AN EDUCATIONAL BUSINESS SERIES FOR SUCCESS: DEFINING HOW OWNERSHIP INTEREST(S) CAN BE TRANSFERRED IF ONE OR MORE OF THE OWNERS CAN NO LONGER OR DO NOT WANT TO CONTINUE IN THE BUSINESS

In our last article, we explained why setting in place an exit strategy when the time comes and minimizing the potential for conflict is important. In this post, we will be discussing how ownership interest(s) can be transferred if one or more of the owners can no longer or do not want to continue in the business.

PART 3 – DEFINING HOW OWNERSHIP INTEREST(S) CAN BE TRANSFERRED IF ONE OR MORE OF THE OWNERS CAN NO LONGER OR DO NOT WANT TO CONTINUE IN THE BUSINESS

Your business is soaring along, meeting or exceeding all projections and expectations, and then suddenly one of the owners wants to pull out of the company. Or something disastrous happens and an owner simply cannot continue.

There is a myriad of reasons an owner may leave the business, including simply not having the passion to remain in it, but no matter what, you can and should be prepared. Whether your business continues to function at a high level or crumbles during this transitional period depends on how well you have anticipated situations that involve transfers of ownership interests. A well-drafted buy-sell agreement can help keep your business on track by defining how and when ownership interests can be transferred, and for how much.

Typical Buy-Sell Provisions

In many cases, the owner's interest must be sold back to the company, the remaining shareholders, or a combination thereof. A solid buy-sell agreement may be structured in several different ways and account for differing triggering events. In all cases, however, the buy-sell agreement should specify the value of the interest after the owners agree on the method of valuation.

In the most common scenario involving the death or disability of an owner, co-owners are required to buy the departing owner's share. Under what is commonly called a "cross-purchase plan," each owner would buy a life insurance policy on every other owner and pay the premiums, either personally or using business funds. The remaining owner or owners could then purchase the departing owner's interest from their heirs using the life insurance

proceeds.

When the business itself will buy the departing owner’s share upon the death of an owner, the buy-sell is funded with a life insurance policy bought by the business and on which it pays the premiums. The business would then use the proceeds of the policy to purchase the owner’s share from their heirs.

In a situation in which a sole proprietor has handpicked someone to take over the business, a one-way buy-sell agreement may be the best choice. In this case, the chosen person—whether it is an employee, child, sibling, spouse, etc.—would buy an insurance policy on the owner and name themselves as the beneficiary. Premiums may be paid by the business or by the future owner.

Buy-sell agreements may also give the business the option to buy a departing owner’s interest first. If the business declines, the option then moves to the remaining owners, but if they do not buy all the remaining interest, the business must buy it. This type of arrangement is called a “wait and see” plan because it allows the business to decide whether it makes good financial and tax sense to purchase the departing owner’s shares at the time of the triggering event.

A buy-sell agreement may also provide remaining owners with a “right of first refusal,” giving them the option to buy the departing owner’s interest before it is offered to anyone else for purchase. This provision can help ensure that the remaining owners maintain a say in who their future partner will be, though it is not foolproof if the remaining owners do not have the funds available to buy the interest.

Remember, too, that owners do not always have equal shares in the business, and that means that separate buy-sell agreements may be in order. For example, a buy-sell for a minority owner may require them to sell their interest to the majority owner while one for the majority owner may prefer that a particular person, such as a child, take over their shares.

Overall, a comprehensive buy-sell agreement can cover many triggering events and scenarios while also keeping all current owners happy both during the course of business and in the case that the contract must kick in. The best buy-sell for your business will minimize potential conflict while also considering exactly what your specific business needs as well as potential tax consequences.

Check out our next article in our business series covering what types of protection needs to be considered in a transition.

If you have questions about your company’s succession, please contact a member of our Estate and Business Succession Planning team.

OTHER ARTICLES IN THIS SERIES:

- An Educational Business Series for Success: Setting in Place an Exit Strategy When the Time Comes and Minimizing the Potential for Conflict
- An Educational Business Series for Success: Why Buy-Sell Agreements are Necessary Even if You Don’t Plan to Sell Your Company Soon

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ERICA REIB REELECTED TO THE BOARD OF THE STATE BAR’S LABOR AND EMPLOYMENT SECTION

Attorney Erica N. Reib was recently reelected to the Board of the Labor and Employment Section of the State Bar for a three-year term beginning July 1, 2022, making this her third term in a row. The State Bar of Wisconsin provides opportunities for lawyers to work on issues that matter to them and the public they serve. The Labor and Employment Section includes new and experienced attorneys who practice labor and employment law. The section keeps members up-to-date on recent developments in the law. The section also allows members to exchange information and opinions on various labor topics and legal issues in the workplace.

Erica is a member of O’Neil Cannon’s Employment Law Practice Group. She assists clients with employment discrimination litigation, non-competition and trade secret litigation, OSHA matters, wage and hour issues, NLRB and unfair labor practice matters, employment policy and agreement drafting and review, unemployment compensation, investigations and proper employment practices to avoid litigation. She volunteers her time at the Marquette Volunteer Legal Clinic and Milwaukee Justice Center, and is a board member and legal committee chair at the Audio and Braille Literacy Enhancement, Inc.

Erica is pleased to be elected again and looks forward to continuing her involvement on the Board. If you would like to contact Erica, she can be reached at 414-276-5000 or erica.reib@wilaw.com.

TAX AND WEALTH ADVISOR ALERT: WHAT IS AN

ESTATE PLAN?

We are often asked, “What is an estate plan?” An estate plan can mean different things depending on your unique personal and financial situation. We structure your estate plan based on many things, such as whether you are single, married, or divorced; whom you want your estate to pass to upon your death; and the complexity and makeup of your assets. Some individuals may need more estate planning, some may need less.

Here is a list of the typical documents we include in an “estate plan.”

Revocable Trust

People often come to us asking for a “simple” Will. However, a Will-based estate plan is not always the best choice. A “simple” Will now may cause beneficiaries significant cost and delay, later, when the Will gets probated. This is why we often recommend that our clients establish a “Revocable Trust.”

A Revocable Trust is a trust that you create during your lifetime and acts as the “centerpiece” of your estate plan. The Trust is designed to help you manage your assets during your lifetime and to designate who will receive your property upon your death. You are the “grantor” or creator of the Trust and serve as Trustee during your lifetime, so you still retain control over the assets in your Trust. The Trust is both completely amendable and revocable during your lifetime.

Upon your death, your trust property is divided and distributed to your named beneficiaries, often your children. A share for a beneficiary can either be distributed outright and free of trust, or it can be held in trust for that beneficiary’s benefit. A share held in trust can be useful for a beneficiary to protect from creditors and divorce, or if a beneficiary is a spendthrift.

Married couples often create a “joint” Revocable Trust together. A joint Revocable Trust is a useful tool to minimize taxes and effectively manage a married couple’s assets, before and after death.

A Revocable Trust is particularly useful if you have minor children, you own your own business, or you own real property in multiple states. The Trust also makes the administration of your assets more efficient if you become incapacitated.

Last Will and Testament

Even if you have a Revocable Trust in place, it is still necessary to have a Will. This is what we refer to as a “Pour-Over Will.” The Pour-Over Will serves a few important purposes. First,

in the event that you fail to re-title an asset into your revocable trust, the Pour-Over Will is designed to receive those assets upon your death and "pour" them into your Revocable Trust. Second, the Pour-Over Will is the only place you can nominate a guardian for your minor children if you were to unexpectedly pass away. Finally, the Pour-Over Will distributes your personal property, such as your furniture, household items, clothing, etc. to your intended beneficiaries.

Martial Property Agreement

For married couples, we often draft a Marital Property Agreement. This agreement allows married couples to "opt in" to Wisconsin's marital property system by classifying most of your assets as marital property upon yours and your spouse's deaths. The Marital Property Agreement also contains a "Washington Will Provision," which means the surviving spouse can fund the trust upon the death of the first spouse and thus avoid probate. This agreement, however, does not address divorce and is used solely for estate planning purposes.

Durable Power of Attorney

In the event that you become incapacitated as a result of an accident or illness, you can appoint an "agent" in your Durable Power of Attorney to oversee your financial affairs. We are often asked what the difference is between an "agent" and a "trustee." An "agent" manages the assets outside of your Revocable Trust, while a "trustee" manages the assets held by your Trust. A Durable Power of Attorney offers great flexibility in administering your financial affairs and also allows you to avoid a costly guardianship proceeding.

Health Care Power of Attorney

A Health Care Power of Attorney allows you to appoint an individual to make health care decisions on your behalf in the event that you are unable to do so yourself. The document also allows you to express your wishes regarding entering a nursing home or community-based residential facility when the need arises, as well as other important end-of-life decisions.

HIPAA Release and Authorization

The Health Insurance Portability and Accountability Act was passed into law in 1996. This Act prevents medical professionals from divulging your personal medical records to family members or other individuals. Because of this, it is often difficult for family members to gain access to your medical information in the event of an emergency. Our HIPAA Release and Authorization allows medical professionals to release your personal medical records to persons of your choosing (often family members) to help manage your care.

Deed

If you establish a Revocable Trust, an important step is re-titling your real property into the name of your Revocable Trust. Thus, upon your death, you avoid having the real estate pass through probate, and your Trustee will have the ability to maintain, manage, and/or sell your real property upon your death. This step is especially important for property owned outside of Wisconsin. If you fail to transfer your real property into your Revocable Trust, you risk needing an "ancillary" probate in the state in which your real property is located. This can be a costly and tedious step we try to avoid.

ATTORNEY JESSICA HASKELL ELECTED TO THE BOARD OF DIRECTORS OF THE STATE BAR'S BANKRUPTCY, INSOLVENCY AND CREDITORS' RIGHTS SECTION

Attorney Jessica K. Haskell has been elected to the Board of Directors of the Bankruptcy, Insolvency and Creditors' Rights Section of the State Bar of Wisconsin for a three-year term beginning July 1, 2022. The Bankruptcy, Insolvency and Creditors' Rights Section seeks to inform its members about developments in bankruptcy and collection law and to serve the judiciary and the public. Specifically, members work on developing the law, increasing communication between practitioners, and improving the standards of the profession.

Jessica is a member of O'Neil Cannon's Banking, Receivership, and Creditors' Rights Practice Group. She represents court-appointed receivers, secured and unsecured creditors, financial institutions, and corporations in state and federal court. Jessica is pleased to be elected and looks forward to being involved with the Board in her new role.

TAX AND WEALTH ADVISOR ALERT: IRREVOCABLE INCOME-ONLY TRUSTS, HOW THEY CAN HELP YOU APPLY FOR MEDICAID AND WHEN THEY SHOULD BE AVOIDED.

An irrevocable income-only trust can be an indispensable tool when planning for retirement and long-term care expenses. It's important to know how these trusts work, how they help

you qualify for Medicaid, and how to set one up.

What Are Irrevocable Income-Only Trusts?

Irrevocable income-only trusts are used for Medicaid planning. They are a type of living trust that protects assets from being sold to cover long-term care expenses such as nursing homes. These assets are placed in a trust so that they can be passed down to beneficiaries. The beneficiary of the trust is only entitled to receive the trust income; the trust principal is not accessible.

You can use an irrevocable income-only trust to qualify for Medicaid. You make your assets the trust principal, which becomes inaccessible to you. By doing so, you can only access the trust income, which is subsidized to pay for your nursing home care, and then Medicaid pays the rest. However, the amount Medicaid pays must be under $2,000 by the end of each month, and if not, it may increase the amount you pay out of pocket.

Qualifying for Medicaid

Although you can use this type of trust to help qualify for Medicaid, keep in mind, it creates a waiting period of ineligibility. Each state has laws about when you can start receiving Medicaid benefits after transferring funds to an irrevocable income-only trust.

The Benefits and Downsides of Irrevocable Income-Only Trusts

An irrevocable income-only trust has several advantages, including:

- You retain the ability to qualify for Medicaid benefits and still preserve some assets for your loved ones.
- In the interim, between setting up an irrevocable income-only trust and entering a nursing home, you may establish an income stream for yourself.

There are some downsides to keep in mind when considering creating an irrevocable income-only trust, such as:

- You lose control over your assets in the trust. This is because the trust is irrevocable, which means you cannot change or terminate the trust.
- Medicaid's look-back period is 60 months, so if you become ill before this period ends, you are left without funds to pay for nursing home bills. Medicaid will not cover these costs. You should not put *all* of your assets in the trust for this reason.
- If you are young and healthy, a **revocable trust** is a much better structure for your estate plan because it allows you to change your estate plan and, more importantly, it keeps you in control of your assets.

How to Set Up an Irrevocable Income-Only Trust

To start an irrevocable income-only trust, you'll need to gather some important information. Make a list of your assets and income from all sources, including all assets transferred within the last five years. Then, determine whether your resources are exempt, non-exempt, or inaccessible for Medicaid purposes. Finally, consult with an experienced Medicaid law attorney to help you finalize and set up the fund.

Working with an experienced attorney can help you better ascertain your cash flow needs. You will have to ensure your present income needs are met and that you have sufficient funds to pay your nursing home bills if you unexpectedly become ill.

If you'd like further information about this topic, please contact a member of our Estate and Business Succession Planning team.

OCHDL IS PLEASED TO ANNOUNCE THAT RYAN J. RIEBE HAS JOINED THE FIRM

Attorney Ryan J. Riebe, a graduate of the University of Minnesota Law School, has joined the Litigation Practice Group of O'Neil Cannon Ryan has experience counseling individuals and businesses in a wide variety of litigation matters in state and federal courts and in mediation and arbitration. He is licensed to practice law in both Wisconsin and California. We are very pleased to have Ryan join OCHDL.

OCHDL, founded in Milwaukee in 1973, is a full-service law firm that focuses on meeting the many needs of businesses and their owners. Our experienced attorneys work with businesses and their owners at all stages of the business life cycle, helping them start, grow, and transition their businesses. We also assist business owners with their personal legal needs, including tax and estate planning, and family law. For more information about the types of services we provide, please visit our **website** or contact your OCHDL attorney.

THE WILAW QUARTERLY NEWSLETTER

Newsletter Article Highlights:

- The Great Wealth Transfer and Its Implications on Estate, Trust, and Probate Litigation
- Setting in Place an Exit Strategy When the Time Comes and Minimizing the Potential for Conflict
- Union Organization Is on the Rise

Firm News:

- Trevor Lippman Leads Effort to Secure $5.4 Million Settlement in Will Fraud Case
- Jim DeJong Featured on WISN AM 1130
- Joseph Gumina Recently Quoted in The Daily Reporter

Click the image below to read more.

AN EDUCATIONAL BUSINESS SERIES FOR SUCCESS: SETTING IN PLACE AN EXIT STRATEGY WHEN THE TIME COMES AND MINIMIZING THE POTENTIAL FOR CONFLICT

In our last article, we reviewed why creating a buy-sell agreement can protect the owners of a company and help guide the process of a business succession plan. In this post, we will review how to create an exit strategy and minimize conflict when it comes time to begin to transfer the business.

PART 2 – SETTING IN PLACE AN EXIT STRATEGY WHEN THE TIME COMES AND MINIMIZING THE POTENTIAL FOR CONFLICT

Whether it’s in personal relationships or business, the old song is right: “Breaking up is hard to do.” Sure, you go into the company with starry eyes and big dreams, but you also must be a realist and know that things could go south quickly and unexpectedly — and splitting up can get ugly fast.

The best way to ensure a smooth transition when the time comes is to devise an exit strategy that will minimize the potential for conflict. A well-designed buy-sell agreement can act as

your road map for how the business's owners will act and respond in the case of certain triggering events. Think of it as a prenuptial agreement but in the business world, and keep your focus on the goal of making the breakup go as smoothly as possible.

Although a buy-sell agreement makes it sound like someone is buying and selling a business, what it really does is sets out the circumstances under which the business's owners can sell their interests, who can purchase them, and the value of the interest. Let's take each of those aspects separately and delve deeper.

Triggering Event

When a business owner can sell his or her interest is generally called the "triggering event." Just as its name implies, the triggering event is what sets the buy-sell agreement in motion, and it generally occurs with the death, illness, disability, retirement, divorce, or bankruptcy or insolvency of an owner (partner or shareholder). Alternatively, an owner just may simply want out of the business for personal reasons, or you may want to terminate the employment of one of the business's owners within the company. A buy-sell agreement can cover any, some, or all of these events, depending on the preferences of the company's owners.

Who Can Purchase the Interest

One of the best parts about being involved in a closely held company is that its owners get to decide who their co-owners are – usually other stockholders. A solid buy-sell agreement maintains this owner freedom by specifying who may purchase an outgoing owner's interest in the business. For instance, the owners may agree that their spouses or children will always have first dibs on their ownership interests.

Valuation

The importance of placing a value on the ownership interest while in calm, non-volatile times cannot be overstated. When a triggering event occurs, emotions can run high, and depending upon the circumstances, so can animosities and other unflattering and unproductive feelings. In other words, this is not the time you want to be haggling over the price of an owner's interest in the business. Leaving the price open until that point could result in different owners wanting to use different valuation formulas or disagreement on selecting a professional appraiser.

Accordingly, to avoid problems regarding valuation, the best course of action is to have it determined before any kind of triggering event and while everyone is still working collaboratively toward common goals. This value then gets memorialized in the buy-sell agreement, and once it must go into effect, owners don't have a lot of room to complain about it. However, since the value of a business will change annually, so should the value be updated annually. If such value has not been updated for 18 (or 24) months prior to the

Triggering Event and is not covered by a formula which automatically updates the value, then the value should be obtained by an appraisal of the business by an appraiser qualified to handle such job.

Just as with a prenuptial agreement, a buy-sell agreement is tailored to fit your individual needs. Just like no two marriages are alike, your buy-sell agreement should not simply have boilerplate language either. While you may be able to find templates online, a buy-sell agreement should reflect the specific needs and circumstances of an individual business to avoid the risk of facing legal challenges later.

The main goal, after all, is always to put in place an agreement among business partners as to what the end of a relationship will look like and leave as little room as possible for conflict, especially in terms of litigation, the costs of which could hamper, or even destroy, what's left of your business. Besides, at the end of a relationship — business or personal — no one needs added stress, and that's exactly what a properly drafted buy-sell agreement can help eliminate.

Check out our next article in our business series explaining how ownership interests can be transferred if one or more of the owners can no longer or do not want to continue in the business.

If you have questions about your company's succession, please contact a member of our Estate and Business Succession Planning team.

Other articles in this series:

- An Educational Business Series for Success: Why Buy-Sell Agreements are Necessary Even if You Don't Plan to Sell Your Company Soon

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JOSEPH GUMINA, GRANT KILLORAN, AND ERICA REIB PUBLISHED IN THE WISCONSIN LAWYER

An article by Attorneys Joseph Gumina, Grant Killoran, and Erica Reib entitled "COVID-19 Vaccination Mandates: What Now?" is featured in the March edition of the State Bar of Wisconsin publication *Wisconsin Lawyer*. In their article they detail the challenges mandates create and the current legal status of workplace vaccination requirements.

Read the full article here.

TREVOR LIPPMAN LEADS EFFORT TO SECURE $5.4 MILLION SETTLEMENT IN WILL FRAUD CASE

Attorney Trevor C. Lippman, a member of the firm's Inheritance Litigation Team, recently resolved a two-year dispute representing the siblings of a deceased physician involving allegations that the opposing party conspired with an attorney and two witnesses to create a fraudulent will after the death of their brother.

In what can only be described as a tragic, yet fascinating case, the partner of a deceased physician had his purported estate planning attorney (no longer licensed) produce a copy of a will to the decedent's siblings approximately one week following their brother's death. Under the older will, the siblings received the entire multimillion-dollar estate. Under the new will, the siblings would receive $100,000.

Attorney Lippman fought to allow for a full investigation surrounding the purported new will over the objections of the decedent's partner, who sought, with the purported drafting attorney and two witnesses, to rush this matter to resolution.

What began as an investigation into possible allegations of undue influence and lack of capacity quickly turned into an investigation into the authenticity of the new will and the attorney, witnesses, and partner's involvement in the possible fraudulent creation of that will after the decedent's death. The investigation involved the review of thousands of documents, telephone records, text messages, and an ink testing analysis to test how old the ink was on notes the drafting attorney purportedly drafted in 2017.

Shortly before a scheduled five-day trial before the Milwaukee County Circuit Court, Attorney Lippman successfully negotiated a mediated resolution which resulted in the admission of the older will that had identified the siblings as the sole beneficiaries and the siblings' retention of approximately 88 percent of the estate, or $5.4 million.

The Inheritance Litigation Team is fortunate to work with incredible clients who have questions or concerns about a loved one's estate plan when there are legitimate questions surrounding that estate plan, whether it be through a will, trust, or payable-on-death transfer.

Upon the completion of this mediation, O'Neil Cannon was humbled when its clients, unprompted, shared their thoughts about their experience with Attorney Lippman and the Inheritance Litigation team. Here is what they wrote:

"Professional Integrity and a Very Successful Outcome – Our Experience with O'Neil Cannon.

After our brother died unexpectedly at the age of 60, we had serious concerns about the copy of the will that was produced that did not comport with our understanding of our brother's estate plans. There were also several oddities with trying to obtain the will itself and with the dynamics of the relationship our brother had with the purported beneficiary under the new will.

As this was the first time we had ever been involved in a legal action, we needed a lot of support and explanation from our attorneys. Their communication skills are second to none and they answered all our questions quickly and guided us through all the issues as they developed. Trevor began the investigation and through many twists, turns and complications was able to discover that our concerns were justified. We cannot say enough about Trevor. He is smart and hardworking, he digs deep into the facts, pulling layer after layer together to tell the true story. He kept us informed of his progress and gave us excellent advice. He is stellar in the courtroom. We cannot recommend him highly enough and we are so proud to have been represented by Trevor. The rest of the team at O'Neil Cannon played an important role to support this lengthy, complex endeavor."

Trevor C. Lippman is an experienced attorney at the law firm of O'Neil Cannon Trevor assists clients with all matters related to inheritance disputes, including questions surrounding the creation and administration of trusts and wills. Trevor has assisted hundreds of clients navigate the difficult waters involved in elderly financial abuse allegations and inheritance litigation. Trevor prides himself on protecting the rightful legacies of those who have passed on and seeks to understand each client's unique concerns. To schedule an initial consult with Attorney Lippman, call 414.276.5000 or email Trevor directly at trevor.lippman@wilaw.com.