Estate Planning
Practical Solutions to Common Issues

I have a family business but only one of my children is active in the business. How can we handle that?

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1. Introduction.

a. Many clients own family business interests and planning for those interests is critical to lifetime and estate planning. The plans developed need to be multi-faceted to address the myriad of technical issues that might be involved, and the complexity of the family dynamic as well. This is a component of planning that requires creativity, a collaborative team approach, and often the need to guide the clients as to issues, or considerations

that may be difficult to address. This paper will endeavor to highlight some of the many situations, but cannot possibly cover most of the issues involved in this complex area. The goal will be to provide practical insights that will hopefully help practitioners tackling these engagements.

b. Just to simplify the discussions below, we will assume a nuclear family with the father/parent and founder/owner/control person of the business, child/son in the business and the assumed successor, spouse/mother not involved in the business, and at least one other child not involved in the business.

2. Initial Considerations.

a. This type of planning involves many different facets and considerations, including:

i. Structure of entity. What type of entity is involved? How might that evolve to facilitate the desired planning? In many cases the type of entity and other legal relationships will be whatever was done long ago when the company may have been smaller and the dynamics less complicated.

ii. Income tax planning for the entity now, during the transition, and after the transition. This should planning for the entity, planning for the founder, and planning for the children both in, and outside the business.

iii. Asset protection planning. This vital topic has not always been addressed by families and should be considered in the planning and transition process, e.g., transferring business interests only to trusts and not to children.

iv. Estate tax planning. This should clearly be contemplated for those that it affects or may effect. For large estates, this may be a key driver to all decisions. For smaller estates it may be irrelevant. This is but one example if the dramatic differences in how succession planning must be tailored for each unique client.

v. Estate non-tax planning. Many practitioners may dismiss estate planning for clients sufficiently below the exemption amounts (which should really be the 2026 reduced exemption amounts). That could be a mistake. Even if estate taxes are not relevant to the client estate planning may be very relevant. Even ignoring estate tax considerations, how business interests are transferred, to what receptacle/recipient they are transferred, how estate planning documents are drafted, etc. can be vital to even smaller estates.

vi. The structure and approach to achieve a transition. There are many approaches, options and techniques to transition a business. These range from very simple steps, e.g., founder just gifts or bequeaths equity of the business to the child in the business, to very complex note sale transactions, partnership freezes and other techniques. But whatever approach is ultimately selected, there are likely many ancillary considerations that effect each client differently, and several legal documents that have to be planned, drafted signed and implemented.

vii. The structure and approach to equalize (or not) the child/children not involved in the business.

viii. The structure, approach and arrangements to finance the purchase/transfer of the business. Apart from the legal structure, how, if at all, will the transition be financed? If it is simply a gift or bequest there might be no need to finance the

transition at all. If it is a complex estate plan a note from a trust might be used to finance the transition. Life insurance might be involved. The business itself may generate the cash flow to fund the transition plan. Outside bank financing or a third party purchaser might be involved.

ix. General financial planning. This is foundational to many plans. Unless the founder has no need for any cash flow from the business to be transferred, financial modeling may be critical to assure the founder, and the spouse of the founder, adequate financial resources. For smaller clients the financial forecasting may be the key driver to the planning. For wealthier clients it may not be. But not making this determination could result in the plan being formulated on secondary goals. Regardless of the founder's need for any access to business cash flow, there may still be a need to forecast how children outside the business may be equalized etc. It can also be advisable to forecast business cash flows if the business is going to fund any or most of the transition costs (e.g., paying the founder a private annuity).

x. Insurance planning. This can also be critical to the planning. For example, if the founder and founder's spouse create non-reciprocal SLATs to which the business will be gifted and/or sold to set up the transition (e.g., the child in the business may be named investment trustee) the premature death of one spouse may leave the other spouse with inadequate resources. Life insurance may fill that gap. But insurance considerations should be much broader. When was insurance coverage of the business last reviewed? Is it adequate? What of long term care or disability insurance for the owner? The insurance considerations will vary dramatically from client to client but not addressing insurance coverage in a comprehensive manner could leave dangerous gaps in a plan. Insurance may even be the focus of the plan, e.g., an insurance funded buyout.

xi. Retirement planning. For some very wealthy clients this is not a concern as to the transition plan. For others, it is essential. This is why forecasting was recommended above. Practitioners should be certain that the forecasts are reasonable for the founder as part of the transition planning.

xii. Corporate/business law planning. What do the current legal documents contain? For some businesses, there may be few if any formal legal documents as the business may have grown dramatically since its founding and not kept documentation current and appropriate for the growing business. In some cases relationships with key employees, vendors, etc. may be handshake agreements that have sufficed for decades. That may not be appropriate, safe or what the child assuming the mantle of management will accept.

xiii. And much more.

b. This type of planning is very nuanced and must be tailored to each family's unique goals, needs, circumstances, etc. This is a point repeated throughout the outline. Too often clients seek a standard legal document, e.g., a simple buy sell agreement, and don't understand the critical importance of looking at the myriad of personal, legal, tax, asset protection, financial and other issues that may be important to achieving their goals. Similarly, some practitioners have a few approaches or documents they use in succession

planning that they try to squeeze clients into. That too can be quite dangerous to the client, the founder, the child and the family not in the business.

3. ## Key Questions.

   a. ### What are the personal goals and objectives for the business succession?

      i. Do the parents wish to preserve family harmony? How important is that? What issues do they anticipate? What issues might the clients not have anticipated?
      ii. Is there a desire to create a formula that the client can use to update a buyout certificate each year as the value of the business evolves?
      iii. Is instead of a buyout an estate plan to minimize potential estate taxes a significant or primary goal?

   b. ### Is the parent's assessment of the abilities and interests of the child in the business and the child/children not in the business really objective?

      i. In many cases very bright and inciteful parents/transferors may just not see the realities that are beneath the surface. For example, the child who is the intended successor may really prefer to be a schoolteacher than the president of a family widget manufacturing company. Another common issue is whether the child designated as successor to the business really has the skills to run the business.
      ii. Input from long time advisers such as the family CPA, business CPA, business attorney, perhaps even long time vendors or customers who have grown to have a personal relationship with the family might be tapped. An independent business consultant could be hired to review the succession and make recommendations. In some instances an independent appraiser might have insights to offer.
      iii. If the designated heir can run the business but perhaps not fully or as well as desired other options might be considered. For example, a profit sharing/bonus arrangement might be entered into with key employees that retains their services well into the future to assist the child/successor.
      iv. Another consideration or approach might be to create a Board of Directors (the same concept can be grafted onto an LLC structure) that has the child, perhaps an independent adviser, and key employee, or others jointly make certain key decisions.
      v. This same concept can also be grafted onto a trust structure by mimicking the Board of Directors concept with a board of Investment Advisors.

   c. ### Should children in the business and not in the business be "equalized"?

      i. Many clients start the discussion of succession with equalizing the children in the business and those not in the business. But first, what is "equal"?
      ii. How much contribution has been made by the child in the business? This can vary across a broad spectrum. Consider:
         1. What if the child always wanted to be a teacher and took on the role of running the family business because of family pressure or guilt?
         2. What if the child has worked in the business for years with no equity and in fact a salary that is less than what an outsider would be paid. The child has made a tremendous contribution to the business and helped it grow. What of this pre-transaction contribution?

3. In contrast the child may reluctantly be in the business and is basically coasting on the founder's "coat tails" and makes modest effort and may not even really earn the salary being given.
4. There is a myriad of contribution levels in between.

iii. Consider what happens after the transition or death of the founder. Will the child continue the business as assumed? Is there anything in the legal documents and structure planned so that the child is motivated or constrained from liquidating the business?

d. Should children not in the business be given interests in the business?

i. For many clients this can be a very delicate consideration. It often requires more nuanced thought than many clients realize.

ii. This is sometimes not done and would seem worrisome in that the decisions of those in the business versus those not in the business may be at odds.

iii. When this is done, it may be preceded by a conversion of voting to non-voting interests.

iv. Another option is to gift or bequeath interests to a directed trust and perhaps the child in the business (or a board which may include the child) is designated as the, or one of the investment advisers for the trust. This may be the safest way to let all children benefit from the economic value of the business (e.g., the value founder created before the transfers).

e. Should interests be given to, or favored for, the child in the business?

i. How can this be determined?

ii. For example, founder gifts interests in the business solely to the child in the business believing that will help motivate or enable that child to run the business. That may be confusing control and equity (labor and capital).

iii. A child operating a business could be named manager of the business and be provided a salary (perhaps a salary determined by a reasonable compensation analysis or formula based on industry benchmarks, etc.). That salary could even be pegged at a percentage of the benchmark or formula, e.g. 150% of the determined salary to provide greater reward to the child. But the equity in the business still could be held in trust for all descendants.

iv. If one child is given the lion's share of the business how will other children react? What if a descendent of another child wants to enter the business in the future? What if the child given control of the business liquidates the business?

v. If the child is given control of the business while the founder is alive, what if the child turns against the founder/parent and fires them from the business? This, and worse, has occurred. All these contingencies must be considered in the planning. Frequently clients dismiss this and other "what if" questions believing adamantly that everyone in the family will behave nicely. The statistics on the survival of family businesses belie that assumption.

f. What if the child in the business harms the business?

i. Not every child has the ability to manage the business. In many cases even if the child can manage the business the child may not have the enterprising spirit that

the founder had. All of this should be considered in planning the succession and forecasting business results into the future.

ii. If the child is capable, but not as capable as the founder, projecting cash flows from the business into the future may have to contemplate the loss of the founder, the child/successor's real abilities, etc. Otherwise the contemplated purchase of the founder's interests may not have the correct pricing and the agreed price might not be able to be paid.

g. What if the business itself fails due to no fault of the child in the business?

i. Regardless of the child's capabilities external circumstances may have a dramatic and potentially negative impact on the business.

ii. Example: The business manufactures widgets. Ten years from now, China enters the widget business in a big way, underpricing that for which the US based business can sell units. The business volume and profitability crash.

iii. While future events are difficult, perhaps impossible, to predict, what might be done? If the transition is to be paid for by a note, should the note have an adjustment clause? Might the price be reduced and a participation in business gross revenue as the payout, be structured instead? That might net more to the parent (which might be undesirable if the founder's estate is taxable), but it may also provide more "breathing room" to the child/successor as some of the purchase price will be contingent on future earnings.

iv. Again, a key point is consideration should be given to the ancillary consequences of any plan to avoid great harm to the family.

h. Is the business ready to be transitioned to the next generation?

i. There may be internal circumstances within the business that could hamper the child's ability to be successful. Many founders may have relied on "handshake" agreements and relationships built over years as the business grew. Such arrangements depend upon earning trust through positive past performance. A new owner of a business will not likely be able to jump into these relationships quickly.

ii. In order to get ready for succession, the business should secure key relationships with written and enforceable contracts. The founder should facilitate meetings between his successor and important vendors, customers and employees so that the successor can develop those relationships. Successful transitions occur over time and require significant investments of time by the founder, the successor and key employees.

iii. The business may need to put together formalized standard operating procedures to clarify how essential functions are accomplished within the organization.

iv. For transitions that occur over time, perhaps the business should invest in audited or unaudited financial statements to quantify the contributions of the successor and identify areas for improvement.

v. The business may need to hire a general manager to operate the business until the child is able to take over.

i. Should the child in the business purchase the interests of the business from the estate or others?
    i. The child/successor could simply purchase the business from the estate at appraised value. While that sounds simple, is it realistic?
    ii. How will the value be determined? Consider the myriad of variables that can arise in a determination of value for a non-marketable closely held business asset? This could be ripe for disputes amongst heirs.
    iii. What cap rate should be used?
    iv. Consider that if the price is determined after the death of the founder, the founder will not guide the decision.
    v. Some think having two appraisals, and if they cannot agree on price, a third appraisal assures quick resolution. Those appraisal battles can be costly, time consuming and problematic.
    vi. Instead, consider appraising the business now and creating a formula to update a contractual buyout arrangement each year. That way there is less uncertainty for the family to fight over in the future.

j. Should outright gifts ever be made of business interests?
    i. Most estate planners always caution against outright transfers and recommend trust transfers to protect the business interests.
    ii. If the context of the family business if the patriarch's desire is to pass the business on for many generations if feasible, long term trusts should be used as the receptacles for transfers. Otherwise, what if the issue of the child not in the business are interested in entering the business, while the issue of the child presently involved in the business do not wish to do so? If outright gifts are made, the cousins not in the business would own it and those wanting to run it would not. That could destroy any possibility of passing the business to the third generation.
    iii. Some still use annual gifts to make gifts, but given the large historic exemption amounts that may be tedious, costly and unnecessary.

k. The potential for changes disrupting the planning needs to be evaluated and can greatly complicate the planning process.
    i. What if external sources result in a substantial increase in the value of the business at different points in time?
    ii. What if external sources result in a substantial decrease in the value of the business at different points in time?
    iii. What if the order of death is different than anticipated? Example: Business owner/spouse dies after other spouse.
    iv. What if an unanticipated or early disability occurs of the parent/transferor?
    v. What if an unanticipated or early death or disability occurs of the child/transferee?

l. What if something happens to the child/successor?
    i. It may not be anticipated as more than a remote risk when a child who is healthy and young (especially as compared to the founder), the prospect of the

child/successor predeceasing the founder, or becoming disabled, practitioners should consider what should occur if something happens to that child: disability, death, ceases working in the business.

ii. What if the child simply quits work? What happens to the business? Might there be a requirement to give six months or other specified notice so the business can be transitioned?

iii. If the child dies or becomes disabled does the founder wish to buy back the business? Sell the business to a third party?

iv. Are key employees able to bridge these challenges?

v. An important point is that these less obvious issues should be considered as unplanned consequences that could be devastating financially to the family and destructive of the business.

4. Options to Structure Arrangement.

a. Introduction.

i. Clients owning interests in a closely held family business need to address an exit strategy. In many cases, the clients wish to have a child who is in the business take over the operation of the business at some point, or when the founder retires, dies or is incapacitated.

ii. This can raise a myriad of income tax, estate tax, estate planning (apart from estate taxes), corporate/business, and family issues. Is the designated successor capable of handling the business? How should ownership of the entity be handled/transferred and is that to be addressed in the same manner as the control of the entity?

iii. Following is a listing and brief description of several of the many ways these transfers can be structured.

b. Non-voting interests.

i. Would succession be as simple as making the founder's shares non-voting on death and having those shares pass to trusts for the surviving spouse and on his or her death to trusts for the children equally? This could also be done by recapitalizing the entity into voting and non-voting interests and gifting or selling (depending on estate planning goals and the founder's financial needs) the voting interests to the child in the business.

ii. The concept of this approach to planning is to enable all children to share equally in business profits, but assure that those not in the business cannot interfere with the child running the business.

iii. The simplistic approach outlined above, however, is likely not sufficient to protect the interests of all involved. As but one example, without more protections the child in the business could increase her salary and thereby unduly reduce funds available for distribution to all owners.

c. Bifurcating the operating business from passive property ownership

i. Where the business is operated in a space that is owned by the founder, perhaps the operations might be separated out from the real estate. If the real estate is not owned in a separate entity, it would likely be advantageous to consult with

tax advisors to evaluate whether the property might be spun off into its own limited liability company or other entity.

ii. The operating business should likely have a written lease agreement with arms-length terms with the entity that owns the property in which the business operates. Rental amounts should be paid timely, properly recorded in the books of both entities and reported as required on timely filed income tax returns.

d. Death buy out by child in the business.

i. An agreement could be planned so that the child in the business must buy founder's shares based on appraised value with terms, e.g. 10% down and the balance with a self-amortizing note over a term of years that makes the payments reasonable for the rest of the family and palatable to the child in the business, and with consideration to business cash flow. This might be documented in a buy sell agreement for the entity or might even be contained in the founder's will/revocable trust.

ii. For example, if a mandated buyout is provided for, the valuation formula should consider the economic impact of the death of the founder on the business valuation. If an appraiser is hired currently to quantify the value and potential impact of the founder's passing that same analysis may inform how to price and structure a disability or retirement buyout. If this is deferred until death the founder of the business will not be present to guide the discussions or decisions. That could increase the risk of conflict amongst surviving family members. Consider obtaining now:

1. Value of the business.
2. Value of the business without founder's involvement (e.g., death).
3. Terms for a buyout that would not unduly financially stress the child in the business, or the business viability itself, after founder ceases involvement for any reason (retires, disabled, dies).
4. A formula that could be used to adjust and calculate buyout values in the future.

e. Redemption Insurance funded buyout on death.

i. Life insurance is commonly used to transition a closely held business. Be cautious that the planning considers all forms of the founder's cessation, not merely death, e.g., disability, slowing down, full retirement.

ii. The business could buy and pay for life insurance on the founder and on death receive proceeds used to purchase founder's interests in the business. That could be structured to then leave the child in the business as the sole owner. If the business redeems the founder's shares then the remaining family members would benefit from that cash without entanglement with the child running the business.

iii. Be cautions as the recent Connelly case held that the value of the insurance death benefit had to be included in the value of the business as reported by the founder's estate.

f. Cross-Purchase Insurance funded buyout on death.

i. The child in the business could buy and pay for life insurance on the founder's life and on death receive proceeds used to purchase founder's interests in the business under a cross-purchase arrangement. That could be structured to then leave the child in the business as the sole owner.
ii. The son will have to have the cash flow to pay for the insurance.
iii. Will this be a symmetrical arrangement with the founder buying the shares of the child if the child predeceases? In the alternative, if the child predeceases the founder, a buyout agreement may merely mandate a sale of all business interests and a division of proceeds based on ownership interests each of the parent and child had at that point in time.

g. Disability insurance funded buyout.
    i. This is used infrequently because of the cost of disability buyout insurance, but it may be an option to consider. Even if not feasible, pricing the coverage may be informative to other decisions the client might make.
    ii. The child in the business or the business could purchase disability buyout insurance that pays off in the event the founder is disabled, and those proceeds could be required under the terms of a buyout agreement to be paid to founder and the founder (or his guardian, etc.) and the founder would be required to sell those shares to the child in the business.
    iii. In most situations an alternative arrangement for funding the buyout is needed as the insurance will be too costly. It could be arranged with a payment overtime supported by a note, etc.

h. Lifetime buy out by child in the business.
    i. An agreement could be structured so that the child in the business buys founder's shares while the founder is alive, and without waiting for death. That may be fairer to the child if the child is personally and actively growing the business as that will facilitate the value being purchased before the child increases the value further. The price might be based on appraised value with terms, e.g., 10% down and the balance with a self-amortizing note over a term of years that makes the payments reasonable for the rest of the family and palatable to the son and with consideration to business cash flow. This might even be structured in tranches so that if business or personal circumstances change the founder can adjust future sales. That might be done by having 10% of the founder's interests sold this year, and in each future year the terms of sale could be evaluated. If the founder determines that another child later wishes to enter the business there would still be equity to sell to that child as well.
    ii. A better approach might be to sell to a grantor trust, avoiding capital gains, and assuring that the equity is in a trust that might benefit any or all children as circumstances warrant.

i. Sale to Third Party.
    i. This might be an option, but it if occurs, the timing and trigger events should be considered.
    ii. Should parameters be provided in the governing documents? For example, a sale must be at a fair arm's length price, no sweetheart compensation, etc. must be

sold within 3-6 months and the child must operate it fully until then. Is this even contemplated? Might this only be an option if something happens to the child in the business? If something happens to both the founder and the child designated successor the only option might be to sell the business.

iii. At some stage the founder may not have the interest or the ability to run or sell the business. A comprehensive succession plan should consider that. It may be as simple as naming, for example, someone as a successor manager of the LLC operating the business if neither the founder or child can serve and empowering that person to operate the business pending sale. The directive given may be for that person to immediately list the business for sale and operate it only until that is accomplished, with a stated goal of selling the business as quickly as possible. The odds of this may be remote but too often in 40 years of practice the unlikely scenarios do occur, and this and others are relatively simple and inexpensive to address in a comprehensive buy sell plan.

j. Sale to Successor or Trust for Private Annuity.

i. While sales for a private annuity have traditionally been used as part of estate planning to reduce the value of the estate, it is a technique that can assure a founder cash flow for life when transitioning the business.

5. Documentation That Might be Used.

a. Document coordination.

i. Whatever the succession goals and whatever plan is adopted coordination of all relevant documents is critical to the success of the plan.

ii. Example: If the founder is incapacitated will a buyout be triggered? What will be provided for in the governing documents (operating agreement, etc.) for the entity as to disability? Should anything be addressed in the founder's durable power of attorney or revocable trust? What of the use of a salary continuation agreement? Coordinate and be certain that the estate planning documents address what might be beneficial to the plan. If there is a disability the agent under the founder's durable power of attorney may act on his behalf. If the client has a revocable trust and the business equity was transferred to the trust (or the agent under the durable power does that), then the successor trustee may be the person the child in the business will deal with. These people might be different. What is coordinated between these documents and the entity documents such as the operating agreement? If there is a governing document for the business entity might the agent or successor trustee vote those interests to change the deal?

b. Family Element of Documentation.

i. Family buyout arrangements are different and must consider the personal lens that agreements for unrelated parties may not address.

ii. An example of the above is defining what is fair market value? Once you have the business appraised, you might wish to specify certain factors that if there is ever a future appraisal be considered so that the value is reasonable for all parties. For example, you might want to set a discount on the founder's interests, or

alternatively provide to protect the founder's surviving spouse that a discount be limited, e.g., to 20%, or that no discount be applied. These types of considerations require an appraisal report to identify. This could be important to reduce the risk of disputes and protect all parties.

iii. Obtain an appraisal today and have the appraiser create a formula to evaluate future valuations/buyouts so that the buyout agreement and have a self-adjusting mechanism.

iv. Discuss with the client the importance of having communication with all the children, both those in the business and not to be in the business, as to the broad picture of the plan to get buy in.

c. Buy-sell agreement.

i. A buy-sell agreement could be used to contractually obligate the child/successor to buy the business. But to be complete this should address disability, retirement, slowing down at work, and death for both the founder and the child/successor.

d. Operating (Partnership/Shareholders') agreement.

i. The operating agreement may include the buy sell (or it may be a separate agreement).

ii. Consider whether it should include restrictions on family involvement to address children not in the business and assure they cannot enter the business. Is that really desired?

iii. Disability buyout, salary continuation, perquisites, etc. should be addressed.

iv. Retirement. This should be considered.

v. Other. Every family situation is different, what else might need to be considered?

vi. The operating agreement might incorporate an agreement about salaries, expenses, etc. so that there would be some parameters on what the child successor to the business could pay himself and take by way of perquisites. That might be necessary or essential if a non-voting/voting structure is used in which founder's shares pass as non-voting interests (perhaps becoming non-voting on death) to trusts for the surviving parent and other children. Absent some parameters there may be no way to prevent adverse harm to the economic interests of the other family members. For example, what if the son tripled his salary thereby diminishing profits that would otherwise be available for distribution to other family members (or trusts for their benefit)?

e. Employment agreement.

i. Should an employment agreement be entered into with the child/successor? Should it include parameters for contribution to the business?

ii. What about employment agreements for key employees to enhance the likelihood of their being engaged for the transition and beyond? Perhaps that could be coupled with a "sweetener" to entice them to stay, e.g., a bonus based on gross revenues in year 3 after death or retirement of the founder.

f. Compensation continuation agreement.

i. If the founder may need financial contribution from the business in the event of disability consider a deferred compensation arrangement. Many founders don't realize that salary and perquisites end in the event of disability.

ii. Consider the founder's spouse. Should an agreement be created to provide for salary and perhaps even certain perquisites in the event of the death or disability of the founder?

iii. Does this raise Sec. 2036 estate inclusion issues if done after the business is transitioned?

g. Trust.

i. As a general matter, transfers of equity interests should be in trust not outright.

ii. If the value is large a sale to a grantor trust might be necessary to shift the business without triggering income tax.

iii. Trusts can protect heirs from divorce and suit risks and keep the business outside the transfer tax system.

iv. Having a trust own interests can provide valuable flexibility to pivot if the anticipated heir does not continue, or if others at the current or in a future generation, wish to enter the business.

h. Durable power of attorney.

i. If equity interests are owned by the founder, if the founder is incapacitated who can vote those equity interests? Consideration should be given to what is included in the founder's durable power of attorney and revocable trust if that is used.

ii. Also, consider and coordinate this with provisions in the entity governing documents.

i. Will/Revocable trust.

i. If equity interests are owned by the founder, on death those equity interests will pass to the client's estate/revocable trust. Post death who can vote those equity interests? Consideration should be given to what is included in the founder's will (and revocable trust if that is used). Should a special executor for business interests be named?

ii. Also, consider and coordinate this with provisions in the entity governing documents.

6. Ancillary Considerations.

a. Counsel.

i. Who can the attorney represent in this type of planning?

ii. Considerations.

1. From a tax perspective, certain types of transfers might appear more arm's length, e.g., a note sale to a grantor trust of a business interest, if the seller/founder and the trust are represented by independent counsel (in larger transactions a third attorney might be used as escrow agent to hold title documents if there is a valuation adjustment mechanism).
2. From a legal ethics perspective, some attorneys may be concerned about the potential or actual conflicts of interest that may exist and may wish to evaluate whether those can be waived if there is a concern, and if not the attorney may insist on their being separate counsel for one or more of the parties involved.

3. From a personal perspective, especially if a child/heir active in the business is buying some or all of the business, it may be psychologically advantageous for them to have their own counsel and be an independent party to the transaction.

iii. If there is, for example, founder as owner/founder, child in the business, and the business. Counsel might represent the business, or perhaps one owner/potential owner, or perhaps both the business and one owner/potential owner.

iv. If the attorney endeavors to represent the parent/founder and the child/buyer or successor to the business there is a clear conflict of interests between the two and that will need to be addressed in the representation.

v. If the business will be transferred to an irrevocable trust as part of an estate tax plan perhaps the business and the founder/transferor might be represented by someone different then the attorney who represents the trust.

b. Minimizing Family Conflict.

i. What are the family dynamics? What can be done to minimize potential issues and conflicts?

ii. How does each family member view the arrangement? Have the parents discussed the plans with all of the children including those not in the business?

iii. What might go wrong with the plan that is being considered in terms of creating or exacerbating family conflict? What can be done to minimize those issues?

c. Financial planning and forecasts.

i. If a parent is going to transition a business to a child in the business and wants to consider "equalizing" (whatever that might mean) the children outside the business a financial model showing the client/parent what different scenarios might present could be essential to:

1. Assure that the parents have adequate resources for their needs under various scenarios.
2. Determine how much if anything the parents might need from the transfer of the business (e.g., sale of the business whether to the child or a trust, etc.), or post-transfer of the business (e.g., salary, license payments, rental payments, etc.) to assure their financial solvency.
3. Financial security might help inform how much is bequeathed to the child in the business versus the other children, how much insurance is affordable, how much insurance might be advisable for liquidity purposes, etc.
4. For example, if the parents financial forecasts indicate that they are on solid financial footing with a high likelihood of achieving and maintaining financial independence to an advanced age like 95 or higher, perhaps if the business is going to be sold to the child involved in the business, it may be sold at an amount less than the appraised value to make the financial impact on the child less challenging. That type of decision cannot be effectively made without a valuation now, and may not be possible to be addressed after the parent's death or disability. If this approach is

used the client should be aware that the reduction in price on the sale would constitute a gift.

ii. Financial modeling may be useful for both the child in the business and the children outside the business to confirm that the plan is viable for them as well.

1. If the value of the business is artificially suppressed to make it easier on the child taking over the business, what might that do to the financial security of the children outside the business?
2. If a child is to buy the business will that be viable under various possible scenarios of the child's personal financial situation and with various permutations of possible business performance?

iii. To reasonably address forecasting, a realistic budget is necessary. Even if downplayed the reality is that many closely held businesses absorb expenses for the principal and or other family members that may be involved in the business, which need to be considered. For example, if the parents personal expenses are paid for by the business, if the founder stops working or dies, which of those expenses will the successor owner/child be willing to continue? If those costs are not factored into a reasonable budget, will the parents post-retirement or disability, or post-death of the active parent, be comfortable financially?

iv. To reasonably address forecasting it must be honestly and openly discussed what personal expenses of family members who are not in the business the closely held businesses covers. Are those to be continued? What of the tax risk? Perhaps parent was comfortable having children not involved in the business on payroll, health insurance, using company owned cars, etc. Will the child be willing to continue those transactions? Might the child/new owner's new CPA frown on actions that the parent's long time CPA ignored? How might this all affect the planning?

d. Insurance Needs Analysis/Planning.

i. All types of insurance coverage should be evaluated for use in the buy sell and for other purposes.

1. Even if the client opts not to purchase insurance, it may be helpful to quantify the cost of using insurance to fund various buy sell or succession options.
2. If there is a child in the business and children outside the business perhaps life insurance could be used to fund a bequest to the children not in the business. That way, regardless of how aggressive the valuation is of the business being transmitted to the child active in the business, it may be less unfair to the children not in the business.
3. Using insurance can avoid entanglements between the child in the business and those children not in the business.
4. Would key person and/or buyout life insurance make sense for the business?
5. What about the use of disability buy out insurance?

ii. Whether or not the child in the business might purchase life or other insurance relative to the business buyout the client should have an insurance consultant

suggest planning and pricing so that the client can make an informed decision if that is an option worth considering. Even if the parent/seller/founder is leading these discussions, the child buyer should be involved in and informed of the results of various insurance options so that they are comfortable with the process.

iii. A point that should be considered is the potential impact of the founder of the business ceasing work (whether due to death, disability, retirement, etc.) on the business cash flow.
    1. Insurance could change the calculus of that issue.
    2. Whether or not the founder expects any negative impact on the business and on the business cash flow to finance a purchase price (with or without a note) should be evaluated.
    3. This could be an express question posed to a business consultant or the appraisal firm to confirm an objective view of this.
    4. That independent analysis may provide insight into how to structure the buyout arrangements, and the need for or uses of insurance, in the event of death, disability or even retirement of the founder/parent.

e. Intellectual property documentation.
    i. Too many closely held businesses, and often professional practices, have not taken appropriate steps to protect trade names, logos and other intellectual property rights.
    ii. It might be necessary to have intellectual property counsel to trademark and copyright appropriate items relating to the business.
    iii. Who owns these rights? Does the business own them? Are they perhaps still owned by the founding family member personally?
    iv. How should the deal be structured? Sometimes there can be advantages to finding that IP rights are owned outside the entity.
    v. Example: Son had created a logo used by the business. Title was never transferred to business. Son trademarked the logo and licensed its use to the business. When the business was valued it did not include valuable IP rights which the son owned. That helped the estate plan.
    vi. Example: If the business is owned in a C or S corporation it may be advantages to find out that valuable IP rights are owned individually outside the entity.