

**“EVERY UNHAPPY BUSINESS IS UNHAPPY IN ITS OWN WAY”:
The Nature of the Family Owned/Controlled Business, the Disputes that Arise
within Them, and the Options for Resolving Such Disputes**

Presented by:

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I. Overall Objectives

- a. To appreciate the distinctiveness of the family owned/controlled business and its inherent challenges
- b. To identify common family owned/controlled business disputes and corresponding remedies and procedures
- c. To identify alternatives for preempting and resolving family owned/controlled business disputes

II. Introduction to the Family Owned/Controlled Business

- a. Definition
 - i. Family must have ability to control business decisions (*e.g.*, the ability to appoint top management)

- ii. Must be two or more family members with a stake in the business (*i.e.*, providing the condition for the possibility of governance conflicts and variant expectations from the business)

b. Prevalence in the U.S.¹

- i. Over 80% of all U.S. businesses are family owned/controlled

- 1. Approximately 35% of the Fortune 500 are family owned/controlled

- ii. Over 50% of the nation's workforce are employed by family owned/controlled businesses

- iii. Family owned/controlled businesses account for the bulk of the nation's GDP

c. Some interesting statistics and anecdotes

- i. Despite prevalence in the U.S., long-term continuity and profitability are rare

- 1. The "30/13/3" statistic²

¹ Benjamin Means, *Nonmarket Values in Family Business*, 54 Wm. & Mary L. Rev. 1185 (2013)

² John Ward, *Keeping The Family Business Healthy: How to Plan for Continuing Growth, Profitability and Family Leadership* (1987)

- a. Only 30% of family owned/operated businesses survive the 2nd generation
 - i. 10% - 20% drop in profitability in 2nd generation
 - ii. 10% - 20% drop in stock value in 2nd generation for publicly-traded companies
- b. Only 13% survive the 3rd generation
- c. Only 3% survive the 4th generation

- ii. The “Carnegie Conjecture” – enormous wealth deadens talent³

“The parent who leaves his son enormous wealth generally deadens the talents and synergies of the son.”

-Andrew Carnegie

“One of the strongest natural proofs of the folly of hereditary right of kings is that nature disapproves it, otherwise she would not so frequently turn it into ridicule by giving mankind an ass for a lion.”

-Thomas Paine

³ Francisco Perez-Gonzalez, *Inherited Control and Firm Performance*, 96 Am. Econ. Rev. 5 (2006)

1. Case-in-point: The Vanderbilt Family⁴

“Several generations of Vanderbilts showed both the talent for acquiring wealth and dispensing of it in unmatched volume; they dispensed of their wealth for frequent and unparalleled self-gratification and very often did it with a forthright stupidity.”

-John Kenneth Galbraith

- a. Within 50 years of the death of Cornelius Vanderbilt (1794-1877), his direct descendants began to die penniless
- b. Within 70 years of his death, the last of the 10 famous Fifth Avenue Vanderbilt mansions was demolished
- c. Within 100 years of his death, not one of 120 Vanderbilt descendants gathered at a family reunion at Vanderbilt University was a millionaire

2. Japan as an exception to the rule?⁵

- a. In Japan, heir-run companies out-perform other companies

⁴ Marianne Bertrand and Antoinette Schoar, *The Role of Family in Family Firms*, 20 J. Econ. Perspectives 2 (Spring 2006)

⁵ Vikas Mehrotra, Randall Morck, Jungwook Shim, and Yupana Wiwattanakantang, *Adoptive Expectations: Rising Sons in Japanese Family Firms*, 108 J. Fin. Econ. 3 (2013)

- b. Many successful Japanese heirs, however, are adopted (e.g., Toyota, Suzuki)
 - i. Japan's adoption rate is second only to U.S.
 - ii. 98% of adoptions in Japan, however, are of males 25-30 years old
 - iii. In other words, family-member owners adopt when:
 - 1. there is no male heir –or-
 - 2. the male heir is deemed inadequate to run the business
 - iv. Conclusion: Heir-run companies in are so successful in Japan in large part because non-blood, adopted heirs are put in charge

III. The Family Owned/Operated Business Distinguished

- a. Family businesses embody inherently conflicting values
 - i. Family first: one's obligations as a family member take priority

1. Equal treatment of family members (oftentimes irrespective of talent or merit)
 2. Special provisions (unequal treatment) for incapable/disabled family members
- ii. Business first: one's obligations as a business-person take priority
 1. Maximize individual shareholder wealth at all costs
- b. Breakdown of the traditional law-and-economics view / rational-actor model

"It is not from the benevolence of the butcher, the brewer, or the baker that we can expect our dinner, but from their regard to their own interest."

-Adam Smith

- i. Business owners predictably will make decisions that they believe maximize their investment
 - ii. Family business owners, however, are not predictable in this regard because the business of the family often trumps self-interest
- c. Distinctive challenges flowing from fundamental value conflict
- i. Confused/conflated social roles

1. Every family business owner/manager is also a family member (*i.e.*, The executive/manager/employee relationship at work is also a parent/child, sister/brother, uncle/nephew relationship at home)

 2. Raises question of what role trumps and under what circumstances
- ii. “Spill-over” conflicts – pre-existing and longstanding family affairs and dynamics tend to spill over into the business relationship (and vice-versa)
1. Traditional/cultural family roles

 2. Old grudges, jealousies, resentments

 3. Divorce/remarrying
- iii. Transition difficulties for founders
1. The founding parent and the immortality complex (“*If I die, I want the business to go to...*”)
 - a. For founding parent, stepping down feels like an abdication of the throne

 - b. For founding parent, stepping down can result in a loss of identity (compounded by a real or perceived lack of respect from children once business is in their hands)

- c. Founding parent is often incapable of seeing child as head of the business

iv. Lack of corporate formalities

- 1. As a general rule, family businesses have a natural *dis*-inclination to formalize their business affairs

- a. Agreements and understandings among family members more often based on blood, honor, and trust

“All of my key employees are my sons. Blood is the best security in this business”

-Ali Kerim Bey in *From Russia With Love*

- b. Lawyers and formal contracts can be seen as offensive, potentially a breach of family trust, and can result in a breakdown in the relationship
- c. Related debate regarding admissibility/weight of non-documentary evidence of family-business understandings:

- i. “The nexus of contracts that defines a family business includes the parties’ various . . . unwritten contracts, connections, and understandings, all of which bear upon the parties’ expectations. Accordingly, . . . evidence of oral agreements and implicit understandings . . . should be admissible” (see Means, *The Contractual Foundation of Family-Business Law*)

- ii. “My own view, perhaps reflecting my New York home pride, favors the relative certainty provided by the judicially imposed, statutory operating agreement that comes into play when the parties fail to enter into a written agreement” (see Mahler, *The Oral LLC Agreement: Boon or Bane?*)

2. Failure to document ownership interests

- a. Can give rise to ultimate form of minority shareholder oppression: repudiation of stock interest
 - i. “It is difficult to recognize a more reasonable shareholder expectation than that its interest will not be repudiated in its entirety, and that legal action would be required to compel its acknowledgment” (*Pappas v Fotinos*, 28 Misc 3d 1212[A] [Sup Ct, Kings County 2010])
 - ii. *Quazzo v 9 Charleton St. Corp.* (2014 NY Slip Op 30625[U] [Sup Ct, NY County 2014] [father’s repudiation of daughter’s ownership interest])
 - iii. *Quadrozzi v Estate of Quadrozzi* (99 AD3d 688 [2d Dept 2012] [brother’s repudiation of brother’s ownership interest])
- b. Can give rise to issues of shareholder standing in various contexts

- i. “In the real world, particularly that in which close corporations operate, evidence of share ownership is often not found in the corporate books and records, for any number of reasons” (*Matter of Pappas v Corfian Enters., Ltd.*, 22 Misc 3d 1113[A] [Sup Ct, Kings County 2009])
- ii. Right to judicial dissolution (*Wenger v LA Wenger Constr. Co. Inc.*, 2010 NY Slip Op 52236[U] 2010 [Sup Ct, Suffolk County 2010])
- iii. Right of inspection of corp. books & records (*Ng v Ng*, Sup Ct, NY County, Index No. 114291/10)
- iv. General shareholder standing to sue (*Reichman v Reichman*, 88 AD3d 680 [2d Dept 2011])

c. *Reichman v Reichman* case study

- i. Plaintiff-son sought injunctive and declaratory relief as 80% shareholder in successful online bath store based on documentary evidence
- ii. Defendant-father claimed he was sole owner based on unwritten familial understandings
- iii. Trial court ruled in favor of father, assigning weight to unwritten familial understandings and the parties’ “temperament, appearance, and demeanor” at trial (*Reichman v Reichman*, 2011 NY Slip Op 33760[U] [Sup Ct, Nassau County 2011])

- iv. Appellate Division reversed and held in favor of the son, pointing to documentary evidence of ownership (*Reichman v Reichman*, 88 AD3d 680 [2d Dept 2011])

- 3. Failure to hold and/or record board and shareholder meetings (*Armentano v Armentano*, Index No. 50761/12 [Sup Ct, Westchester County 2013])
 - a. Business judgment rule often inapplicable in closely-held companies because of interested directors

 - b. Importance of establishing *bona fide* business justification for board activity and no reasonable alternative for accomplishing the same objective
 - i. Compensation increases

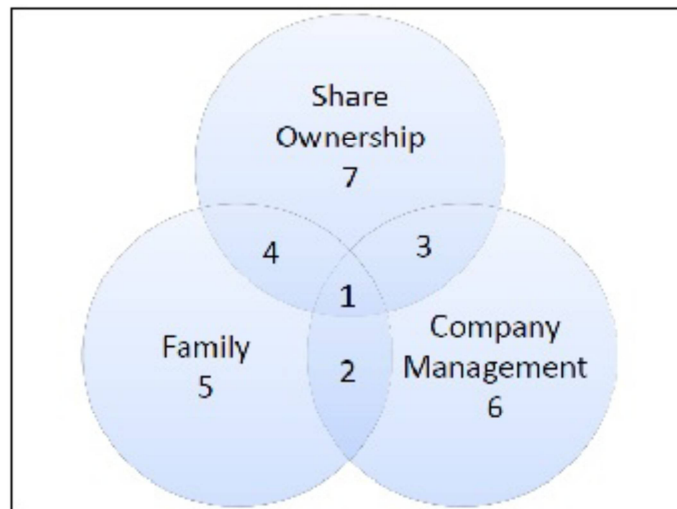
 - ii. Stock issuance

- 4. Failure to bargain at arm's length
 - a. Family members typically have an aversion to lawyers and formal agreements because their understandings are based on blood, honor, and trust

 - b. Family members don't anticipate leaving the business or just assume they'll be taken care of

- c. Result is that family members don't adequately protect themselves in the event of a separation
 - i. No employment agreement addressing termination, compensation, etc.
 - ii. Inadequate, overly-restrictive, or non-existent stock transfer provisions (buy-sell, redemption, "put" options, etc.) resulting in minority lock-in

5. Diagram of ownership/family/management complications in the family business



- a. Disputes most commonly arise between managing and non-managing family owners
 - i. Active family owners may want to re-invest profits and can insulate themselves by raising their own comp or providing themselves with other benefits

- ii. Non-active family owners want (need) dividends and a return on their investment and don't have (or are forbidden) access to the company coffers

- iii. "Phantom" income example:
 - 1. Active family owners can simply gross up their comp to cover tax liability on *pro rata* share of undistributed income listed on K-1s

 - 2. Non-active family owners rely on distributions to cover their *pro rata* tax liability

 - 3. *Troy v Carolyn D. Slawski* (CPC, PC, 2011 NY Slip Op 30476 [Sup Ct, NY County 2011] [brother/brother law firm])

IV. Common Manifestations of Family Owned/Controlled Business Disputes

- a. Exclusion from operations
 - i. Unilateral removal from board

 - ii. No notice of board/shareholder meetings

- iii. Exclusion from outside business ventures and start-ups
 - iv. Creation of related entities w/o offer of ownership interest
 - v. Purchase/sale of company assets (*e.g.*, real estate)
- b. Non-disclosure/withholding of key company information
- i. No board/shareholder meeting minutes
 - ii. No audited/unaudited annual/quarterly financial statements or tax returns
 - iii. No access to accounting information (general ledgers, underlying journal entries re: G&A expense information, auto, gas, credit card, travel & entertainment, etc.)
 - iv. No access to key valuation information (third-party offers, expressions of interest, etc.)
 - v. No access to short-term / long-term business plans (growth vs. sale of the company)
 - vi. No access to executive compensation/benefits information (amount and structure)

c. Withholding of dividends and other distributions

- i. Most common “squeeze-out” technique
- ii. Control owner can insulate themselves from a “growth” strategy by increasing comp and other benefits
- iii. Outside minority, dependent on dividends or other distributions, forced to sell unmarketable interest at undervalued price
- iv. “Phantom” income tax liability – control owners can gross-up their comp, outside minority must rely on distributions

d. Minority lock-in

- i. No ability for force liquidation event at a fair price
 1. Unmarketable minority interest in a private company with no dividend policy
 2. Restrictive or non-existent transfer provisions (no “put” option / no neutral appraisal process, etc.)

V. Common Remedies and Proceedings

a. Books-and-records proceedings under statutory and common law

i. Demand must be in good faith and for a proper purpose

1. Financial condition of company

2. Value of interest

3. Mismanagement

4. Rationale behind no-dividend policy

5. Information in aid of litigation

b. Judicial dissolution under statutory or common law

i. Dissolution under BCL § 1104 – “deadlock” or “dissension”

ii. Dissolution (and elected buyout) under BCL §§ 1104-a / 1118 – “oppression” or “diversion”

1. Requires 20% or more of voting shares
 2. Majority may elect buyout at fair value
- iii. Common law dissolution (*White v Fee*, 2012 NY Slip Op 51133[U] [Sup Ct, Westchester County 2012])
1. Palpable or egregious breach of fiduciary duty by the majority
 - a. Looting corporate assets to enrich themselves at minority expense
 - b. Continuing corporation solely to benefit themselves
 - c. Coercing minority to sell their shares at a sacrifice
- iv. Dissolution under LLCL § 702 (*Matter of 1545 Ocean Ave, LLC*, 72 AD3d 121 [2d Dept 2010])
1. Management must be unable or unwilling to promote purpose of business –or–
 2. Continuation of business is financially unfeasible
- c. Statutory appraisal rights (BCL §§ 623, 806)

- i. Usually triggered by significant change in corporate structure (merger, consolidation, etc.)
 - ii. Also can be triggered by a charter amendment adversely affecting fundamental shareholder rights (preemption, preferential, voting, and redemption)
 - d. Other discretionary, alternative remedies
 - i. “[C]onsideration must be given to the totality of circumstances . . . to determine whether some remedy short of or other than dissolution constitutes a feasible means of satisfying . . . the [minority shareholder’s] expectations” (*Matter of Kemp & Beatley*, 64 NY2d 63 [1984])
 - ii. Compelled buyout (*Matter of Zulkofske v Zulkofske*, 2012 NY Slip Op 51210[U] [Sup Ct, Suffolk County 2010])
 - iii. Compelled dividend policy (*Gimpel v Bolstein*, 125 Misc 2d 45 [Sup Ct, Queens County 1984])

VI. Preempting Family Business Disputes by Agreement

- a. Shareholder/Operating Agreements
 - i. Operational/management provisions
 - 1. Supermajority/unanimous approval

2. “Major” decisions
- ii. Buy/sell provisions
 1. Right of first refusal/offer
 2. Deemed offer and related triggers
 - a. *Matter of Doniger v Rye Psychiatric Hosp. Ctr., Inc.* (122 AD 2d 873 [2d Dept 1986])
 3. Shotgun
 4. “Quick Draw”
 - a. *Mintz v Pazer* (Index No. 502127/13 [Sup Ct, Kings County 2014]).
 5. Put/call options
 6. Appraisal parameters
 7. “Phantom” income

- a. *Troy v Carolyn D. Slawski* (CPC, PC, 2011 NY Slip Op 30476 [Sup Ct, NY County 2011])

- iii. Dispute resolution provisions

1. Good-faith negotiation/“cool down” period
2. Mandatory mediation/designated mediator(s)
3. Arbitration/designated arbitrator(s)

- b. Succession planning

- i. General considerations

1. “Nuanced nepotism” – objective standards for hiring/promoting family members
2. Consider equivalent, non-business-related assets to non-active family members
3. Be considerate of all the players and their primary concerns

- a. Founders

- i. Economic realization of their years of hard work
 - ii. Satisfaction that the business (one of their “children”) will continue
 - iii. Maintaining control
- b. 2nd generation
 - i. Economic realization for efforts/opportunity for growth
 - ii. Satisfaction that business will continue
- c. Non-active family members
 - i. Some share in the economic benefits of the business
 - ii. Recognition of chosen path
- d. Non-family employees
 - i. Some share in the economic benefits of the business

ii. Comfort of cont'd employment

ii. Mechanisms for transfer/retention of control

1. Proxy

a. Founder transfers shares to children in exchange for irrevocable proxies

i. Children acquire economic benefits of ownership

ii. Founder retains control of business

2. Voting Trust Agreement

a. Founder transfers shares to trust for benefit of children

i. Trust becomes shareholder / founder is trustee

ii. Founder retains control tempered by fiduciary duty as trustee in favor of children

- iii. Example: *Zacharius v Kensington Publ. Corp.*, 2014 NY Slip Op 50011 [Sup Ct, NY County 2014])

3. Recapitalization

- a. Founder creates class B non-voting stock and issues to children / key employees
 - i. Children / key employees acquire economic benefits of ownership
 - ii. Founder retains control of business

VII. Other Means of Resolving Family Owned/Operated Business Disputes

- a. Litigation can be a poor solution for resolving family business disputes
 - i. Finality difficult to achieve because family members can't truly go their separate ways

“[E]ither the parties [in a non-family business dispute] will find a way to go on and continue to do business with each other . . . or they find a way in which they can separate and never see each other again. That’s a little harder to do with families.”

-Hon. Alan D. Scheinkman, Westchester Commercial Division

- ii. Settlement may offer closest approximation of finality because parties can avoid the creation of a win/loss record

“[W]ith court decisions, there are people who perceive that they have won and people who perceive that they have lost and it only puts more salt in the wounds.”

-Justice Scheinkman

- b. Early intervention

- i. Unassisted negotiation
- ii. Mediator-assisted negotiation
- iii. Arbitration

- c. Creativity in drafting/negotiating settlement terms

- i. Crafting terms in light of emotional/psychological backdrop of parties
- ii. Neutral and binding third-party appraisal process
- iii. Fair exit mechanisms

iv. Institution of dividend policy

v. Anti-dilution provisions

VIII. Annexed Materials (organized topically)

Background on Family Business

- a. Benjamin Means, *Nonmarket Values in Family Businesses*, 54 Wm. & Mary L. Rev. 1185 (2013)
- b. Marianne Bertrand and Antoinette Schoar, *The Role of Family in Family Firms*, 20 J. Econ. Perspectives 2 (Spring 2006)
- c. Francisco Perez-Gonzalez, *Inherited Control and Firm Performance*, 96 Am. Econ. Rev. 5 (2006)
- d. Vikas Mehrotra, Randall Morck, Jungwook Shim, and Yupana Wiwattanakantang, *Adoptive Expectations: Rising Sons in Japanese Family Firms*, 108 J. Fin. Econ. 3 (2013)

Repudiation of Stock Interest as Form of Minority Shareholder Oppression

- e. *Quazzo v 9 Charleton St. Corp.* (2014 NY Slip Op 30625[U] [Sup Ct, NY County 2014])
- f. *Quadrozzi v Estate of Quadrozzi* (99 AD3d 688 [2d Dept 2012])
- g. *Pappas v Fotinos* (28 Misc 3d 1212[A] [Sup Ct, Kings County 2010])
- h. *Lund v Krass, Snow & Schmutter, P.C.* (62 AD3d 551 [1st Dept 2009])
- i. *Matter of Pickwick Realty, Ltd.* (246 AD2d 863 [3d Dept 1998])
- j. *Matter of Parveen* (259 AD2d 389 [1st Dept 1999])

Oral and Implied Agreements in the Context of Family Business Law

- k. Benjamin Means, *The Contractual Foundations of Family-Business Law*, Forthcoming 75 Ohio St. L. J. (2014)
- l. NY LLCL, § 417 (a)
- m. *Matter of Spires v Lighthouse Solutions, LLC* (4 Misc 3d 428 [Sup Ct, Monroe County 2004])
- n. *Matter of Horning v Horning Constr., LLC* (12 Misc 3d 402 [Sup Ct, Monroe County 2006])

- o. Peter A. Mahler, *New York Business Divorce*, “The Oral LLC Agreement: Boon or Bane” (Feb. 3, 2014)
- p. *Federico v Brancato* (2014 NY Slip Op 50902[U] [Sup Ct, Suffolk County 2014])

Shareholder Standing

- q. *Matter of Pappas v Corfian Enters., Ltd.* (22 Misc 3d 1113[A] [Sup Ct, Kings County 2009]) (dissolution under BCL § 1104-a)
- r. *Wenger v LA Wenger Constr. Co. Inc.* (2010 NY Slip Op 52236[U] 2010 [Sup Ct, Suffolk County 2010]) (dissolution under BCL § 1104-a)
- s. *Jedrzejcyk v Gomez* (2014 NY Slip Op 02872 [1st Dept 2014]) (dissolution under BCL § 1104)
- t. *Ng. v Ng* (Sup Ct, NY County, Index No. 114291/10) (shareholder right of inspection)
- u. *Reichman v Reichman* (88 AD3d 680 [2d Dept 2011]) (shareholder derivative rights, etc.)
- v. *Reichman v Reichman* (2011 NY Slip Op 33760[U] [Sup Ct, Nassau County 2011]) (shareholder derivative rights, etc.)
- w. Peter A. Mahler, *New York Business Divorce*, “Father May Not Know Best: Appeals Court Grants Injunction in Son’s Bid to Establish Majority Ownership of LLC” (Oct. 17, 2011)

Establishing Business Justification for Board Action/Business Judgment Rule

- x. *Armentano v Paraco Gas Corp.*, (90 AD3d 683 [2d Dept 2011])
- y. *Armentano v Armentano* (Index No. 50761/13 [Sup Ct, Westchester County, January 2013])
- z. *Marx v Akers* (88 NY2d 189 [1996])
- aa. *Schwartz v Marien* (37 NY2d 487 [1975])

Common Remedies and Proceedings

- bb. BCL § 1104 (Judicial Dissolution – Deadlock/Dissension)

- cc. BCL § 1104-a / 1118 (Judicial Dissolution – Oppression/Diversion)
- dd. BCL § 624 (Books & Records)
- ee. BCL §§ 623, 806 (Appraisal Rights)
- ff. BCL § 626 (Shareholder Derivative Action)
- gg. LLCL § 702 (Judicial Dissolution)
- hh. LLCL § 1102 (Books & Records)
- ii. LLCL §§ 1002 / 1005 (Appraisal Rights)
- jj. *White v. Fee* (2012 NY Slip Op 51133 [Sup Ct, Westchester County 2012]) (Common Law Dissolution)
- kk. *Armentano v Armentano* (Index No. 50761/12 [Sup Ct, Westchester County, August 2012]) (Common Law Dissolution)
- ll. *Ferolito v Vultaggio* (99 AD3d 19 [1st Dept 2012]) (Common Law Dissolution)
- mm. *Matter of 1545 Ocean Ave., LLC* (72 AD3d 121 [2d Dept 2010]) (Judicial Dissolution of LLC)
- nn. *Matter of Tatko* (173 AD2d 917 [3d Dept 1991]) (Common Law Right of Inspection)
- oo. *Matter of Zulkofske v Zulkofske* (2012 NY Slip Op 51210[U] [Sup Ct, Suffolk County 2010]) (Compelled Buyout)
- pp. *Matter of Clever Innovations* (94 AD3d 1174 [3d Dept 2012]) (Compelled Buyout)
- qq. *Gimpel v Bolstein* (125 Misc 2d 45 [Sup Ct, Queens County 1984]) (Compelled Dividends)
- rr. *Matter of Kemp & Beatley* (64 NY2d 63 [1984]) (other discretionary, alternative relief)

Shareholder/Operating Agreement Provisions and Other Agreement Terms

- ss. *Mintz v Pazer* (Sup Ct, Kings County, Index No. 502127/13) (“shotgun” and “quick draw” provisions)

- tt. Peter A. Mahler, *New York Business Divorce*, “Court Enforces ‘Quick Draw’ Buy-Sell Agreement in Suit Between 50/50 Shareholders” (March 31, 2014)
- uu. *Zacharius v Kensington Publ. Corp.* (2014 NY Slip Op 50011 [Sup Ct, NY County 2014]) (voting trust agreement)
- vv. *Troy v Carolyn D. Slawski* (CPC, PC, 2011 NY Slip Op 30476 [Sup Ct, NY County 2011]) (“phantom” income)
- ww. *Matter of Doniger v Rye Psychiatric Hosp. Ctr., Inc.* (122 AD2d 873 [2nd Dept 1986]) (deemed offer)

Settling Family Business Disputes

- xx. Peter A. Mahler, *New York Business Divorce*, “A Judge’s Wise Words on Disputes in Family-Owned Businesses” (Feb. 13, 2013)
- yy. Matthew D. Donovan, *The Westchester County Commercial Division, Common-Law Dissolution, and the Resolution of Family-Owned Business Disputes*, 39 *Westchester County B. J.* 1 (June 2014)