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Solving the “King Lear Problem”

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In Shakespeare’s play, King Lear, an aging ruler relinquished control to two of his three daughters. The succession failed miserably, destroying his family and destabilizing his kingdom. King Lear shows why few family businesses survive beyond three generations. Understanding Lear’s failure is crucial to avoiding Lear’s fate, whether the family business in question is a monarchy, a media empire, or a hardware store. The conventional wisdom is that Lear gave away his kingdom too soon and left himself vulnerable to predatory heirs. This has been referred to as the “King Lear Problem.”

The conventional wisdom is wrong. Lear’s succession plan failed because he waited too long. Like Lear, those who control family businesses are often reluctant to step aside. For example, until he was well into his nineties, Sumner Redstone declared that his succession plan was to never die. The predictable consequence was litigation that engulfed the companies he controlled, including CBS and Viacom. Yet, despite its importance, the question of family-business succession has been neglected by legal scholars. Using King Lear as a framing device, this Article identifies obstacles to succession and shows how legislative initiatives, judicial intervention, and private ordering can facilitate the timely transfer of ownership and control across generations.

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INTRODUCTION

William Shakespeare's play, *The Tragedy of King Lear*,¹ illustrates the problem of family-business succession. The play concerns the transfer of power from an aging monarch to daughters who neglect him once they have received their inheritance. Courts have often invoked the play's archetypal tale of family dysfunction in cases that pit parents against children.² In particular, courts cite

1. WILLIAM SHAKESPEARE, *THE TRAGEDY OF KING LEAR*.

2. See, e.g., *In re Estate of Boman*, 898 N.W.2d 202, at 6 n. 9 (Iowa Ct. App. Feb. 8, 2017) (unpublished table decision) ("It is hard to miss the parallels this case presents to the Shakespearean tragedy of King Lear"); *Van Horn v. Van Horn*, 393 F. Supp. 2d 730, 734 (N.D. Iowa 2005) ("This dispute between a father and his children over ownership of the family corporation is reminiscent of the family fracas depicted in Shakespeare's King Lear."); *Vargas v. Vargas*, 771 So. 2d 594, 595 (Fla. Dist. Ct. App. 2000) ("Like King Lear, this *inter vivos* transfer has caused a great deal of sibling rivalry."); *Menzone v. Menzone*, 1999 Mass. App. Div. 58, 58 ("From Cain and Abel through *King Lear* until today, our history is replete with examples of pain and suffering caused through the real or perceived inequitable devolution of one generation's assets to the next."); *Newell v. High Lawn Mem'l Park Co.*, 264 S.E.2d 454, 461 (W. Va. 1980) (stating that plaintiff should "have learned the lesson of King Lear, namely that once the property is gone the solicitous attention of others may be gone as well"); *Gordon v. Gordon*, 4 Phila. 419, at 420 (Pa. Ct. Com. Pl. Aug. 21, 1980) ("Plaintiff is a contemporary King Lear who, in return for protestations of love and affection and a promise to care

Lear’s mistreatment at the hands of his daughters Goneril and Regan as a defining example of filial ingratitude.³ According to conventional wisdom, Lear’s tragic error was that he surrendered his kingdom prematurely and left himself vulnerable to predatory heirs.⁴ This has been referred to as the “*King Lear* problem.”⁵

The conventional wisdom is wrong. Lear’s succession plan failed, not because he acted rashly, but because he waited too long. Like Lear, many family business owners are reluctant to hand over power until circumstances compel them to do so. According to a recent survey, while a majority of family business owners anticipate transferring control to the next generation, only “15% of them have anything resembling a succession plan in place.”⁶ Sumner Redstone, who served for decades as the controlling owner of CBS and Viacom, famously declared that his succession plan was to never die.⁷ The predictable consequence of Mr. Redstone’s neglect was protracted litigation that harmed the businesses he controlled.⁸ Lawsuits concerning family-business succession have impacted other well-known businesses, including

for him in his old age, gave substantially all his property to his son, who then refused to help his father.”).

3. See *Robitaille v. Robitaille*, 613 N.E.2d 933, 933 (Mass. App. Ct. 1993) (“Ernest Robitaille repeated King Lear’s mistake: he gave his estate to his progeny in return for room and board.”); *Springham v. Kordek*, 462 A.2d 567, 568 (Md. Ct. Spec. App. 1983) (“Shakespeare, in his tragedy ‘King Lear,’ portrayed the bitterness of a parent plagued by ungrateful children.”); *Hawkins v. Doe*, 119 P. 754, 757 (Or. 1912) (“In the tragedy of King Lear the great dramatist portrays the foolishness of an old man who in his lifetime strips himself of his possessions, and depends on the gratitude of his children for support in his declining years.”).

4. See *infra* Section II.A.

5. See HENDRIK HARTOG, *SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERITANCE AND OLD AGE* 33–34 (2012) (describing the “King Lear problem” of premature bequests to ungrateful heirs).

6. See *The Family Business Sector in 2016: Success and Succession*, PwC, <https://www.pwc.com/gx/en/services/family-business/family-business-survey-2016/succession.html> [<https://web.archive.org/web/20171006130250/https://www.pwc.com/gx/en/services/family-business/family-business-survey-2016/succession.html>] (last visited Oct. 6, 2017) (summarizing results of PwC 2016 U.S. Family Business Survey). Whatever its specific content may be, “[h]aving such a plan signals to key stakeholders that the business is here for the long term, whereas the absence of a plan casts uncertainty on the company’s future.” PwC, *THE MISSING MIDDLE: BRIDGING THE STRATEGY GAP IN US FAMILY FIRMS* 29 (2017), <https://www.pwc.com/us/en/private-company-services/publications/assets/pwc-family-business-survey-us-2017.pdf> [<https://perma.cc/D894-BVPC>].

7. See KEACH HAGEY, *THE KING OF CONTENT: SUMNER REDSTONE’S BATTLE FOR VIACOM, CBS, AND EVERLASTING CONTROL OF HIS MEDIA EMPIRE* 222 (2018); Anna Nicolaou, *Viacom and CBS Mogul Sumner Redstone Dies Aged 97*, *FIN. TIMES* (Aug. 12, 2020), <https://www.ft.com/content/eadc3dcf-4186-46a6-8e5b-1ba17d17df6a> [<https://perma.cc/VW6B-QT24>] (stating that “[t]he cantankerous billionaire had promised never to give up managing his empire”). As late as 2014, when Mr. Redstone was 91, “he dismissed his daughter Shari’s prospects as the next chief of the family business, saying he would ‘not discuss succession . . . you know why? I’m not going to die.’” *Id.*

8. See Matthew Garrahan & Shannon Bond, *Succession Battle Engulfs Sumner Redstone’s Media Empire*, *FIN. TIMES* (Feb. 4, 2016), <https://www.ft.com/content/913ae5be-cb46-11e5-be0b-b7ece4e953a0> [<https://perma.cc/Q7R3-XGAB>] (“A battle over the future of Sumner Redstone’s media empire that was playing out in Hollywood whispers has burst into the open, pitting Shari Redstone, the billionaire’s daughter, against Philippe Dauman, the under-fire chief executive of Viacom.”).

Koch Industries, the E&J Gallo Winery, Hyatt Hotels, and U-Haul.⁹ Indeed, for family businesses, “leadership succession . . . [is] the crucial issue.”¹⁰

Yet, the topic of family-business succession has largely been ignored by legal scholars.¹¹ While the literature covers relevant doctrinal issues including tax reduction strategies, valuation techniques, estate planning, and corporate restructuring,¹² more fundamental issues concerning the alignment of family and business value systems have not received comparable scrutiny.¹³ This is a significant oversight because family businesses are a major contributor to the nation’s economy, accounting for a substantial percentage of gross domestic revenue and employing more than half of all workers.¹⁴ Reportedly, “[i]n some American industries, such as construction, the percentage of family firms is as high as 95%.”¹⁵ The majority of family businesses are small, but family businesses also include approximately a third of Fortune 500 companies.¹⁶ Ultimately, whether they are traditional mom-and-pops or multinational corporations with public shareholders, all family businesses must confront the question of succession.¹⁷

9. For an account of these and many disputes involving family-business succession, see GRANT GORDON & NIGEL NICHOLSON, *FAMILY WARS: STORIES AND INSIGHTS FROM FAMOUS FAMILY BUSINESS FEUDS* (2010).

10. ANDREA COLLI, *THE HISTORY OF FAMILY BUSINESS: 1850–2000*, at 66 (2003).

11. See Allison Anna Tait, *Corporate Family Law*, 112 NW. U. L. REV. 1, 7 (2017) (“In light of how ubiquitous the family business is and the impact of these businesses on the economy, it is somewhat surprising that legal scholars have paid little attention to the legal problems of corporate families.”); Benjamin Means, *The Contractual Foundation of Family-Business Law*, 75 OHIO ST. L.J. 675, 676 (2014) [hereinafter Means, *Contractual Foundation*] (“Nor have legal scholars paid sufficient attention to family businesses.”).

12. For an excellent survey of planning issues in closely held businesses, see DWIGHT DRAKE, *BUSINESS PLANNING: CLOSELY HELD ENTERPRISES* (4th ed. 2013).

13. Corporate law scholarship typically assumes that investors are economically rational actors, and so the influence of family values and relationships may be overlooked. See Benjamin Means, *Nonmarket Values in Family Businesses*, 54 WM. & MARY L. REV. 1185, 1193 (2013) [hereinafter Means, *Nonmarket Values*] (citing FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 232 (1991)). The study of family business dynamics fits more comfortably within the ambit of behavioral economics, which recognizes that people’s choices are often more complex than the classical models allow. See, e.g., Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1473 (1998).

14. See Tait, *supra* note 11, at 5; DRAKE, *supra* note 12, at 274. Family businesses are a global phenomenon. See, e.g., Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599, 1612 (2000) (evaluating “the intersection of corporation and family law” in China).

15. Luis R. Gomez-Mejia, Cristina Cruz, Pascual Berrone, & Julio De Castro, *The Bind that Ties: Socioemotional Wealth Preservation in Family Firms*, 5 ACAD. MGMT. ANNALS 653, 658 (2011).

16. Tait, *supra* note 11, at 5 (citing *Family Business Facts*, CONWAY CTR. FOR FAM. BUS., <http://www.familybusinesscenter.com/resources/family-business-facts> [https://perma.cc/Y7nm-TXBY] (last visited Apr. 12, 2017)).

17. Even if incumbents do not plan to preserve family ownership and control, they must still devise an exit strategy to capture the value of the business. Delay can damage the prospects for a sale. See *infra* Section III.C.

Using *King Lear* as a framing device, this Article identifies key succession challenges and recommends a range of legislative, judicial, and private ordering initiatives and best practices. Perhaps most far reaching, this Article contends that lawmakers and advisory groups, such as the American Law Institute and the Uniform Law Commission, should draft a new form of business association tailored to the needs of family businesses.¹⁸ The “F Corp.” would facilitate succession planning through an independent board committee with authority to oversee the succession process, a mandatory retirement age for senior executives to ensure a timely turnover of managerial responsibilities, and a required election concerning whether the business will be run by family members or nonfamily professional managers.¹⁹ Lawmakers should also consider creating financial incentives for lifetime transfers of ownership and control.²⁰

Even without legislative reform, courts can use existing law to support succession planning. To that end, courts should clarify the fiduciary duties owed by boards of directors. In particular, courts should hold that the fiduciary obligation of care requires a board of directors to implement a succession plan and review it on a periodic basis.²¹ When there are challenges to the capacity of incumbents, courts should establish an evaluative standard sufficient to ensure that those in control of a family business are capable of acting with ordinary prudence when making decisions concerning succession. Notably, the proposed standard would be higher than the level of cognitive functioning currently required for other types of testamentary capacity.²²

Family-business governance can also be shaped by lenders, customers, suppliers, distributors, and key nonfamily employees. The stability of a family business is of legitimate concern to those who depend on it. To the extent counsel for these counterparties include “business continuity” on their due diligence checklists, they can mitigate risk for their clients by requiring a clear succession plan as a condition for business dealings.²³ Taken together, a mix of private ordering and

18. See *infra* Section III.A.1 (using the recent history of benefit corporation legislation to show how a family business entity type could be created and promoted).

19. See *infra* Section III.A.1.

20. See *infra* Section III.A.2 (evaluating low-cost loans, tax subsidies, and other incentive programs, some based on existing programs for family farms and for minority-owned and women-owned businesses).

21. In smaller businesses that lack a formal board structure, an analogous fiduciary obligation could be imposed on the control group.

22. See, e.g., *Govan v. Brown*, 228 A.3d 142, 145 (D.C. 2020) (requiring “memory and mind . . . to generally know (1) the property owned, (2) the intended beneficiaries of that property, and (3) the nature of the instrument being executed.”). The court stated that “[e]ven the weak, aged, powerless, ignorant, and uninformed have the right to create a testamentary document.” *Id.* at 150.

23. See Donald V. Fites, *Make Your Dealers Your Partners*, in *HARVARD BUSINESS REVIEW ON MANAGING THE VALUE CHAIN* 155, 178–79 (President & Fellows of Harv. Coll. eds., 2000) (reporting that Caterpillar, a major manufacturer of construction and mining equipment, prefers to work with family-owned dealers and describing several steps it takes to ensure that those family businesses will be able to transfer control across generations without disruption).

public incentives offers the best prospect of improving the governance of family businesses, making successful transfers across generations more likely.

The Article proceeds as follows. Part I uses *King Lear* and several contemporary examples to explain why family-business succession is fraught with difficulty. Part II contends that standard accounts of the “*King Lear* problem”²⁴ get the causal story backwards because the root difficulty is usually unwarranted delay, not undue haste. Like Lear, incumbents are often unwilling to cede power, confuse family and business roles (especially when daughters are potential successors), and make succession decisions unilaterally—sometimes decades too late. Part III suggests legislative, judicial, and private ordering interventions to motivate and support family-business succession. By addressing succession questions earlier, family business owners improve the odds that the right answers will not have been foreclosed by circumstance.

I. THE PERILS OF SUCCESSION

A family business is one that is owned and controlled by members of the same family.²⁵ At their best, family businesses exhibit a long-term commitment to generating value for the benefit of family owners and other stakeholders.²⁶ In order

24. See HARTOG, *infra* note 45, at 33–34.

25. Depending on the context, scholars have employed more specific definitions of family business. See, e.g., Danny Miller & Isabelle Le Breton-Miller, *Challenge Versus Advantage in Family Business*, 1 STRATEGIC ORG., 127 (2003) (defining family business as one in which “a family has enough ownership to determine the composition of the board, where the CEO and at least one other top executive is a family member, and where the intent is to pass the firm on to the next generation”). Although fine distinctions may be needed for certain kinds of empirical work, “any single definition of family business will struggle to account for a wide variety of family and business contexts.” Means, *Contractual Foundation*, *supra* note 11, at 690–91 (recommending “diversification of the family-business model”).

26. See Nicolas Kachaner, George Stalk, Jr. & Alain Bloch, *Resilience: Lessons from Family Business*, in OWN THE FUTURE: 50 WAYS TO WIN FROM THE BOSTON CONSULTING COMPANY 243, 244 (Michael Deimler, Richard Lesser, David Rhodes & Janmejaya Sinha, eds., 2013) (“Executives of family businesses often invest with a 10- or 20-year horizon, concentrating on what they can do now to benefit the next generation.”); Danny Miller, Isabelle Le Breton-Miller & Barry Scholnick, *Stewardship vs. Stagnation: An Empirical Comparison of Small Family and Non-Family Businesses*, 45 J. MGMT. STUD. 51, 73 (2008) (noting that family business owners “exhibit much care about continuity, community and connection: specifically, about the long term preservation and nurturing of their business and its markets”); Benjamin Means, *The Value of Insider Control*, 60 WM. & MARY L. REV. 891, 935 (2019) [hereinafter Means, *Value of Insider Control*] (focusing on family control of public corporations and arguing that “controlled companies can soften the harder edges of capitalism by bringing the values of controlling owners into the marketplace”).

for a family business to outlast its current owners, however, there must be an effective transfer of power.²⁷ This is easier said than done.²⁸

Very few family businesses survive three generations, and the drop off is steep at each generational handoff.²⁹ The tragedy that unfolds in *King Lear* shows why this might be the case. Indeed, a leading treatise suggests that “no one should undertake family business planning without at least three books at hand: a current copy of the state business organization law, a current copy of the Internal Revenue Code, and a copy of *King Lear*.”³⁰

Former Supreme Court Justice Anthony Kennedy has described using *King Lear* to counsel a client “who had built a successful business and was planning to leave it all to one son, in hopes the son would duly take care of his other two children—a son and a daughter.”³¹ Justice Kennedy realized that he needed a vivid example of what can go wrong in a family-business succession to help his client perceive the risks involved:

“I was trying to counsel him, but it wasn’t getting very far, so I picked out a book from the bookshelf, told him to read it over the weekend and get back to me,” Kennedy said wryly. “It was ‘King Lear.’ He called me back and told me we were going to do it my way.”³²

As Justice Kennedy recognized, Shakespeare’s play illustrates the perils of combining business and family relationships.³³ Despite differences in context,³⁴ family business owners confront the same basic issues as Lear when deciding how to divide their wealth and business interests among multiple offspring.³⁵

27. See Susanna Fellman, *Managing Professionalization in Family Business: Transforming Strategies for Managerial Succession and Recruitment in Family Firms in the Twentieth Century*, in THE ENDURANCE OF FAMILY BUSINESSES: A GLOBAL OVERVIEW 248, 269 (Paloma Fernández Pérez & Andrea Colli eds., 2013); Benjamin Means, *Wealth Inequality and Family Businesses*, 65 EMORY L.J. 937, 939 (2016) (“Typically, owners seek to increase family wealth, to provide employment for family members, and, ultimately, to transfer control to a new generation of family owners.”).

28. See Means, *Nonmarket Values*, *supra* note 13, at 1191 (observing that “the transfer of control from one generation to the next invites tension between the family norm of equal treatment and the business norm of meritocracy”).

29. See George Stalk, Jr. & Henry Foley, *Avoid the Traps That Can Destroy Family Businesses*, 26 HARV. BUS. REV., Jan.–Feb. 2012, at 25, 25.

30. LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES § 21:1 n.1 (2021).

31. Matthew Renda, *Kennedy Defends Rule of Law, Europe in Ninth Circuit Speech*, COURTHOUSE NEWS SERV. (July 26, 2018), <https://www.courthousenews.com/kennedy-defends-rule-of-law-europe-in-ninth-circuit-speech/> [<https://perma.cc/YA6D-BSKP>].

32. *Id.*

33. See Tait, *supra* note 11, at 4–5 (noting that family participants do not behave like rational economic actors and are influenced by “personal tensions, desires, and loyalties.”).

34. See KATHARINE EISAMAN MAUS, BEING AND HAVING IN SHAKESPEARE 112 (2013) (“King Lear takes place in the remote past . . .”).

35. See Karen E. Boxx, *Shakespeare in the Classroom: How an Annual Student Production of King Lear Adds Dimension to Teaching Trusts and Estates*, 58 ST. LOUIS U. L.J. 751, 757–58 (2014) (“Successful family business owners face the same dilemma of succession planning—how to turn the

A. Lear's Undoing

The problem of succession sets *King Lear* in motion and provides the impetus for the drama that follows. In the first Act, Lear summons his three daughters and announces that he intends for them to take over the kingdom.³⁶ To avoid “future strife,” Lear offers each daughter a sizeable share.³⁷ As a condition of inheritance, however, Lear requires his daughters to participate in a “love trial.”³⁸ Lear states that his “bounty” will depend on his daughters’ declarations of their love for him: “Which of you shall we say doth love us most”³⁹ The declarations may have been meant as formalities to confirm the wisdom of Lear’s intended allocation of the kingdom.⁴⁰

Lear’s older daughters recognize the demands of the occasion and play their part unstintingly. Cordelia, however, is unable or unwilling to do what is required of her and remains silent when Lear asks, “what can you say to draw a third more opulent than your sisters? Speak.”⁴¹ Her answer is “Nothing, my lord.”⁴² Cordelia’s recalcitrance puts Lear in a bind, because he has stated that the division of the kingdom will depend on his daughters’ declarations of love.

When Lear begs Cordelia to reconsider, she responds with a lawyerly assessment: “You have begot me, bred me, loved me. I return those duties back as are right fit.”⁴³ Enraged by Cordelia’s “untender” answer, Lear disinherits her.⁴⁴ Turning to Goneril and Regan and their husbands,⁴⁵ Lear declares, “I do invest you jointly with my power, preeminence, and all the large effects that troop with majesty.”⁴⁶ Lear’s gift is not unconditional. He reserves to himself the title of king

reins over to the next generation smoothly so that the business will continue to prosper.”); GORDON & NICHOLSON, *supra* note 9, at 69 (“The chief difference between a monarchy and a family firm is that the latter generally has more choices and fewer resources.”).

36. SHAKESPEARE, *supra* note 1, at act 1, sc. 1, ll. 37–40.

37. *Id.* at act 1, sc. 1, l. 44.

38. KENJI YOSHINO, A THOUSAND TIMES MORE FAIR: WHAT SHAKESPEARE’S PLAYS TEACH US ABOUT JUSTICE 212 (2011).

39. SHAKESPEARE, *supra* note 1, at act 1, sc. 1, ll. 51–53. Lear favors his youngest daughter, Cordelia, and hints that she may receive the most “opulent” part of the kingdom. *Id.* at act 1, sc. 1, l. 86.

40. *See* YOSHINO, *supra* note 38, at 213 (“Each daughter need only show up and make a ceremonial speech to show her gratitude”). According to Professor Yoshino, the formality is indicative of a legal proceeding: “less a love test than the most high-stakes real estate closing in English history.” *Id.* Alternatively, the public ceremony may be designed to make up for the *lack* of any law that could bind the participants. *See* Ralph Berry, *Lear's System*, 35 SHAKESPEARE Q. 421, 421–22 (1984) (arguing that Lear’s demand for public declarations of love from his daughters may function as a commitment device, reinforcing norms that Lear will need to rely upon for his future security).

41. SHAKESPEARE, *supra* note 1, at act 1, sc. 1, ll. 85–86.

42. *Id.* at act 1, sc. 1, l. 87.

43. *Id.* at act 1, sc. 1, ll. 96–97.

44. *Id.* at act 1, sc. 1, ll. 106–19.

45. Lear “apparently assumes that the daughters’ entitlement will pass to their husbands ‘under coverture,’ as property normally would in marriage” MAUS, *supra* note 34, at 114.

46. SHAKESPEARE, *supra* note 1, at act 1, sc. 1, ll. 130–32.

and one hundred knights, “a number tantamount to a personal army.”⁴⁷ Having no castle or territory of his own, Lear states his intention to reside with his daughters in turn with all expenses to be borne by them.

Although Goneril and Regan benefited from Lear’s banishment of Cordelia, the sisters agree to act jointly to protect themselves from Lear’s increasingly erratic behavior because they fear the “unruly waywardness that infirm and choleric years bring with them.”⁴⁸ Goneril and Regan are well aware that Lear loved Cordelia best, and they conclude that his callous dismissal of Cordelia shows “the infirmity of his age.”⁴⁹ Their concerns are understandable considering that Lear retains the title of king and a large retinue of knights bound to his service.⁵⁰

The relationship between father and daughters deteriorates. Goneril objects that Lear’s knights “grow riotous.”⁵¹ Instead of deescalating conflict, Goneril and Regan deliberately provoke their father’s fury and then conspire to render him powerless. Goneril “dismisses fifty of Lear’s knights ‘at a clap.’”⁵² When Lear rails against his daughters’ treachery, he is stripped of his retinue entirely.⁵³ Although Lear retains the title of king, he discovers that his privileges depend on his power, which he has “given away.”⁵⁴ Lear curses Goneril and Regan in shockingly personal terms.⁵⁵ Accompanied by his fool, Lear ventures into the heath where he is exposed to the elements. In the midst of a storm, Lear goes mad.

Lear’s disposition of the kingdom has not come only at his own expense. A struggle for control ensues, matching Cordelia against her sisters.⁵⁶ Each has an

47. YOSHINO, *supra* note 38, at 219 (stating that an “ordinary retinue” for a king might have been a dozen knights).

48. SHAKESPEARE, *supra* note 1, at act 1, sc. 1, ll. 298–99.

49. *Id.* at act 1, sc. 1, ll. 290–94.

50. As Goneril puts it, “He may enguard his dotage with their pow’rs. And hold our lives in mercy.” *Id.* at act I, sc. 1, ll. 324–327.

51. *Id.* at act 1, sc. 3, l. 6.

52. *Id.* at act 1, sc. 4, l. 286. See also YOSHINO, *supra* note 38, at 220.

53. YOSHINO, *supra* note 38, at 221 (“With brutal efficiency, the daughters then work in tandem to whittle down the number of knights in Lear’s retinue. They pare Lear’s one hundred men to fifty, then to twenty-five, then to ten, then to five, and then to nothing.”).

54. SHAKESPEARE, *supra* note 1, at act 1, sc. 3, l. 18 (referring to “those authorities That he hath given away!”).

55. *Id.* at act 2, sc. 4, ll. 278–82 (“[Y]ou unnatural hags. I will have such revenges on you both That all the world shall—I will do such things—what they are yet, I know not, but they shall be the terrors of the earth!”). Lear acknowledges that Goneril is his daughter: “my flesh, my blood,” but converts the metaphor to suit his purpose: “Thou art a bile, a plague sore . . . in my corrupted blood.” *Id.* at act 2, sc. 4, ll. 221–252.

56. Meanwhile, in a subplot that amplifies the play’s theme of generational conflict and betrayal, the Earl of Gloucester falls victim to the treachery of his illegitimate son, Edmund. The Gloucester subplot also involves sibling rivalry between Edmund and his brother, Edgar, who is the legitimate heir. One scholar points out that while legitimacy is an antiquated consideration for most families, analogous concerns regarding unequal treatment of siblings can arise in “blended” families with children from more than one marriage. See Boxx, *supra* note 35, at 755 (noting conflict caused by Rupert Murdoch’s decision to give children from a later marriage “diminished voting rights”).

army at her command.⁵⁷ Thus, the strife Lear sought to forestall is brought into being by his mismanagement of succession. After much bloodshed and betrayal, all three sisters perish.⁵⁸ In the play's final Act, Lear emerges onstage carrying the broken body of Cordelia. Lear dies of grief and "the royal family of Britain is completely extinct."⁵⁹ Unlike Shakespeare's other tragedies, there is no tidy restoration of order at the play's end—the bleakness is all encompassing.⁶⁰

B. *Lear as Archetype*

Although most family business conflicts end short of murder, *King Lear* teaches us how a failed succession can cause irreparable damage to a family business and to family relationships. As an archetypal story, *King Lear* retains its relevance because it provides a pattern for understanding grievances at the intersection of wealth, control, and intimacy.⁶¹ When a family business dispute arises, a litigant may claim the mantle of innocent Cordelia. Or, a business owner may be cast as a befuddled Lear, unfit to run the kingdom. In situations where multiple siblings or cousins are in a position to inherit, *King Lear* shows that the ownership structure is inherently unstable when each potential allocation of power can be undermined by a different alliance.⁶² The Sections that follow explore these possibilities.

1. *The Media Baron: Who is Cordelia?*

Like Lear, the mogul Sumner Redstone refused to relinquish control of his media empire until his late-in-life decisions vested operational control in his daughter, Shari Redstone.⁶³ Yet, Mr. Redstone had previously rejected Ms. Redstone

57. Although she was disinherited by Lear, Cordelia married the prince of France. SHAKESPEARE, *supra* note 1, at act 1, sc. 1, ll. 290–303. The French army fights to assert her claim to the British throne.

58. Goneril murders Regan and then kills herself. Cordelia dies at the orders of Edmund, a villainous character aligned with Goneril and Regan but also playing them against each other. As two commentators aptly observe, "*King Lear* is a very busy play." LESLEY KORDECKI & KARLA KOSKINEN, RE-VISIONING LEAR'S DAUGHTERS: TESTING FEMINIST CRITICISM AND THEORY 10 (2010).

59. MAUS, *supra* note 34, at 130.

60. See Fintan O'Toole, *Behind 'King Lear': The History Revealed*, N.Y. REV. BOOKS, Nov. 19, 2015 (reviewing JAMES SHAPIRO, *THE YEAR OF LEAR: SHAKESPEARE IN 1606* (2016)).

61. Although a kingdom is not a family business in a literal sense, the parallels are striking. The modern-day British monarchy's resemblance to a family business inspired its nickname, the Firm. See generally PENNY JUNOR, *THE FIRM: THE TROUBLED LIFE OF THE HOUSE OF WINDSOR* (2005); Robert Shrimsley, *Royals to Royalties: The Firm Is in Business*, Fin. Times (June 30, 2011), <https://www.ft.com/content/e31c28ac-a341-11e0-8d6d-00144feabdc0> [https://perma.cc/6R6E-2L35] (observing that "[t]he Duke of Edinburgh has long referred to the British royal family as 'the Firm'").

62. In the economics literature, this is known as the problem of the "empty core." Varouj A. Aivazian & Jeffrey L. Callen, *The Coase Theorem and the Empty Core*, 24 J.L. & ECON. 175, 179 (1981).

63. See David Folkenflik, *Viacom CEO Out as Redstone Family Reasserts Control*, NPR: TWO WAY (Aug. 19, 2016, 1:43 AM), <https://www.npr.org/sections/thetwo-way/2016/08/19/490573944/viacom-ceo-out-as-redstone-family-reasserts-control> [https://perma.cc/HL8Q-SWCR]

as a candidate for succession and locked her out of the business.⁶⁴ By the time power transferred from father to daughter, there were serious questions about his capacity to understand the issues, let alone make responsible decisions.⁶⁵ Perhaps Ms. Redstone was another Goneril or Regan, taking unfair advantage of a patriarch in decline. Or perhaps Ms. Redstone was Cordelia—faithful, overlooked, and finally appreciated by a father whose authoritarian grip on power had blinded him to her merit as his successor.⁶⁶

The Shakespearean parallels were made explicit in a lawsuit involving Mr. Redstone’s former girlfriend, Manuela Herzer. With Ms. Redstone now in control of her father’s finances, the parties battled over millions of dollars that Mr. Redstone had given Ms. Herzer in cash, real estate, and various testamentary devises.⁶⁷ The litigants agreed that Sumner Redstone was being manipulated, but they disagreed about who was culpable.

Borrowing the template of *King Lear*, lawyers for Ms. Herzer sought to frame the case to her advantage:

The comparison of waning Sumner Redstone to demented King Lear is apt. Ailing and easily fooled, King Lear, unable to discern false flattery from the truth, is duped into surrendering his power, land, and fortune to his two conniving daughters who ruthlessly implement their scheme to eliminate all opposition. The contemporary version of this drama was set to unfold in five acts in a trial in the Los Angeles Probate Court. If the play had run its course, it would have revealed that Shari Redstone (“Shari”) was Goneril and Regan combined, Manuela Herzer was the wronged Cordelia who truly loved and cared about Lear, and Redstone was Lear, blind to his daughter’s lies about Manuela.⁶⁸

Ms. Redstone’s lawyers might have turned *King Lear* to a different purpose, however, casting Ms. Herzer in the role of Goneril or Regan and asserting that

(noting that before corporate maneuvers solidified her control of the family business, “Shari Redstone, Sumner’s 62-year-old daughter by his first marriage, had long been estranged from her father”).

64. *See id.*

65. *Id.* *See also* HAGEY, *supra* note 7, at 304. For further analysis of capacity issues in family-business succession, see *infra* Section III.B.2.

66. According to one account, Shari Redstone reconciled with her father after a fashion only by forcing her way to power: “Some describe Shari’s involvement in the business as motivated entirely by family dynamics: it was the only way that she could actually become a person in her father’s eyes. The irony was that Shari’s professional ascent could only come about by battling her own father, who obstinately refused to be succeeded.” HAGEY, *supra* note 7, at 304.

67. The case did not concern the ownership of his business empire, strictly speaking, but rather the distribution of wealth from his estate.

68. Tim Molloy, *With Shakespeare Filing, Redstone Case Is a Mid-Summer Nightmare of Complications*, WRAP (June 13, 2016, 6:33 PM), <https://www.thewrap.com/with-shakespeare-filing-redstone-case-is-a-mid-summer-nightmare-of-complications/> [<https://perma.cc/V7RA-JVBE>] (noting that “lawyers for Sumner Redstone’s ex Manuela Herzer invoked Shakespeare to ask for a new trial about his medical care”). Because Ms. Herzer had a romantic relationship with Mr. Redstone, the Cordelia role is not a perfect fit, but the contrast between the innocent young woman and her more worldly and corrupt sisters taps into a powerful narrative.

Ms. Redstone was Cordelia. When Ms. Herzer became involved with Sumner Redstone, he was already in his 90s, and she was decades younger. Over several years, Mr. Redstone gave her approximately \$75 million dollars in gifts, included her as a beneficiary in his will, and cut off all ties with his daughter.⁶⁹ Ms. Redstone could have argued that her father was manipulated by a younger woman who, like Goneril and Regan, professed her love for him in order to obtain what she wanted.⁷⁰

For both sides, then, the *King Lear* story offered an opportunity to create a compelling narrative and, equally, presented a risk that they would be cast as the villain of the piece. Lawyers know that framing the issue for decision is often an advocate's most important job; in a family business dispute, that may involve assigning the parties to roles—the meaning of a story can depend on who is playing what part.⁷¹

2. *The Oil Tycoon: Another Lear?*

The interrelated problems of delayed succession and diminished capacity are present as well in the case of Jack Grynberg, “a self-made survivor of the Holocaust” who founded companies that “manage his vast oil holdings.”⁷² Instead of enjoying a restful old age, Grynberg faced “a hostile takeover of his life’s work by his own family: his wife, Celeste, 81, and their three children”⁷³ As summarized by the Supreme Court of Colorado, the nature of the dispute was as follows:

According to Grynberg, he transferred his ownership interests in the businesses to the Family on the condition that he would remain in control of the businesses until his death In 2016, however, the Family voted to remove Grynberg as president of each business, citing his declining mental health. Grynberg refused to comply In its complaint, the Family asserted that Grynberg was exhibiting erratic behavior, making irrational decisions, and committing significant company funds to obviously fraudulent scam operations.⁷⁴

69. William D. Cohan, “Betrayal,” “Blackmail,” and “Elder Abuse”?: *The Battle for Sumner Redstone’s Affection—and Fortune—Gets Even Weirder*, VANITY FAIR (May 3, 2018), <https://www.vanityfair.com/news/2018/05/sumner-redstone-shari-redstone-manuela-herzer-complaint> [<https://perma.cc/MPS2-GR96>].

70. The parties settled their dispute, apparently on terms favorable to the Sumner family. See Meg James, *Sumner Redstone and Family Settle Legal Dispute with His Ex-Companion Manuela Herzer*, L.A. TIMES (Jan. 8, 2019, 3:55 PM), <https://www.latimes.com/business/hollywood/la-fi-ct-sumner-redstone-manuela-herzer-20190108-story.html> [<https://perma.cc/9TXE-M2U4>].

71. For further discussion of role disputes in family businesses, see *infra* Section II.B.2.

72. David Migoya, *Denver Oil Tycoon Jack Grynberg Fights with His Family Over Control of Billion-Dollar Empire*, DENVER POST (Nov. 13, 2017, 8:51 AM), <https://www.denverpost.com/2017/10/23/Denver-oil-tycoon-jack-grynberg-fights-family-over-billion-dollar-empire/> [<https://web.archive.org/web/20191011101837/https://www.denverpost.com/2017/10/23/denver-oil-tycoon-jack-grynberg-fights-family-over-billion-dollar-empire/>].

73. *Id.*

74. *In re Gadeco, LLC v. Grynberg*, 415 P.3d 323, 326 (Colo. 2018).

What should have been a valedictory moment for Grynberg turned into a bitter repudiation of his legacy.⁷⁵ Like Lear, Grynberg surrendered power to his family late in life and then found that his accustomed privileges were no longer secure. Moreover, just as Lear’s daughters claimed that they took away Lear’s retinue because of the “infirmity of his age,” Grynberg’s family contended that they were protecting the businesses from an erratic and irrational old man who was no longer fit to rule.

Whether or not Grynberg’s cognitive functioning was impaired, as his family alleged, his succession plan was unrealistic because it sought to preserve total control of the family businesses until his death. In this respect, Grynberg’s approach to succession, like Lear’s, invited conflict with the next generation of family owners. The transition of power in both cases was subject to a qualification that undermined the overall objective.⁷⁶ Ironically, business owners who cannot take an objective view of their own mortality may miss the opportunity to shape the direction of the family business precisely because of their insistence on maintaining control until the end.⁷⁷

Finally, the Grynberg litigation paralleled *King Lear* in its devastating impact on personal relationships. The *Denver Post* reported some inflammatory portions of an affidavit filed by Grynberg in the lawsuit:

Miriam “suffers from medical conditions” and “has not worked a day in her life,” while . . . Rachel and Stephen “have wasted the education which I provided.”

....

75. See David Migoya, *Denver Oil Tycoon Jack Grynberg Not Entitled to \$400 Million in Back Pay in Family Feud, Judge Rules*, DENVER POST (June 21, 2019, 4:18 PM), <https://www.denverpost.com/2019/06/21/judge-denver-oil-tycoon-jack-grynberg-family-feud/> [<https://web.archive.org/web/20210506171207/https://www.denverpost.com/2019/06/21/judge-denver-oil-tycoon-jack-grynberg-family-feud/>].

76. See Harry Berger, Jr., *King Lear: The Lear Family Romance*, 23 CENTENNIAL REV. 348, 355–56 (1979) (evaluating implications of Lear’s reservation of a retinue of knights pledged to his service: “[w]hat he bestows in one line he takes away in another”). According to this commentator’s assessment, Lear “formally renounces power and control with the intention of keeping informal control over them [his daughters].” *Id.* at 356.

77. See, e.g., Erik Eckholm, *A Complicated Legal Battle Over Sumner Redstone’s Mental Acuity*, N.Y. TIMES (May 25, 2016), <https://www.nytimes.com/2016/05/26/business/media/a-complicated-legal-battle-over-sumner-redstones-mental-acuity.html> [<https://web.archive.org/web/20220616140527/https://www.nytimes.com/2016/05/26/business/media/a-complicated-legal-battle-over-sumner-redstones-mental-acuity.html>] (describing litigation concerning “whether [Sumner Redstone] acted freely, with a clear understanding of the consequences, . . . when he had a lawyer inform two directors at Viacom that they were removed from a crucial trust—a body that will manage the corporate holdings when Mr. Redstone dies or if he is officially declared to be incapacitated”). The removed trustees argued “that Mr. Redstone is profoundly impaired and that his formerly estranged daughter, Shari Redstone, had isolated and manipulated him to secure trustee appointments for her own allies.” *Id.* Consequently, Mr. Redstone’s actual wishes, whatever they may have been, had to be interpreted by a court in the context of a competency hearing.

“Rachel dabbles in art in Denver and Stephen pretends to be a film maker in Los Angeles,” Grynberg’s affidavit says. “Neither do anything productive . . . I have decided enough is enough . . . They have no ability to manage these companies.”⁷⁸

Grynberg’s harsh words are reminiscent of Lear’s denunciation of his daughters. Like Lear, Grynberg’s words were to no avail, and he was left isolated from his family and powerless. Although none of the litigants appear to have referenced *King Lear* explicitly, the multiple parallels between the two troubled business successions are evidence of the timelessness of the Lear story.

3. Circus Siblings: Which Two?

When incumbent owners fail to plan for a transfer of power, they set their successors up for failure.⁷⁹ Whether the incumbents make no plans at all, or, as in *King Lear*, present a slapdash arrangement at the last minute, the members of the next generation may have to contend with each other for control. In the absence of a single designated successor or a carefully calibrated balance of power, multiple owners may shift alliances in an unstable effort to obtain and preserve control. This phenomenon is known as the problem of the “empty core.”⁸⁰

Even after Lear steps aside, no sister can feel secure in her rule, because the other two can align against her. As Professor Brinig explains:

Students of economics, political science, and game theory who have read Kenneth Arrow know about the phenomenon of cycling. The classic example is not too far distant from the problem posed in *Lear*: three thieves seek to divide their booty, and may decide how to divide it by majority rule. The problem is that any two may form alliances to defeat the interests of the third. Game theorists call the result the “empty core”: there is no determinate solution short of violence among the thieves of approximately the sort that transpires in *Lear*.⁸¹

78. Migoya, *supra* note 72.

79. See Christos R. Sigalas, George Chondrakis, Anastasios Zaharopoulos & George S. Vozikis, *Performance Lags and Gaps During Family Business Succession: The Dual Inefficiency of Succession Discontinuity and Lower Initial Postsuccession Performance*, in THEORETICAL DEVELOPMENTS AND FUTURE RESEARCH IN FAMILY BUSINESS 231, 235 (Phillip H. Phan & John E. Butler eds., 2008) (noting “the importance of strategic planning” which includes “making the preparations necessary to ensure the harmony of the family and the continuity of the enterprise through the next generation”).

80. Aivazian & Callen, *supra* note 62, at 179.

81. MARGARET F. BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY 202 (2000); see also MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 54–58 (2000) (using *King Lear* to illustrate the “empty core” analysis); Tracey E. George & Robert J. Pushaw, Jr., *How Is Constitutional Law Made?*, 100 MICH. L. REV. 1265, 1270 (2002) (reviewing STEARNS, *supra*) (“Stearns creatively elucidates a number of complicated social choice concepts, making them both accessible and interesting. Perhaps his best effort is his modern revision of Shakespeare’s tale of *King Lear* to illustrate the ‘empty core’ problem.”).

In family-business succession, the “empty core” problem arises when the previous generation chooses not to anoint a single leader and, whether by design or default, divides power so that no shareholder has an independent majority.⁸²

Sometimes, family business owners refuse to anoint an heir and leave it to the next generation to decide for themselves when the time comes.⁸³ Lear recognized that it was his responsibility to ensure a stable succession, but he created the potential for internecine warfare when he decided that his daughters would each take a part of the whole.⁸⁴ Even with Cordelia disinherited, she remained a threat to her sisters through her marriage to the prince of France, and Goneril and Regan lacked sufficient grounds for trust to avoid conflict with each other. Lear’s division of his kingdom on a map did not preclude the sisters from reallocating power amongst themselves, and any single provisional alignment could always be undercut by a different majority coalition.

The classic case, *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Ringling*, provides a striking example of shifting coalitions in a family business.⁸⁵ In *Ringling Bros.*, three family shareholders were battling for control of the circus: Edith Conway Ringling (“Edith”); Aubrey B. Ringling Haley (“Aubrey”); and John Ringling North (“John”). Edith and Aubrey each held 315 shares; John had 370.⁸⁶ Edith and Aubrey had signed a vote pooling agreement, which documented their intention to vote as a block when electing members of the board of directors.⁸⁷ *Ringling Bros.-Barnum & Bailey Combined Shows, Inc.* conducted elections using a cumulative voting scheme, which meant that Edith and Aubrey could always select five board members if they acted jointly.⁸⁸ John’s 370 shares were enough for him to select the remaining two board members, or three if Edith and Aubrey did not combine their votes in order to select a fifth director.

82. In a three-party relationship there is always the possibility of a two-against-one alliance. GORDON & NICHOLSON, *supra* note 9, at 117. One of the parties to the dispute may be a member of the older generation. *See id.* (observing that “[i]n a family when a parent and child ally against the other child . . . the scene is set for serious conflict”).

83. *See id.* at 39 (“As often happens when a strong man and emperor dies, he leaves a power vacuum.”).

84. To be clear, my argument is not that a contemporary family business owner should always select a single leader in the next generation. The “empty core” problem, however, may be one reason for creating a presumption against dividing control among multiple family members unless there is reason to believe that they can work together effectively.

85. *See generally* *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Ringling*, 53 A.2d 441 (Del. 1947). For a fuller account, see J. Mark Ramseyer, *The Story of Ringling Bros. v. Ringling: Nepotism and Cycling at the Circus*, in *CORPORATE LAW STORIES* 135 (J. Mark Ramseyer ed., 2009).

86. *Ringling*, 53 A.2d at 442.

87. *Id.* at 443.

88. *See* Jeffrey N. Gordon, *Institutions as Relational Investors: A New Look at Cumulative Voting*, 94 COLUM. L. REV. 124, 127 n.8 (1994) (noting that whereas “straight voting ensures that a majority shareholder elects all the directors . . . [C]umulative voting . . . permits a sufficiently large minority to win one or more seats”).

The lawsuit concerned the enforceability of the vote pooling agreement.⁸⁹ Yet, from the practical standpoint of corporate control, the vote pooling agreement did not matter. Regardless of what Edith and Aubrey might have intended when they signed the agreement, the reality of the situation was that control of the corporation depended on the alignment of any two of the shareholders.⁹⁰ So long as Edith and Aubrey remained aligned, they controlled the corporation and had five of seven directors. Once Aubrey decided to join forces with John instead, the combination of his two directors and hers guaranteed them majority control, whether the total was four or five out of seven.⁹¹ Thus, the voting agreement was not sufficient to stabilize control, because the corporation, like Lear's kingdom, was subject to the "empty core" problem.⁹²

In general, even if two siblings are able to reach a stable arrangement to disinherit a third, the outcome is presumably not what their parents would have intended. Moreover, instead of allowing the business to operate unimpeded, the most likely result of such maneuvering is litigation based on allegations of breaches of fiduciary duty, often coupled with a petition to dissolve the business.⁹³ For example, in one recent case, a father founded a business and issued one-third interests to his two sons.⁹⁴ When the father died, his daughter inherited his one-third interest.⁹⁵ The daughter and one of her brothers subsequently fired the remaining brother and began to withhold funds from him, which he had historically relied on to pay taxes.⁹⁶ The court held that this pattern of behavior was an abuse of control that constituted shareholder oppression.⁹⁷

As the preceding examples illustrate, when business and family interests diverge, lawsuits often follow: "Siblings sue siblings; children sue parents; spouses divorce; families and businesses fall apart."⁹⁸ *King Lear* retains its relevance, because Shakespeare's dramatization of the conflict between a father and his daughters captures something eternal.⁹⁹ This Section has reviewed a few of the ways in which

89. *Ringling*, 53 A.2d at 443.

90. *See Ramseyer, supra* note 85, at 154–55.

91. *See id.*

92. *Id.* at 159–60.

93. *See generally* Douglas K. Moll, *Shareholder Oppression and Dividend Policy in the Close Corporation*, 60 WASH. & LEE L. REV. 841 (2003); Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 48 BUS. LAW. 699 (1993); Benjamin Means, *A Voice-Based Framework for Evaluating Claims of Minority Shareholder Oppression in the Close Corporation*, 97 GEO. L.J. 1207 (2009).

94. *See R.D. Clark & Sons v. Clark*, No. CV146050218, 2016 WL 5415739, at *1 (Conn. Super. Ct. Aug. 30, 2016).

95. *See id.*

96. *See id.* at *1–2.

97. *See id.* at *12.

98. Means, *Nonmarket Values, supra* note 13, at 1192 (citations omitted).

99. If modern-day family businesses like Grynberg's sometimes pay unintentional tribute to *King Lear*, the play has also inspired more than its share of artistic homages. Recent examples include *Dunbar*, in which the author envisions Lear as Henry Dunbar, a media baron dispossessed by his daughters, EDWARD ST. AUBYN, *DUNBAR* (2017), and *We That Are Young*, in which Lear is

King Lear provides a pattern for contemporary disputes, but the point can be generalized: A mix of aging incumbents who are loathe to cede power, hard-to-divide family wealth, miscommunication, and greed too often ends in tragedy.¹⁰⁰ Family trust built over long periods of time dissolves in an acid bath of rivalry and recrimination.¹⁰¹

II. DEFINING THE KING LEAR PROBLEM

In the family-business literature, allusions to *King Lear* often serve as shorthand for the heightened emotions and irrationality that family dynamics can inject into business dealings, as well as the tragic consequences that may follow.¹⁰² Thus, commentators have observed that when we survey conflict in family businesses, “[w]e are entering Shakespearean territory where foolish old kings make a hash of the handover of power”¹⁰³ But what is the nature of Lear’s error? This Part evaluates standard answers to that question and then proposes a different set of explanations.¹⁰⁴ Crucially, Lear erred, not by parting with his kingdom too early, but by waiting until it was already too late.

A. The Conventional Account

Most commentators concur with the assessment of Lear’s fool that Lear brought tragedy upon himself by relinquishing his kingdom during his lifetime without any ability to control what “he hath given away.”¹⁰⁵ Compounding his error, Lear was misguided in seeking public testimonials from his daughters and proved

reincarnated as Devraj Bapuji, a business tycoon whose transfer of the family business to two of his three daughters goes awry, PRETI TANEJA, *WE THAT ARE YOUNG* (2017). A production of *King Lear* starring Anthony Hopkins as Lear is available via Amazon Prime. See generally *King Lear* (Amazon Prime Streaming Video, 2018).

100. See, e.g., GORDON & NICHOLSON, *supra* note 9, at 103 (describing how Henry Ford’s family forced his retirement from the company he had founded: “Henry, a frail and crushed man, did not go quietly. He even shed tears in public. His business life had ended, and two years later, with nothing left to live for, his corporal life ended”).

101. See, e.g., *Hjartarson v. Hjartarson*, 147 P.3d 164, 170 (Mont. 2006) (holding that children violated agreement by excluding father from corporate decision-making and denying him access to funds for living expenses).

102. To cite one example, Lear’s behavior in demanding that his daughters declare their love for him as a condition for inheritance was no more irrational than the father who kicked a child out of the family business for marrying someone of the wrong religious faith. See *Meiselman v. Meiselman*, 307 S.E.2d 551, 553 (N.C. 1983). In both situations, questions of family intimacy supplanted a more proper evaluation of business competency.

103. GORDON & NICHOLSON, *supra* note 9, at 69.

104. Although they have not received much attention from legal scholars, family businesses have been the subject of “extensive ongoing research in other disciplines.” Means, *Nonmarket Values*, *supra* note 13, at 1193.

105. SHAKESPEARE, *supra* note 1, at act 1, sc. 3, ll. 17–19. See also HARTOG, *supra* note 5; Patricia A. Cain, *Family Drama: Dangling Inheritances and Promised Lands*, 49 TULSA L. REV. 345, 353 (2013) (reviewing HARTOG, *supra* note 5) (describing *King Lear* as “the story of a wealthy man who gave away his wealth too soon”).

unable to discern their true intentions.¹⁰⁶ Above all, Lear is said to have erred by disinheriting Cordelia, whose silence should have been perceived as an indication of her virtue.¹⁰⁷ Instead, Lear credulously accepted the false encomiums delivered by Goneril and Regan.

Commentators have also examined the play's political dimensions.¹⁰⁸ Most have concluded that Lear's division of his kingdom among his children was another serious mistake.¹⁰⁹ Without a single acknowledged ruler, each territory would be in conflict with the others and vulnerable to the depredations of a foreign power.¹¹⁰ According to this perspective, Lear might have done better by applying the principle of primogeniture or otherwise identifying a single successor.¹¹¹

When judged in the context of family-business ownership, however, these explanations of Lear's failed succession plan have limited value and can be misleading. First, rather than reducing Lear's daughters to crude caricatures of good and evil, it is more instructive to view them as complex individuals navigating a difficult political environment.¹¹² That is, the daughters' actions are, at least in part, a function of their situation and not just an expression of inherent character traits.¹¹³ If parents neglect their children, play favorites, muddle business and family considerations, and refuse to commit to a transfer of ownership and control, they should not be surprised to find that their children harbor resentment and may repay unkindness with unkindness.¹¹⁴

106. See, e.g., *Van Horn v. Van Horn*, 393 F. Supp. 2d 730, 734 n.1 (N.D. Iowa 2005) (“Looking for his progeny to bask him in love, Lear decides he will bequeath the greatest riches upon whichever daughter makes the most sycophantic incantation of devotion and adoration. When his favorite daughter, Cordelia, fails to be sufficiently obsequious in the eyes of the King, he disowns her.”).

107. For example, a study guide written for high school students instructs its readers that Cordelia “is almost like the Virgin Mary in her meekness and gentleness” and “[o]nly Shakespeare could draw a picture of such utter goodness in so few lines.” ROBERT SCHUETTINGER, *MONARCH NOTES: WILLIAM SHAKESPEARE’S KING LEAR* 90 (1966).

108. See, e.g., GEORGE W. KEETON, *SHAKESPEARE’S LEGAL AND POLITICAL BACKGROUND* (1967).

109. See Ronald W. Cooley, *Kent and Primogeniture in King Lear*, 48 *STUD. ENG. LITERATURE* 327, 332 (2008). Professor Cooley states that a dissenting critic “is almost unique in his praise for ‘the policy of sectional division.’” *Id.* at 346 n.28 (quoting Berry, *supra* note 40).

110. See *id.* at 331–32.

111. As a technical matter, however, primogeniture laws would not have pertained to a situation involving female heirs. See MAUS, *supra* note 34, at 113 (explaining the law of “partible inheritance”).

112. See KORDECKI & KOSKINEN, *supra* note 58, at 1 (arguing that performances of the play “often shut down the full humanity of Lear’s daughters”). Scholars who dismiss the older daughters as “wicked” are “too numerous to cite.” *Id.* at 2 n.1.

113. See TZACHI ZAMIR, *DOUBLE VISION: MORAL PHILOSOPHY AND SHAKESPEAREAN DRAMA* 188 (2007) (arguing that Goneril and Regan acted at first “not out of wickedness but due to rather ordinary overriding considerations”).

114. Lear, for example, “can hardly be unaware of the implications of his behavior—unaware that his giving was a form of taking; his paternal kindness a form of hostility; his renunciation an effort to retain his power; his retention of power a response to the terror of the impotency of old age.” Berger, *supra* note 76, at 356.

Second, although dividing the kingdom was an unusual strategy, Lear could have reasonably believed he was setting conditions for peace among several regional powers linked by kinship ties.¹¹⁵ His last-minute alteration, removing Cordelia from the equation, may have fatally compromised what would have otherwise achieved a stable balancing of interests.¹¹⁶ As a question of political strategy, it is hard to see why installing a weak ruler to oversee the entire kingdom makes more sense than allowing each daughter to control a more modest realm.¹¹⁷ If Lear had followed the principle of primogeniture and given the kingdom in its entirety to Goneril and her husband, the Duke of Albany, there is reason to doubt that the outcome would have been favorable.¹¹⁸ While his execution left much to be desired, Lear was not wrong to consider a wider range of options for shifting control to the next generation.

In a family-business succession, likewise, there is no one-size-fits-all answer. Whether division of a family business is possible or whether it is preferable to identify a single leader in the next generation will depend on the characteristics of the business and the family’s specific circumstances.¹¹⁹ In some cases, family business owners may be well advised to consider options not generally available in a monarchy—joint rule over undivided assets or sale of the business to someone outside the family.¹²⁰ Family owners can also hire a professional manager to serve as chief executive with day-to-day operational authority and confine the family’s involvement to the board of directors.¹²¹ Rather than following a predetermined

115. See Stuart Elden, *The Geopolitics of King Lear: Territory, Land, Earth*, 25 LAW & LITERATURE 147, 151 (2013) (“Lear is not a foolish king in initially proposing such a division.”); Harry V. Jaffa, *The Limits of Politics: An Interpretation of King Lear, Act I, Scene 1*, 51 AM. POL. SCI. REV. 405, 409 (1957) (contending that Lear’s initial plan was a “product of sound principles of statecraft”). Alternatively, as one commentator observes, the division of the kingdom could be understood as an extension of the “logical” managerial system Lear had applied while king, using “competition and rivalry” to keep himself safe. Berry, *supra* note 40, at 422.

116. See Elden, *supra* note 115, at 152 (arguing that Lear’s response to Cordelia’s refusal to pay him public tribute was “rash”).

117. As noted previously, however, the daughters’ inheritance was subject to the “empty core” problem since any two daughters could, in theory, combine to outmaneuver the third. See BRINIG, *supra* note 81, at 202. To implement a divided-kingdom strategy successfully, Lear would have needed to create an atmosphere of trust—it was far too late for that when Lear announced his decision in public and forced his daughters to flatter him in exchange for their inheritance.

118. Among other things, the play shows the Duke of Albany to be indecisive and weak. Albany is a “man who spends most of the play backing off from his responsibilities.” Berry, *supra* note 40, at 425.

119. See KELIN E. GERSICK, JOHN A. DAVIS, MARION MCCOLLOM HAMPTON & IVAN LANSBERG, GENERATION TO GENERATION: LIFE CYCLES OF THE FAMILY BUSINESS 205 (1997) (“Families that choose a Controlling Owner structure for the next generation are betting the store and the family fortune on the leadership, talent, business acumen and emotional maturity of one person . . .”).

120. See MYRON E. SILDON, GETTING THE FAMILY BUSINESS READY TO SELL 5 (2012) (noting that succession often fails and arguing that, “[i]n most cases, it should not pass to family members and should be sold”).

121. See JOSH BARON & ROB LACHENAUER, HARVARD BUSINESS REVIEW FAMILY BUSINESS HANDBOOK: HOW TO BUILD AND SUSTAIN A SUCCESSFUL, ENDURING ENTERPRISE 65 (2021)

script, family business owners should select the option that best suits the needs of the business and the family's values.¹²²

Third, conventional interpretations of the play are unhelpful if they suggest that the correct strategy for controlling owners is to plan to die in office. Among other shortcomings, this advice precludes the possibility of a well-earned retirement.¹²³ While it is true that lifetime transfers can put parents in a vulnerable position, the value of a family business depends on its ability to maintain its operations without significant disruption.¹²⁴ To the extent Lear's mistreatment by his daughters signals a need for caution in effectuating lifetime transfers of control, modern trust law can facilitate phased transfers while protecting the older generation's financial interests against the risk of filial ingratitude.¹²⁵

Succession is least likely to go according to plan when there is no plan—few legal situations are messier than when surviving members of a family business are left to sort matters out for themselves. Even if a patriarch or matriarch makes a belated effort to put succession plans in order, a compressed timetable creates needless difficulties that could have been avoided with forethought.¹²⁶ Put plainly, if business owners care about the enterprise they have built and want to reduce the likelihood of its collapse, the true lesson of *King Lear* is to start *early*. Critiques of Lear's supposedly premature abdication of the throne get it backward.

B. Obstacles to Succession Planning

The tragedy that befalls Lear has little to do with the substance of his succession plan. When we first encounter him, Lear is in his eighties and in declining

("Some family businesses require their businesses to be run by family members; other firms prohibit family members from working in the company.").

122. See GERSICK, DAVIS, HAMPTON & LANSBERG, *supra* note 119, at 206; *cf.* GORDON & NICHOLSON, *supra* note 9, at 49 (describing succession of ownership of the Reliance Group, one of India's largest companies, "[t]he unbundling of the businesses and the possibility for the brothers to act as leaders in their own right, in their own style and with their own businesses, proved to be a formula that unleashed dramatic innovation and growth").

123. Lifetime transfers can also be a useful way to reduce inheritance taxes "by removing assets, and future appreciation on assets, from the business owner's estate." See CHARLES D. FOX, IV, KEEPING IT IN THE FAMILY: BUSINESS SUCCESSION PLANNING (Am. L. Inst.-Am. Bar Ass'n Comm. on Continuing Pro. Educ. 2011).

124. See G. Warren Whitaker, *Classic Issues in Family Succession Planning*, PROB. & PROP., Mar./Apr. 2003, at 32, 33 ("From an estate planner's perspective, Lear made some wise and brave decisions. First, he recognized that he was too old to run the kingdom of Britain. Rather than cling to power, he sought to provide for an orderly transition to younger hands.").

125. See Boxx, *supra* note 35, at 757; Whitaker, *supra* note 124, at 33 (arguing that Lear "should have been advised to give each daughter's share to a separate revocable trust for that daughter's benefit"); Thomas E. Tyner, *Shakespeare's King Lear and the Importance of Good Legal Drafting*, WASH. ST. BAR NEWS, Apr. 2012, at 22, 22 ("But in the end, all of the tragic events of *King Lear* could have been avoided had Lear simply taken the time to engage the services of a marginally competent real estate lawyer and asked that lawyer to draft a simple legal document.").

126. See GORDON & NICHOLSON, *supra* note 9, at 39 ("Hoping for peace on your deathbed is rather too late to build a climate of cooperation . . .").

health; it is long past time for him to have faced the issue of succession. Yet, few family business consultants would be surprised by his failure to do so. For Lear, as for many family business owners, giving up control is difficult because his sense of self is bound up with his position. Moreover, Lear fails to distinguish his legitimate expectations as a king and as a father. This sort of role confusion is also common in family businesses and increases the risk of a failed succession. Finally, handing control across generations requires clear communication, which involves listening. Like monarchs, family business owners are accustomed to issuing commands and may not be ready to treat their children as equals. The following Sections take up the topics of identity, role, and process *seriatim*.

1. Identity

“Who is it that can tell me who I am?”¹²⁷

When Lear announces his intention to hand over his kingdom to his daughters, he is an octogenarian. Yet, he still cannot abide a complete transfer of power. Instead, he specifies that he will retain the title of king and a retinue of knights to attend him. As king, his presence cannot help but cast a shadow over his daughters’ rule, leaving open the question of who really is in charge. A perennial problem in family-business succession is controlling owners who refuse to let go.¹²⁸ For this reason, “succession is the ultimate test of a family business.”¹²⁹

The transfer of power is rarely just a business decision for a controlling owner. Apart from economic considerations, the incumbent’s individual identity may be entwined with the status that comes from leadership.¹³⁰ Surrendering a business position means leaving behind a major part of what has given an individual’s life meaning and allowing “younger strengths” to rise in the workplace and at home.¹³¹ Thus, the patriarch of a family business may wonder whether he will sit at the head

127. SHAKESPEARE, *supra* note 1, at act 1, sc. 4, l. 236.

128. See F. HODGE O’NEAL & ROBERT B. THOMPSON, OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS § 2.5 (2021) (“[M]any founders are reluctant to acknowledge their own mortality, or even if they are, are unwilling to deal with possible conflicts between a parental desire to share with all children equally and the reality that one or more children will not be in the family business as it goes forward.”); *All too Human: How Families Can Cause Trouble for their Firms*, ECONOMIST (Apr. 16, 2015), <https://www.economist.com/special-report/2015/04/16/all-too-human> [<https://web.archive.org/web/20201024153224/https://www.economist.com/special-report/2015/04/16/all-too-human>] (“Many family patriarchs are larger-than-life figures who are unwilling to make way for their successors.”).

129. GERSICK, DAVIS, HAMPTON & LANSBERG, *supra* note 119, at 193.

130. See MATTHIAS WALDKIRCH, *Social Identity Theory and the Family Business*, in THEORETICAL PERSPECTIVES ON FAMILY BUSINESSES 137 (Mattias Nordqvist, Leif Melin, Matthias Waldkirch & Gershon Kumeto eds., 2015) (explaining that individual identity is derived in substantial part from “membership in social groups or categories”).

131. See BLAKE E. ASHFORTH, ROLE TRANSITIONS IN ORGANIZATIONAL LIFE: AN IDENTITY-BASED PERSPECTIVE 13 (2001) (stating that “the more the individual is involved in and identifies with work, the more consequential and potentially taxing the transition process tends to be for the individual”).

of the table for family meals once his children have taken over.¹³² Perhaps as a consequence, family business owners often neglect to create or follow a plan for succession.¹³³

The problem of identity is at the core of *King Lear*.¹³⁴ Lear's situation is tragic because what he wants is impossible to achieve. Lear is the king and must remain so to remain himself. Even though Lear states that he wants to "crawl, unburdened toward death," he perceives that abdicating the throne is tantamount to a total erasure of self. Yet, by remaining king, if mostly in name, he creates tensions that break the fragile compromise he has sought to achieve and deprive him of peace in his old age.¹³⁵ When his daughters turn their backs on him, Lear experiences not only a betrayal but a loss of identity. Bewildered, he asks, "[w]ho is it that can tell me who I am?"¹³⁶ The dual blow is too much for Lear's fragile mind to bear.

Lear's personal identification with the kingship also helps to explain why conflicts with his daughters escalate so rapidly. He perceives their rebukes as earthshaking upheavals of the natural order. By belittling Lear as a doddering old man and asserting their power over him, Goneril and Regan threaten the core of his identity as a king, a father, and a man. In family businesses, "the root of the most poisonous conflicts is identity—the idea that one is being diminished or damaged; that one is wounded or threatened in some essential way."¹³⁷ As *King Lear* makes plain, family-business succession requires a separation of personal identity and business status; unless the incumbents are prepared to give up control, the formal clarity of financial and legal arrangements they devise will not matter.¹³⁸

2. Role

"Thou Mad'st thy Daughters thy Mothers"¹³⁹

King Lear also shows the importance of roles and role-playing. Although they are not scripted in advance by an omniscient playwright, social roles

132. See Lee Anne Fennell, *Death, Taxes, and Cognition*, 81 N.C. L. REV. 567, 584 (2003) ("Maintaining control over assets is consistent with continuing to exercise power and authority in this life; dispersing assets suggests abdication of that power and authority and capitulation to death.").

133. See O'NEAL & THOMPSON, *supra* note 128.

134. See Berry, *supra* note 40, at 422 (arguing that "*King Lear* is a tragedy of identity, in the sense that the King has created a system that is his own identity").

135. As one commentator puts it, Lear "goes through an abdication without abdicating." STANLEY CAVELL, *MUST WE MEAN WHAT WE SAY?* 255 (Updated ed. 2015).

136. SHAKESPEARE, *supra* note 1, at act 1, sc. 4, l. 230.

137. GORDON & NICHOLSON, *supra* note 9, at 11. Thus, even if a dispute concerns money, "money often represents all kinds of psychological elements, and most powerfully when it stands for how much one is valued or loved." *Id.*

138. See Gomez-Mejia, Cruz, Berrone & De Castro *supra* note 15, at 662 (observing that succession in family firms is different because of the "deep and potentially divisive emotions among family members and the trauma of letting go after a long, unchallenged reign at the top").

139. SHAKESPEARE, *supra* note 1, at act 1, sc. 4, ll. 172–173.

prescribe behaviors and set expectations that regulate our interactions.¹⁴⁰ Family members who work together in a business must navigate multiple roles.¹⁴¹ Parents, for instance, may also be employers. Role confusion can endanger family-business succession.

First, as *King Lear* illustrates, problems arise when a role is carried over to a domain where it is inappropriate. In the workplace, what should matter most is professional competence. Family businesses suffer when participants are judged according to non-business standards—whether that means applying lax rules for hiring and promotion, on the one hand, or exacting retribution for family grievances, on the other.¹⁴² Identifying a suitable successor is challenging enough without adding family expectations to the mix.

Lear collapses the distinction between private and public roles when he demands that his daughters declare their love for him to guide his division of the kingdom.¹⁴³ Regardless of Lear’s intentions, the result is to foreground family connections rather than more appropriate considerations of role suitability.¹⁴⁴ Moreover, “their expressions of love are compromised in advance by the nature of his request, since he is asking them to show how amorous they are, not so much for him as for his land.”¹⁴⁵ Lear punishes Cordelia for refusing to perform her filial role in public.¹⁴⁶

Second, and relatedly, *King Lear* shows how gender biases can affect family-business succession. Lear’s succession dilemma arises only because of the absence of a suitable male heir, which forces him to consider how to perpetuate his rule through his daughters and their husbands. Because family roles are often

140. See generally A. PAUL HARE & HERBERT H. BLUMBERG, *DRAMATURGICAL ANALYSIS OF SOCIAL INTERACTION* (1988).

141. See ASHFORTH, *supra* note 131, at 24 (stating that social roles are what enable individuals to “categorize themselves and others as a means of ordering the social environment and locating themselves and others within it”). Consequently, if “social roles are incompatible, family business has a built-in conflict.” Means, *Nonmarket Values*, *supra* note 13, at 1209.

142. See Means, *Nonmarket Values*, *supra* note 13, at 1212–13 (identifying a “feedback loop” whereby “family problems can become business problems, and business disagreements can further sour family relations”).

143. See YOSHINO, *supra* note 38, at 212 (“Lear is accused of making the category mistake of confusing love and statecraft.”). According to Professor Yoshino, Lear’s “love trial” could be justified as a merit-based alternative to allocation by birth order. See *id.*

144. According to one scholar, “[i]n merging an identity produced by law and one produced by love, Lear abnegates the duties of the sovereign and unseats the affections of the father.” Susan Sage Heinzelman, *When Law and Love Are Not Enough: King Lear and the Spectacle of Terror*, 28 QUINNIPIAC L. REV. 755, 756 (2010).

145. See Berger, *supra* note 76, at 354.

146. His reaction, however, is not completely irrational. Even if Lear has put her in an embarrassing position, one could argue that Cordelia acted badly in rejecting her assigned role at a public and ceremonial occasion. See Berry, *supra* note 40, at 427 (“There are decencies which in aggregate conduce to the decorum of existence. Cordelia, in making her demonstration, flouts them all.”). Alternatively, one might argue that Cordelia makes the case for her fitness to rule by insisting on a distinction between the personal and the political.

gendered, the expectations imposed on women can limit their opportunities to take on leadership responsibilities.¹⁴⁷ Instead of being evaluated as candidates for succession, women may be valued by their parents mainly as a way of bringing worthy males into the family.¹⁴⁸ As one commentator explains, “[s]ons-in-law are often expected to join the family business and can be viewed as natural candidates for succession even if they are less capable and competent than daughters.”¹⁴⁹

King Lear opens with the question of who will wed Cordelia, the resolution of which is presumed to turn on her inheritance of a portion of the kingdom.¹⁵⁰ When women’s value in a family business is defined by their relationship with men—whether a father, a husband, or a son—it becomes correspondingly less likely that they will receive fair recognition for their own contributions and ownership interest.¹⁵¹ The subjugation of women’s interests limits the leadership talent available to the family business.

Gender bias can also endanger succession when the result is an unfair distribution of economic resources. Males in the next generation are often given disproportionate power, which can lead to dissension when they abuse their control.¹⁵² For example, in one fairly typical case, the parents appointed their sons as directors of the family business and gave them voting stock while leaving their

147. The demonization of Goneril and Regan may be attributed in part “to the sexist expectation that daughters, rarely sons, must care for aging parents.” KORDECKI & KOSKINEN, *supra* note 58, at 18.

148. See Calvin Wang, *Daughter Exclusion in Family Business Succession: A Review of the Literature*, 31 J. FAM. & ECON. ISSUES 475, 476 (2010).

149. *Id.*

150. SHAKESPEARE, *supra* note 1, at act 1, sc. 1, ll. 49–52 (“The princes, France and Burgundy, Great rivals in our youngest daughter’s love Long in our court have made their amorous sojourn, And here are to be answer’d.”). In *A Thousand Acres*, a novel that transplants *King Lear* to the setting of an Iowa family farm, the daughters help to ensure the continuity of the farm by marrying men who can work alongside their father in the fields. See JANE SMILEY, *A THOUSAND ACRES* (2001). Even in publicly traded companies, “[t]here is still, in the twenty-first century, evidence that stock markets positively value strategic marriage alliances by family-controlled firms.” HAROLD JAMES, *Family Values or Crony Capitalism?*, in *THE ENDURANCE OF FAMILY BUSINESSES*, *supra* note 27, at 57, 74.

151. See Christine Blondel with Marina Niforos, *The Women of the Family Business*, in *THE ENDURANCE OF FAMILY BUSINESSES*, *supra* note 27, at 199, 200.

152. In one recent case, two sisters established shareholder oppression after their three brothers, including the company’s president, froze them out of a business their parents had founded. *Bone v. Coyle Mech. Supply, Inc.*, No. 5-15-01172, 2017 WL 2403268, at *1–2 (Ill. Ct. App. June 6, 2017). In another case, problems arose after a father created family limited partnerships to avoid estate taxes, appointing his two daughters as limited partners and naming another company he owned as the general partner. *Boutell v. W.H.B. Co.*, No. 11-10617, 2012 WL 380238, *2 (E.D. Mich. Feb. 6, 2012). When the father passed away, his son became the president of the general partner and allegedly used his control to deprive his sisters of their fair share of revenue. *Id.* at *3–4. Likewise, a court found breaches of fiduciary duty in a case involving a family business controlled by grandsons of the founder; the plaintiffs were granddaughters of the founder and minority shareholders in the family business. See *Goret v. H. Schultz & Sons, Inc.*, No. A-4281-10T1, 2013 WL 4792847, at *1 (N.J. Super. Ct. App. Div. Sept. 10, 2013).

daughters with nonvoting stock.¹⁵³ Over time, the sons increased their salaries, stopped paying dividends, and caused the corporation to cover millions of dollars in personal expenses.¹⁵⁴ When the minority shareholders complained and sought redemption of their shares, the majority shareholders implemented a plan to offer approximately fifty percent of the fair market value for the shares.¹⁵⁵ A court found that this pattern of behavior constituted shareholder oppression.¹⁵⁶ Had the parents established a role for their daughters in the business, the abuse of control problem might have been prevented in the first place.¹⁵⁷

Gender roles are less rigid today than in Shakespeare’s time, let alone the remote England of his *King Lear*, but many family businesses continue to apply traditional, gendered assumptions when allocating opportunities.¹⁵⁸ Part of the problem is that when women wield authority, their presence in the workplace may be perceived in terms of a stereotyped and limited set of family roles.¹⁵⁹ It is sometimes said that women in business roles “must master a high-wire act that maneuvers around the ‘double bind’—a woman executive cannot be too masculine or feminine.”¹⁶⁰ Thus, after Lear has relinquished power, his fool scolds him, “Thou Mad’st thy Daughters thy Mothers.”¹⁶¹ The gendered implication is that Lear has become infantilized—an insult that would not have landed with the same force if Lear had vested power in a son.¹⁶²

On the other hand, while family relationships tend to make gender roles more salient, parents also typically want the best for all their children and may reject the idea that gender should limit their daughters’ opportunities in life. For this reason, family businesses can also create opportunities for women to take on leadership

153. See *White v. Fee*, 953 N.Y.S.2d 554, *2 (Sup. Ct. 2012) (unpublished table decision).

154. See *id.* at *2–3.

155. See *id.* at *4.

156. See *id.* at *15.

157. See LUCIA ALBINO GILBERT & JOHN C. GILBERT, *WOMEN WINEMAKERS: PERSONAL ODYSSEYS* 135 (2020) (“Women’s recognized success in a traditional field can help change stereotypical perceptions of women’s abilities and provide opportunities to counter the ‘lack of fit’ gender-role traditionalism that can influence hiring and promotions.”).

158. See Karin Staffansson Pauli, *Gender Theory and the Family Businesses*, in *THEORETICAL PERSPECTIVES ON FAMILY BUSINESSES*, *supra* note 130, at 191 (observing that “obstacles to [women’s] involvement” include “stereotyped roles, and certain aspects of succession and primogeniture” (citing Rocio Martínez Jimenez, *Research on Women in Family Firms: Current Status and Future Directions*, 22 *FAM. BUS. REV.* 53 (2009))); Wang, *supra* note 148, at 475 (reporting studies that “females—notably daughters—are almost always overlooked as succession candidates”).

159. See Judith G. Greenberg, *Insider Trading and Family Values*, 4 *WM. & MARY J. WOMEN & L.* 303, 308 (1998) (contending that “gender is one of the concepts that structures the ways we think about other, seemingly unrelated, issues”). Professor Greenberg notes a contrast between the “male-identified market” and “the women’s realm of family.” *Id.* at 311.

160. Marleen A. O’Connor, *Women Executives in Gladiator Corporate Cultures: The Behavioral Dynamics of Gender, Ego, and Power*, 65 *MD. L. REV.* 465, 468 (2006).

161. SHAKESPEARE, *supra* note 1, at act 1, sc. 4, ll. 176–177.

162. See Blondel, *supra* note 151, at 212 (“Daughters accessing leadership roles challenge traditional family relationships.”).

responsibilities that they might not find as readily elsewhere.¹⁶³ Good intentions, however, are no guarantee of fair treatment in the workplace.¹⁶⁴ When male incumbents fail to prepare wives and daughters for leadership roles, they create a needless risk of future crisis.¹⁶⁵ To limit the effect of gender bias, incumbent owners should seek to include daughters in the business as early as possible—“active involvement in the family business and a close relationship with incumbents (fathers) can be a pathway to leadership and control for some daughters.”¹⁶⁶ Again, the lesson for a successful transition is to begin the process as soon as possible.

To summarize, roles defined by families, by business organizations, and by other cultural institutions organize and give meaning to relationships among individuals. Outside the theater, roles may not be scripted, but most roles nevertheless provide guidance to those who inhabit them.¹⁶⁷ Family businesses, like monarchies, are particularly challenging because they require participants to negotiate multiple, potentially conflicting roles.

3. *Process*

“Come not Between the Dragon and His Wrath”

By definition, family businesses “link two societal institutions, family and firm, in cooperative ventures for mutual advantage.”¹⁶⁸ The joinder is uneasy, however, because each institution is built to serve different values. Families typically allocate their resources to address needs and to reduce vulnerability; businesses prioritize competence and reward merit. Thus, in family businesses, “conflicts unavoidably arise about the appropriate distribution of the advantages gained, and about the principles that should govern the resolution of those conflicts.”¹⁶⁹

163. As one commentator observes, “in less than the span of a human lifetime, women’s roles have changed more than in all of history.” Marleen O’Connor-Felman, *American Corporate Governance and Children: Investing in Our Future Human Capital During Turbulent Times*, 77 S. CAL. L. REV. 1255, 1261 (2004).

164. Despite social changes, “economic and biological influences lead to the continuation of traditional gender roles.” *Id.* at 1273.

165. See FELLMAN, *supra* note 27, at 276 (reporting interview with female CEO regarding her perception that “her father had never really accepted her as his successor”). The CEO explained the negative consequences when her father’s death pushed her into a leadership role for which she had not been prepared: “The day after my father died, I sat in his office with my mother and we knew that we faced a huge challenge. At that point, I had not even been a director. I had to learn a lot and learn it quickly.” *Id.* (internal quotation marks omitted).

166. Wang, *supra* note 148, at 480.

167. See ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 73–74 (1959) (“The legitimate performances of everyday life are not ‘acted’ or ‘put on’ in the sense that the performer knows in advance just what he is going to do [But this] does not mean that he will not express himself . . . in a way that is dramatized and pre-formed in his repertoire of actions.”).

168. See Ludo Van der Heyden, Christine Blondel & Randel S. Carlock, *Fair Process: Striving for Justice in Family Business*, 18 FAM. BUS. REV. 1, 2 (2005); Means, *Nonmarket Values*, *supra* note 13, at 1189 (“[A] successful family business must find ways to mediate the tension between expectations rooted in family life and expectations inherent to the marketplace.”).

169. Van der Heyden, Blondel & Carlock, *supra* note 168.

Family-business succession foregrounds these concerns.¹⁷⁰ To avoid violating business or family values, families must create a fair set of procedures for making decisions about succession.¹⁷¹ Without such procedures, succession planning may break down in one of two ways. First, incumbents may be daunted by the sheer complexity of the planning exercise.¹⁷² With more pressing operational challenges to handle, it will be very tempting for incumbent owners to procrastinate. Also, incumbents may worry about the costs, both financial and emotional, of engaging a difficult topic.¹⁷³

A second risk to succession in the absence of agreed-upon procedures for decision-making is that the older generation will avoid difficult conversations by making all the important decisions unilaterally. Incumbents have the prerogative to decide the timing and the allocation of financial and control rights, but their raw exercise of power is not enough to convey legitimacy or to command respect.¹⁷⁴ In the face of uncertainty, talented members of the next generation may decide to pursue other opportunities rather than waiting for the family business leaders to make room for them, or they may bristle at having decisions made without their input.

Accordingly, whether incumbents prefer to divide control equally among potential family successors, identify a leader in the next generation, or bring in outside managers, they should strive to create an inclusive process that will be perceived as fair even by those who do not get everything they want.¹⁷⁵ To that end,

170. See, e.g., KELLY LECOUVIE & JENNIFER PENDERGAST, FAMILY BUSINESS SUCCESSION: YOUR ROADMAP TO CONTINUITY 3 (2014) (“The impact of family dynamics on business decisionmaking is often most apparent at the time of a generational transition.”).

171. Although appropriate procedures may vary, it is important to clarify some of the criteria for a fair process. See STEARNS, *supra* note 81, at 81–82 (“Unless the term *fair* is specifically defined, such claims operate as a conversation stopper, but one that fails to identify, let alone resolve, underlying philosophical or methodological disagreements.”).

172. See Gregory F. Monday, *A Blueprint for Family Business Succession Planning*, BUS. L. TODAY (Jan. 16, 2018) [hereinafter Monday, *Blueprint*], <https://businesslawtoday.org/2018/01/a-blueprint-for-family-business-succession-planning/> [<https://perma.cc/BQD6-MFT3>] (“[O]ne reason why so many family businesses do not engage in proper succession planning is because it is difficult and complex. Family business succession planning must take account of countless unknown future circumstances . . .”). Mr. Monday is also the author of a recent practitioner’s guide to family-business succession issues, GREGORY MONDAY, THE LAWYER’S GUIDE TO FAMILY BUSINESS SUCCESSION PLANNING: A STEP-BY-STEP APPROACH FOR LAWYERS, BUSINESS OWNERS, AND ADVISORS (2020).

173. For example, if some family members are not included in a succession plan, “[T]hey may just switch off, not just from the business but from the family, losing any sense of emotional bond.” GORDON & NICHOLSON, *supra* note 9, at 168.

174. See E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 9 (1988) (“[O]ne of the most reliable findings in research on procedural justice: that people react more favorably to procedures that give them considerable freedom in communicating their views and arguments.”).

175. See Van der Heyden, Blondel & Carlock, *supra* note 168 (“Conflicts generated by the interface of family, shareholding, and business interests should benefit from an effective application of fair process principles.”); GORDON & NICHOLSON, *supra* note 9, at 168 (In a family business, “people

family business owners should engage all stakeholders in dialogue, establish clear criteria for choosing among various alternatives, and, once a decision has been made, articulate the reasons supporting that decision.¹⁷⁶ Succession planning takes time and cannot be thrown together at the last minute.

The time commitment and costs associated with implementing a robust process for succession may seem unappealing to family business owners. If they value the business, however, and wish to see it prosper into the future, succession planning is one of the most important investments they are likely to make. *King Lear* is a stark example of the consequences of neglect. The potential merit of dividing the kingdom—whether in the interests of distributive justice or political strategy—was undermined by the haphazard, arbitrary manner in which Lear imposed his decisions on his children. Lear acted without the benefit of any dialogue with those who would be affected by his decision. He rejected and banished his advisors, issuing threats to those who would intervene: “Come not between the dragon and his wrath.”¹⁷⁷

By disregarding the views of others with a stake in the venture and refusing to take neutral, objective advice, Lear created discord and made future conflict more likely. Indeed, by conditioning his gift on his daughters’ statements of love for him, he wounded their pride unnecessarily, stating, in effect, that “to strip him of his power, they [would] have to pay for it by risking a humiliating posture—sitting up and begging, crowing for cheese.”¹⁷⁸ Yet, family business owners too often follow Lear’s example and make decisions without consulting those who will be affected by them because they think they are entitled to deference and that “they know best.”¹⁷⁹

can get more upset about what they perceive as an unfair process than the inequality of the division in itself.”).

176. See Van der Heyden, Blondel & Carlock, *supra* note 168, at 4–5 (defining key characteristics of fair process).

177. SHAKESPEARE, *supra* note 1, at act 1, sc. 1, l. 122. In the context of family-business succession, “some of the most powerful and helpful interventions come from advisers with a background in family therapy who are able to help families develop healthy communications and emotional self-discipline.” GORDON & NICHOLSON, *supra* note 9, at 33. Some lawyers who specialize in representing family businesses may develop this expertise themselves; others may bring in outside family-business consultants as appropriate.

178. See Berger, *supra* note 76, at 354. Although few, if any, family business owners would follow Lear by staging a literal “love trial,” it is not uncommon for them to reward “filial loyalty” above all other considerations. See GORDON & NICHOLSON, *supra* note 9, at 117 (describing how Sumner Redstone drove his son out of the family business and awarded power to the daughter who stood by his side during an acrimonious divorce).

179. GORDON & NICHOLSON, *supra* note 9, at 19 (observing that parents may continue to exercise judgment from “beyond the grave”—specifically, “[t]hey can cast a shadow of control in the way they write their wills and construct their family trusts”).

As a matter of first principles, there may be no clear answer concerning how the assets of a family business should be passed down to heirs.¹⁸⁰ The choice will implicate the family’s values, the needs of the business, and the preferences of various stakeholders. Although most families “aspire to distribute roughly equal resources to their children,”¹⁸¹ they may use a different metric for allocating the ownership of a family business.¹⁸² For example, in order to preserve capital for the continuation of the business, one family partnership required that the equity held by deceased family members be repurchased at net book value, even if the fair market value of the decedent’s interest was much higher.¹⁸³

What matters, then, is not *what* the family decides, but *how* it decides and *when* it decides. In their role as counselors, lawyers can impress upon family business owners the practical importance of engaging in a constructive dialogue with their children.¹⁸⁴ To get the message across, lawyers might consider following Justice Kennedy’s example and giving clients a copy of *King Lear* as a case study concerning the limits of authoritarian parenting in succession planning.¹⁸⁵ By following procedural guidelines, family owners can limit the risk of a failed succession.

In sum, lawyers who advise family businesses must be cognizant of how family dynamics can affect succession planning. A lawyer’s technical expertise will be misspent if family dynamics drive succession planning, as when a patriarch refuses to surrender control or when parents insist upon bequeathing a business to their children in equal shares regardless of each child’s competence or interest. No legal structure can stand if it is built on shifting sands of ego and delusion.

180. In some cases, the optimal solution may be to sell the business to outsiders and to distribute cash to family members. See Kenneth Kaye, *When the Family Business Is a Sickness*, 9 FAM. BUS. REV. 347, 347 (1996) (“No one has calculated how many of the [family-business succession] ‘failures’ were actually terrific success stories, creating liquidity that opened new paths of opportunity for the next generation; or, conversely, how many that ‘made it’ through a transition trapped their successors in misery.”).

181. Means, *supra* note 13, at 1188.

182. One commentator opines that if the business is to remain in the family, it is almost always best to identify a single successor and to avoid becoming a “business run by a committee of children.” See DRAKE, *supra* note 12, at 176.

183. See, e.g., Estate of Cohen *ex rel.* Perelman v. Booth Computs., 22 A.3d 991, 993–94 (N.J. Super. Ct. App. Div. 2011) (approving mandatory repurchase at \$178,000, even though fair market value was alleged to be \$11,526,162).

184. Lawyers also play an important role in ensuring that the family’s succession plan is implemented properly. For example, in one recent dispute the parents’ advance planning was circumvented when two sons exploited a loophole and had themselves appointed as their mother’s estate’s administrators, because their father had been incapacitated by a stroke. The sons then changed their father’s estate plan in order to distribute the family business shares to themselves at a discounted price, cutting out their sister from the distribution. See Osborn v. Griffin, 50 F. Supp. 3d 772, 780–83 (E.D. Ky. 2014), *aff’d*, 865 F.3d 417 (6th Cir. 2017).

185. See Renda, *supra* note 31.

III. TOWARD A SOLUTION

The *King Lear* tragedy is not inevitable. While the world is full of foolish Lears, unworldly Cordelias, and conniving Gonerils and Regans,¹⁸⁶ it also contains supportive families and enlightened business owners who understand that they are running a relay race and need to focus on “passing the baton.”¹⁸⁷ To the extent incumbent family business owners might delay what they see as an unpleasant task, this Part contends that lawmakers, courts, and, in some cases, contractual counterparties can create strong incentives for succession planning. Moreover, public and private measures can reinforce each other.

A. Legislative Initiatives

The law governing business associations is principally state law.¹⁸⁸ States offer partnership, limited partnership, corporate, and limited liability company choices, among others, each with a different set of default and mandatory governance rules.¹⁸⁹ No state, however, offers a form of business association designed specifically for use by family businesses. Nor, with limited exceptions, have legislators at the federal, state, or local level created financial incentives for family businesses to engage in succession planning. Given the economic importance of family businesses, and the social cost of avoidable business failures, lawmakers should consider the utility of both types of intervention.

1. The F Corp.

In the past decade, interest in forms of business association designed to facilitate social enterprise has skyrocketed.¹⁹⁰ The most popular social enterprise statutory form in the United States, the benefit corporation or “B Corp.,” has now been adopted by thirty-seven states and is on the legislative agenda in another four

186. See generally GORDON & NICHOLSON, *supra* note 9; ROGER FRITZ, WARS OF SUCCESSION: THE BLESSINGS, CURSES AND LESSONS THAT FAMILY-OWNED FIRMS OFFER ANYONE IN BUSINESS (2005).

187. See, e.g., Ben Dooley & Hisako Ueno, *This Japanese Shop Is 1,020 Years Old. It Knows a Bit About Surviving Crises*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2020/12/02/business/japan-old-companies.html> [<https://perma.cc/KFZ4-SL95>].

188. See STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 14 (2002) (explaining that “[s]electing a state of incorporation has important consequences, because of the so-called ‘internal affairs doctrine’—a conflicts of law rule holding that corporate governance matters are controlled by the law of the state of incorporation”).

189. For example, corporate law imposes mandatory fiduciary duties that may be waived in an LLC. See *AM Gen. Holdings LLC v. The Renco Grp., Inc.*, No. 7639-VCS, No. 7668-VCS, 2016 WL 4440476, at *15 (Del. Ch. Aug. 22, 2016) (stating that “the LLC Act enables contracting parties to alter and even eliminate equitable fiduciary duties”).

190. See Emily Winston, *Benefit Corporations and the Separation of Benefit and Control*, 39 CARDOZO L. REV. 1783, 1796–97 (2018) (stating that the “social enterprise movement . . . was likely accelerated by the widespread negative social effects of the 2008 financial crisis and subsequent Great Recession”). For an overview, see generally THE CAMBRIDGE HANDBOOK OF SOCIAL ENTERPRISE (Benjamin Means & Joseph W. Yockey eds., 2019).

states.¹⁹¹ The B Corp. explicitly authorizes managers to combine the pursuit of profit with the achievement of other social objectives.¹⁹² An analogous “F Corp.” entity could establish a structure for the dual family and business purposes typical of a family firm. In particular, drafters of F Corp. model legislation should include the following best practices for succession planning.

Independent Board Committee. The F Corp. statute should require the creation of an independent committee with authority to establish criteria for hiring and evaluating family members within the organization. The committee should also have primary responsibility for vetting candidates for leadership succession and should be required to have a majority of independent members.¹⁹³ Even if its rulings were advisory, an independent committee would play an important mediating role and could help family constituents sidestep the role conflicts that can endanger family-business succession.

Some family businesses have already established committees along these lines. Recently, *The New York Times*’ Ochs-Sulzberger family used an independent committee to evaluate candidates for the position of publisher.¹⁹⁴ The position had been family-held since 1896, but that was no guarantee that a family member would be deemed ready for the responsibility.¹⁹⁵ Likewise, the Brown-Forman Corporation, which makes spirits including Jack Daniel’s and Woodford Reserve, relies upon an independent Nominating Committee to identify candidates for the board of directors and “lead the work of the Board in succession planning for the

191. See *State by State Legislative Status*, BENEFIT CORP. INFO. CTR., <https://benefitcorp.net/policymakers/state-by-state-status> [<https://web.archive.org/web/20210121201213/https://benefitcorp.net/policymakers/state-by-state-status>] (last visited Jan. 21, 2021). There are actually two closely related concepts at issue: the nonprofit B Lab entity that drafted the model benefit corporation legislation also promotes a “B Corp.” certification for businesses that “meet the highest standards of verified social and environmental performance, public transparency, and legal accountability to balance profit and purpose.” *What’s Behind the B?*, B LAB U.S. & CAN., <https://usca.bcorporation.net/about-b-corps> [<https://perma.cc/XK3W-PU67>] (last visited Aug. 9, 2022). This Article *infra* uses the B Corp. label inclusively to refer to benefit corporations and to third-party certifications.

192. See Winston, *supra* note 190, at 1786.

193. One scholar has defended the role of independent directors in family businesses, noting that they can provide “a reality-check function . . . when questions of management succession are on the table.” See Deborah A. DeMott, *Guests at the Table?: Independent Directors in Family-Influenced Public Companies*, 33 J. CORP. L. 819, 853 (2008). Professor DeMott limits her focus to the interests of nonfamily shareholders who may not have the same preference for “[k]eeping management within the family.” *Id.* The benefit of an independent perspective is not limited to nonfamily constituencies, however. For example, “[s]ome possibilities, such as appointing a nonfamily CEO to succeed a founder or a founder’s descendant, may merit serious consideration when viewed objectively, but may be so fraught with implications internal to the family that they will receive their due only if pressed by members of the board.” *Id.*

194. See Sydney Ember, *A.G. Sulzberger, 37, to Take Over as New York Times Publisher*, N.Y. TIMES (Dec. 14, 2017), <https://www.nytimes.com/2017/12/14/business/media/a-g-sulzberger-new-york-times-publisher.html> [<https://perma.cc/8U3B-SKV4>].

195. *Id.*

Chief Executive Officer.”¹⁹⁶ To ensure its independence, the Nominating Committee must “consist of at least three directors, at least one of whom is a member of the controlling shareholder family group and a majority of whom are ‘independent’ as that term is defined by the listing standards of the New York Stock Exchange.”¹⁹⁷ The Nominating Committee provides a neutral venue for addressing potential conflicts between business and family values.¹⁹⁸

Retirement Age. The F Corp. framework should formalize another governance best practice by mandating that the board establish a retirement-age policy for board members and senior officers. As Justice O’Connor observed in a decision upholding a mandatory retirement age for state court judges, “[i]t is an unfortunate fact of life that physical and mental capacity sometimes diminish with age.”¹⁹⁹ The F Corp. statute might also provide for periodic cognitive screening beginning at age fifty and increasing in frequency over time. Regular cognitive screening could be in lieu of a mandatory retirement age or a supplemental measure.

Brown-Forman’s corporate governance guidelines are instructive in this regard. The guidelines state that “[n]o director may stand for re-election to the Board at the Annual Meeting of Stockholders immediately following his or her 72nd birthday.”²⁰⁰ The company allows limited exceptions to that policy, but only upon recommendation of the Committee and “a special vote by the Board, with two-thirds of directors approving, without the vote or participation of the affected director.”²⁰¹ Brown-Forman’s written policy facilitates succession planning because it makes clear that the retirement of an incumbent is not a judgment regarding that

196. See BROWN-FORMAN CORP., CORPORATE GOVERNANCE AND NOMINATING COMMITTEE CHARTER 1 (2021), https://www.brown-forman.com/sites/default/files/team_resources/2021-07/2021-01-27-CGN-Charter_final_approved-by-the-board.pdf [<https://perma.cc/M9VW-ARKJ>] (describing duties of Corporate Governance and Nominating Committee (the Nominating Committee)). Brown-Forman was founded in 1870 and is a family controlled, publicly traded corporation. See *Historical Timeline*, BROWN-FORMAN, <https://www.brown-forman.com/history-timeline> [<https://perma.cc/89U7-X6TN>] (last visited Aug. 9, 2022).

197. See BROWN-FORMAN CORP., *supra* note 196,

198. *Id.* Although disputes must be resolved on their own merits, the Committee’s charter makes clear that family values should not be ignored: “[T]he Committee shall pay due attention to the corporate governance implications of the Brown family’s control of a majority of the Company’s outstanding voting stock, including by staying apprised of the family’s own governance initiatives and by appropriately balancing the governance needs of a public company with those of a family controlled company.” *Id.*

199. *Gregory v. Ashcroft*, 501 U.S. 452, 472 (1991). One commentator argues that because cognitive decline is neither inevitable nor uniform, it would be better to “empower” individual judges by providing them with information about their cognitive functioning. See Francis X. Shen, *Aging Judges*, 81 OHIO ST. L.J. 235, 238 (2020).

200. BROWN-FORMAN CORP., CORPORATE GOVERNANCE GUIDELINES 4 (2022), https://www.brown-forman.com/sites/default/files/team_resources/2022-02/2022-01-25%20Corporate%20Governance%20Guidelines_final%20approved%20by%20Board.pdf [<https://perma.cc/3KJS-34SE>].

201. *Id.* In exceptional cases, the board might recognize the continuing contributions of a director, especially since “there is no published neuroscientific research suggesting that a particular age . . . should serve as the bright line cutoff for cognitive decline.” Shen, *supra* note 199, at 281.

person’s capacity to continue in the role. Instead, by shifting the focus from individual competence to business policy, a preset retirement age recognizes that the timely transition of ownership and control is beneficial for a family business.²⁰²

Family Managed vs. Professionally Managed. Drafters of F Corp. legislation might also borrow from LLC statutes, which distinguish between manager-managed and member-managed organizational structures.²⁰³ In that regard, an F Corp. could require family businesses to designate whether they wish to adopt a “family control” or “family ownership” structure. A family business would select “family control” so long as it intends for family members to occupy the CEO and other senior officer positions.²⁰⁴ By contrast, the choice of “family ownership” would indicate that family involvement is limited to board oversight and that independent managers will hold the senior management positions and exercise operational control.²⁰⁵ Although the choice would be alterable, perhaps subject to a supermajority vote, clarifying the basic parameters of succession planning would help reduce the grounds for conflict.²⁰⁶

These are just a few examples of how an F Corp. choice of entity could offer governance principles designed to meet the needs of typical family businesses.²⁰⁷

202. A retirement policy also recognizes the reality that, for most people, cognitive decline is a natural part of aging. *See, e.g.,* Jonas Persson, Lars Nyberg, Johanna Lind, Anne Larsson, Lars-Göran Nilsson, Martin Ignvar & Randy L. Buckner, *Structure–Function Correlates of Cognitive Decline in Aging*, 16 CEREBRAL CORTEX 907, 907 (2005).

203. *See* Douglas K. Moll, *Minority Oppression & the Limited Liability Company: Learning (or Not) from Close Corporation History*, 40 WAKE FOREST L. REV. 883, 917–18 (2005) (“LLC statutes typically provide for partnership-like management by members . . . or for corporate-like management by managers . . .”). Although members have managerial authority in member-managed LLCs, in manager-managed LLCs, “members are not agents of the LLC and, generally, have the authority to make only major decisions,’ while managers . . . have the authority to bind the LLC and to make day-to-day management determinations.” *Id.* at 918 (citation omitted).

204. If family owners have the skillset and interest to handle operations directly, the “elimination of the separation between owners and management” allows for more efficient operations. *See* Johan Lambrecht & Jozef Lievens, *Pruning the Family Tree: An Unexplored Path to Family Business Continuity and Family Harmony*, 21 FAM. BUS. REV. 295, 298 (2008). For family businesses of this type, it is often best to mandate buyouts of passive family owners to avoid conflict about dividends and salary. *See id.*

205. The Brown-Forman Corp. falls into this category, although there is no formal written policy to that effect. After several generations of direct family control, the family made the strategic choice to delegate operational decisions to professional managers and to focus on larger questions of strategy and vision. Interview with Matthew Hamel, Gen. Couns., Brown-Forman Corp. (Nov. 16, 2020) (notes on file with author).

206. It is hard to create a process to accomplish a task, and, at the same time, to argue about what it is you are trying to accomplish. If readers need authority to support that proposition, I would invite them to sit in on a few faculty meetings. A law school’s hiring committee is often a particularly rich source of examples.

207. Other topics of interest might include disclosure requirements regarding the prioritization of family and business interests, the extent to which the family would be authorized to maintain voting control without holding a majority of the firm’s equity, the establishment of buy-sell agreements or other exit rights for non-participating family members, whether to create a family advisory board separate from the board of directors, and whether to authorize greater latitude for ownership and

Although well-run family businesses like Brown-Forman Corp. may not need assistance, off-the-shelf family business best practices could provide guidance for the vast majority of family businesses that lack the time, resources, or inclination to develop tailored governance procedures. Nor is the prospect of an F Corp. entity unrealistic. The widespread adoption of B Corp. statutes in the last decade demonstrates that, if they are backed by determined advocates, there is a pathway for state-by-state adoption of new forms of business association.

Objections. In addition to its value as precedent, the recent history of the B Corp. provides a helpful preview of objections that are likely to be lodged against the F Corp. Those objections largely fall into two categories: (1) that the new entity form departs from other forms of business association in ways that are normatively undesirable; and (2) that the new entity form is unnecessary, because its structure can be achieved by modifying existing entity forms through tailored organizational documents and related contracts.

Regarding the asserted undesirability of the B Corp. and other forms of social enterprise, commentators have argued that allowing managers to sacrifice profits to pursue an unrelated social purpose exacerbates agency costs.²⁰⁸ When questioned about poor economic performance, managers can gesture toward non-financial goals; when asked why the business failed to dedicate more resources toward a social mission, managers can remind critics that, as a business venture, the social enterprise is also obligated to earn a reasonable return on investment.²⁰⁹ In short, those who serve two masters serve none.²¹⁰ On similar grounds, critics might object to an F Corp. structure that allows managers to operate the business to serve the interests of a controlling family at the expense of profitability.²¹¹

control exercised through trusts and foundations. Some issues might be resolved through a mandatory family-business structure; others might be better accommodated by presenting a template of choices for family owners to review on a periodic basis. Also, some governance features might be bundled together, so that, for example, electing a family ownership model would come with one type of buy-sell arrangement and a separate advisory board to represent the interests of a greater number of family members.

208. See Charles M. Yablon, *Mixed-Motive Investments and Agency Costs*, in THE CAMBRIDGE HANDBOOK OF SOCIAL ENTERPRISE LAW, *supra* note 190, at 384.

209. Managers act on behalf of owners and, like other agents, have incentives that may not be fully aligned with the goals of the owners. See generally Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980).

210. See Stephen Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1427–28 (1993) (“In economic life, as in religious life, no one can serve two masters at the same time. Directors thus cannot be loyal to both shareholders and nonshareholder constituencies.”).

211. The agency cost concern presupposes the existence of investors whose interests are not fully aligned with the controlling family members. Even in smaller family businesses, there may be family owners who are not active in the business and depend upon those who control the business for a return on investment. Larger family businesses that are publicly traded owe duties to nonfamily shareholders.

In response, advocates of social enterprise have observed that corporate managers already enjoy substantial discretion to pursue a variety of objectives over varying time horizons and that managers need not seek to maximize short-term profits.²¹² Indeed, the business judgment rule permits managers to assert, without offering hard evidence to support their claims, that community investment, environmental responsibility, and other forms of stewardship are the best way to preserve long-term business value.²¹³ For this reason, while organization as a B Corp. may signal to investors the heightened importance of a social mission to the corporation, managers already have the practical ability to pursue such objectives if they choose to do so.²¹⁴ The same could be said of F Corps. Whether or not family stewardship produces greater economic value, there are limited avenues for external attack under existing business association statutes. Social enterprise and family stewardship alike are shielded from scrutiny by the business judgment rule.²¹⁵

Taking nearly the opposite tact, a second major line of objection to B Corps. is not that they are dangerous, but that they are superfluous.²¹⁶ With a modicum of creativity, almost any form of business association can be adapted to suit the needs of its owners. The majority of new businesses are organized as LLCs, in part because LLC statutes defer most questions to the parties’ operating agreement. Delaware’s LLC Act declares, for example, that it is state policy to give

212. See *Paramount Commc’ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 42 (Del. 1994) (“Under normal circumstances, neither the courts nor the stockholders should interfere with the managerial decisions of the directors.”); ERIC W. ORTS, *BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM* 41 (2013) (“In the United States, the ‘business judgment rule’ bestows significant discretion to corporate managers and directors to exercise independent decision-making authority on a wide range of decisions . . .”).

213. See, e.g., *Shlensky v. Wrigley*, 237 N.E.2d 776, 781 (Ill. 1968) (rejecting shareholder suit based on management’s refusal to install lights at Wrigley Field in order to schedule night baseball games). Even without management’s assertion of a particular justification, the court speculated that “the long run interest of the corporation in its property value at Wrigley Field might demand all efforts to keep the neighborhood from deteriorating.” *Id.* at 780. Ultimately, the court concluded that the merits of the decision were not subject to review as long as there were no allegations of “fraud, illegality or conflict of interest in [the] making of that decision.” *Id.*

214. See Joseph W. Yockey, *Using Form to Counter Corruption: The Promise of the Public Benefit Corporation*, 49 U.C. DAVIS L. REV. 623, 639 (2015) (“The business judgment rule provides ample flexibility to corporate managers to make any socially driven decision they desire. All they must do is act in due care, in good faith, and stay free of conflicts of interest.” (citing Joseph W. Yockey, *Does Social Enterprise Law Matter?*, 66 ALA. L. REV. 767, 787 (2015))). Professor Yockey argued that a public benefit corporation could help spur social enterprise, not by creating new legal possibilities, but by “disrupting norms and expectations.” *Id.* at 640.

215. Where stewardship shades into self-dealing, however, courts can use the fiduciary duty of loyalty to police the decisions of boards and controlling shareholders. See Means, *Value of Insider Control*, *supra* note 26, at 931 (arguing that, in the context of dual-class stock, “[t]he duty of loyalty . . . provides another mechanism for regulating controlling shareholders in conflict-of-interest transactions”). Thus, “[a]lthough family succession may survive enhanced scrutiny, the perpetuation of family ownership must be justified.” *Id.*

216. See Peter Molk, *Do We Need Specialized Business Forms for Social Enterprise?*, in *THE CAMBRIDGE HANDBOOK OF SOCIAL ENTERPRISE LAW*, *supra* note 190, at 241, 242 (arguing that the LLC combined with external certifications provides sufficient flexibility for social enterprise).

“the maximum effect to the principle of freedom of contract.”²¹⁷ Using this freedom, entrepreneurs can create a dual-purpose entity to pursue environmental or other social goals. Likewise, a family could allocate economic and voting rights in any fashion it chose.²¹⁸ To the extent specialized provisions governing social enterprises or family businesses are not already commonplace, therefore, it may be evidence that there is not a market demand for them.²¹⁹

Although accurate, the objection overlooks the significance of transaction costs.²²⁰ Even though a social enterprise mission or a distinctive family-business structure could be built using existing business entity forms, the modification of legal forms requires the involvement of lawyers and the attention of entrepreneurs who might prefer to simply adopt a useful off-the-shelf governance form. Commentators have observed that social-enterprise statutes make a difference, because “[s]ocial entrepreneurs are likely not going to want to reinvent the ‘legal’ wheel.”²²¹ Regardless of what is theoretically possible under existing law, “it is far more efficient for a deliberate, off-the-shelf hybrid alternative to be made available than to expect every social enterprise to design its own one-off supporting infrastructure.”²²² For substantially the same reasons, an F Corp. that provides a workable model for family business owners could save considerable time and effort.

Finally, even if one had concerns about the normative desirability of family businesses *and* believed that existing forms of business association can be tailored to suit the purposes of family owners, a dedicated family business statute could be useful as a way of surfacing normative concerns and developing best practices for governance.²²³ As one scholar argues in the B Corp. context:

[T]he value of the benefit corporation form comes from its ability to create an important new institutional structure to govern the evolving social enterprise space. For example, the form provides a focal point that ought

217. DEL. CODE ANN. Tit. 6, § 18-1101(b) (2013).

218. Alternatively, a family could use a trust to hold equity and direct the trustee to allocate business assets according to whatever rules the family saw fit. *See generally* Karen E. Boxx, *Too Many Tiaras: Conflicting Fiduciary Duties in the Family-Owned Business Context*, 49 HOUS. L. REV. 233 (2012).

219. In this regard, it may be notable that while many states have passed B. Corp. legislation, very few businesses have availed themselves of it. There is not a general repository of family-business organizing documents, many of which are not publicly available, so it is not possible to say whether family businesses regularly modify standard governing arrangements.

220. *See* Ofer Eldar, *Designing Business Forms to Pursue Social Goals*, 106 VA. L. REV. 937, 952 (2020) (“A legal form would be unnecessary if it was costless for firms and subsidy providers to use standard private ordering mechanisms, such as contracts.”).

221. *See* Carol Liao, *Early Lessons in Social Enterprise Law*, in THE CAMBRIDGE HANDBOOK OF SOCIAL ENTERPRISE LAW, *supra* note 190, at 101, 120.

222. *See id.* at 121.

223. Unlike statutory provisions, individually tailored LLC agreements are not standardized and can create considerable confusion. *See generally* Leo E. Strine, Jr. & J. Travis Laster, *The Siren Song of Unlimited Contractual Freedom*, in RESEARCH HANDBOOK ON PARTNERSHIPS, LLCs AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS 11 (Robert W. Hillman & Mark J. Loewenstein eds., 2015).

to make it easier for like-minded actors to cooperate and collaborate on issues ranging from corporate governance practices to capital formation. It is a highly visible archetype that provides common ground and a clear framework for firms and stakeholders to coordinate their activities.²²⁴

In much the same fashion, an F Corp. model could facilitate a constructive dialogue concerning the value of various approaches to family-business ownership and control. Over time, the F Corp. could be revised accordingly.

As a first step, a draft of model F Corp. legislation would need to be created by an enterprising state, the Uniform Law Commission, the American Law Institute, or by a private advocacy group similar to B Lab, which has promoted the B Corp. model. For family businesses, there are a number of national organizations, such as the Family Firm Institute,²²⁵ the Cambridge Family Enterprise Group,²²⁶ and the John L. Ward Center for Family Enterprises at the Kellogg School of Management,²²⁷ that might be interested in sponsoring the effort. Even if a family-business entity were authorized by statute in only a small handful of jurisdictions, family businesses located elsewhere could choose to organize themselves under the law of one of those jurisdictions.²²⁸

2. Financial Incentives

Apart from the practical and emotional difficulties associated with identifying business leaders for the next generation, family-business succession also poses a financial challenge.²²⁹ Family businesses often lack the accumulated assets necessary

224. Joseph W. Yockey, *Does Social Enterprise Law Matter?*, 66 ALA. L. REV. 767, 770 (2015).

225. Information about the FAMILY FIRM INSTITUTE can be found on its website. See FFI, <https://www.ffi.org/> [<https://perma.cc/SLF9-UGRE>] (last visited Aug. 9, 2022).

226. See CAMBRIDGE FAM. ENTER. GRP., <https://cfeg.com/> [<https://perma.cc/8DNR-632L>] (last visited Aug. 9, 2022).

227. See *Kellogg Research Centers*, NORTHWESTERN KELLOGG, www.kellogg.northwestern.edu/faculty/research-centers.aspx [<https://perma.cc/KS3G-2GFW>] (last visited Aug. 9, 2022).

228. Businesses are not limited to the entity choices in their home jurisdiction. Notably, the state of Delaware benefits from out-of-jurisdiction incorporation choices for publicly traded corporations: “The website for Delaware’s Division of Corporations recites that “[m]ore than half a million business entities have their legal home in Delaware including more than 50% of all U.S. publicly traded companies and 60% of the Fortune 500.” Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1749–50 n.1 (2006) (citation omitted). Delaware or another state might seek to claim similar status for F Corps. Once the F Corp. form became available, it would be important to line up a strong cohort of early adopters to demonstrate its viability. See Liao, *supra* note 221, at 116 (noting that “[t]he B Corporation movement . . . began with eighty founding companies”).

229. See Glenn R. Ayres, *Rough Corporate Justice*, 11 FAM. BUS. REV. 91, 91 (1998) (noting that while leadership succession in a public corporation is “normally not a major capital-allocation issue” the situation is different for most family businesses, because “succession is not only a highly charged emotional transition, but it also may put the capital integrity of the firm at risk”). In theory, the payment of estate taxes could also impede a transfer of business ownership across generations. As a practical matter, though, the estate tax is not a concern for most family businesses. See Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11061, 131 Stat. 2054, 2091 (2017) (more than doubling estate tax exemption). The current value of the exemption is nearly \$12 million.

to buy out incumbent owners who are ready to retire, and banks may be reluctant to provide credit to younger, unproven managers.²³⁰ To reduce the financial burden, thereby incentivizing lifetime transfers of ownership and control, lawmakers could offer low-cost loans, tax subsidies, bidding preferences for government contract work, and free counseling.²³¹

Regardless of the form of support, legislative intervention would necessarily involve an allocation of societal resources to family businesses. For example, below-market loans would not only return a lower-than-market profit but would also, in the aggregate, expose the government to losses in the form of unrepaid principal.²³² Also, unless developed in partnership with banks and other private lending institutions, a government loan program would come with a significant administrative apparatus, adding to its overall cost.

Accordingly, before offering low-cost loans, enacting a tax subsidy, or otherwise committing public resources to facilitate family-business succession, lawmakers should evaluate the costs and benefits to assure themselves that the policy would be worthwhile. As one commentator explained, in the context of tax subsidies for social enterprise, proponents of any such program should be able to address four concerns:

First, what aspects . . . should be considered for incentivization? Second, is it in fact desirable as a policy matter to incentivize one or more of those aspects? Third, could tax law in theory incentivize a desired aspect; that is, are the tools that tax law deploys suitable for accomplishing this goal? Fourth, would tax law sufficiently incentivize the desired aspect to justify the cost of doing so in terms not only of lost revenue to the government but also of increased complexity and other unintended consequences

230. Even if parents are willing to take less than fair market value, they still need enough to fund a comfortable retirement. Ayres, *supra* note 229, at 93.

231. For an assessment of different forms of government intervention in markets, including cash grants, tax credits, and the deferral or exclusion of gains from taxable income, see Samuel Estreicher & Clinton G. Wallace, *Equitable Health Savings Accounts: Bridging the Left-Right Divide*, 56 HARV. J. ON LEGIS. 396, 412–13 (2019). If the government chose to employ a tax-subsidy strategy, it would need to take account of existing tax-driven timing considerations. See Dwight Drake, *Transitioning the Family Business*, 83 WASH. L. REV. 123, 132 (2008) (noting that, from a tax standpoint, succession planning “is helped by focusing on three timeframes: the period both parents are living, the period following the death of the first parent, and the period following the death of the surviving parent”).

232. In other contexts, government interventions into private markets to promote social goals have led to enormous losses. See, e.g., Susan S. Kuo & Benjamin Means, *Collective Coercion*, 57 B.C. L. REV. 1599, 1634 (2016) (noting that “because the [federal flood] insurance program is not actuarially sound—indeed, it exists precisely because no private insurer would cover the relevant risks—the principal effect seems to have been an increase in the moral hazard that arises when an individual can keep the benefits while outsourcing some of the costs of his or her activity”).

(including the feasibility of measuring how well the incentive actually works and the costs it imposes)²³³

Public support for family businesses ought to reflect a normative judgment that family businesses are socially valuable. It is one thing to observe that delayed transfers of power can endanger the viability of a family business; it is another to conclude that the state should put its thumb on the scale by creating a financial incentive for lifetime transfers.

Indeed, an objection to this proposal might be that the effort to preserve family ownership reflects a romanticized view of a particular form of economic activity. A recent parody of Hallmark Christmas movies includes, as a *de rigueur* plot point, that the protagonist should be a young woman who has established a successful independent career in a big city but returns home, in part, because

The family farm/business must be failing

Her one remaining parent or guardian must tell her that the family business is on the brink of financial ruin. What will the town do without her family’s farm/restaurant/dentist office? Go to another farm/restaurant/dentist office?! Not possible. She must fix it.²³⁴

In other words, we can value the contributions of family businesses in general without feeling it necessary to ensure the survival of any particular family business. At a minimum, though, this Article presumes that there are costs associated with the avoidable failure of a family business. Those costs include the inefficiency of destroying a profitable business, the collateral expenses of litigation, and, sometimes most consequential, the toll taken on marriages, sibling bonds, and parent-child relationships. The costs are borne by the family but also by a wider circle of stakeholders. The fatal collapse of Lear’s kingdom is an extreme example, but the demise of any business can cause harm to investors and other stakeholders. Accordingly, without attempting to determine the optimal level or mode of intervention, this Article assumes that public support of family-business transitions would increase social welfare.²³⁵

Moreover, the normative question need not have a single answer. In sectors of the economy resembling family farming, lawmakers may wish to prioritize the

233. See Lloyd Hitoshi Mayer, *Creating a Tax Space for Social Enterprise*, in THE CAMBRIDGE HANDBOOK OF SOCIAL ENTERPRISE LAW, *supra* note 190, at 157, 165.

234. Madeleine Trebenski, *Guidelines for Female Protagonists in Hallmark Christmas Movies*, MCSWEENEY’S (Dec. 20, 2018), <https://www.mcsweeneys.net/articles/guidelines-for-female-protagonists-in-hallmark-christmas-movies> [<https://perma.cc/S4X4-944M>].

235. The dominant view of regulation is that the goal should be to maximize welfare, leaving distributional concerns to the income tax. See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 993–94 (2001). For a dissenting argument that distributional concerns should count when evaluating policy, see generally Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489 (2018). Even if distributional concerns were considered explicitly, it is not clear how they might affect the analysis. See generally Means, *Wealth Inequality and Family Businesses*, *supra* note 27 (arguing that family businesses provide a pathway to the middle class for many families but can also entrench disparities in wealth across generations).

ideal of small-scale ownership, whether by the incumbent family or by others interested in entering the business. Lawmakers might also take into account the promotion of business ownership by underrepresented or vulnerable populations. For example, the Transition Incentives Program, administered by the United States Department of Agriculture (U.S.D.A.), applies to land that has already been designated as farm eligible and facilitates the transfer “from a retired or retiring owner or operator to a beginning, veteran, or underserved farmer or rancher.”²³⁶ Other government programs provide benefits to businesses that are owned by women or minorities.²³⁷

Whether applied broadly, only in particular economic sectors, or only to family businesses of a particular type or scale, the operational parameters of a financial incentives program would need to be clarified. For example, lawmakers would need to decide whether their goal is to encourage transfers within the family, or to remain neutral between succession plans that preserve family ownership and those involving a sale outside the family. Also, in the latter case, lawmakers might further distinguish between sales to outsiders that also could be classified as a family business and sales to non-family business investors. For present purposes, it is enough to show that legislative initiatives can bolster family-business succession by incentivizing planning and, in some cases, helping bridge the gap between a succession plan and available assets.

Finally, whether or not lawmakers authorize loans, tax subsidies, or other types of financial aid, government agencies can also help by providing information concerning succession planning. In the context of family farms, for example, the U.S.D.A. has amassed written guidelines, videos, and offers access to in-person consultation through U.S.D.A. Farm Service Agency county offices.²³⁸ Materials available via the U.S.D.A. website include, Farm Succession and Transfer: Strategies for the Junior Generation; Transferring the Farm Virtual Workshop; When to Start Planning Your Legacy; Fair vs Equal Treatment of Farm Heirs; and Farm Succession Dos and Don'ts.²³⁹ Although not a substitute for advice of counsel, compilations of general advice can encourage family businesses to begin the succession planning process and inform them about the nature of the task.

236. See *Planning What's Next: Building the Next Generation on the Land*, U.S. DEP'T OF AGRIC., <https://newfarmers.usda.gov/planning-whats-next> [<https://web.archive.org/web/20210203164907/https://newfarmers.usda.gov/planning-whats-next>] (last visited Feb. 3, 2021). Interestingly, the Incentives Program focuses on new farmers and excludes intra-family transfers. See *id.* (“This program can provide annual rental payments for up to two additional years after the expiration of the [Conservation Reserve Program] contract, provided the transition is not to a family member.”).

237. See, e.g., *Women-Owned Businesses*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/business-guide/grow-your-business/women-owned-businesses> [<https://perma.cc/6DV6-CLFH>] (last visited Aug. 10, 2022) (providing an overview of resources for women entrepreneurs including loan programs and assistance in competing for federal contracts).

238. See *Planning What's Next*, *supra* note 236.

239. See *Farm Transition Planning Toolbox*, FARM ANSWERS, https://farmanswers.org/Toolbox/farm_transition_planning_toolbox [<https://perma.cc/B6N6-TR56>] (last visited Aug. 10, 2022).

B. Judicial Intervention

Unlike lawmakers, courts resolve individual disputes and are not well-positioned institutionally to make broader judgments concerning social policy.²⁴⁰ Nevertheless, the law has a prospective effect, and judicial decisions shape behavior. To illustrate the judicial role, this Section focuses on board-of-director fiduciary duties and challenges to the capacity of incumbent family owners, two topics that are relevant to family-business succession and comfortably within the purview of judicial review. Notably, both topics overlap with the proposed F Corp. statutory provisions described earlier: an independent committee would help the board satisfy its fiduciary duty of care; a mandatory retirement policy would reduce concerns regarding the capacity of aging incumbents.

1. Fiduciary Duty

A corporation’s board of directors owes fiduciary duties to the corporation and its shareholders.²⁴¹ The duty of care, as set forth in the 1984 Model Business Corporation Act, provides that “[a] director shall discharge his duties . . . with the care an ordinarily prudent person in a like position would exercise under similar circumstances.”²⁴² To satisfy the standard, board members “need not achieve perfection.”²⁴³ Accordingly, while the fiduciary duty of care cannot be leveraged to require directors to follow “ideal corporate governance practices,”²⁴⁴ it sets a minimum standard of competence.

The board’s fiduciary duties are not excused when there is a controlling owner, even if the controlling owner is the chair of the board. For example, in *ATR-Kim Eng Financial Corp. v. Araneta*, a family business incorporated a holding company in Delaware, but the holding company had “no reporting system . . . in place” and

240. See Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1002–04 (1924) (stating that courts are limited to the facts before them and may not have adequate factual context to make broader policy determinations). Constitutional doctrines such as standing, ripeness, and mootness are intended to limit judicial involvement to live cases and controversies. See Matthew I. Hall, *Asymmetrical Jurisdiction*, 58 UCLA L. REV. 1257, 1260 (2011).

241. See *Stanziale v. Nachtomi (In re Tower Air, Inc.)*, 416 F.3d 229, 238 n.12 (3d Cir. 2005); *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998). Fiduciary duties can also attach to controlling shareholders. See *Ivanhoe Partners v. Newmont Mining Corp. (In re Newmont Mining Corp. S’holders Litig.)*, 535 A.2d 1334, 1344 (Del. 1987) (holding that “a shareholder owes a fiduciary duty only if it owns a majority interest in or exercises control over the business affairs of the corporation”); D. Gordon Smith, *Firms and Fiduciaries*, in *CONTRACT, STATUS, AND FIDUCIARY LAW* 293, 293–94 (Paul B. Miller & Andrew S. Gold eds., 2016) (arguing that fiduciary duties are linked to control over critical resources).

242. MODEL BUS. CORP. ACT § 8.30(a) (Am. Bar Ass’n, revised 2016).

243. *Cooke v. Oolie*, No. CIV. A. 11134, 2000 WL 710199, at *17 (Del. Ch. May 24, 2000); Michael P. Dooley & E. Norman Veasey, *The Role of the Board in Derivative Litigation: Delaware Law and the Current ALI Proposals Compared*, 44 BUS. LAW. 503, 521 (1989) (observing that “the duty of care is more aspirational than consequential”).

244. *Brehm v. Eisner*, 746 A.2d 244, 256 (Del. 2000).

its nonfamily directors “entirely deferred” to the controlling owner.²⁴⁵ Araneta, the controlling owner, “caused the corporation to transfer its key assets—its ownership of several businesses worth over \$35 million . . . to members of his family in violation of his fiduciary duties.”²⁴⁶ Although the other board members did not benefit personally, they violated their own fiduciary duties to the corporation because they “did nothing to make themselves aware of [the controlling owner’s] blatant misconduct or to stop it.”²⁴⁷

Likewise, Sumner Redstone’s control of CBS and Viacom should not have prevented board members from insisting upon a well-documented succession plan.²⁴⁸ Had board members intervened, CBS and Viacom might have avoided years of costly litigation. Instead, as a consequence of Sumner Redstone’s refusal to acknowledge his own mortality, the businesses suffered turmoil as Redstone’s daughter, Shari Redstone, struggled to assume command over the objections of senior management.²⁴⁹ Sumner Redstone owned CBS and Viacom indirectly through a family-owned holding company, National Amusements, as well as a series of trust instruments, but the boards of CBS and Viacom owed their fiduciary duties to their respective corporations and all shareholders. As board members, they could not fulfill their duty to provide oversight of each corporation’s activities without satisfying themselves concerning the existence and suitability of a succession plan.²⁵⁰ Mr. Redstone’s public statements concerning his disregard of succession planning were a “red flag” the directors ignored.²⁵¹

245. *ATR-Kim Eng Fin. Corp. v. Araneta*, No. CIV A. 489-N, 2006 WL 3783520, at *20 (Del. Ch. Dec. 21, 2006), *aff’d*, 930 A.2d 928 (Del. June 14, 2007).

246. *Id.* at *1.

247. *Id.* at *20. The court concluded that because the board members “acted as . . . stooges for Araneta, seeking to please him and only him, and having no regard for their obligations to act loyally towards the corporation and all of its stockholders,” *id.* at *1, they were “jointly liable for Araneta’s fiduciary violations,” *id.* at *21.

248. In connection with the acquisition of Paramount in the late 1990s, Redstone did disclose a succession plan, which involved Viacom’s CEO, Philippe Dauman, assuming control, but the succession plan was not binding: “Sumner had no intention of naming a successor. As long as he had control, he could have named the Man in the Moon and then taken it back.” HAGEY, *supra* note 7, at 151 (quoting an unnamed “family associate”).

249. *See generally* Garrahan & Bond, *supra* note 8.

250. In 2015, a lawsuit challenging Sumner Redstone’s capacity in the context of a private dispute exposed the possibility that the boards of Viacom and CBS had been pretending that he was still in charge while knowing that he was not capable of making decisions. As one commentator put it, if the allegations were true, “then a great fraud had been perpetrated upon the shareholders of Viacom and CBS, who had been paying tens of millions of dollars to an ‘executive chairman’ who could not manage to stay awake until the end of a televised baseball game and sobbed through the opening credits of *Deadpool*.” HAGEY, *supra* note 7, at 266–67.

251. Ordinarily, boards satisfy the duty of care by “gaining assurances from management and advisers that systems believed appropriate have been established coupled with ongoing monitoring of systems in place, such as those concerned with compliance or internal controls . . .” MODEL BUS. CORP. ACT § 8.30 cmt. 8-195 (Am. Bar. Ass’n 1984). Directors are “entitled to rely on the honesty and integrity of their subordinates” but not when they are on notice of a potential problem. *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 130 (Del. 1963).

Given the importance of succession planning and the disastrous consequences of neglecting it, courts should hold that a board of directors falls short of its fiduciary obligation if it fails to require succession planning. Ideally, and consistent with this Article’s F Corp. proposal, the board would create an independent committee to evaluate the issue. As exemplified by Sumner Redstone’s obstinance, the absence of succession planning exposes a family business to the risk of a leadership vacuum and destabilizing conflict among members of the next generation. Therefore, upon proper petition, courts should not hesitate to enter injunctive relief to order a corporation’s board to put into place a succession plan.²⁵²

The only person capable of avoiding tragedy in *King Lear* was Lear; there was no independent legal mechanism to force Lear to confront his mortality or to review the merits of his succession plan, once he decided to put one in place. The fiduciary structure of corporate law, however, vests authority and responsibility in the board of directors, even when there is a controlling owner.²⁵³ Moreover, “to the extent controlling owners hold board positions or senior managerial roles, the controlling owners owe the same fiduciary duties as any other board member or manager when acting in that capacity.”²⁵⁴ By holding that the duty of care requires the board of directors to plan for succession, courts can motivate board members to act, thereby ensuring that succession planning will not be ignored or made subject to the whims of a controlling owner.

2. Incapacity

There is another risk of delayed succession planning: changes in an incumbent’s cognitive ability and emotional temperament can jeopardize the transfer of power.²⁵⁵ This, too, is a lesson of *King Lear*. Having held onto his kingdom until he was in his eighties and in poor health, Lear badly mismanaged the transition to his daughters. In a fit of pique, he disinherited the daughter he most admired, because she failed to participate in a demeaning pageant of public flattery. He banished his closest advisor for questioning his judgment. Lear’s behavior betrayed the “infirmity of his age.”²⁵⁶

252. Plaintiffs might also seek monetary damages in the wake of a failed business succession. Causation issues aside, however, “[c]ases holding directors liable for a breach of the duty of attention or care, uncomplicated by self-dealing or conflict of interest are rare.” *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1147 (Del. Ch. 1994).

253. Although beyond the scope of the present discussion, it should be noted that “across all forms of business association, the fiduciary duties of care and loyalty are available to regulate insider control.” Means, *Value of Insider Control*, *supra* note 26, at 926.

254. *Id.* at 925, (citing *Zahn v. Transamerica Corp.*, 162 F.2d 36, 45 (3d Cir. 1947)).

255. See Timothy A. Salthouse, *When Does Age-Related Cognitive Decline Begin?*, 30 NEUROBIOLOGY AGING 507, 508 (2009) (stating that cognitive decline typically commences before the age of sixty and becomes more pronounced after seventy).

256. SHAKESPEARE, *supra* note 1, at act 1, sc. 1, l. 299.

And, yet, a challenge to a present-day Lear's testamentary capacity would almost certainly be rejected.²⁵⁷ Testators are entitled to a presumption of capacity, and the standard for evaluating capacity requires only that testators know what assets they hold, that they recall the people who are "the natural objects of their bounty," and that they understand the nature of their testamentary act.²⁵⁸ Cases finding incapacity tend to involve dementia or severe mental illness.²⁵⁹ At the time he made his disposition, Lear understood that he was king, recognized his daughters, and was fully aware that he was dividing his kingdom among them according to a plan he had drawn for the purpose.²⁶⁰

If adopted, a mandatory retirement policy would reduce the likelihood of serious capacity issues in family businesses. When issues concerning capacity do arise, however, this Article recommends that courts apply a more exacting test than the usual standard for testamentary capacity. In a family business, the disposition of assets is, among other things, a business decision, and the legal deference to a testator's disposition of property should not exceed the deference accorded to other business decisions.²⁶¹ Failure to engage in succession planning is not protected by the business judgment rule.²⁶² Further, while courts are reluctant to second-guess the choices of those charged with running a business, the business judgment rule is subject to fiduciary constraints of care and loyalty.²⁶³ An incumbent who has

257. See, e.g., *In re Will of Goldberg*, 582 N.Y.S.2d 617, 620 (Sur. Ct. 1992) ("It is hornbook law that less mental capacity is required to execute a will than any other legal instrument."); *Weeks v. Drawdy (In re Estate of Weeks)*, 495 S.E.2d 454, 461 (S.C. Ct. App. 1997) ("The degree of capacity necessary for the execution of a will is less than that needed for the execution of a contract." (citing *McCullum v. Banks*, 50 S.E.2d 199 (S.C. 1948))); *In re Will of Rasnick*, 186 A.2d 527, 534 (N.J. Super. Ct. 1962) ("As a general principle, the law requires only a very low degree of mental capacity for one executing a will.").

258. See, e.g., *In re Estate of Killen*, 937 P.2d 1368, 1371 (Ariz. Ct. App. 1996).

259. See, e.g., *Riddell v. Edwards*, 32 P.3d 4, 9–10 (Alaska 2001) (upholding finding of incapacity based on diagnosis of dementia or Alzheimer's disease and trial court's assessment that "[a]t numerous points in her conversation with the court, [testator] was utterly confused about the status of people in her life and about her own capabilities" (alteration in original)).

260. Lear probably lacked capacity by the end of the play (heath, lightning), but capacity is judged at the time of the testamentary act, so Lear's eventual madness would not be relevant to the inquiry.

261. For a broader analysis of the relationship of family and business law in family businesses, see Means, *Contractual Foundation*, *supra* note 11, at 689 (arguing that "family law's influence runs through the essential questions of business organization law: who the members are, what obligations they owe to one another, and how the assets of the firm will be controlled and distributed").

262. See 1 STEPHEN A. RADIN, *THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS* 88 (6th ed. 2009) ("Technically speaking, [the business judgment rule] has no role where directors have either abdicated their functions, or absent a conscious decision, failed to act." (quoting *Aronson v. Lewis*, 473 A.2d 805, 813 (Del. 1984))).

263. See *id.* at 53 ("Numerous Delaware decisions hold that the presumption of the business judgment rule 'can be rebutted if the plaintiff shows that the directors breached their fiduciary duty of care or of loyalty or acted in bad faith.'" (quoting *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 52 (Del. 2006))).

suffered serious cognitive decline cannot be relied upon to act with the reasonable prudence required by the duty of care.

To operationalize the recommended standard, courts could order medical evaluations based on well-pled allegations of incapacity.²⁶⁴ Where necessary, courts could then invoke the remedy for incapacity under existing law, which authorizes the appointment of a conservator when an individual has lost the ability to manage their assets.²⁶⁵ Applying an evaluative standard tied to ordinary business judgment rule considerations would leave incumbent family business owners with broad, but not entirely unchecked authority. Moreover, judicial intervention could still be limited if the incumbent had created a private mechanism to address the problem of capacity, perhaps through the terms of a revocable trust.²⁶⁶

One commentator has defended the minimal threshold for testamentary capacity by arguing that the “inquiry is not at all concerned with the testator’s ability to manage her property adequately during her lifetime.”²⁶⁷ Even assuming that distinction is valid in nonfamily business contexts, managerial and testamentary decisions are not “completely different” when what is at stake is the future of a family business.²⁶⁸ To the contrary, succession planning is a crucial component of managing a family business. Accordingly, it would be a mistake to defer to the testamentary decisions of an incumbent who would not otherwise be deemed fit to manage his or her affairs.

Sumner Redstone illustrates the importance of evaluating the capacity of family business owners. In his later years, Redstone lost the power of speech and was reduced to only a few words, reportedly using an iPad to indicate “yes,” “no,” and “f*** you.”²⁶⁹ Yet, he remained in his position as CEO and board chair of National Amusements, Inc., the holding company that held a controlling stake in

264. See Denise C. Park & Patricia Reuter-Lorenz, *The Adaptive Brain: Aging and Neurocognitive Scaffolding*, 60 ANN. REV. PSYCH. 173, 174 (2009) (describing advances in clinical evaluations including “neuroimaging tools”); see also Timothy A. Salthouse, *Neuroanatomical Substrates of Age-Related Cognitive Decline*, 137 PSYCH. BULL. 753, 759 (2011).

265. Ralph C. Brashier, *Conservatorships, Capacity, and Crystal Balls*, 87 TEMP. L. REV. 1, 7 (2014) (“Painting with the broadest of brushes, one might state that the essential question a conservatorship court must answer is whether the respondent so lacks the *ability to manage* his assets that the state must intervene by appointing a conservator to assist him.”).

266. See David J. Feder & Robert H. Sitkoff, *Revocable Trusts and Incapacity Planning: More Than Just a Will Substitute*, 24 ELDER L.J. 1, 3 (2016) (stating that “revocable trusts are also commonly used for *incapacity planning* as a substitute for a court-appointed conservator (or guardian)”).

267. Brashier, *supra* note 265, at 10.

268. *Id.*

269. Keach Hagey, *Sumner Redstone Wouldn’t Have Last Word on a CBS-Viacom Merger*, WALL ST. J. (Apr. 3, 2018, 5:30 AM), <https://www.wsj.com/articles/sumner-redstone-wouldnt-have-last-word-on-a-cbs-viacom-merger-1522747801> [<https://web.archive.org/web/20180403215339/https://www.wsj.com/articles/sumner-redstone-wouldnt-have-last-word-on-a-cbs-viacom-merger-1522747801>] (“Questions have surfaced in recent years about Mr. Redstone’s mental standing. To help him communicate, some people who recently have met with him say that he has an iPad loaded with snippets of his voice, connected to buttons for words or phrases including ‘yes,’ ‘no’ and ‘f—you.’”).

Viacom and CBS.²⁷⁰ Reports concerning the extent to which he was capable of making decisions were, at best, uncertain.²⁷¹ In one lawsuit, opposing counsel addressed a geriatric psychiatrist's report that Sumner Redstone met the standard for legal capacity by observing that the report "did not answer whether Sumner Redstone 'had sufficient capacity to make complex decisions impacting the governance of billion dollar publicly held corporations.'"²⁷² The distinction is important: patriarchs like Lear and Sumner Redstone should not have the power to manage and dispose of business assets once it is clear that they cannot act with ordinary prudence.

To be clear, requiring that incumbents have the functional ability to make informed business decisions is not a high bar. Only by comparison with the standard for testamentary capacity does business judgment rule deference resemble heightened scrutiny. Some level of cognitive decline is a normal part of aging and may be compensated for with the wisdom that comes from experience.²⁷³ In most cases, even if there is cause for concern, the issue of capacity will not be sufficiently clear to warrant judicial intervention. Increased judicial scrutiny of the capacity of family business owners is not a panacea. Accordingly, the best remedy is for incumbents to begin succession planning early, reducing the risk that their judgment will be clouded by the time they are ready to make decisions about how to transfer ownership and control.

C. Private Ordering

The governance of a family business impacts non-family stakeholders. In particular, when a family business enters into long-term economic relationships with other parties, they are exposed to the risk that the family business will fail to meet its obligations. For many family businesses, succession is the greatest threat.²⁷⁴ Thus, the extent to which a family business has a reasonable succession plan in place may be important to lenders, suppliers, distributors, customers, non-family key

270. *Id.*

271. *Id.*

272. Lisa Richwine, *Sumner Redstone Has Capacity to Make Trust Decisions, Says Doctor*, REUTERS (June 2, 2016, 7:38 PM), <https://www.reuters.com/article/businessNews/idCAKCN0YP085?edition-redirect=ca> [<https://perma.cc/A9MQ-R5KH>].

273. See Lisa Zaval Ye Li, Eric J. Johnson & Elke U. Weber, *Complementary Contributions of Fluid and Crystallized Intelligence to Decision Making Across the Life Span*, in AGING AND DECISION MAKING: EMPIRICAL AND APPLIED PERSPECTIVES 149, 154 (Thomas Hess, JoNell Strough & Corinna E. Löckenhoff eds., 2015) (stating that accumulated experience may "offset the declining ability to process and manipulate new information").

274. See COLLI, *supra* note 10 (identifying "leadership succession" as the "crucial issue" for a family owned business); 1 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL & THOMPSON'S CLOSE CORPORATIONS AND LLCs: LAW AND PRACTICE, § 1:13 (Rev. 3d ed. 2021) ("[P]erhaps most important of all, the managers of a close corporation or LLC are often so busy that they neglect to make definite plans for management succession and to develop younger participants capable of eventually taking over control of the business.").

employees, and private equity companies that specialize in acquiring and managing portfolios of family-owned businesses.

If a family business has not adopted an adequate succession plan, potential counterparties may refuse to do business or demand a more favorable price to account for the risk. Alternatively, counterparties may negotiate for the type of succession plan they believe is needed to protect the value of the deal.²⁷⁵ Either way, whether counterparties choose “exit” or “voice,” they send a signal to the management of a family business that there is a problem that needs to be corrected.²⁷⁶ For example, even if they are otherwise impervious to advice, incumbent owners will listen if they are told that they must draft a succession plan and a buy-sell agreement in order to qualify for financing.

In a case study published by the Harvard Business Review, the CEO and Chairman of Caterpillar, a major vendor of construction and mining equipment, explained the steps it takes to ensure the reliability of its sales distribution network.²⁷⁷ Caterpillar sells its products through independent dealers, the majority of which are closely held and family owned.²⁷⁸ From Caterpillar’s standpoint, independent dealers provide “knowledge of the local market and . . . close relations with customers.”²⁷⁹ But Caterpillar’s reputation is tied up with its dealers, and it conducts regular reviews of each dealer to ensure that “they are well run.”²⁸⁰

In particular, Caterpillar takes a number of proactive steps to manage the risks associated with family-business succession:

We actively help dealers keep the business in the family. For example, when the principal of a privately held dealership is about 50 years old, we hold seminars for the family on tax issues and succession planning—both financial and management. These seminars are held two or three times during the principal’s active working life to ensure that the next generation is ready.²⁸¹

275. See HAGEY, *supra* note 7, at 151 (noting that a major investor demanded a succession plan as a condition for funding Sumner Redstone’s acquisition of Paramount). Although the succession plan was never binding, the plan nevertheless created family dissension because it named a nonfamily CEO as heir apparent: “[I]n some ways, the real news was that Sumner had passed over his own children, who were then in their forties, both lawyers, both on the board of Viacom, and both actively working in the family business.” *Id.*

276. See ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 4 (1970).

277. See Fites, *supra* note 23, at 157–60.

278. See *id.*

279. *Id.* at 162.

280. *Id.* at 175 (“Every year, we review all our dealers’ performance—in terms of sales, market position, service capability, organizational structure, and plans for ownership and management continuity—to establish the areas that each dealer needs to work on during the next year.”).

281. *Id.* at 179.

Caterpillar also pays attention to the next generation: “We also encourage owners to involve their kids in their dealerships from an early age.”²⁸² In some cases, Caterpillar provides very specific advice about how the children should be integrated into the business, and it sponsors seminars to educate them.²⁸³ Ultimately, Caterpillar reserves to itself the right to make succession decisions for its dealerships, stepping in where necessary to block next-generation leaders that Caterpillar believes are not up to the job.²⁸⁴

Caterpillar’s level of involvement in the family dynamics of its independent dealerships may be unusual, but Caterpillar is not alone in recognizing the importance of business continuity and the risk factors associated with family ownership. One entrepreneur who has co-owned several businesses with her spouse explained that she has been on both sides of the issue:

We were often asked to provide details of our succession plan and we always asked closely held asset managers for details on their succession plans. Although more than a few older business owners viewed it as an insult, it is simply a risk factor that needs to be assessed. Specifically, we always wanted to know 1) ownership structure and any transfer obligations, 2) who would fill senior roles when they were vacated, and 3) if plan A fails, what is plan B for succession. We would also include an ability to cancel the contract for cause with departure of key players being a stated cause.²⁸⁵

Admittedly, there may be downsides to having governance decisions influenced by third parties who are more interested in stability than fairness. For example, an outside investor might insist on a clearly identified control person, rejecting shared-control structures that better suit the talents and interests of family members. On the whole, though, private ordering should be seen as beneficial if it induces family businesses to engage in succession planning.

CONCLUSION

If *King Lear* reveals tragic flaws in a premodern king, the flaws are shared by many contemporary family business owners. Too often, family business owners shirk their responsibility to plan for succession. Like Lear, they may feel entitled to make succession decisions whenever they want and according to whatever criteria they prefer. So long as the incumbents enjoy running the business themselves, they

282. *Id.*

283. *See id.* (“We recently held a conference . . . that was attended by 20 to 25 sons and daughters, who ranged in age from 15 to 23. The idea was to introduce them to Caterpillar, to get them interested in the business, and to allow them to meet their peers.”).

284. *Id.* (stating that by the time the incumbents “are ready to retire, we have seen enough of their children to know what they can do and which ones are capable of taking over the business”).

285. E-mail from Karen Wells, Entrepreneur, to author (Dec. 7, 2020, 08:10 EST) (on file with author).

may feel no particular urgency to think very hard about what comes next. This complacency is dangerous—rarely do problems get better when they are ignored.

To encourage succession planning, this Article has proposed several avenues for intervention. An F Corp. designed for family businesses could include best practices to guide succession planning. Alternatively, third parties with economic leverage might require some of the same best practices through private ordering. Public support in the form of low-cost loans and tax subsidies could further incentivize lifetime transfers of ownership and control. Finally, courts should invoke the fiduciary duty of care, both to require boards to initiate succession planning and as a standard for evaluating the capacity of incumbents.

The key is to get started. Although conventional accounts of the “*King Lear* problem” assert that Lear erred by handing over his kingdom too soon, any experienced family-business advisor would disagree. In fact, Lear’s plan collapsed because he waited too long to implement it and failed to lay the necessary groundwork. Once a family commits to a succession-planning process, lawyers have a variety of tools available to protect the financial and participatory rights of the older generation. The earlier the plan is developed, however, the more flexibility lawyers will have to achieve their clients’ goals. If incumbents hope to preserve family ownership across generations, they need to understand that procrastination can be fatal. That is *King Lear*’s true lesson.

