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AN ESTATE PLAN IS NOT A BUSINESS SUCCESSION PLAN

By Randy Spiro

A Closely Held Business can be passed on under a Will or Revocable Living Trust. From this it does not follow that the Will or Trust serves as a succession plan for that business.

No two succession plans are identical, but one key question is whether the business should be sold by the parents while it is operating at its best, rather than distributed to the children. If the children do not want the business or have no ability to operate it, selling the business during the parents lifetime may optimize its value. When an asset is held until the owner's death, the capital gain is forgiven, so this lifetime sale would result in foregoing the stepped up basis.

If the business is to be passed on, there may be non-family member employees whose contributions are critical to the success of the business. Giving, them stock, stock options or other compensation incentives may give them the motivation to help the younger generation to keep the business profitable and growing.

In some families not all the children are involved in the business. In other families where all the children are involved, some of them take on more important roles than others. Thus, leaving each child an equal share of the business may sow the seeds of discontent. Even when it is agreed that one child should receive a higher percentage than another child, the question arises whether the child receiving a smaller share of the business should receive extra non-business assets to equalize the over-all distribution. Such equalization may draw the ire of the business savy child who may believe that he or she has sweat equity in the business.

Making lifetime gifts of shares in the business is often used to reduce the value of the parents' estate for federal estate tax purposes. Each time such gift is made it must be valued through an appraisal of the entire business and through a minority and marketability discount appraisal of the interest given. Annually, a husband and wife can each give $13,000 to each child (or to any other donee) without the gift being charged against the donor's $1,000,000 lifetime gifting exemption or against the donor's $3,500,000 (for donors dying in 2009) at death exemption.

Parents who run their business may have trouble releasing control of the business. When they fail to do so, it is difficult to believe that the children who have had no experience running the business when their parents were living will suddenly blossom into good leaders at their parents death.

Each child has unique qualities that should be considered. A child may try to work in the business to please the parent but not have his or her heart in it. Children may be competing with each other in the business to the detriment of family relationships and values.

One technique to address the above factors (and others) is the annual retreat. Facilitators can be brought in to promote communication and to help develop family and business goals. Charitable giving may be a technique to help family members work toward a common goal. Only after a true business succession plan is developed can the estate planning documents be adjusted to reflect decisions made about the business.