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# FAMILY BUSINESSES AND THE BUSINESS OF FAMILIES: A CONSIDERATION OF THE ROLE OF THE LAWYER

Steven H. Hobbs†  
Fay Wilson Hobbs‡

## INTRODUCTION

One of the primary responsibilities of a family is to provide for the care and nurturing of its members.<sup>1</sup> Such care is exhibited through the family's sharing of similar goals and values, its emphasis on family unity, and its mutual concern for the welfare of its members.<sup>2</sup> Each responsibility has an economic cost necessary to ensure basic survival of the individuals in this familial relationship. The need for vital economic security, present and future, engages family members in the pursuit of financial resources to meet this need.

Many families engage in joint or collective economic enterprises, such as a family business, to generate income for the family. There are a variety of family businesses: solely owned businesses from which an individual family member draws a return; a business owned and managed by several family members; an enterprise conducted with non-family members partnered in a corporation or partnership; or a limited liability business entity. However acquired, money is pooled to meet family expenses, and the business may be the family's biggest, and sometimes only, financial asset.<sup>3</sup>

Increasingly, the legal profession is recognizing the unique legal needs of family businesses and is structuring the practice of law in a manner designed to better assist family businesses.<sup>4</sup> Lawyers have al-

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1. See BENJAMIN BENSON ET AL., *YOUR FAMILY BUSINESS: A SUCCESS GUIDE FOR GROWTH AND SURVIVAL* 5 (1990).

2. See *id.* at 39 (stating "[m]embers value the unity of the family, share the same goals and values and are concerned about each other's welfare"). The commitment to family precludes pursuits that threaten "the best interests of the family." *Id.* at 40. "This attitude, combined with a high level of trust, enables the team-building that is important in the business . . ." *Id.* It also tends to prevent "conflict that results from the pursuit of individual agendas." *Id.* Everyone pulls together, and no individual member tries to glorify himself. See *id.*

3. See *id.* at 4.

4. A recent ABA Journal article reflecting on how a significant number of family-owned businesses will pass to the next generation as baby boomers age and retire, offered insight on the legal and social issues facing clients with businesses. See Michael Higgins, *Pass the Torch*, 84 A.B.A. J. 48 (1998). For a discussion of issues of valuing the family business at divorce, see Stuart B. Walzer & Jan C. Gabrielson, *Valuation of Stock in Closely Held Corporations at the Time of Marriage Dissolution*, 1 J. AM. ACAD. MATRIM. LAW. 1 (1985).

ways worked with families and offered legal assistance in organizing and structuring their businesses. Lawyers have also drafted estate plans which pass wealth and the business on to the next generation.<sup>5</sup> Recently, however, attorneys have begun to regard the practice of family business law as a unique specialty with emerging practice parameters.<sup>6</sup> For example, Joe M. Goodman and Dirk R. Dreux IV authored the book *Business Succession Planning and Beyond: A Multidisciplinary Approach to Representing the Family-Owned Business*,<sup>7</sup> which provides a critical addition to the educational tools and reference guides lawyers need when representing family-owned businesses.<sup>8</sup> The Goodman and Dreux text is grounded in a broader base of literature which has developed theories about providing professional services to families in the context of the businesses which they own.<sup>9</sup> This article furthers that inquiry.

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5. See, e.g., Sara Hamilton, *Wealth Management: Keeping It In The Family*, 136 TR. & EST., Aug. 1997, at 28; Andrew M. Katzenstein & Lisa C. McArthur, *Planning for the Family-Owned Business Exclusion Under TRA '97*, 24 EST. PLAN. 465 (1997).

6. Small businesses and micro-businesses are increasingly the focus of law school clinics and are providing needed training to future lawyers. Such clinics are providing an invaluable service to poor and low income families seeking to move from welfare to self-empowerment. Professor Susan Jones, the director of a small business clinic at the George Washington University School of Law, has noted:

Small business development and [community economic development] initiatives, emphasizing job creation through self-employment, will no doubt spearhead many welfare-to-work efforts. One half to two-thirds of microenterprise programs target welfare recipients for self-employment training. Because small businesses already account for the bulk of new job growth, they will also absorb former welfare recipients as new work force entrants. Welfare reform itself will create new industries ranging from job training to the creation of child care facilities for new working mothers.

Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering For Social Change and Economic Justice*, 4 CLINICAL LAW REV. 195, 202 (1997) (citation omitted).

7. JOE M. GOODMAN & DIRK R. DREUX IV, *BUSINESS SUCCESSION PLANNING AND BEYOND: A MULTIDISCIPLINARY APPROACH TO REPRESENTING THE FAMILY-OWNED BUSINESS* (1997).

8. Throughout this article we refer to small businesses, closely held businesses, and family-owned businesses interchangeably. While they are not always the same, there is a developing body of literature which considers the unique skills lawyers must bring to the task of counseling such business clients. See generally DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991); CLIFFORD R. ENNICO, *BUSINESS LAWYER'S HANDBOOK* (1992); HARRY J. HAYNSWORTH, *THE PROFESSIONAL SKILLS OF THE SMALL BUSINESS LAWYER* (1984).

9. Many consultants to family businesses are not lawyers but are management consultants, accountants, family therapists, or financial planners. The principle works in the area of family businesses include: BENSON ET AL., *supra* note 1; DAVID BORK, *FAMILY BUSINESS, RISKY BUSINESS: HOW TO MAKE IT WORK* (1986); W. GIBB DYER, JR., *CULTURAL CHANGE IN FAMILY FIRMS: ANTICIPATING AND MANAGING BUSINESS AND FAMILY TRANSITIONS* (1986); JOHN L. WARD, *KEEPING THE FAMILY BUSINESS HEALTHY: HOW TO PLAN FOR CONTINUING GROWTH, PROFITABILITY, AND FAMILY LEADERSHIP* (1987).

The vast majority of family-owned businesses are small businesses owned and controlled by one or more family members.<sup>10</sup> As such, the impact to the family and the business when the family unit falters is not only emotionally devastating to the family, but may be financially disastrous to the business and the economic stability of the family. The principal theme of this article explores the impact to the family and the business when the family structure is shattered, and devises an analytical process for lawyers to work with family business owners and/or managers to minimize the impact on the business. The article draws on family systems theory as used in family therapy and as relied upon by many family business consultants.<sup>11</sup>

Part One considers the economic and social significance of small and family-owned businesses to our society. Part Two borrows from the theoretical literature of family therapy to describe a framework and context for working with clients who own family businesses. This literature provides insight on how families function and suggests a frame of reference for assessing problems presented by a family owning a business. Part Three furthers the inquiry by focusing on how issues facing a family business are often interrelated with issues facing the family itself. Part Four proposes an analytical model based on a family systems perspective which could aid lawyers in solving legal problems of the client involved in a family business. The process considers how to gather social, emotional, legal, and financial information useful for structuring a solution to the problem. Part Five presents a hypothetical problem to which the family systems approach is applied.

In proposing a process through which the multidimensional issues surrounding a family business are considered by a lawyer, inevitably one also must consider the ethical obligations. As a preliminary matter, one must consider the basis of the lawyer's engagement. A lawyer could represent an individual who is a family business owner or could represent the family business as an entity. Is the lawyer representing a spouse with a family business who is seeking a divorce? Is the lawyer engaging in estate planning for the client whose primary asset is a family-owned business? Is the lawyer, acting as legal counsel for the family business, restructuring the ownership interests of the family-owned business in succession planning? Regardless of the lawyer's role, the full panoply of ethical issues is implicated.<sup>12</sup> A full explanation of the ethical matters is beyond the scope of this article and will be preserved for another time.<sup>13</sup> The operating assumption of this ar-

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10. See *infra* text accompanying note 15.

11. See GOODMAN & DREUX, *supra* note 7, at 16-28. See also sources cited *supra* note 9.

12. For a thorough discussion of the many ethical issues, see GOODMAN & DREUX, *supra* note 7, at 97-145.

13. Significant work has already been done on the question of representing multiple family members. See Teresa Stanton Collett, *The Ethics of Intergenerational Representation*, 62 *FORDHAM L. REV.* 1453 (1994); Steven H. Hobbs, *Facilitative Ethics in*

title is that, regardless of the lawyer's role, more competent and comprehensive legal advice and assistance can be provided if the lawyer has a basic knowledge of the unique challenges of representing a family business.<sup>14</sup>

### I. FAMILY BUSINESS BY THE NUMBERS

Statistics on small businesses give a perspective on the relative number of families which are supported by small businesses, even though not all family businesses are small. The United States Small Business Administration, Office of Advocacy, reported the following statistics which emphasize the role small businesses play in the United States economy:

In 1996, the United States had 6,190,907 employer-based businesses and 8,970,000 self-employed persons in 1996, for an approximate total of 15,160,907 businesses. According to 1994 data, 99.7 percent of the businesses were small businesses, defined as businesses with fewer than 500 workers.

Small businesses created all of the 11,827,000 net new jobs from 1992 to 1996. Very small businesses (less than 20 employees) represented 68.4 percent of this growth with 8,084,000 new jobs. These numbers clearly reflect the importance of small businesses as job creators.<sup>15</sup>

Identifying a business as a family business is not always easy. Melissa Carey Shanker and Joseph H. Astrachan have surveyed a variety of literature, research, and databases to present a clearer picture of the number of family businesses and their impact on the economy.<sup>16</sup> How many there are depends on how one defines family businesses. Shanker and Astrachan have designed a continuum which divides family businesses into three definitional groups:

The broadest and most inclusive definition requires that the family have some degree of effective control over strategic direction, and that the business is at least intended to remain in the family. This definition includes businesses where a family member is not in direct daily contact with the business but influences decision-making, perhaps through board membership or significant stock ownership. The middle division would include all the criteria of the broadest group and would require that the founder or descendant runs the

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*Divorce Mediation: A Law and Process Approach*, 22 U. RICH. L. REV. 325 (1988); Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1253 (1994).

14. For a different approach to these issues, see Steven H. Hobbs, *Ethics in the Age of Entrepreneurship*, 39 S. TEX. L. REV. 599.

15. SBA Off. of Advoc., *Small Business: Backbone of the United States Economy*, (visited Mar. 7, 1998) <<http://www.sbaonline.sba.gov/ADVO/stats/profiles/97us.html>>.

16. See Melissa Carey Shanker and Joseph H. Astrachan, *Myths and Realities: Family Businesses' Contribution to the U.S. Economy—A Framework for Assessing Family Business Statistics*, 9 FAM. BUS. REV. 107 (1996).

company. Again, this definition would include those businesses where only one member of the family is directly involved in the day-to-day operations. The narrowest family business definition would require that the business have multiple generations involved, direct family involvement in daily operations, and more than one family member having significant management responsibility.<sup>17</sup>

Various statistics and criteria are used to measure the number and the economic impact of businesses in the broad, middle, and narrow divisions. Statistics can be found by researching publicly traded companies, Internal Revenue Service statistics on tax returns, government documents on Gross Domestic Product ("GDP"), employment data, and estimates on job creation. Based on their survey, Shanker and Astrachan found the following general statistics classified by a broad, middle, or narrow definition of family business:

**BROAD DEFINITION:** 20.3 million businesses; 49% of GDP; 78% of new jobs created; and 59% of the total workforce.

**MIDDLE DEFINITION:** 12.2 million businesses; 30% of GDP; 48% of new jobs created; and 37% of the total workforce.

**NARROW DEFINITION:** 4.1 million businesses; 12% of GDP; 19% of new jobs created; and 15% of the total workforce.<sup>18</sup>

These numbers present a more realistic understanding of the quantity and importance of family businesses based on hard facts as opposed to popular perceptions which tend to restate statistics without any hard facts to support them.<sup>19</sup> However, other studies are useful for obtaining a fuller, richer sense of the identifying characteristics of family businesses. A recent survey on family businesses by Mathew Greenwald & Associates for the Massachusetts Mutual Life Insurance Company identified these businesses using the following numerical definitional criteria: "To establish OWNERSHIP, the family must own more than half the business for private firms (the vast majority of the [survey] sample) or, in the case of public firms, the family must own more than ten percent (10%) of the stock."<sup>20</sup> One source identifies the family business across generations where "a family business is

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17. *Id.* at 109-10.

18. *Id.* at 116.

19. The authors explain as follows:

We found that most family business statistics quoted in literature are a form of "Street Lore" or commonly accepted estimates—estimates that in fact are not derived from primary research. Despite the lack of research foundations, "Street Lore" statistics tend to be reasonable when viewed through the prism of a broad and inclusive definition of a family business. If a more rigorous definition is used, however, "Street Lore" statistics can be considered inflated and invalid estimates.

*Id.* at 117.

20. Mathew Greenwald & Assoc., *A Telephone Survey of 1,029 Family Business Owners: Major Finding of the Family Business Survey* (Sept. 1995) <<http://www.massmutual.com/fbn/html/res95.html>>.

one that has been started by a family member and has been passed, or is expected to be passed, to succeeding generations of the family[.]”<sup>21</sup> The business is a major organizing feature of the family as “members of the family work, participate in or benefit from the enterprise.”<sup>22</sup> Goodman and Dreux offer a more encompassing definition:

At the simplest level, a family business is a pool of capital (usually, but not always, in the form of an operating, economic entity) that happens to be influenced/controlled, owned, and/or managed by: one or more members of a single family; one or more branches of an extended family; one or more unrelated families; and/or some combination thereof. . . . As should be already apparent, the number, range, and degree of ‘family business’ permutations can be (and indeed is) quite extensive. Consequently, generalized or otherwise, offhand definitions do not apply readily. One size does not fit all.<sup>23</sup>

The point is, big or small, privately-held or public, significant family assets are tied up in an enterprise for profit which supports the family.<sup>24</sup>

“Family businesses are different from other forms of enterprise.”<sup>25</sup> “As Calvin Coolidge said, ‘The business of America is business.’ And the family enterprise is its backbone. Socially and culturally, the family business offers the opportunity to unify work and family concerns for the benefit of succeeding generations.”<sup>26</sup> The dynamics of a family that works together in a profit-making enterprise are complicated. Neither pure business techniques nor organizational theory address the dynamics fully.<sup>27</sup> The next section considers the dynamics of family systems in greater detail.

## II. BORROWING MODELS FROM SOCIAL AND FAMILY COUNSELING

In previous work, we urged a consideration of therapeutic models used by social workers and mental health professionals as a basis for

21. BORK, *supra* note 9, at 24.

22. *Id.*

23. GOODMAN & DREUX, *supra* note 7, at 1-2.

24. The findings of a recent telephone survey of family business owners indicate the following:

Nearly half of all family business owners report that they have personal guarantees or loans to their companies (48%). Owners of smaller family businesses (1994 gross revenues less than \$10 million) are somewhat more likely to report having made personal guarantees or loans. Half of the owners of these smaller family firms have made personal loans (51%), compared with 43% of owners of firms whose 1994 gross revenues are \$10 million or more.

Greenwald & Assoc., *supra* note 20, at 7-8.

25. BORK, *supra* note 9, at 23.

26. *Id.* at 7.

27. *See id.* at 24.

framing family issues presented in the lawyer's office.<sup>28</sup> In therapeutic models, a client presents a problem and seeks advice and assistance in solving the problem.<sup>29</sup> Lawyers traditionally assess the given facts in terms of the law. Social workers generally begin with a look at how a person *experiences their world*<sup>30</sup> and organizes their life, and in particular, how the family is structured. Who in the family has an interest in the present problem and who has an influence on its outcome?<sup>31</sup> What family factors influence the decision-making process? What resources are available to the client for solving this problem? In gathering this information from a family counselor's perspective, one sees through the mind's eye the interlocking web of networks of individual and personal relationships through which the client experiences the world and establishes a context or framework for solving the problem.<sup>32</sup>

A useful method of thinking as a family counselor is through a model generally called "family systems," a therapeutic model developed in the early 1960s by Dr. Murray Bowen.<sup>33</sup> Family systems analysis is a process of identifying and gathering information needed to assist a client in solving a problem.<sup>34</sup> Therapists have found this

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28. See Steven H. Hobbs & Fay Wilson Hobbs, *The Ethical Management of Assets for Elder Clients: A Context, Role and Law Approach*, 62 *FORDHAM L. REV.* 1411, 1412 (1994) (utilizing the family systems approach presented in this article). *But cf.*, Lee E. Teitelbaum, *The Family as a System: A Preliminary Sketch*, 1996 *UTAH L. REV.* 537 (1996) (presenting a view of family systems from a social science perspective).

29. See Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 *IND. L.J.* 775, 799 (1997). This author argues for using social science research on families to craft therapeutic solutions to family law adjudications:

The goal of therapeutic jurisprudence suggests a need to restructure the law and the legal process by applying behavioral science knowledge to accomplish therapeutic outcomes without interfering with traditional notions of justice. The potential exists to apply therapeutic jurisprudence to family law. In the family law context, this concept of the law as a therapeutic agent is particularly relevant to situations where families experience intra- or inter-family crisis. Envisioning the court's role in these family crisis situations as that of facilitating more positive relationships or outcomes and of strengthening families' functioning, or a "prescriptive focus," seems particularly appropriate.

*Id.* (citations omitted).

30. See Douglas G. Flemons & Patricia M. Cole, *Connecting and Separating Family and Business: A Relational Approach to Consultation*, 5 *FAM. BUS. REV.* 257 (1992).

31. See NANCY BOYD-FRANKLIN, *BLACK FAMILIES IN THERAPY: A MULTISYSTEMS APPROACH* 42-63 (1989) (discussing extended family networks and their influence on family structure).

32. See SALVADOR MINUCHIN, *FAMILIES & FAMILY THERAPY* 13 (1974).

33. See generally MICHAEL E. KERR & MURRAY BOWEN, *FAMILY EVALUATION: AN APPROACH BASED ON BOWEN THEORY* (1988).

34. See JOHN BRADSHAW, *BRADSHAW ON: THE FAMILY* 27 (1988).



method useful in treating social and psychological problems. As one author observes:

[T]he concept of families as systems helps explain a bewildering array of behaviors. The very notion of mental illness is no longer useful, since it implies some *intrapsychic* phenomena. The family system model shows how each person in a family plays a *part in the whole system*. Family systems help us understand why children in the same family often seem so different. And seeing the family as a system helps us to see how the poisonous pedagogy is carried from generation to generation.<sup>35</sup>

Systems are the networks by which one organizes and experiences life.<sup>36</sup> Networks are assessed for the nature, quality, and characteristics of each interpersonal relationship found in any particular network.<sup>37</sup> Further evaluations are made of the resources, processes, and mechanisms available through these networks for confronting and solving the problems and challenges of life.<sup>38</sup>

Lawyers, like social workers and family therapists, initially gather background information about the client and the client's particular or present problem, i.e., they tell us their stories.<sup>39</sup> Not only do the clients' stories offer insight into how the problem arose, but they also provide a context for solving the problem and preventing reoccurrences in the future. The stories provide clues that, when assessed through the prism of common humanity, yield a therapeutic prescription for the problem.<sup>40</sup> The focal point of the assessment is the interpersonal relationships of the client, and how these relationships are critical to evaluating and solving the problem.<sup>41</sup> Family systems analysis depends on this point.<sup>42</sup>

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35. *Id.*

36. See BOYD-FRANKLIN, *supra* note 31, at 149. See also BRADSHAW, *supra* note 34, at 27 (noting "[t]he theory of family systems accepts the family itself as the patient").

37. See MINUCHIN, *supra* note 32, at 13.

38. Hobbs and Hobbs explain as follows:

The model's basic assumption is that an individual or a family is being presented to the therapist to solve a particular problem. The solution may require more than just the individual to implement—other family members and other resources may have to come into play. The therapist will only be aware of these broader solutions if she applies a therapy model that is designed to elicit this information.

Hobbs & Hobbs, *supra* note 28, at 1414.

39. See BOYD-FRANKLIN, *supra* note 31, at 134.

40. Bradshaw explains as follows:

Family system thinking is grounded in the fact that we humans are inextricably social. My first beliefs about myself were formed from my mother's feelings and desires about me. My self-definition literally began in the womb.

BRADSHAW, *supra* note 34, at 25.

41. See BOYD-FRANKLIN, *supra* note 31, at 135.

42. *Id.* at 135-36.

This analysis calls for finding a way to describe the interpersonal relationship and to use this knowledge to craft a solution. First, the process begins with assessing the nature of the relevant relationship. Family compositions include natural family of origin (marriage, legal or legally recognized), blended family (a second marriage for one of the parties who has children, whether or not there are additional children), or family by adoption (marriage with adoption or a single parent adoption).<sup>43</sup> On the surface, differences in the nature of these relationships may not appear to note an appreciable difference. However, if there is a breakdown in the relationship, knowing the nature of the relationship will prove to be vital.<sup>44</sup>

The nature of the relationship depends, in part, on how the relationship was formed and the corresponding authoritarian patterns. Patterns within a natural or traditional family are often equally divided. Decision making about offspring is equally shared. This is not the case with blended families or single families. Within blended families, patterns will be determined by whether the children in the family are his or her children from a previous marriage. Alterations will occur again if the other natural parent remains a part of the child's life. In single parent households, variations in patterns exist depending on whether the single parent is male or female and whether the other parent is active in the child's life. The nature of each bond determines, as an initial matter, the rules of interaction between the parties.

The "interventionist" (lawyer, social worker, or therapist) next assesses the quality of the relationship.<sup>45</sup> This involves an examination of the communication and interaction patterns within the unit.<sup>46</sup> "Responses can range from reactive to thoughtful. Reactive responses can result in an escalation of anxiety. . . . Thoughtful responses can reduce the anxiety and keep it reasonably contained in the family unit."<sup>47</sup> Yet, each member of the family unit forms relationships outside the unit which may impact the family. Such relationships in-

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43. See Steven H. Hobbs, *In Search of Family Values: Constructing a Framework for Jurisprudential Disclosure*, 75 MARQ. L. REV. 529, 534-35 (1992).

44. See Hobbs, *supra* note 13, at 333.

45. Intervention is a term therapists use to describe their efforts of helping a family solve specific problems. Minuchin describes the process as follows:

The scope of the family therapist and the techniques he uses to pursue his goals are determined by his theoretical framework. Structural family therapy is a therapy of action. The tool of this therapy is to modify the present, not to explore and interpret the past. Since the past was instrumental in the creation of the family's present organization and functioning, it is manifest in the present and will be available to change by interventions that change the present.

The target of intervention in the present is the family system. The therapist joins that system and then uses himself to transform it. By changing the position of the system's members, he changes their subjective experiences.

MINUCHIN, *supra* note 32, at 14.

46. See KERR & BOWEN, *supra* note 33, at 290.

47. *Id.* at 300.

clude significant others or in-laws.<sup>48</sup> If strained, these relationships can further compound the problem.<sup>49</sup>

Such inquiries lead us to consider more specific characteristics of the relationship. In essence, what describes the relationship? Is the relationship long-term with significant historical commonality? Is it a strong bond that has endured many trials and tribulations, or is it weak and non-reliable? Is it a new or short-term relationship with limited purpose or interaction? Is it an emotionally intimate relationship in which personal secrets are shared? Is it a healthy or hurtful relationship in the sense of emotional or psychological compatibility? Do the individuals share common values, objectives, and goals? Or is it purely professional and based on a working relationship within a business? Is the relationship mutually beneficial? Answers to these questions provide clues as to whether the family functions in harmony or in a state of discord.

Mental health professionals generally consider the many systems within which a client structures his or her life. Nancy Boyd-Franklin describes multiple systems as a series of concentric circles emanating from the individual's center, much like ripples form when a stone is dropped into a still pond.<sup>50</sup> At the center, or first level, is the individual who sees and interacts with the world in his or her own particular manner. The next level identifies a range of sub-systems consisting of primary family relationships such as husband-wife, parent-child, and siblings. The third level is the household, those immediate family members who currently live in the same residence. The fourth level recognizes the extended family across generations. The fifth level identifies the system of friends and acquaintances with whom personal relationships vary in duration and intensity. The sixth level includes the broader community consisting of neighbors, schools, religious institutions, and social and civic organizations. The seventh and outer level represents official government agencies and authorities such as the family court and social services.<sup>51</sup>

These systems are fluid. They are not fixed within the level or across levels, but often overlap and interconnect. They change and are transformed over time. What happens in one system can, and often does, impact other systems.<sup>52</sup> These impacts can be hurtful or they can be healing and nourishing.<sup>53</sup> For example, a divorce may occur between husband and wife, but it impacts children and extended family members with its accompanying stress and strain. Or, an alcoholic family member might succeed in recovery, thereby reducing

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48. See BORK, *supra* note 9, at 82.

49. See *id.* at 83.

50. See BOYD-FRANKLIN, *supra* note 31, at 148-50.

51. *Id.*

52. *Id.* at 150.

53. See BORK, *supra* note 9, at 43.

family stress and increasing his ability to be a fully contributing member of the family circle.<sup>54</sup>

Changes that occur in families often result from "the thinking the family member does about what he has learned about his family."<sup>55</sup> Change in families is difficult because it demands that people not only look at, but also adjust beliefs that have been developed over a lifetime.<sup>56</sup> For change to occur, priorities need to be adjusted. Family members are socialized as to appropriate family behavior. Values are often at the core of these behavioral patterns.<sup>57</sup> Only when families are viewed as a system, not a set of individual people, can problems be understood and change accomplished.<sup>58</sup>

### III. TOWARD AN UNDERSTANDING OF FAMILY BUSINESS

The major focus of this article is that lawyers have much to offer families and the businesses they own. As suggested above, the lawyer, in advising a family business or a family with a business, may be aided by a deeper understanding of the social dynamics of this unique client.<sup>59</sup> Furthermore, recent changes in the law of business associations have caused us to develop new ways of thinking about the legal needs of small and closely-held businesses.<sup>60</sup> Accordingly, this section

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54. One author explains as follows:

The rules devised by parents for their children may reflect religious and cultural values. Economic circumstances and historical experience (including the parents' own history, such as an alcoholic relative) may also play a part. Tolerance for disobedience, and hence response to rule violation, are also highly localized. Some parents regard expressions of independence by their children as a normal developmental occurrence; others (again perhaps because of religious or cultural values) regard such demands as disrespectful and inappropriate. Situational factors may play a role as well.

Teitelbaum, *supra* note 28, at 553.

55. KERR & BOWEN, *supra* note 33, at 301.

56. See BORK, *supra* note 9, at 42.

57. *Id.*

58. *Id.* at 23.

59. Cowan and Milne explain as follows:

If you are a consultant to family owned businesses, you have challenging clients. The nature of their business brings an incredible amount of baggage that you must understand and carry to be able to give them the best advice possible. One of the ways you can hope to achieve this is by convincing the owners of the family business of the importance of writing their family/business history.

Phyllis M. Cowan & Paul D. Milne, *The Family Business History: A Catalyst to a Successful Succession Plan*, 16 EST. & TR. J. 344, 348 (1997).

60. The Northwestern School of Law of Lewis and Clark College recently began publishing a journal for this purpose, *The Journal of Small and Emerging Business Law*. In the Spring 1997 Inaugural Issue, Dean James L. Huffman offered these remarks highlighting the purpose of the new journal:

We have developed a business law program which integrates the traditional law school curriculum with an emphasis on the legal needs of small and closely held businesses. Most of our graduates who do business related work, like most of the graduates of most law schools, provide legal services

briefly considers some of the legal issues directly impacting family businesses and how a family systems approach might address these legal matters.

First, the lawyer is usually consulted when a client seeks to organize or restructure a business. Certainly the recent changes in business association law offer a myriad of choices as to the form of the business entity. Whether a limited liability company or a corporation is right for a particular client depends on the unique family needs of the participants. Special attention should be paid to the organic documents that establish the legal relationships of the parties and determine how interests will be held and transferred in the future.<sup>61</sup> The objective can be stated as follows:

Within each form of business, the lawyer must help the client create a working structure that accommodates the participants' interests and abilities. The working structure must also enhance the chance of successfully pursuing the endeavor by reflecting the business planning efforts of the entrepreneur. It will establish who has what authority to legally bind the enterprise and lay out how business decision making will be accomplished. The structure should further define the financial relationships of the participants and how to parcel out the fruits of the endeavor. The structure will provide the means for accepting new participants and allowing an exit mechanism for those who wish to leave.<sup>62</sup>

Other legal issues are also important at formation.<sup>63</sup> Are there regulatory rules which must be considered? Are there environmental, licensing or zoning matters to resolve? What are the tax implications for the participants? What are the financing needs of the business and will family members be personally liable for the credit of the business? Will there be venture capitalists participating, and if so, what will be their legal relationship to the business? This is just a sampling of the

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to entrepreneurs and the many small businesses that are the backbone of the United States economy. *The Journal of Small and Emerging Business Law* will serve these lawyers and the businesses that they represent.

James L. Huffman, DEAN'S REMARKS, 1 J. OF SMALL AND EMERGING BUS. L. (1997).

61. In doing transactional work for clients seeking to form a business, the nature, quality, and characteristics of their relationship are also important for planning purposes. Is it a relationship based on family ties or friendship bonds? How does the business relationship created by law, such as a joint business venture or a partnership, affect how the participants relate to one another? How do you advise them about the difficulties of doing business without squashing their enthusiasm for the venture?

62. Steven H. Hobbs, *Toward a Theory of Law and Entrepreneurship*, 26 CAP. U. L. REV. 241, 257-58 (1997).

63. For a discussion of formation issues, see Harry J. Haynsworth IV, *Preventive Law for Small Business: All Relevant Factors Should Tell Proper Form for a Small Business*, 7 PREVENTIVE L. REP. 15 (1988); WILLIAM A. KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES (6th ed. 1996).

legal matters that a lawyer skilled in recognizing the unique needs of a family business must consider.<sup>64</sup>

Second, a lawyer's skills are needed when the family business is ready to be passed on to the next generation or when the current family participants seek to plan their estate in order to avoid taxes and to predetermine the fate of the business.<sup>65</sup> It is beyond the scope of this article to fully consider all of the issues in succession planning and estate planning. Other authors provide a more complete analysis of the many legal and non-legal issues.<sup>66</sup> In succession planning, the main feature is control of the enterprise and development of new leadership among the next generation.<sup>67</sup> If the founder of the business is the family patriarch, which child will succeed to which post in the business? How will decision-making be accomplished? How will ownership shares be split among future family members? Will the business be disposed of or will it continue? While these questions barely touch the surface, they do indicate the complexity involved with a family business moving into the next generation.<sup>68</sup>

Estate planning is no less complex. If the lawyer is wrong, the family may suffer a large tax bill as the estate passes through probate.<sup>69</sup> Moreover, the business owners may be more focused on retirement planning and how to get fruits out of the business. In that case, the lawyer must still consider the needs of all of the participants. In a

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64. See Hobbs, *supra* note 62, at 254-57.

65. See Higgins, *supra* note 4, at 49.

66. See GOODMAN & DREUX, *supra* note 7, at 57-63. As suggested throughout, family systems and business systems are different, even as they are interconnected. One author describes this tension: "Families and businesses have separate and often mutually exclusive psychological profiles. Businesses succeed by being aggressive and confrontational; families avoid confrontations between and among family members. Businesses succeed by changing to meet altered circumstances and new challenges; families succeed by achieving homeostasis and resisting change." John J. Gallo & David A. Hjorth, *Handling the Nontax Issues in Business Succession Planning*, 25 EST. PLAN. 22 (1998).

67. Glenn R. Ayres, *Rough Family Justice: Equity in Family Business Succession Planning*, 3 FAM. BUS. REV. 3 (1990).

68. Goodman and Dreux state the matter as follows:

[W]hen the subject matter turns to business succession, the number, complexity, and interconnectivity of issues can appear overwhelming. Whether the decision maker is a business founder (who has never encountered succession before), a business heir (whose corporate legacy has been handed down through multiple generations), or a corporate steward (who has both inherited ownership and earned control—and needs to prepare a new generation for stewardship), the enormity of the task remains the same. It will be the largest, most important, complex, and far-reaching challenge that the individual, his or her family, employees, and advisors will probably ever undertake.

GOODMAN & DREUX, *supra* note 7, at 34.

69. For a consideration of more complex estate planning devices, see David M. Cohen, *What You Need to Know About Family Partnerships*, 12 PRAC. REAL EST. LAW. 13 (Sept. 1996); and Russ A. Prince, *Exploring the Family Office Advantage*, 130 TR. & EST. 68 (June 1991).

family with a business, not everyone will be happy with the succession or the estate planning because not everyone will be treated equally.<sup>70</sup> The wisdom of one author suggests that the advisor to a family business should use his or her skills to facilitate what he calls "*rough family justice*[,] defined as equity, not equality, among members of the family system in a context designed to serve the best interests of the family business . . . ."<sup>71</sup>

The third area in which lawyers confront the future and fortunes of a family business is at divorce. For a family member facing divorce, the family business, if founded during marriage, may be classified as a marital asset subject to division.<sup>72</sup> If the family business is one inherited by one of the spouses, or was separate property of that spouse, then a determination must still be made as to whether the divorcing spouse has any interest.<sup>73</sup> The business must be valued and then a determination made as to the appropriate amount available to be distributed equitably to each spouse.<sup>74</sup>

There are significant complications. If there is no possibility of liquidating the business, will the two spouses continue to be intertwined in the business? For instance, if the husband has a substantial interest, can he manipulate the books to reduce the value of the business or reduce his income from the business, thereby shortchanging his spouse in property distribution or child and/or spousal support? How can the parties cooperate to preserve the business as a going concern and still disentangle their domestic relationship? What are the tax consequences if the spouses cash out of the business?<sup>75</sup> These questions are by no means comprehensive. However, they do illustrate the

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70. One author describes the matter as follows:

It is common that the key family asset is the business, and only one of the children has chosen it as his or her life's work, while the other children have followed other pursuits. The parent-owner typically wants to leave the business to the child involved in the business, yet treat all the children equally. Even if the dollar value of the assets can be mathematically divided into equal shares, the parents are concerned whether any distribution will be truly fair when one child gets a business and the others receive cash or other assets.

Fairness and equality are not easy to define. "Equality" carries with it the notion of a quantitative, measurable sameness in the shares of the estate's assets. "Fairness," on the other hand, is best translated as "equitable." After considering all the issues, we want to do the right thing for each of our children, but the result may not always be mathematically equal.

Gallo & Hjorth, *supra* note 66, at 24.

71. Ayres, *supra* note 67, at 5.

72. For a discussion of these issues, see Michael R. McEvoy & Christopher M. Potash, *Dividing a Closely Held Corporation When a Couple Divorce*, 23 EST. PLAN. 57 (1996).

73. Examples of such issues can be found in these cases: *Rowe v. Rowe*, 480 S.E.2d 760 (Va. Ct. App. 1997); *Priebe v. Priebe*, 556 N.W.2d 78 (S.D. 1996).

74. See Alan S. Zipp, *Business Valuation Standard for Divorce is Different from Fair Market Value*, 11 AM. J. FAM. L. 167 (1997).

75. See McEvoy & Potash, *supra* note 72.

complexity of untangling the domestic and business relations of a couple.<sup>76</sup>

#### IV. A SYSTEMS ANALYTICAL PROCESS FOR COUNSELING IN THE FAMILY BUSINESS CONTEXT

The premise is that problems presented to a lawyer have both business/legal and familial/non-legal aspects.<sup>77</sup> Families are emotionally based; businesses are objective.<sup>78</sup> A family-operated business is both because family values carry over into the business.<sup>79</sup> The family must recognize that, if the business is to succeed, it must be managed according to sound business principles. A successful business is in the best long-term interest of the family.<sup>80</sup> Family dynamics must be able to adapt when circumstances change, particularly when the health and welfare of the family business is at stake.<sup>81</sup> The family must be able to transform itself in ways that meet the new circumstances without jeopardizing the future of the business or without losing the continuity that provides a frame of reference for its members.<sup>82</sup>

To be of maximum benefit, the appropriate solution or advice for the client should be framed in the context of the larger social dynamics and environment of the client.<sup>83</sup> In other words, the solution or advice should be in the context of the client's family systems. "The goal of applying family systems theory in business is to identify family

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76. For a thoughtful analysis of the complexity bankruptcy might play on the domestic reorganization process, see Catherine E. Vance, *Till Debt Do Us Part: Irreconcilable Differences in the Unhappy Union of Bankruptcy and Divorce*, 45 *BUFF. L. REV.* 369 (1997).

77. For many American families, their lives in their families and their lives in business are tightly interwoven and define who they are. For a fascinating, multi-generational study of such a family, see SUSAN E. JONES & ALEX S. TIFF, *THE PATRIARCH: THE RISE AND FALL OF THE BINGHAM DYNASTY* (1991) featuring the Bingham family of Louisville, Kentucky, that owned major newspapers and media businesses.

78. See BENSON ET AL., *supra* note 1, at 54.

79. See *id.* at 6.

80. See *id.*

81. See MINUCHIN, *supra* note 32, at 50.

82. See *id.*

83. While this article focuses on the family and the business as separate, but interlocking systems, other scholars have further differentiated the business to include the governing board or board of directors as a separate system with unique influence. See DYER, *supra* note 9. Dyer offers the following insight for managing change in a family business:

Why do some family businesses succeed and others fail? The answer is frequently found in the interacting dynamics of business culture, family culture, and the culture of the governing board. By *culture* we mean the basic assumptions and values that underlie the behavior of the family and the firm. To the large extent this three-part cultural configuration—business, family, and board—determines whether or not the family business will continue to survive in succeeding generations.

*Id.* at 13.



patterns that impair operations or impede [business] progress.”<sup>84</sup> For example, no lawyer could give completely competent estate planning advice without first obtaining an understanding of the client’s family relationships, personal values, and life goals and objectives (objectives are designed to accomplish the stated goals).<sup>85</sup> Moreover, the business itself can be viewed as a series of systems utilized to advance a specific economic goal—profit.<sup>86</sup> Legal and strategic planning issues of the business and the continued profitability of the business may impact the economic health of the family.<sup>87</sup> Conversely, social, financial and legal issues of the family may impact the economic health of the business. Business and family are thus interconnected and each can impact the other.<sup>88</sup>

The participants of the enterprise are connected in a series of relationships such as owners, managers and employees. In offering advice to a small or family-owned business, the assessment of the business is complicated by the fact that family members may be owners, manag-

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84. BORK, *supra* note 9, at 43.

85. Goodman and Dreux explain as follows:

Estate planning is often the first step to personal financial planning, retirement planning, planning for disability, and succession planning for the family business. These matters cannot be addressed if the business owner and spouse have not discussed and agreed upon specific objectives. The estate plan is the one definite and ultimate objective around which other decision making and planning for individual family members and the enterprise can be structured.

GOODMAN & DREUX, *supra* note 7, at 158.

86. For example, the manufacturing of a product or the offering of a service to the public are but two primary alternatives for achieving this goal of making a profit. But to achieve this goal, groups of people must work together to produce the product or offer the service.

87. The process that is recommended in this article takes into account that the legal advisor to the family business will have some understanding of the planning needs of the business. John Ward puts it this way:

The term *strategic planning* refers to the process of developing a business strategy. Strategic planning provides a systematic way of asking key business questions and is designed to create insights into the company and the environment in which it operates. Such inquiry challenges past business practices and opens the way for choosing new alternatives. The result should be a well-prepared *strategic plan* that spells out specific steps to better satisfy customers, increase profit, and revitalize the company for the next generation.

WARD, *supra* note 9, at 98. He further recommends a strategic plan for the family in order “to spell out the long-term personal and professional goals for family members and clarify the ‘family structure’ suitable for accomplishing those goals.” *Id.*

88. These authors explain as follows:

Sometimes problems are not unique to either the family or the business, but occur in both. The consultant can then look for commonalities in the contexts and help clients to, as it were, photograph two birds with one camera. The best scenario is to orient clients to a difficulty in a way that allows them to find their own solutions.

Flemons & Cole, *supra* note 30, at 265.

ers and/or employees.<sup>89</sup> As such, they can have a dual relationship—one family-structured and one business-structured.<sup>90</sup> The treasurer and president of the business might also be husband and wife. Systems analysis helps gather information about the strengths and weaknesses of these interconnected relationships and how each goes about solving particular problems of the business. Any strategic planning for the business may have to be addressed in terms of these varied relationships and how they function together as a unit.<sup>91</sup> At times it may be difficult to determine where the family ends and the business begins. The objective is to understand the context in which the client is seeking advice, and to assist the client in framing family issues and business issues within the relationship, identifying when the two relationships should be separated and when it is necessary to connect them.<sup>92</sup> From this position, the advisor can bring his or her expertise to bear on the issue presented.

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89. Goodman and Dreux use the systems approach to articulate this interconnectedness of family and business:

To enhance our understanding of the foundational “systemic” differences discussed above, it is also crucial for the intervening professional to understand that, at any given moment, the systems’ participants (the owner, his or her spouse, their children, their children’s spouses, the cousins, other family members, management, and so on . . .), simultaneously occupy a number of different roles or identities (and consequently have multiple perspectives/loyalties) within the context of these merged systems. At this juncture, it is important to note that the “business” system has been further subdivided into a management and an ownership component. As a result, an owner/founder can function as head of the family, chief executive of the management team, and majority shareholder.

GOODMAN & DREUX, *supra* note 7, at 21.

90. These authors explain as follows:

A family can be viewed as a kind of contextual hybrid, a unique combination of two sets of rules and expectations. A theorist could highlight the *duality* of the combination, focusing on the inherent differences between family and business relationships; however, it is also possible to underscore the *unity* of the combination, to view a family business as a complete entity with an integrated structure and organization.

Flemons & Cole, *supra* note 30, at 258.

91. See KERR & BOWEN, *supra* note 33, at 284.

92. Flemons and Cole explore the notion that the problem presented must be analyzed in terms of the context in which the problem is situated. Is it connected to the business or a whole separate family matter, or a combination of family and business. They observe:

Such contextual notions can provide a port of entry into the unique complexities of family businesses. It should be clear at this juncture that there are no simple, objective containers (contexts) called *family* and *business* within which people behave and make meaning. To reiterate the points made [earlier in the article], contexts (1) are critical in the creation and determination of meaning; (2) are constructed relationally and interpreted individually; (3) often cannot be ‘pinned down’ unambiguously; (4) are themselves contextualized (thus making paradox possible); and (5) are consistencies or stabilities in a world of flux, a kind of relational ‘constant’ woven of ephemeral strands (and thus are themselves subject to alteration when the changing of one or more of the strands changes).

Using the family systems model, one identifies the multiple systems in the family and the business and then does a Social, Emotional, Legal and Financial ("SELF") assessment with the client.<sup>93</sup> Analysis of the client's social environment refers to the client's social beliefs and physical environment. The concept encompasses an examination of his or her past, present and future social culture. The culture includes ethnic and religious beliefs, norms and values. Examination of these factors provides insight into a particular client.<sup>94</sup> Knowledge about the client's fears and goals allows the current problems to be addressed comprehensively. Knowing how the family was "socialized" has an impact on the problem being addressed. In the case of family businesses, social factors also include how the family and the business are structured, the relevant interpersonal relationships, and the nature and quality of those relationships. Social attitudes need to be investigated. Attitudes cloud judgment and perception, and are often the forerunner to emotions.

Emotions are how the individual reacts to stimuli. The stimuli, both internal and external, trigger reactive responses. Internal stimuli may be hormonal. For example, mood swings can be triggered by premenstrual syndrome or PMS. External stimuli are experienced in our day to day interaction with the world. The focus here is on external cues (those factors beyond our ability to control) that cause positive and negative feelings and behaviors. For example, a family member has a serious car accident which triggers both fear and caring in the family unit. Discovering an employee theft triggers great disappointment and anger.

Emotional feelings and triggers bear exploration. Lawyers, in advising family businesses, must be aware of statements and actions that will elicit emotions in their client. One source describes how the emotional issues discovered in a family system can influence decision-making in the business system:

You may become puzzled when trying to achieve a legal solution and encounter what seems to be unreasonable resistance or procrastination. For example, a father may put off estate planning because he simply can't come to grips with telling his son that he feels he is not capable of running the business and doesn't want to leave him stock. Or two brothers may squabble over the smallest business de-

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Flemons & Cole, *supra* note 30, at 262.

93. "Family system thinking is grounded in the fact that we humans are inextricably social." BRADSHAW, *supra* note 34, at 25.

94. Bradshaw explains as follows:

Like all social systems a family has basic needs. The family needs: a sense of worth, a sense of physical security or productivity, a sense of intimacy and relatedness, a sense of unified structure, a sense of responsibility, a need for challenge and stimulation a sense of joy and affirmation and a spiritual grounding.

*Id.* at 31.

cision while big issues go neglected and the business suffers. Many times emotional issues and relationship problems are blocking the resolution of what would seem to be fairly straightforward legal or business problems.<sup>95</sup>

From an emotional perspective, investigative issues may include: (1) emotional issues that impact the decision-making process; (2) whether husband and wife can continue to work together in the business; (3) the impact of divisions on children; and (4) the emotional trauma of a divorce on the day-to-day operation of the business.

Legal investigation includes considerations of the legal consequences for the business as discussed above in Section Three.<sup>96</sup> Examining interconnected personal relationships reveals legal consequences which might be hidden if the focus is on one client taken out of the context of these relationships.<sup>97</sup> Financially, how will decisions impact the family's current and future finances and financial planning? The lawyer normally gathers information about a family client's financial needs and his or her ability to meet these needs. However, the financial health of the business is also an important consideration. Preserving and achieving financial well-being for the parties involved will demand vigilant review of the business operations and profit distribution.<sup>98</sup>

Critical family experiences can unravel important system patterns. Family businesses cannot avoid conflicts but may manage them by setting boundaries between personal and professional occasions. This is not merely one event causing another, but the association of events which influence family and business patterns.<sup>99</sup>

Systems analysis entails not only the identification of interconnected personal relationships, but also a substantive evaluation of the nature, quality, and characteristics of the systems in order to bring the strengths and resources of the systems to bear on the problem without letting the weaknesses and deficits hinder the development of a solution. The main benefit of using a family systems approach is that it

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95. Sam H. Lane et al., *Working with Family Businesses*, PRAC. LAW., Sept. 1996, at 83, 85.

96. See *supra* text accompanying notes 59-76.

97. Livingston states the matter as follows:

With a generation of family-business owners getting ready to retire and almost half of all marriages failing, the issue of keeping company ownership in family hands is more pressing than ever. Yet few business-owning families actually take steps to prevent divorce proceedings from jeopardizing their wealth, thereby leaving their life's work exposed to lengthy, expensive, and often bitter legal battles over financial settlements.

Abby Livingston, *Make Your Family Business 'Divorce-Proof'*, NATION'S BUS., Jan. 1997, at 64.

98. See generally WARD, *supra* note 9.

99. See MONICA MCGOLDRICK & RANDY GERSON, GENOGRAMS IN FAMILY ASSESSMENT 84 (1985).

establishes a context whereby the family preserves the business goose which is laying the family's golden eggs.

V. HYPOTHETICAL FAMILY PROBLEM WITH SYSTEMS ISSUES—  
A REFLECTION

A. *Case Study: His Cheating Heart*<sup>100</sup>

This is a lonely and frightening time for Julia Woods, age 51. She recently heard that Bill, her husband of 26 years, is having an affair with his 33-year-old administrative assistant, Jeanne. Bill, age 54, is the founder and CEO of a \$50 million-a-year company, Woods Manufacturing. Julia and Bill have had "psychological divorces and remarriages" for years, but neither has ever taken formal steps to end their marriage.

On a visit to the plant one day, Julia inadvertently overheard Bill's secretary (Mary) talking with another employee about Bill's affair. Jeanne, who has a reputation throughout the company as an excellent worker, is a single mother who needs her job to support her young daughter.

Julia is reluctant to confront Bill to confirm that he is having an affair. She is fearful of losing not only Bill, but also her role as his wife, which provides her with financial security and prestige in the community. Although she is half owner of the company, she never wanted to work at the plant and has spent her time on volunteer activities. She has chaired many local charity events and is admired for her organization and fund-raising skills.

As confident as Julia is, she feels so insecure about Bill that she fears a confrontation will further hurt what relationship they do have. Their son, Stuart, 25, also works in the company. "I'm afraid he will learn about his dad's affair just like I did - accidentally," Julia says.

The health and profitability of the business have waned recently, and Julia worries that news of an affair could take the company down even further. "How," she asks, "can I protect myself both personally and financially?"

B. *Discussion*

This scenario is reminiscent of the Terry McMillan novel, *Waiting To Exhale*.<sup>101</sup> One of her female lead characters assisted her husband in starting a business, only to be deserted by him when the business became very successful. The husband ran off with his administrative assistant and attempted to cheat his wife out of her fair portion of the business. The most vivid scene involving this couple happened when

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100. *Case Study: His Cheating Heart*, NATION'S BUS., July 1997, at 57.

101. TERRY McMILLAN, *WAITING TO EXHALE* (1992).

the vengeful wife loaded her husband's prized possessions into his luxury car and set it ablaze. The above scenario is just as incendiary.

The problem assumes that the wife has come to the lawyer's office seeking advice. The natural tendency is to decide whether a divorce should be considered and how the wife can best protect her financial and legal interests. In the traditional adversarial model, all out war would be declared, with the business becoming the spoils awarded to the victor and the husband and his paramour being burned. If one steps back from the brink of war, one recognizes that the business, which feeds this family and many others, may not survive if it becomes a target of war. To keep this family from going down in flames will require a skilled practitioner who steps back to frame the issues in the larger context of the family and business systems. Again, this process is recommended whether you are representing the spouse seeking the divorce, the family business, or if you are the mediating facilitator between the parties. The goal should be to avoid, as much as is practicable, the potential disintegration of the family systems from wiping out the primary resource needed to sustain the welfare of the various family members. Accordingly, a *SELF* analysis is called for.

First, gather as much information about both systems as possible. What are the collective and individual histories of the parties? How would the family members identify their strengths and weaknesses? What are the nature, quality and characteristics of the family? What are the goals, objectives and values of the family, both historically and currently? How are decisions made in the family? Are there individuals outside of the immediate family circle who have influence or offer advice and guidance during times of crisis?

Similar questions can be examined from the perspective of the business. Here the dual relationships should be identified and inventoried for strengths and weaknesses. Also, the role of non-family members in the business should be assessed, especially if these business participants have some influence with the family or its members. What impact will the affair and the possible divorce have on the business? Will there be financial repercussions because of bad press or a possible sexual harassment claim from the subordinate employee? How will the tensions between the boss, his family (especially the son), his paramour, and other employees affect the working relationships within the business system?

In the given scenario, while both Julia and Bill are each multi-talented and accomplished individuals, they do not have what one author has called a "passionate marriage."<sup>102</sup> The marital relationship has obviously caused significant emotional stress and heartache. This is key in determining whether they will be able to lay aside emotional

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102. See DAVID SCHNARCH, *PASSIONATE MARRIAGE: LOVE, SEX, AND INTIMACY IN EMOTIONALLY COMMITTED RELATIONSHIPS* (1997).

issues in order to work together in the business, regardless of the future state of their personal relationship.

Julia, in her capacity as a community volunteer, may have social skills and resources useful for revitalizing the business. Through her community networks she may be able to draw financial resources to the business which may enhance its health. In contrast, from a divorce perspective, these same social skills might be suitable for commencing an independent, post-marital existence. In which case, the primary legal issue may be providing her share of the business's economic value in a fair and equitable manner.

The scenario is rich with other social, emotional, legal and financial issues which may impact the health of the business. Jeanne, the par-amour, is a single parent who needs the job to support her family. Will the affair have an impact on her maintaining custody of her daughter? How has the relationship with Bill impacted her daughter? If she has to leave the job, will she be able to sustain their current standard of living? Will her love relationship be the demise of Bill's marriage and possibly the business? Will she become the next Mrs. Woods, and if so, what will be the impact on the family and the business? Stuart, the son, could be placed between his parents and possibly could have divided loyalties. What will be Stuart's emotional cost for protecting his mother from knowledge of the affair or for attempting to maintain a professional, business relationship with his father? Certainly these issues merely scratch the surface. How deep the counselor goes will in part depend on the willingness and emotional abilities of the parties to set aside self interests for the greater good of protecting the family's financial safety net. While these may not be germane to the ultimate issues which confront the legal advisor, they are factors to be considered when crafting possible solutions. In fact, solutions may not work or be completely successful if the parties and the legal advisor(s) do not have a full understanding of the family system, the business system, and the interlocking connections which form the basis of the family's financial health.

#### CONCLUSION

An old African proverb points out that when elephants fight only the grass gets trampled. So too, when family members fight on the green grass provided by their family business, the business suffers. Family businesses are important, not only to the families for which they provide economic fruits to meet the necessities of life, but also because of their significant contributions to the economic and social stability of society. The legal needs of these businesses are unique, and should be understood in the broader human context of the personal relations of the business participants. Lawyers, informed by the thinking of family systems theorists and the experience of family therapists who use this approach, will be better prepared to fulfill the role

of legal advisor to a family business or to an individual with a family law problem which may impact a family owned business. While we do not suggest that lawyers practice therapy as they practice law, we do see the case for enhancing the lawyer's counseling skills and techniques.