

Wealth & Power

Family Succession and Family Governance

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Zurich 2 May 2019

Theories

- The transfer of wealth at death (succession) often creates family dissension
“Parents in Heaven, Children in Court”—a Chinese saying

Proposal: This dissension can be prevented (or lessened) by good family governance

- Ideally the family would see the wealth transfers as “transparent”
“accountable” and “participatory”
- The same applies to the transfer of power

Overview

- Various legal regimes exist for the disposition of property at death
 - Common law-testamentary freedom (with limits)
 - Civil law—state determined shares (with some freedom)
 - Religious law: Sharia (Sunni), Hindu (undivided property) and Navajo Nation
- Family Governance
 - Family decision-making Process
 - Family Constitutions
- Policy discussions

Disposition of Property at Death

- The state could reclaim it
- It could have been “co-owned” and pass to surviving owners
- The state could direct to whom the ownership would pass
- The state could allow the prior owner to direct the new ownership
- A combination of some or all of these alternatives?

Common Law: Testamentary Freedom

- United States
- England and Wales
- Canada
- Australia and New Zealand
- Former colonies of the British Empire (off-shore jurisdictions)
- Law is a changing collection of court decisions

The State has “back-up” rules of Heirship

- The intestacy rules of inheritance will apply if there is no will.
- These rules tend to focus on immediate family.
- The spouse is always favored in some form.
- Children and other close relatives come next in order.
- After no “close” family remains the property becomes owned by the state.

The Testator can Alter the Intestacy Shares

- With a valid will (testation) a testator is free to direct his or her property to pass to any person or any charity, in theory.
- However, directions that are “immoral” will not be enforced.
- Family Protection Acts may override the testator who was not “fair.”
- Spousal rights can be used to challenge the will.
- Co-owners’ rights pre-empt under property law.

Civil Law

- Inheritance shares and heirs are determined by state law.
- Law is a written organized “code” not a collection of court decisions.
- Napoleonic Code (1804) is the basis of most current civil codes.
- About 150 countries have a civil law system.
- Family members usually have “fixed” inheritance rights.
- The testator usually has a remaining share that he or she can direct by will.

Civil Law Variants

- Some apply the fixed shares on a lifetime basis: the testator may not make lifetime gifts that would reduce a child's fixed share.
- The fixed share might apply to assets themselves.
- Alternatively the fixed share might apply to an equivalent amount in money.
- Sometimes the fixed share applies only to the assets remaining at death.
- If all assets are included there might be a "claw-back" remedy to collect.

Religious (Personal) Inheritance Laws

- Sharia (Sunni) Law—inheritance shares for spouses and children are fixed (sons receive twice the share of daughters) with a “free” share (that often has restrictions) to leave by will.
- Hindu Law—with an “undivided” family a deceased member’s property continues as a part of the family’s undivided property.
- Navajo Nation—a tribal “peace maker” is appointed to sit with the family to agree on the next ownership.

Conflicts and Choices

- With an array of potential inheritance laws, conflicts and choices are increasingly common.
- Traditionally the law where homes and lands exist is the law of that land. (lex situs)
- Otherwise the law of the “residence” (“domicile”) of the decedent usually applies.
- An overlay of conflicting religious law adds challenges (new Sharia courts in London and elsewhere).

Policy Discussion

- Is the right to leave an inheritance part of the right of property ownership?
- Should inequality of wealth limit the right to build large fortunes?
- Is the possibility of accumulating private wealth an economic motivator?
- Should Family Protection Acts be more widespread?
- How should conflicting laws be resolved?

Can Family Governance Help with Inheritance Disputes?

- Family Governance refers to the way in which family decisions are made.
- Usually family governance deals with current issues:
 - How an investment strategy is formed and revised
 - Whether all education expenses are paid by a family fund
 - Rules for sharing vacation residences
 - How trustees are chosen and changed
 - Procedures for regular family meetings

Family Governance could Address Inheritance Plans

- The terms of a potential trust agreement could be reviewed—and revised-- by the family
- Plans for large lifetime gifts could be reviewed and revised by the family
- Plans to move assets to fit under a different legal system could be reviewed and revised by the family

Having a chance to see (transparency) and understand (accountability) and revise (participation) is likely to result in satisfaction with the plans

Inheritance Disputes

- Inheritance disputes arise from classic emotions:
 - Envy—with a belief that other siblings received better treatment
 - Surprise---that expectations were not met
 - Greed—a sense of entitlement to the wealth
 - Disappointment—a feeling of a lack of affection
 - Embarrassment—public humiliation from a small bequest
 - Resentment—that a later spouse or “friend” was given a generous amount

Family Governance

- Family Governance is Shared Decision-making.
- What are the topics that families make decisions about and/or have disputes about?
- Families know their tough issues—and they know their best solutions.
- Formal family governance creates a positive problem-solving environment for family solutions.

Family Governance Process

- First meet separately with each “key” member of the family (including too many is better than excluding anyone who wants to be included).
- Listen to whatever concerns they may have.
- Consolidate the feedback into a positive written report.
- List those topics that could use some attention.
- Use those topics as the running agenda for proper family meetings.

Family Meetings

- The importance of regular formal family meetings cannot be emphasized too much.

Professor John Ward: “It does not matter what they talk about. What makes them succeed is that they have regular family meetings.”

- Most families agree they need an outside facilitator, at least at the beginning.

Process at the Family Meeting

- The facilitator has sent out the Agenda.
- Often the facilitator will open by asking each person what they hope to achieve at this meeting or what is of most concern to them.
- At the first meeting the facilitator might call for rules of discussion, to be listed on a board. (interrupting, sarcasm, etc.)
- The Agenda items will be discussed, in order, with the facilitator ensuring that the discussions are participated in by everyone and are in a respectful manner.

A Successful Process is a Slow Process

- Everyone needs to be heard. Traditional “power” must be shared.
- The OECD in its corporate governance principles focuses on “transparency” and “accountability.”
- In a family setting I add a third: “participation.”
- The consensus building is great, but even more valuable is practicing the skill of positive, listening communication.
- Those who were labeled as uninterested usually become interested.

Follow-up

- Written minutes need to be sent out to record the decisions that were made.
- A date needs to be chosen for the next, and future meetings.
- Someone needs to confirm the next Agenda.
- The meeting location needs to be confirmed: a board room? A hotel meeting room? The family home?
- Allow a proxy for someone who cannot attend?

Common Elements in Family Governance

- Creating a Family Council
- The council would represent the larger family group
- Its members would be elected, often to give branch representation
- The function is similar to a board of directors
- General issues could be decided by the Council
- Larger issues would be referred to the larger family (like shareholders)

Examples of Inheritance Issues

- One patriarch had private plans to put substantial assets in a family trust.
→ He used a family meeting to explain and get the family views, resulting in improvements to the trust.
- One patriarch assumed the oldest son would take over the family head role.
→ In the family meeting discussion it was clear the other children did not agree, resulting in a redefinition of the role of the family head.

Additional examples

- One daughter, angry at not being included in the planning, withheld her necessary partnership vote out of spite, bring the business to a halt.
- A patriarch decided privately to leave his fortune to a charity: the children were shocked and embarrassed, and didn't know his reasoning.
- One daughter-in-law convinced her husband to sue his brothers because he was paid less than they were.
- One brother over-borrowed and his siblings had to pay his debts.

Including a Family Constitution

- Much of my work has been to help families create their own constitutions (or charters).
- The constitution would cover the decision-making rules.
- The preamble would contain the family's purpose in creating a governance process.
- The final provisions would be the method to resolve disputes and to make amendments

Constitution Contents Often Include

- Creating a Family Council
- Creating a Family Office
- Creating family committees to oversee:
 - Investment portfolios
 - Distribution plans and dividends
 - Philanthropic projects
 - Community role

The Value of a Family Constitution

- The value is not in the document.
- The value is in the process the family goes through to create the document!
- Succession planning can become just another issue—to be addressed and discussed with transparency, accountability and participation.

Acceptance of Wealth & Power Transfers

- With good family governance, the family members will have been given the relevant information (transparency) and asked questions (accountability) and made revisions (participation).
- Transfers of wealth and of power would not be challenged later, but would be accepted.
- Ideal result: Harmony in the Family