a thirty-seven percent higher absenteeism rate, were forty-nine percent more likely to have accidents, and sixty percent more likely to make errors.<sup>128</sup> Further findings

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127. There are a number of theories that have been proposed to help explain the effects of work environment on employee productivity. The “presence of well-being” theory posits that positivity in the workplace increases employee engagement, that, in turn, drives committed and dedicated performance, in turn driving productivity, and, finally, in turn and by extension, the “bottom-line.” Barbara Fredrickson theorizes that positive emotions, like negative emotions, have evolutionary roots. While “negative emotions may lead to fight or flight behavior and a narrowing of cognitive activity,” positive emotions, such as “joy, interest, and love” broaden cognitive activity, including an individual’s “information-processing strategies,” “creative thinking,” and memory. This “loosening” of cognitive abilities, in turn, encourages the “bonding of individuals to each other, their work, and their organization,” leading to actions that translate into “successful business outcomes within organizations.” James K. Harter et al., *Well-Being in the Workplace and Its Relationship to Business Outcomes: A Review of the Gallup Studies*, NHS EMPLOYERS 5, 6, <http://www.nhsemployers.org/~media/Employers/Documents/Retain%20and%20improve/Harter%20et%20al%202002%20WellbeingReview.pdf> (last visited Apr. 4, 2017) (summarizing Barbara L. Fredrickson, *The Role of Positive Emotions in Positive Psychology: The Broaden-and-Build Theory of Positive Emotions*, 56 AM. PSYCHOL. 218 (2001)).

128. Emma Seppala & Kim Cameron, *Proof That Positive Work Cultures Are More Productive*, HARV. BUS. REV. (Dec. 1, 2015), <https://hbr.org/2015/12/proof-that-positive-work-cultures-are-more-productive>. The Gallup Organization surveyed hundreds of organizations around the world and found a clear—and compelling—relationship between employee engagement (i.e., the emotional commitment of an employee to his workplace) and profitability. For example, business units with employees that “know what is expected” of them, have “opportunit[ies] to do what [they] do best,” believe managers “care” about them and their opinions, and who have “opportunities to learn and grow,” had lower employee turnover rates, higher customer satisfaction and loyalty rates, higher employee productivity rates, and higher profitability. In fact, “business units with

determined that disengaged employees were less productive, less profitable, and, over time, reduced a company's value by up to sixty-five percent.<sup>129</sup> Discussing this research, Emma Seppala and Kim Cameron observe that “[t]oo many companies bet on having a cut-throat, high-pressure, take-no-prisoners culture to drive their financial success. . . . Although there’s an assumption that stress and pressure push employees to perform more, better, and faster, what cutthroat organizations fail to recognize is the hidden costs incurred.”<sup>130</sup>

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employee engagement at the 95th percentile for a given company have . . . more than double the success rate of [business units with employee engagement] at the 5th percentile.” Harter et al., *supra* note 127, at 9–14. The study has led researchers to conclude that “[b]usiness units that use principles of positive psychology may be able to influence employee engagement, and this then may enhance the bottom line.” *Id.* at 14.

129. Seppala & Cameron, *supra* note 128.

130. *Id.* The investment banking world—an industry that is well-known for its intensely competitive environment and well-compensated risk-takers—is rife with examples of extremely toxic behavior. Such behavior often leads to significant corporate losses. For example, Howie Hubler at Morgan Stanley (lost \$9.4 billion), Jerome Kerviel at Societe Generale (lost \$7 billion), Brian Hunter at Amaranth Advisors (lost \$6.6 billion and firm closed), John Meriwether at Long-Term Capital Management (lost \$4.6 billion and firm dissolved), and Bruno Iksil at JPMorgan Chase (lost \$2 billion). Cory Mitchell, *10 Traders Who Cost Their Companies Billions*, TRADERHQ: TRADER U. (June 11, 2014), <http://traderhq.com/traders-cost-company-billions>. Although individuals who exhibit certain personality traits such as overconfidence, high self-regard, and strict adherence to rules, are more likely than others to engage in toxic behavior, negative culture, and/or proximity to toxic workers promotes and breeds more toxicity. See Michael Housman & Dylan Minor, *Toxic Workers* (Harvard Bus. Sch., Working Paper No. 16-057, 2015), [http://hbs.edu/faculty/Publication%20Files/16-057\\_d45c0b4f-fa19-49de-8f1b-4b12fe054fea.pdf](http://hbs.edu/faculty/Publication%20Files/16-057_d45c0b4f-fa19-49de-8f1b-4b12fe054fea.pdf). This, in turn, has been attributed to causing “major organizational costs, including customer loss, loss of employee morale, increased turnover, and loss of legitimacy among important external stakeholders.” *Id.* at 2. Indeed, the study posits that bad workers have a stronger effect on a firm than good workers, concluding that avoiding “toxic workers” provides more cost-benefit to a firm than finding and retaining a “superstar.” *Id.* at 3, 19–21. Moreover, research shows that workplace stress can increase voluntary job turnover by almost fifty percent, creating incremental costs associated with recruiting and training new employees while losing the productivity associated with experienced employees. See generally CHRISTINE PEARSON & CHRISTINE PORATH, *THE COST OF BAD BEHAVIOR: HOW INCIVILITY IS DAMAGING YOUR BUSINESS AND WHAT TO DO ABOUT IT* 89–90 (2009). Adam Grant, a Wharton Professor known for his research on culture, including

By contrast, Shawn Achor, a former Harvard University professor and a respected business consultant, whose work focuses on the competitive advantages of a positive attitude and work culture, observes that those who are happy experience thirty-one percent higher productivity, thirty-seven percent higher sales, three times greater creativity, and twenty-three percent fewer fatigue symptoms. Happy people are also up to ten times more engaged, forty percent more likely to receive a promotion, and thirty-nine percent more likely to live to age ninety-four.<sup>131</sup> Numerous studies have demonstrated that employees prefer a happier workplace to increased compensation, a workplace characterized by forgiveness, kindness, trust, respect, and inspiration. And many of those studies demonstrate, in turn, that “a positive work culture leads to improved employee loyalty, engagement, performance, creativity, and productivity.”<sup>132</sup>

While the only limits to how positive cultures can be created or nurtured may be our imaginations, there are a number of recognized strategies that have been scientifically proven to provide benefits to individuals and organizations,

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the advantages of cooperating and helping (“giving”) compared to the disadvantages of selfish behavior (“taking”), writes:

Consider a landmark meta-analysis led by Nathan Podsakoff, of the University of Arizona. His team examined 38 studies of organizational behavior, representing more than 3,500 business units and many different industries, and found that the link between employee giving and desirable business outcomes was surprisingly robust. Higher rates of giving were predictive of higher unit profitability, productivity, efficiency, and customer satisfaction, along with lower costs and turnover rates. When employees act like givers, they facilitate efficient problem solving and coordination and build cohesive, supportive cultures that appeal to customers, suppliers, and top talent alike.

Adam Grant, *In the Company of Givers and Takers*, HARV. BUS. REV. (Apr. 2013), <https://hbr.org/2013/04/in-the-company-of-givers-and-takers>.

131. ACHOR, *supra* note 97, at 189.

132. Emma Seppala, *Good Bosses Create More Wellness Than Wellness Plans Do*, HUFFINGTON POST (Oct. 24, 2016), [http://www.huffingtonpost.com/emma-seppala-phd/good-bosses-create-more-w\\_b\\_12602574.html](http://www.huffingtonpost.com/emma-seppala-phd/good-bosses-create-more-w_b_12602574.html).

including: (1) fostering social connections,<sup>133</sup> (2) promoting “psychological safety,”<sup>134</sup> (3) practicing gratitude,<sup>135</sup> (4) being

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133. Positive social connections not only improve productivity, but may be essential to physical health as well. *See* Seppala & Cameron, *supra* note 128 (“Stress filled workplaces have been shown to increase unhealthy behaviors, such as excessive drinking and smoking. A large number of empirical studies confirm that positive social connections at work produce highly desirable results. For example, people get sick less often, recover twice as fast from surgery, experience less depression, learn faster and remember longer, tolerate pain and discomfort better, display more mental acuity, and perform better on the job.”); *see also* C. Nathan DeWall et al., *When the Love Hormone Leads to Violence: Oxytocin Increases Intimate Partner Violence Inclinations Among High Trait Aggressive People*, 5 SOC. PSYCHOL. & PERSONALITY SCI. 691 (2014); Sarah D. Pressman et al., *It’s Good to Do Good and Receive Good: The Influence of a “Pay it Forward” Style Kindness Intervention on Giver and Receiver Well-Being*, 10 J. POSITIVE PSYCHOL. 293 (2015). Family businesses can benefit by developing strategies to insure positive social connections, such as organizing family picnics, holiday parties, and similar social events.

134. An increasingly recognized business strategy is based on the concept of “psychological safety,” an environment in which co-workers feel comfortable taking risks, sharing ideas, and asking questions without fear of being embarrassed or punished for speaking up. Particularly effective are practices such as promoting “turn-taking” in conversations and not expecting employees to put on a “work face” when they get to the office. *See* Tom Austin, *Collective Intelligence Depends on Social Sensitivity and Balanced Conversational Turn-Taking*, GARTNER (OCT. 1, 2010), [http://blogs.gartner.com/tom\\_austin/2010/10/01/collective-intelligence-depends-on-social-sensitivity-and-balanced-conversational-turn-taking](http://blogs.gartner.com/tom_austin/2010/10/01/collective-intelligence-depends-on-social-sensitivity-and-balanced-conversational-turn-taking); Charles Duhigg, *What Google Learned from Its Quest to Build the Perfect Team*, N.Y. TIMES (Feb. 25, 2016), [https://www.nytimes.com/2016/02/28/magazine/what-google-learned-from-its-quest-to-build-the-perfect-team.html?\\_r=0](https://www.nytimes.com/2016/02/28/magazine/what-google-learned-from-its-quest-to-build-the-perfect-team.html?_r=0); Aamna Mohdin, *After Years of Intensive Analysis, Google Discovers the Key to Good Teamwork Is Being Nice*, QUARTZ (Feb. 26, 2016), <http://qz.com/625870/after-years-of-intensive-analysis-google-discovers-the-key-to-good-teamwork-is-being-nice>; *see also* Amy Edmondson, *Psychological Safety and Learning Behavior in Work Teams*, 44 ADMIN. SCI. Q. 350, 377 (1999) (finding that employees who have confidence that their employers or supervisors have their best interests at heart tend to perform better than employees who are afraid of their employers or supervisors). An easy way for family businesses to establish “psychological safety” is to agree upon and implement a formal code of conduct and communication ground rules.

135. Within any relationship, although perhaps particularly so with family members in business together, it can be easy to take others for granted and fail to offer thanks for a job well done. The practice of expressing appreciation encourages others to think more positively, which strengthens family relationships and enhances the company’s bottom line by helping employees feel calm, re-energized, and think more clearly. This allows employees to function more productively. For example, “when managers take the time to thank their

helpful,<sup>136</sup> (5) showing empathy,<sup>137</sup> (6) demonstrating

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employees, those workers are more engaged and productive.” Dacher Keltner, *Don't Let Power Corrupt You*, HARV. BUS. REV. (Oct. 2016), <https://hbr.org/2016/10/dont-let-power-corrupt-you>. Similarly, Appirio, an IT consulting company, found that sixty percent of job seekers said they cared the most about whether their potential co-workers seemed to be appreciated by their prospective employer. In comparison, only five percent said it was most important to know how fast they could get promoted, and just “4% were most concerned with knowing how often employees were evaluated for raises.” Dom Nicastro, *Appirio Says a Simple ‘Thanks’ Can Help You Keep Your Best Workers*, CMS WIRE (Aug. 10, 2016), <http://www.cmswire.com/digital-workplace/appirio-says-a-simple-thanks-can-help-you-keep-your-best-workers>. Professional advisors might consider offering the following suggestions to their clients: (1) encourage people to express thanks in person and on a timely basis; (2) be specific when acknowledging effort, particularly if it involved an extraordinary contribution, such as working at night or on weekends; (3) when appropriate, acknowledge teams—and teamwork; (4) keeping a gratitude journal; and (5) simply making oneself available to listen to a family member or co-worker. See Kennon M. Sheldon & Sonja Lyubomirsky, *How to Increase and Sustain Positive Emotions: The Effects of Expressing Gratitude and Visualizing Best Possible Selves*, 1 J. POSITIVE PSYCHOL. 73, 75 (2006) (commenting on the positive psychological impact of expressing gratitude); Stephanie Voza, *The Science of Gratitude And Why It's Important in Your Workplace*, FAST COMPANY (Nov. 24, 2016) <https://www.fastcompany.com/3065948/the-future-of-work/the-science-of-gratitude-and-why-its-important-in-your-workplace>. It might also be noted that saying thank you to staff or coworkers is also beneficial to your health. In a meta-analysis of several studies, Harvard Health found that “[g]ratitude helps people feel more positive emotions, relish good experiences, improve their health, deal with adversity, and build strong relationships.” *Giving Thanks Can Make You Happier*, HARV. HEALTH PUBLICATIONS: HEALTHBEAT (Nov. 2011), <http://www.health.harvard.edu/healthbeat/giving-thanks-can-make-you-happier>. Further, “[r]esearch conducted at the University of California, Davis, found that people who worked daily to cultivate an attitude of gratitude experienced improved mood, energy and substantially less anxiety due to lower cortisol levels.” Travis Bradberry, *3 Powerful Ways to Stay Positive*, FORBES (Aug. 23, 2016), <http://www.forbes.com/sites/travisbradberry/2016/08/23/3-powerful-ways-to-stay-positive/2/#1a7332ca6c6d>.

136. See Keltner, *supra* note 135 (“Studies show that individuals who share with others in a group—for example, by contributing new ideas or directly assisting on projects not their own—are deemed more worthy of respect and influence and more suitable for leadership. Mike Norton at Harvard Business School has found that when organizations provide an opportunity to donate to charities at work, employees feel more satisfied and productive.”).

137. New studies in neuroscience have demonstrated the importance of empathy in the workplace. For example, researchers found through brain-imaging studies that “when employees recalled a boss that had been unkind or un-empathic, they showed increased activation in areas of the brain associated with avoidance and negative emotion,” while, by contrast, empathetic bosses

compassion,<sup>138</sup> (7) practicing forgiveness,<sup>139</sup> and (8) showing

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fostered a sense of collegiality and good will. Seppala & Cameron, *supra* note 128. Such findings have great relevance to anyone and any organization, including family businesses where insensitivity to family members and others, perhaps particularly by family members in positions of power, can generate ill will by rude and selfish behavior, such as by interrupting coworkers, multitasking during meetings, raising their voices, and insulting colleagues. There are, of course, countless ways to incorporate empathy in a family business, such as simply listening with focused interest and engagement, signaling concern with phrases such as “I’m sorry,” or, before meetings, taking a moment to ask the person you’ll be with what’s new. See Keltner, *supra* note 135.

138. Researchers at the University of Michigan’s CompassionLab have found that leaders who demonstrate compassion toward employees nurture individual and organizational resilience that helps in managing challenges. See CompassionLab, *Leadership And Compassion*, UNIV. MICHIGAN, <http://www.bus.umich.edu/facultyresearch/research/TryingTimes/compassion.htm> (last visited Mar. 20, 2017). Stanford University also has a Center for Compassion. See *The Center for Compassion and Altruism Research and Education*, STAN. UNIV., <http://ccare.stanford.edu/about/mission-vision> (last visited Mar. 20, 2017). Media outlets and academic journals are sharing information on the scientific reasons compassion is so important to our lives (and businesses). See, e.g., Shimul Melwani et al., *Looking Down: The Influence of Contempt and Compassion on Emergent Leadership Categorizations*, 97 J. APPLIED PSYCHOL. 1171 (2012); Aneil K. Mishra et al., *Downsizing the Company Without Downsizing Morale*, MIT SLOAN MGMT. R. (Apr. 1, 2009), <http://sloanreview.mit.edu/article/downsizing-the-company-without-downsizing-morale> (noting the importance of compassion during corporate downsizing); Emma Seppala, *10 (Science-Based) Reasons Why Compassion Is Hot*, HUFFPOST BLOG, [http://www.huffingtonpost.com/project-compassion-stanford/compassion\\_b\\_1676485.html](http://www.huffingtonpost.com/project-compassion-stanford/compassion_b_1676485.html) (last updated Sept. 17, 2012). Families in business together can practice compassion by encouraging one other, providing emotional support, and giving time off from work.

139. While the scientific study of forgiveness is nascent, the work so far demonstrates the power of forgiveness, including in helping to heal emotional wounds and, by reducing stress, accompanying physical ailments. Stanford University has established a center to focus on the power of forgiveness. Frederic Luskin, *The Art and Science of Forgiveness*, STAN. MEDICINE (1999), <http://sm.stanford.edu/archive/stanmed/1999summer/forgiveness.html>. For more information on the emerging study of forgiveness, see generally Alex H.S. Harris et al., *Effects of a Group Forgiveness Intervention on Forgiveness, Perceived Stress, and Trait Anger*, 62 J. CLINICAL PSYCHOL. 715 (2006). These studies show that families and businesses who don’t practice forgiveness stay mired in negativity, causing continuing pain, suffering, and damage to the business by time spent focusing on the hurt rather than pursuing opportunities that could be important to the business. Practicing forgiveness in a family business can sometimes mean the difference between passing the business down to another generation or having to sell or close it. Successful families know the importance of forgiveness and have learned how to forgive each other.

humility.<sup>140</sup> From a family business perspective, particularly those run as partnerships between siblings and cousins, where individuals not only have disparate personalities but increasingly divergent circumstances with correspondingly diminishing shared genetic connections, reinforcing and authentically integrating these traits and behaviors will help create or maintain a workplace culture of acceptance, learning, and mutual support—which, in turn, enhances job satisfaction, employee engagement, performance, and finally, “bottom-line” growth.<sup>141</sup>

#### D. *Fostering Constructive Communication*

Families and businesses, indeed all of humanity, are tied together by its systems of communication, but communication is not easy.<sup>142</sup> We have all likely heard

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140. There is now a growing body of research confirming that practicing humility in the workplace—i.e., owning up to mistakes and being transparent about one’s own limitations, being receptive to feedback, and acknowledging the strengths and contributions of other team members listening—is not only an effective leadership strategy that nurtures a positive workplace culture, but an effective company growth strategy as well. See, e.g., John Dame & Jeffrey Gedmin, *Six Principles for Developing Humility as a Leader*, HARV. BUS. REV. (Sept. 09, 2013), <https://hbr.org/2013/09/six-principles-for-developing>; Bradley P. Owens et al., *Expressed Humility in Organizations: Implications for Performance, Teams, and Leadership*, 24 ORG. SCI. 1517 (2013); Richard Martin, *Humility as a Desirable Personality Trait and a Construct of Effective Leadership: A Review of the Literature* (2014) (unpublished manuscript), [http://www.regent.edu/acad/global/conferences/virtual/2014/papers/2014\\_Moral\\_Leadership\\_Conference\\_Martin.pdf](http://www.regent.edu/acad/global/conferences/virtual/2014/papers/2014_Moral_Leadership_Conference_Martin.pdf).

141. Parents can help their children by (1) making caring for others a priority; (2) providing opportunities for children to practice caring and gratitude; (3) expanding a child’s circle of concerns; (4) being a strong moral role model and mentor; and (5) guiding children in managing their destructive emotions. Many of these behaviors can be—must be—taught by parents to their children years before those children are old enough to start working in a family business. See generally, e.g., Amy Joyce, *Are You Raising Nice Kids? A Harvard Psychologist Gives 5 Ways to Raise Them to Be Kind*, WASH. POST: ON PARENTING (July 18, 2014), [https://www.washingtonpost.com/news/parenting/wp/2014/07/18/are-you-raising-nice-kids-a-harvard-psychologist-gives-5-ways-to-raise-them-to-be-kind/?tid=a\\_inl&utm\\_term=.784e98aba581](https://www.washingtonpost.com/news/parenting/wp/2014/07/18/are-you-raising-nice-kids-a-harvard-psychologist-gives-5-ways-to-raise-them-to-be-kind/?tid=a_inl&utm_term=.784e98aba581).

142. Effective listening is very challenging for a variety of reasons, starting with the fact that humans think much faster than they talk. The average rate of

observations related to the notion of how often we “hear” but don’t “listen.”<sup>143</sup> Unfortunately, without robust communication—and the right kind of communication—relationships can quickly deteriorate, putting family members at great risk of failing to understand each other, whether with respect to confusing finances, business plans, or any aspect of business. And the results can be costly. Fortunately, there are a number of strategies informed by science that can enhance the quality of communicating and, so, reduce friction. Some ideas informed by science to help families more constructively communicate include: (1) memorializing agreements in writing;<sup>144</sup> (2) sensitizing individuals to the importance of non-verbal communication,<sup>145</sup> including posture, tone of voice, focused

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speech for most Americans is around 125 words per minute while the human brain, made up of more than 13 billion cells, processes words at much higher speeds. As a result, there is a differential between thinking and speaking rates, allowing our brain spare time to continue thinking. This spare thinking time can make it difficult to concentrate on what another person is saying. Ralph G. Nichols & Leonard A. Stevens, *Listening to People*, HARV. BUS. REV. (Sept. 1957), <https://hbr.org/1957/09/listening-to-people>.

143. Studies at the University of Minnesota found that the average person remembers only about half of what he or she has heard—no matter how carefully he thought he was listening. *Id.*

144. Over time, research at places like Florida State University and Michigan State University revealed that an average listener will remember only about twenty-five percent of what was said only two months after listening to a talk—and that we are likely to forget from one-half to one-third of what we heard within eight hours. *Id.* Putting agreements in writing will help reduce misunderstandings that result from innocent, but faulty, recollections.

145. Non-verbal communication can occur in a variety of ways, including through gestures, body language (posture), tone of voice, facial expression, eye contact, etc. It can also occur through choices in fashion, hairstyles, and perfume or other scents. We also communicate non-verbally through space (for example, consider the location and decor of an office), time (consider, for example, whether one is punctual or consistently late), symbols (for example, using emojis), and sounds (such as a choice of ringtone on a phone). Interestingly, we can even communicate silently, the meaning of which can be positive or negative, depending on the context, to reflect, alternatively and as only one example, either rapt attention or lack of interest. Sometimes we communicate non-verbally by multi-tasking, such as, for example, when listening to someone but, at the same time, checking emails. It can be both intentional and deliberate, or unintentional and unconscious. It can reflect emotions like happiness, unhappiness, interest,



attention and even smiling;<sup>146</sup> (3) introducing the practice of appreciative inquiry;<sup>147</sup> (4) increasing communication driven

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curiosity, annoyance, empathy, etc. Perhaps the most famous work on the importance of non-verbal communication was done by Albert Mehrabian. See generally, e.g., ALBERT MEHRABIAN, *SILENT MESSAGES* (1971); Albert Mehrabian, “*Silent Messages*”: *A Wealth of Information About Nonverbal Communication (Body Language)*, <http://www.kaaj.com/psych/smorder.html> (last visited Mar. 20, 2017). While the subject is of continuing debate, Mehrabian is well-known for proposing that words account for only about seven percent of how we process a message; the balance is by considering tone of voice (accounting for about thirty-eight percent of how we process a message), and body language (accounting for about fifty-five percent of how a message is processed). Mehrabian, *id.* Families in business together can use this information to help insure that their non-verbal communications are thoughtful and constructive; doing so will help enhance interpersonal relationships. Our propensity to misunderstand each other continues to accelerate due to the increased use of technology to communicate as it is difficult to express emotions and feeling in emails, texts, and tweets that only require a form of written text—at a time when researchers have established the importance of non-verbal communication—for effective communication.

146. One of the more intriguing areas of scientific research that has the potential to help families in business (and many others) concerns smiling: why we smile, how we do it, and its importance. Paul Ekman, one of the world’s leading authorities on facial expressions, has observed that a smile is also one of the most basic human expressions, having the same meaning in different societies. See PAUL EKMAN, *EMOTIONS REVEALED: RECOGNIZING FACES AND FEELINGS TO IMPROVE COMMUNICATION AND EMOTIONAL LIFE* 3–4 (2007); see also Mark G. Frank & Paul Ekman, *Physiologic Effects of the Smile*, *DIRECTIONS PSYCHIATRY*, Dec. 1996, at 1. A study at Penn State University found that smiling not only makes us appear more likable, but more competent as well. Vivian Giang, *How Smiling Changes Your Brain*, *FAST COMPANY* (Jan. 28, 2015), <https://www.fastcompany.com/3041438/how-to-be-a-success-at-everything/how-smiling-changes-your-brain>. One oft cited example of a successful company that focuses on training employees to be pleasant and welcoming to its customers is Starbucks. This commitment to its customers’ experience has been credited as an important factor in the company’s success. See Ken West, *The Customer Experience: Spotlight on Starbucks*, *NAT’L BUS. RES. INST.*, <https://www.nbrii.com/blog/the-customer-experience-starbucks> (last visited Mar. 20, 2017). One “best practice” for families in business together would be to train employees to be pleasant and welcoming to each other, their employees, and customers.

147. Another interesting field in which science is helping to inform how people and organizations can improve the quality of their lives, their relationships, and their organizations is based on a process known as Appreciative Inquiry (AI). AI is premised on the notion that asking questions that bring focus to the positive aspects of their work increases employee energy and engagement. See generally DAVID L. COOPERRIDER & DIANA WHITNEY, *APPRECIATIVE INQUIRY: A POSITIVE REVOLUTION IN CHANGE* (2005). AI has been applied in many contexts, including within the field of conflict resolution. See,

“positivity ratio” (i.e. the number of “positive comments” to the number of “negative comments”);<sup>148</sup> and (5) establishing a written communication policy that includes the foregoing.<sup>149</sup> We also emphasize that positive psychology is NOT about ignoring real issues (although, in practice, there might seem to be less of them as increased attention is given to “possibility seeking” and away from “problem solving”). For example, new studies are demonstrating that facing

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*e.g.*, Arthur Pearlstein, *Pursuit of Happiness and Resolution of Conflict: An Agenda for the Future of ADR*, 12 PEPP. DISP. RESOL. L.J. 215 (2012). Families in business can also benefit from its use in designing constructive agendas and engaging in appreciative based conversations.

148. Psychologist Barbara Frederickson has extensively researched how positive emotions and actions helped build collaborations that were critical for our ancestors to survive in a dangerous world and are now part of our “hard wiring.” *See, e.g.*, Fredrickson, *supra* note 10, at 815 (“Negative emotions carried adaptive significance in the moment that our human ancestors’ [sic] experienced them, as their associated action urges—for example, to fight, flee or spit . . . . Positive emotions, by contrast, carried adaptive significance for our human ancestors over longer time scales . . . [facilitating] discovery: discovery of new knowledge, new alliances, and new skills.”). People can nurture interpersonal relationships by making more “positive” comments than “negative” ones that, in turn, will help keep or put them and their organizations on a growth trajectory. While there is some ongoing debate as to whether the positivity ratio is mathematically quantifiable, Fredrickson observes that “[e]mpirical evidence is thus growing to support the value of calculating positivity ratios . . . [and] ‘higher is better, within bounds.’” *Id.* at 820; *see also* Manfred Diehl et al., *The Ratio Between Positive and Negative Affect and Flourishing Mental Health Across Adulthood*, 15 AGING & MENTAL HEALTH 882 (2011). Moreover, research at Stanford University shows that most people complain once a minute during a typical conversation, in part, because it feels good, but doing so creates new neural connections that, over time, rewire your brain to make future complaining more likely. In addition to diminishing the quality of inter-personal relationships, complaining damages areas of your brain and has been shown to shrink the hippocampus—an area of the brain that is critical to problem solving and intelligent thought. Damage to the hippocampus has also been linked to Alzheimer’s. *See* Travis Bradberry, *How Complaining Rewires Your Brain for Negativity*, ENTREPRENEUR (Nov. 24, 2016), <https://beta.theglobeandmail.com/report-on-business/small-business/sb-growth/how-complaining-rewires-your-brain-for-negativity/article31893948/?ref=http://www.theglobeandmail.com>.

149. Families might benefit from establishing a formal communication policy that not only establishes regularly scheduled, face to face meetings, with ground rules to help insure attention, such as “no cell phones,” but also that incorporate the foregoing findings from AI, as well as insights about positivity ratios, non-verbal communication, and other communication data.

problems head-on, while remaining solution-oriented, increases a sense that one's behavior matters and improves employee productivity.<sup>150</sup>

E. *Ensuring "Fit" by Aligning Interests and Opportunities*

President Harry S. Truman once observed that "[t]he best way to give advice to your children is to find out what they want and then advise them to do it."<sup>151</sup> Unfortunately, anecdotal experience suggests that too many children wind up working in a family business, or in the wrong position in the business, because it is expected, convenient or lucrative—not necessarily because it is a good "fit." And, while some of those individuals successfully handle their roles in the family business, others simply don't have the skills, talents, or interests to succeed, much less enjoy their work.<sup>152</sup> Ongoing research now adds scientific support to the

150. See generally MICHELLE GIELAN, *BROADCASTING HAPPINESS: THE SCIENCE OF IGNITING AND SUSTAINING POSITIVE CHANGE* (2015); Michelle Gielan, *You Can Deliver Bad News to Your Team Without Crushing Them*, *HARV. BUS. REV.* (Mar. 21, 2016), <https://hbr.org/2016/03/you-can-deliver-bad-news-to-your-team-without-crushing-them>.

151. Lydia Dallett, *32 American Presidents Share Their Best Life Advice*, *BUS. INSIDER* (Feb. 16, 2014), <http://www.businessinsider.com/presidential-life-advice-2014-2>.

152. Perhaps this phenomenon is most insightfully captured by Albert Einstein, who is credited with saying that "[e]verybody is a genius. But if you judge a fish by its ability to climb a tree, it'll spend its whole life believing that it is stupid." Melanie Harth, *Fishes and Trees: 12 Timely Mindfulness Tips from Albert Einstein*, *HUFFINGTON POST* (Sept. 16, 2013), <http://www.huffingtonpost.com/melanie-harth-phd-lmhc/mindfulness-tipsb-3605534.html>. The children of family businesses, may, like the children of affluent families, "expect to excel at school and in multiple extracurriculars and also in their social lives. They [may] feel a relentless sense of pressure that plays out in excessive substance use; as the kids stoutly proclaim, 'We work hard—and we play hard!' It [may] play[] out in crippling anxiety and depression, about anticipated or perceived achievement 'failures.' It [may] play[] out in random acts of delinquency—stealing from a friend, shoplifting, defacing property." Suniya S. Luthar, *The Problem with Rich Kids*, *PSYCHOL. TODAY*, <https://www.psychologytoday.com/articles/201311/the-problem-rich-kids> (last updated June 9, 2016). For a discussion on raising children in affluent families, see generally LEE HAUSNER, *CHILDREN OF PARADISE* (1990).

importance of “fit”—and even how to assess it. Perhaps the most influential work in this area is that of Mihaly Csikszentmihalyi, a pioneer in the field of positive psychology, who is credited with discovering that people find genuine satisfaction during a state of consciousness he called “flow.” While in this state, people are completely absorbed in an activity, and feel “strong, alert, in effortless control, unselfconscious, and at the peak of their abilities.”<sup>153</sup> As depicted in Figure 4, flow states are generated by activities in which a person feels challenged, but not to the point of being stressed or bored (i.e., it’s a good “fit”).

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153. *Mihaly Csikszentmihalyi, THE PURSUIT OF HAPPINESS*, <http://www.pursuit-of-happiness.org/history-of-happiness/mihaly-csikszentmihalyi> (last visited Apr. 5, 2017). Csikszentmihalyi defines flow as “the state in which people are so involved in an activity that nothing else seems to matter; the experience itself is so enjoyable that people will do it even at great cost, for the sheer sake of doing it.” MIHALY CSIKSZENTMIHALYI, *FLOW: THE PSYCHOLOGY OF OPTIMAL EXPERIENCE* 4 (1990). Author Steven Kotler describes flow as a state where “[a]ction and awareness merge. Our sense of self and our sense of self-consciousness completely disappear. Time dilates—meaning it slows down (like the freeze frame of a car crash) or speeds up (and five hours pass by in five minutes). And throughout, all aspects of performance are incredibly heightened—and that includes creative performance.” Steven Kotler, *Flow States and Creativity: Can You Train People to Be More Creative?*, *PSYCHOL. TODAY: THE PLAYING FIELD* (Feb. 25, 2014), <http://www.psychologytoday.com/blog/the-playing-field/201402/flow-states-and-creativity>. Throughout his works, Csikszentmihalyi identifies a number of different elements involved in achieving flow, including having clear goals, receiving immediate feedback on one’s actions, and not being overly concerned about failure. See generally CSIKSZENTMIHALYI, *supra*; MIHALY CSIKSZENTMIHALYI, *CREATIVITY: FLOW AND THE PSYCHOLOGY OF DISCOVERY AND INVENTION* (1996); *OPTIMAL EXPERIENCE: PSYCHOLOGICAL STUDIES OF FLOW IN CONSCIOUSNESS* (Csikszentmihalyi & Csikszentmihalyi eds., 1988).

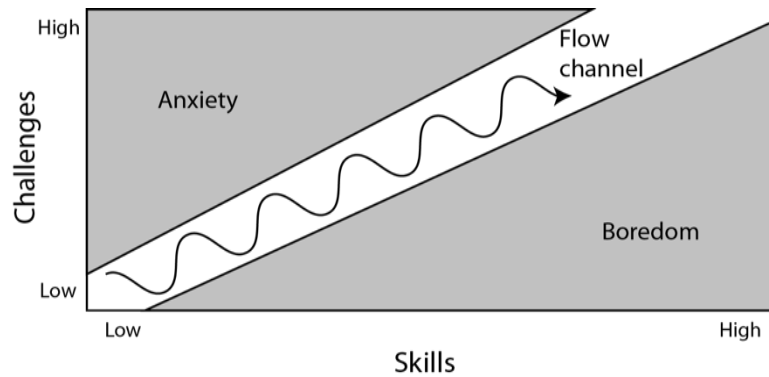


Figure 4.<sup>154</sup>

This work helps explain why, instead of spending time and energy on improving weaknesses, the effects of which might only be marginal, it is better to identify our talents and spend our time and energy intentionally leveraging those talents.<sup>155</sup> A number of personality and behavioral assessments have been developed to help in this process.<sup>156</sup>

154. JESSE SCHELL, *THE ART OF GAME DESIGN: A BOOK OF LENSES* 141 (2d ed. 2015).

155. See generally, e.g., TOM RATH, *STRENGTHS FINDER 2.0* (2007) (discussing the benefits and importance of focusing on your talents).

156. Some of our favorite assessments are listed here. The EQ-i 2.0, developed by Multi-Health Systems, Inc., assesses an individual's emotional intelligence. See *The EQ-I 2.0 Experience*, MUTLI-HEALTH SYS., <http://tap.mhs.com/EQi20.aspx> (last visited Mar. 20, 2017). The Workplace Big Five, developed by the Center for Applied Cognitive Studies, gives employers perspective on how a given candidate might act in certain work-related situations. See *Workplace*, CTR. APPLIED COGNITIVE STUD., <http://centacs.com/workplace> (last visited Mar. 20, 2017). The SHL Occupational Personality Questionnaire, developed by CEB, Inc., helps employers identify behavioral tendencies, such as dependability, that impact job performance. See *Occupational Personality Questionnaire*, CEB: SHL TALENT MEASUREMENT, <https://online.shl.com/gb/en-gb/products/opq32n> (last visited Mar. 20, 2017). DiSC Profile, developed based on the work of psychologist Dr. William Marston, is particularly useful for a perspective on how candidates will act in teamwork-based environments and situations. See *DiSC Overview*, DISCPROFILE, <https://www.discprofile.com/what-is-disc/overview> (last visited Mar. 20, 2017). The Clifton StrengthsFinder, developed based on a longitudinal study by Gallup, Inc., helps uncover the strengths of candidates and existing employees so that strategies can be crafted to develop those strengths. See RATH, *supra* note 155. Recognizing that it is not advisable to force children to work

Identifying individual strengths and weaknesses through this process can help family businesses identify whether a family member is a good “fit” for the business and, if so, how.<sup>157</sup> Ongoing research describes the advantages that accrue when organizations, whether family-owned and controlled or otherwise, find ways to leverage these individual strengths to facilitate true collaborations.<sup>158</sup> Based on these insights, families can help those who work in the business to set appropriate goals, enabling them to feel more competent and effective. Following this process helps to create stronger employee engagement and satisfaction. When everyone on the team functions at their peak, the entire enterprise benefits.

#### F. *Applying Game Theory to Preempt (and Resolve) Conflict*

It is not uncommon for two or more people, particularly when they spend time living or working together, to have differing perspectives about what is good or bad, right or wrong, better or worse. Successful families and businesses don't seek to squelch disagreements, as those often lead to higher quality relationships and decisions.<sup>159</sup> The

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together if they are not compatible, family businesses should incorporate a compatibility test as part of the assessment criteria for leadership and ownership. See KPMG ENTER., FAMILY BUSINESS SUCCESSION: MANAGING THE ALL-IMPORTANT FAMILY COMPONENT 18 (2011), <https://assets.kpmg.com/content/dam/kpmg/pdf/2015/07/3468-succession.pdf>.

157. Families might also benefit by developing a policy that precludes putting family members on the payroll if they can't make a real contribution to the business. Once employed, roles and responsibilities should be clear.

158. See, e.g., David L. Cooperrider, *The Concentration Effect of Strengths: How the Whole System “AI” Summit Brings out the Best in Human Enterprise 2* (2012) (unpublished conference paper), <http://www.davidcooperrider.com/2012/04/22/the-concentration-effect-of-strengths> (“When is it that the best in human beings arises most easily, productively, and naturally? Our answer, from several decades of fieldwork and hundreds of interviews with successful managers, is unequivocal: the best in human organization happens when people collectively experience the wholeness of their system—when strength touches strength—across whole systems of relevant and engaged stakeholders, internal and external, and top to bottom.”).

159. See, e.g., HARRIET B. BRAIKER, *WHO'S PULLING YOUR STRINGS?: HOW TO*

suggestions offered in the preceding sections are the most important steps a family can take to maximize the likelihood that a family in business together will make the best and most principled decisions, and, so, enhance the quality of inter-personal relationships and business prospects, while minimizing the likelihood of destructive disagreements. If individual perspectives cannot, however, be constructively reconciled through these efforts, differences can escalate and turn to conflict. Such conflict can take an enormous toll on family relationships, resulting in breached relationships and the inability for family members to continue working together, as well as on the family's business.<sup>160</sup>

An informal survey of family business literature suggests that mediation, arbitration, and litigation remain common strategies to address unreconciled disagreements that have boiled over.<sup>161</sup> While such traditional tools and techniques might remain relevant as approaches of last resort, they make the likelihood of family members remaining connected, much less working together, remote and, so, attorneys and other advisors to family business owners and stakeholders must develop new approaches, tools

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BREAK THE CYCLE OF MANIPULATION AND REGAIN CONTROL OF YOUR LIFE 42 (2004) (“Conflict can and should be handled constructively; when it is, relationships benefit. Conflict avoidance is not the hallmark of a good relationship. On the contrary, it is a symptom of serious problems and of poor communication.”).

160. Managing disagreements not only risks family division but can be expensive and severely impact a company's bottom line and prospects. HR professionals say that just one incident can soak up weeks of attention and effort. “[M]anagers and executives at Fortune 1,000 firms spend 13% percent of their work time—the equivalent of seven weeks a year—mending employee relationships and otherwise dealing with the aftermath of incivility. And costs soar, of course, when consultants or attorneys must be brought in to help settle a situation.” Christine Porath & Christine Pearson, *The Price of Incivility: Lack of Respect Hurts Morale—And the Bottom Line*, HARV. BUS. REV., Jan.–Feb. 2013, at 115, 118; see also Lynne M. Andersson & Christine M. Pearson, *Tit for Tat? The Spiraling Effect of Incivility in the Workplace*, 24 ACAD. MGMT. REV. 452 (1999); *How Rude!: Workplace Incivility Could Destroy Your Company*, INC.: THE BUILD NETWORK (Nov. 28, 2013), <http://www.inc.com/the-build-network-staff/how-rude-workplace-incivility-could-destroy-your-company.html>. See also *supra* note 93 and accompanying text.

161. See *supra* notes 21–22 and accompanying text.

and skills to do their job well. Families in business together sometimes need “wise counseling,” not “legal advice.”<sup>162</sup> Finding and developing new ways to help family members work together can be rewarding and creative.<sup>163</sup> When those disagreements threaten to boil over, applying insights from game theory can be helpful.<sup>164</sup>

### 1. A Brief Overview of Game Theory

Game theory is a modeling system designed to explore how people interact with each other when they have to solve a problem that requires them to choose between “cooperating with” or “competing against” the partner they are paired with.<sup>165</sup> Perhaps the best known “game” is the “prisoners’

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162. See, e.g., BORK ET AL., *supra* note 16, 1 (“[W]e suggest that professionals . . . look at their practice from a broader context and help the family resolve some issues that may at first seem confusing or even unsolvable . . . . [We also] suggest that professionals add what we call *process consulting skills* to their repertoire. Process consultants do not reject their own professional disciplines but take on an expanded role of teacher in order to help the family learn and grow.”) (emphasis in original); see generally KETS DE VRIES ET AL., *supra* note 54.

163. In one creative approach, the Elghanayan family prepared a partnership agreement dividing a \$3 billion real estate empire between three brothers when a fourth brother departed the business. The agreement, finalized in binding arbitration (with the father as arbitrator) split the empire with the flip of a coin. Charles V. Bagli, *Flipping a Coin, Dividing an Empire*, N.Y. TIMES (Oct. 31, 2009), <http://www.nytimes.com/2009/11/01/business/01real.html>.

[B]y planning ahead and creating a process that they understood and freely adopted, the brothers did some valuable conflict management. They reduced the scope and severity of a potential family wealth conflict and then, when the agreement was needed, they had a far easier conflict to resolve. One that they could put to rest without destroying their wealth, their company, or their family.

*Family Business Buy-Out Conflicts*, DOVETAIL RESOL. (Nov. 11, 2009), <http://www.dovetailresolutions.com/2009/11/family-business-buy-out-conflicts>.

164. The field of Collaborative Law, pioneered and mostly used by matrimonial lawyers, suggests potential new conflict resolution opportunities worthy of exploration that would function by encouraging “corporate attorneys” representing differing factions of a family to help resolve disputes by linking their continuing engagement to finding a solution outside of the courthouse. See PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 23–53 (2001).

165. Game theory, a branch of applied mathematics, provides tools for



dilemma,” in which two individuals are arrested for a petty crime but the police suspect the individuals to be guilty of a much more serious crime. The police, however, do not have enough evidence to secure a conviction for the serious crime and, so, need a confession. The suspects are taken into separate rooms where they cannot communicate with each other and are offered a deal to betray the other prisoner and testify that he committed the serious crime. The terms of the deal are as follows:

- If only one prisoner betrays the other, (a) the betrayer gets both crimes dismissed (and gets zero years in prison) but (b) the other prisoner, who has remained silent, gets the maximum penalty (ten years) for committing the serious crime.
- If both prisoners betray each other, they both go to jail for the serious crime, but for only five years since they assisted the police by confessing.
- If they both cooperate and keep silent, they both go to jail—but only for one year for the petty crime—and get away with the serious crime.

As a result, there are four possible outcomes for each prisoner: (1) receiving the maximum sentence (ten years); (2) a medium sentence (five years); (3) a short sentence (one year); (4) and no sentence. The winner of the game is the prisoner who serves the least amount of jail time. The “dilemma” is that each prisoner is tempted by the prospect that his accomplice will keep silent, in which case, if he confesses and betrays his partner, he wouldn’t have to spend any time in jail. The motivation to make a selfish decision and betray a partner is clear, often leading both prisoners to confess—which makes them both worse off than if they had

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analyzing decision making choices that different players face based on a consideration of other player’s possible decisions. The games help inform the optimal decisions of the players, who may have similar, opposed, or mixed interests, and the outcomes that may result from these decisions. *See generally* GUILLERMO OWEN, *GAME THEORY* (3d. ed. 1995).

“cooperated” and kept their mouths shut.<sup>166</sup>

When considering the advantages and disadvantages of family members who must choose over an extended period of time (as opposed to a single interaction) whether to “cooperate” with each other by making decisions in the family’s collective interests or, instead, make “selfish decisions” in one’s personal interest, it can be helpful to consider a version of Prisoner’s Dilemma in which the players, instead of playing a single game, play against each other repeatedly and, so, can react to the other player’s behavior. In these games, unlike “one-time game players,” both players have an opportunity to react to the other’s previous decisions, including by always cooperating, always being selfish, reacting randomly and unpredictably, etc. It turns out, when played repeatedly, the winners of the extended version of the game (i.e. those who get, in the aggregate, the least amount of time in jail), adopt what is known as a “tit for tat” strategy: a strategy that always begins by cooperating (not confessing the crime and pointing a finger at the other prisoner) and then, after that, doing whatever the other player did on the last move (either remaining silent or confessing the crime).<sup>167</sup> Essentially,

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166. This logic can help explain a variety of irrational behaviors, such as why many family members sometimes spend enormous sums of money in litigating their differences out of “spite” or “principle,” even though they would have been better off economically (much less “emotionally”) having reached a settlement.

167. Explaining how a classic “Tit for tat” strategy can be helpful by sending a message by retaliating—but only once—and letting bygones be bygones, at least until the other party fails to cooperate again, Roger Kay writes:

Tit for tat can swing both ways. It elicits cooperation if you’ve got any inclination, but doesn’t take any guff. When playing against Jesus, a virtuous cycle of cooperation prevails for all 200 rounds. Against Lucifer, Tit for Tat plays pretty good defense. And it wins, in evolutionary terms . . . [I]n a world where Lucifers dominate, a few Tit for Tat players can take back the night if there are enough of them to run into each other from time to time.

Rodger Kay, *Generous Tit for Tat: A Winning Strategy*, FORBES (Dec. 19, 2011), <http://www.forbes.com/sites/rogerkay/2011/12/19/generous-tit-for-tat-a-winning-strategy/#4d0fa6336669>. Adam Grant’s recent work on “giving,” “taking,” and “matching” suggests interestingly related findings and conclusions. *See generally*

those who learn from their mistakes and correct their behaviors do better over time.<sup>168</sup>

## 2. Applying Game Theory to Family Businesses

The prisoner's dilemma game can be used as a model to help family members understand the benefits achievable by cooperating with each other—and the costs to be incurred by focusing on self-interest. Attorneys and other advisors can help family members appreciate the importance of continuous “cooperation” by highlighting how working together collaboratively and collegially can create improved results, while acting in one's self-interest can create resentment and repercussions.<sup>169</sup> We've used game theory to help family members on the verge of litigation appreciate that going down that path would result in substantial lost economic benefits and, through developing a code of conduct and clarifying core operating principles and policies, how they can learn to get along together and prosper. Game theory is not a panacea, but it can help to reduce the frequency and severity of conflicts that threaten to be disruptive by reminding family members that there are multiple benefits to being kind, altruistic, and cooperative, and, especially over time, prices to be paid for selfish

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ADAM GRANT, GIVE AND TAKE: WHY HELPING OTHERS DRIVES OUR SUCCESS (2014).

168. This result has become known as the “Nash equilibrium,” which was named after the Nobel Prize winning mathematician John Nash (whose life was made famous in the movie *A Beautiful Mind*) and describes a stable outcome that results from people or institutions making rational choices based on what they think others will do. See Ken Grimes, *To Trust Is Human*, NEW SCIENTIST, May 10, 2003, at 32 (describing games in which individuals show trust when trusted, distrust when threatened, and noting that initial distrust is self-prophesizing in that it leads to more untrustworthy behavior).

169. Game theory is already being used by academicians to help better understand and model some aspects of family business dynamics. See, e.g., Timothy Mathews et al., *Game Theory and Family Business Succession: An Introduction*, 26 FAM. BUS. REV. 51 (2013); Nava Michael-Tsabari & Dan Weiss, *Communication Traps: Applying Game Theory to Succession in Family Firms*, 28 FAM. BUS. REV. 26 (explaining that game theory helps show how imperfect communication can lead to dysfunctional behavior between a founder and a successor).

behavior.<sup>170</sup>

#### CONCLUSION: A CALL FOR HOLISTIC PLANNING

Having belonged to, studied, and worked with family businesses, we have come to appreciate that traditional planning strategies and techniques which principally focus on how to efficiently “transfer assets” to family members, with little, if any, substantive focus on how to prepare family members to work together, are simply insufficient to help family businesses flourish from generation to generation and contribute to many family failures. Family businesses and their professional advisors need to reimagine and reinvent planning strategies to enhance their likelihood of flourishing. Otherwise, to borrow a concept famously articulated by George Santayana, families will be condemned to repeat the history of too many failed families.<sup>171</sup>

Science has helped us appreciate how our evolutionary legacy too often leads us to act, react and overreact in ways that can, often unintentionally and over time, be responsible for creating family dysfunction and conflict that drives depressingly familiar and consistent reports about the

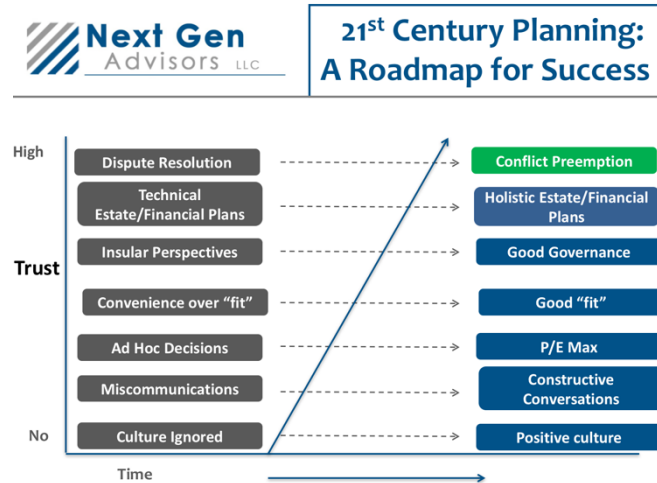
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170. There are countless benefits accruing to those who understand the advantages of cooperative behavior and practice being kind, including, for example, in helping reduce the incidence of divorce, an event that typically causes chaos and dysfunction in a business family, as ownership and wealth are divided, children have to adapt to changed family relationships, and the composition of a management team may also change. See, e.g., Myron E. Sildon, *Dealing with Divorce and the Family Business*, 9 ALI-ABA EST. PLAN. COURSE MATERIALS J. 35 (2003) (noting that cooperation is essential in handling divorce in a family business situation); see generally Emily Esfahani Smith, *Masters of Love: Science Says Lasting Relationships Come Down to—You Guessed It—Kindness and Generosity*, THE ATLANTIC (June 12, 2014), <http://www.theatlantic.com/health/archive/2014/06/happily-ever-after/372573> (explaining that kindness, along with emotional stability, is the most important predictor of satisfaction and stability in a marriage, with evidence showing that the more someone receives or witnesses kindness, the more they will be kind themselves, which leads to upward spirals of love and generosity in a relationship).

171. George Santayana originally stated that “[t]hose who cannot remember the past are condemned to repeat it.” GEORGE SANTAYANA, REASON IN COMMON SENSE 284 (1905).

challenges faced by family businesses. Fortunately, there are easy to apply antidotes to this legacy—Stage 4 Planning™ techniques—that hold great promise for families in business.

In our experience, families in business together would be well-served by following the path outlined in Figure 5 below, beginning with Stage 4 Planning and then, building upon traditional Stage 3 Planning, exploring whether there is a sufficient alignment in interests, values, vision and styles to justify continuing to work together. If so, planners can then more successfully turn their focus to who gets what assets in the most “tax efficient” manner—Stage 1 and Stage 2 planning.



**Figure 5.**

We believe this new approach, based on planning strategies that are informed by the developing fields of positive psychology and social neuroscience, which have been empirically validated through research studies at some of the most prestigious universities in the world and applied in practice by some of the most respected businesses in the world, holds great promise for family businesses. Indeed, the only thing new about our approach is how we have integrated

practical, universal, scientific principles and strategies into a complete system specifically designed to help family businesses. We recognize that no publication is ever “complete” and new insights surface on every subject discussed above, and more. People are complex. Families are complex. And businesses are complex. We hope that our Article adds to the planning possibilities for families that are looking to enhance their wealth, the business’s productivity and bottom line success, and, most importantly, the health and well-being of everyone associated with their enterprises, allowing them to flourish, for generations to come.