

TAB 18

Part 7: Putting It All Into Practice

**Modern Estate Planning –
The High Price of Not Talking**

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Special Lectures 2010
**A Medical-Legal Approach to Estate Planning, Decision-Making,
and Estate Dispute Resolution for the Older Client**



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MODERN ESTATE PLANNING - The High Price of Not Talking

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THE FAMILY MEETING – A PRE-EMPTIVE STRIKE AGAINST ESTATE LITIGATION

Introduction

As the transfer of wealth from one generation to the next proceeds in Canada, the inevitable growth in estate litigation will no doubt continue. In fact, statistically the transfer of wealth in Canada is moving along at an extraordinary rate.

Trusted advisors continue to be faced with clients who come to see them hoping to create an estate plan that is geared in part to either resolving future conflicts or facing those conflicts in the estate planning process itself.

There currently exists an excellent regime whereby lawyers, estate planners, accountants, insurance agents and other allied professionals work together with the client to create a plan that makes sense both from a tax standpoint and from the family dynamics perspective.

Many of these existing estate plans work as the percentage of estate matters that are litigated continue to be proportionately relatively small. However, while the amount of litigation, on a percentage basis, may be small, two difficulties arise in the litigation context. First, even that small percentage of estate litigation that does get created on the death of the client is usually extremely painful for the family, both financially and emotionally. Second, even when you think you have all the “t”s crossed and the “i”s dotted, the advent of estate litigation usually occurs on a fairly random basis. In other words, no matter how hard you try, if the underlying family dynamics have not been considered, then even the best laid plans may well fall into the “black hole” of estate litigation.

Presumably, more than just good documentary planning on the part of your client is now needed.

Historically, the whole estate plan was structured without the input of those who are most affected by the result, namely, the family members. It is the additional component of the family dynamics that is a significant instigator of estate litigation.

Within the confines of the estate litigation arena, the process and the fight can be incredibly harmful to family relationships. These proceedings are often emotionally devastating and financially problematic.

Before examining some of the common causes of and possible alternatives to estate litigation, it is helpful to consider the main estate planning techniques.

What is a Will?

A will is a written statement that sets out how the testator wants his/her assets to be disposed of on death. A will creates an almost unchangeable estate plan, which after death can only be varied if everyone with a financial interest in the estate agrees. As a result, it is important that it accurately describes the testator's wishes. After death, a will provides a framework for the appointment of an executor, who is responsible for the administration of the estate. A will gives the executor the power to deal with assets belonging to the deceased and to distribute them to the beneficiaries selected.¹

Powers of Attorney

A Power of Attorney is a document which allows the grantor to plan for situations where he or she may become incapable and unable to make decisions about his or her property or health. With a Power of Attorney, another person is appointed (known as the "Attorney"), although that person does not have to be a lawyer, to make those decisions on behalf of the grantor. A Power of Attorney is only effective during lifetime and terminates upon death of the grantor.²

There are two different types of Powers of Attorney: one is a Power of Attorney for Property, which allows the Attorney to manage property for the grantor; and the other is a Power of Attorney for Personal Care, which allows the Attorney to make health care decisions for the grantor if he/she becomes incapable of making those decisions him or herself. The same person does not have to be appointed to both positions.

¹ Hull, I.M., Advising Families on Succession Planning: The High Price of Not Talking (LexisNexis) (2005) at page 9.

² *Ibid* at page 47.

Trusts

Trusts offer a number of benefits as an estate planning tool, from lowering or deferring taxes to providing a more flexible method of distributing assets. In examining the benefits, it is important to understand the basics of how trusts work.

A trust is created when the settlor transfers ownership of certain assets to a trustee, who holds and manages the assets for the benefit of the beneficiaries. The beneficiaries are able to enjoy the benefits of the assets but do not legally own them. For example, if you transfer your cottage to your brother in trust for your children, your brother legally owns the cottage, but your children, and not your brother, are entitled to use the cottage.

Trusts can either be *inter vivos* trusts, which are created during the lifetime of the settlor, or testamentary trusts, which are created in a will and take effect on death. Different tax rules apply to the two types of trusts: *inter vivos* trusts are taxed at the highest marginal tax rate and testamentary trusts are subject to the graduated tax rates that apply to individuals.

There are many different types of trusts that may be useful as part of an estate plan. These include:

- **Income trusts.** This creates a trust that gives the beneficiaries the income earned by the trust's capital assets (like an investment account, for instance). For greater flexibility, the trustee may also be given the right to decide how much income should be paid to the beneficiaries. The trustee may even be given the right to pay part of the capital to the beneficiaries over a period of time as well.
- **Spendthrift trusts.** If a family member does not handle money well has a history of financial problems, the settlor may be concerned about giving him or her access to a large sum of money. A spendthrift trust ensures that a beneficiary will have the income needed, while preventing depletion of the capital.
- **Trusts for special needs beneficiaries.** Children with special needs often require considerable ongoing financial support. A trust can secure their long-term future. A special form of trust is created to ensure that the child isn't disqualified from receiving provincial disability support benefits.

- **Spousal trusts.** Transferring property to a trust for the benefit of a spouse allows a deferral of the capital gains taxes that will arise on death until the trust disposes of the property or the surviving spouse dies.
- **Family trusts.** These are useful for income-splitting amongst family members, particularly if the family owns a business.
- **Incentive trusts.** An incentive trust is used to motivate beneficiaries who expect to inherit a large amount of money to lead a productive life.

Advantages of a Trust

Trusts offer many advantages, both to the settlor and the beneficiaries:

- **Tax reduction.** Since testamentary trusts are taxed at the same graduated rates as individuals, they can be used to income-split amongst the beneficiaries. In addition, money can be distributed from the trust so as to minimize the tax consequences to the beneficiaries. For example, capital gains, which are taxed more favourably than other types of income, can be paid by the trust to the beneficiaries and taxed in their hands.
- **Protection from creditors.** Assets that are held in a trust are usually protected from the beneficiaries' creditors.
- **Money management.** If a child inherits a large sum of money at a young age, he or she may not be able to properly manage that money. If the money is held in a trust, the trustee can ensure that the child's living costs and other appropriate expenses are covered, but can delay distributing the bulk of the funds until the child is older and more financially responsible.
- **Gifts to minor children.** In Ontario, children can't legally own property until they are 18. If you want to leave assets to minor children, you must create a trust or the Office of the Official Guardian will administer the money until the child turns 18.
- **Dispute resolution between children.** Transferring a contentious asset, like a cottage, to a trust for the benefit of your children allows the trustee to make decisions about that asset and can reduce the conflict between the children.
- **Protection for a second spouse.** A trust can balance the needs of children from a first marriage with the needs of a second spouse. It is possible to transfer property to a trust that will provide income to a spouse during his or her lifetime. On that spouse's death, the children will receive the remaining capital from the trust.³

³ *Supra* note 1

Bringing in the Family – Protecting the Family from Legal Challenges

Trying to convince your client to open up the full family dynamics during his or her lifetime is a difficult sales pitch. Typically, your client does not even want to deal with the issue of death one-on-one with you, as the trusted advisor, let alone face the prospect of bringing in various family members, including those who are non-blood related.

Having said that, it only takes one dissatisfied beneficiary to start estate litigation. That's what the pre-estate Family Conference is designed to prevent.

When preparing an estate plan, the client wants inevitably to leave their family with a legacy that is accepted, rather than a costly dispute that will erode the value of the estate and may permanently destroy family relationships.

Traditional estate planning focuses on developing a comprehensive estate plan, including a will disposing of assets. While this is important, it does nothing to prevent unhappy family members from bringing a legal action to challenge a will – and it really does take only one disappointed beneficiary to start litigation and deplete the value of an estate.

In our experience, having litigated over estate matters ranging from those that were planned almost to perfection right through to those that were a mess (often created by either the planning process itself or the client (*i.e.* homemade wills or handwritten wills)), the ability of a trusted advisor to accurately predict that an existing estate plan will run smoothly after death is, in our view, very much in doubt.

Currently, disputes come from all angles within the client's world and they are usually very surprising to the family members. For example, your client might be quietly sending \$500.00 per month to relatives overseas, an amount that would not attract much attention to him or her when preparing an estate plan but may, nonetheless, result in a claim by the relatives against the assets of the estate as dependants upon your client's death.

More to the point of the family dynamic itself, many family members do not know and understand the nature and effect of the will itself. As an illustration, many matters are litigated over the question of executor's compensation. In particular, if one family member is chosen over another as executor, the fact that that individual was chosen may bring with it an emotional

consequence after your client's death. One brother may be upset by the fact that he is not "running the show", so to speak, and an easy way to get at his sister/executor is to make trouble in the context of the compensation that she might claim.

Another example of a problem that may arise in a well-planned, carefully constructed estate plan is the transfer of wealth through a family-run company. For instance, if one of the siblings is currently running the company and is given the shares of the parent, it may be an entirely justified, fair and/or equal distribution in the context of the other siblings; however, the event itself may either come as a surprise to the other siblings or, more importantly, may be seen as an unequal distribution which is challenged in the context of an estate litigation proceeding.

What is the Solution?

Of course, there is no definitive solution to this problem as the frailties of human nature prevail, and it is impossible to predict with certainty that any steps taken before death on behalf of your client will result in the perfect, unchallenged and undisrupted administration of his or her estate.

However, there are two aspects which should be considered.

(a) The Existing Approach

There is simply no substitute for good, effective and comprehensive estate planning. By using well-qualified counsel, with the assistance of the necessary allied professionals and trusted advisors, one takes a giant step forward in the preventative strike regime.

From a documentary standpoint, consideration should be given to the drafting techniques employed through the estate planning process. For example, the use of *inter vivos* trusts, trusts within the will, *in terrorem* clauses (*i.e.* levying a cost on those who choose to litigate) included in the will and other drafting tools can go a long way toward creating a "bulletproof" estate plan.

(b) The Family Meeting Approach - Enter the Professionally-Mediated Family Conference

Notwithstanding all of the efforts on the part of your client to create an estate plan that is protected from attack, the one important consideration missing in the existing approach is the role of the beneficiaries themselves.

In fact, arguably, the whole estate planning process should also be looked at from the bottom up and this view from the bottom should, in our opinion, be conducted live, as opposed to projected by the client's estate planning professionals.

A Family Conference provides a client with the opportunity to explain his or her wishes to family members and to describe the intended disposition of the estate. It provides a forum for discussion that ensures both the testator and the intended beneficiaries are comfortable with the proposed dispositions.

It also allows the parties to address the emotional issues that may arise around the will, and if necessary, make changes to the estate plan so that everyone is satisfied.

We hope to provide an overview of the steps which can be taken to protect an estate plan, and explain how the pre-estate Family Conference can play an integral role in the estate planning process.

To the extent that it is possible, full, direct family participation in the estate plan can add another important and effective pre-emptive strike against problems after death.

As to the "sales pitch", presumably a five-minute discussion with your client advising him or her that if the estate plan comes under attack for any reason, which can ultimately never be entirely foreseen or predicted, then tens of thousands of dollars will be spent on lawyers, accountants and other professionals cleaning up the mess. This prospect alone will, no doubt, send shivers down your client's back. However, you will also likely be faced with the sensible reaction on the part of your client that if his/her beneficiaries' can't get along, then so be it. Further, then, your client's impression may be that it will be the beneficiaries loss if they want to fight amongst themselves.

Having said that, the one thing that will likely resonate in your client's mind, in any event, is the fact that his or her whole estate plan can be fought over and substantially restructured, ignoring many of his or her wishes in the context of a fight later in the day.

Finally, your client needs to understand that the impact of the estate plan may result in emotional strife that could ruin relationships or make it worse within the family for the rest of their lives, and bitter feelings may be harboured in respect of your memory.

In our experience, the three-part combination of an incredible waste of money, completely ignoring the testator's wishes and the lifelong emotional impact on the family will leave its mark in your client's mind.

PROTECTING YOUR ESTATE FROM CHALLENGES

A will is the cornerstone of any estate plan. One of the best ways of protecting an estate from challenges is to ensure that a will is professionally drafted and distributes all included assets to the intended beneficiaries. Here are several steps that can be taken during a testator's lifetime to reduce the likelihood of a successful will challenge.

- **Proof of mental capacity.**

A will is invalid if the testator didn't have the mental capacity to sign it when the will was made. The testator should ask his or her lawyer or doctor to take detailed notes on his or her mental capacity and ability to provide and understand instructions at the time of the will signing.

- **Guard against claims of undue influence.**

A will can be challenged on the basis that someone has forced the signing of a document that does not reflect the real intentions of the testator. Those who are elderly, unhealthy, frail or highly dependent on one person when making a will should consider having their lawyer and doctor prepare detailed notes on their mental condition at the time.

- **Ensure the will is properly executed.**

A will can be challenged if it is not properly executed. The drafting lawyer will ensure that the will is properly witnessed and that the witnesses sign the necessary affidavits. Any changes later made to the will must also be properly signed and witnessed.

- **Document any gift made during lifetime.**

If large gifts are made during the testator's lifetime, make sure that the appropriate legal documents are prepared and that a lawyer makes notes as to the mental capacity of the client. This is particularly important if making unequal gifts – for example, if monetary gifts are made to only one child.

- **Drafting wills to protect against challenges.**

Careful will drafting can help reduce estate challenges. For instance, a will can contain a clause providing that if a beneficiary challenges the will, they lose their right to receive anything from the estate. Another possibility is to have all beneficiaries sign a contract

stating that they will not challenge the will. A lawyer can help with the decision as to what might work best in the particular situation.

THE HIGH COSTS OF ESTATE LITIGATION

Protecting an estate from challenges becomes even more important when consideration is given to the financial and emotional costs involved in defending an estate during the litigation process. Individuals generally focus on the fees and disbursements paid to their lawyer, but the emotional costs of litigation can leave family members permanently estranged.

Traditionally, the estate was ordered to pay the costs of all of the parties involved in litigation, regardless of who was successful. However, in recent years, courts have moved away from this approach and are focusing on the success the parties achieve in the litigation. This can mean that parties may have to bear their own costs, or that someone who unsuccessfully challenges a will may be ordered to pay the estate's costs.

There are several stages in estate litigation, and costs climb as you move through each stage. These stages and their approximate costs are as follows:

Obtaining an order organizing the litigation	\$5,000 to \$10,000
Collecting and disclosing evidence to establish the case	\$2,000 to \$20,000
Attending discoveries to give sworn evidence	\$10,000 and up, plus the costs of preparing the transcripts (\$2.00 to \$3.50 a page, with an approximate length of 200 pages)
Preparing for and attending a pre-trial conference	\$3,000 to \$7,500
Preparing for and attending at trial	\$15,000 to \$30,000 a day for trial, plus fees for preparation time
Appeal of court's decision	\$40,000 and up

MEDIATION

Mediation is a non-binding process in which interested parties attempt to reach an agreement on the issues between them with the help of a trained mediator. Mediation is far less costly than

the court process (overall mediation costs generally range from \$7,500 to \$25,000) and allows people to reach an agreement themselves, rather than have a decision imposed on them by a judge. The downside, of course, is that if mediation is unsuccessful, you'll have to pay both the mediation costs and the subsequent litigation costs, which will add to your financial burden.

MOST FREQUENT CAUSES OF ESTATE LITIGATION

Even if a comprehensive estate plan is in place and all the necessary steps to bulletproof the will have been taken, the estate may still wind up the subject of litigation. Here are some of the most frequent causes of estate challenges.

- **Lack of a comprehensive estate plan.**

It's important that the estate plan cover all assets and that it's kept up-to-date, so that it reflects any changes in personal circumstances or intentions.

- **Inadequate estate planning advice.**

Make sure to obtain advice from estate planning professionals (lawyers, accountants, financial planners or insurance professionals) about a specialized estate plan. Obtaining professional advice also reduces the likelihood of poorly drafted documents that may create confusion about the testator's true intentions.

- **Acrimonious family members.**

If family members are acrimonious and believed likely to challenge the wishes of the testator, make sure the estate plan is as enforceable as possible. Keep in mind that if an estate dispute starts, family members may adopt positions that are completely unreasonable and be resistant to all rational advice.

- **Actions of your personal representatives.**

The executors and trustees appointed must behave in a scrupulously fair manner towards all family members. Make sure the individuals selected will be able to set aside any pre-existing feelings they may have about any stated intentions with respect to the estate plan or the beneficiaries and will be able to establish a good relationship with family members.

THE FAMILY CONFERENCE SOLUTION

Protecting families from the high costs of estate challenges by using a Family Conference to solve disputes before they become litigious is a reasonable alternative. With the assistance of a mediator, the Conference can be used to tell family members about any intended estate plans and, hopefully, obtain their approval of that plan.

Before the Family Conference

There are a number of steps which need to be taken before a Family Conference takes place to ensure that it runs smoothly, including determining who to invite. In general, invites should be given to all of the adult members in the family who may be affected by the estate plan. At a minimum, the spouse and children should attend.

Deciding where to hold the Conference is also important. A neutral location, such as the mediator's office, is usually the best choice.

Finally, an Agenda should be prepared before the meeting to ensure that all of the relevant issues are addressed. The mediator will work with the client and their lawyer to prepare the Agenda and become familiar with the estate plan and any issues that are likely to be contentious.

At the Conference

The meeting will generally start with the mediator explaining his or her role to the family members and outlining the rules governing the meeting. Typically, the mediator asks family members to sign two agreements at the beginning of the meeting:

- The Family Conference Agreement, which emphasizes the neutral role of the mediator and the confidential nature of the meeting. It also provides that the mediator cannot be subpoenaed or required to give evidence about the Family Conference.
- The Rules for the Family Conference, which are designed to promote an atmosphere of mutual respect and courtesy.

The meeting often continues with the mediator outlining the Family Conference process and providing a brief outline of the proposed estate plan. The client, and possibly their spouse, will also provide brief opening statements, which reiterate any goals for the Family Conference. The lawyer will then provide a detailed explanation of the estate plan and answer questions that any family members may have.

Once all family members have been fully informed of the details of the estate plan, they can be split into smaller groups or caucuses where they can openly discuss their concerns. The

mediator will move between the caucuses and the parents to determine what issues are dividing the family. The mediator will promote negotiation on these issues and suggest possible ways of resolving them.

The ultimate goal of the family conference is to have all family members sign a Family Constitution, approving the estate plan and agreeing not to contest the will. If the meeting goes well, this can happen in a single session. In some cases, subsequent meetings will need to be held.

Need for Full Disclosure

Essential to the success of the Family Conference is full disclosure of the details of the estate plan to all family members. Without this forthrightness an atmosphere of mistrust could poison the process. In addition, if after death family members discover that the deceased did not fully disclose the details of his or her estate plan, they are more likely to challenge your will.

There are a number of sensitive topics that may be difficult to discuss with family members, including unequal treatment of children, spendthrift beneficiaries, and succession issues with respect to the family business. The mediator can help plan the best way to address these topics with the family.

What if Some Family Members Won't Attend?

Some family members may refuse to attend the Family Conference. If that occurs, the rest of the family should still meet so that their agreement to the proposed estate plan can be obtained. Once the Family Constitution is signed, the mediator can then send it to the non-participating family members and invite them to sign it as well.

In some cases, all family members may attend the Family Conference, but some family members may refuse to approve the proposed estate plan. If that happens, the trusted advisor, be it the lawyer, accountant or estate planner, may want to suggest amending the estate plan to satisfy as many of their concerns as possible without sacrificing personal goals. It is critical that all family members receive a copy of the Family Constitution, even if they have chosen not to sign it.

Even if some family members won't sign the Family Constitution, it is likely that a court will never the less consider the process favourably upon a will challenge. It will also be difficult for these family members to argue that the testator lacked testamentary capacity or was unduly influenced, because the lawyer will have comprehensive notes about the Family Conference. In addition, circulating the Family Constitution to all family members demonstrates a clear intention as to the desired asset distribution.

In the end, whether or not all family members participate in the process or agree with the result, holding a Family Conference and developing a Family Constitution are key steps in protecting an estate from litigation.

After the Conference

Once the Family Constitution is signed, the lawyer and other professional advisors will prepare the necessary documents, including wills, trusts, Powers of Attorney and deeds of gift, to implement the estate plan. Once this is complete, a diligent regular review of the estate plan is necessary to make sure it continues to reflect the client's wishes. Under normal conditions the estate plan should be reviewed every few years. If substantial changes are made to the estate plan, another Family Conference will need to be held.

INCENTIVE/PURPOSE/PRODUCTIVITY TRUSTS

Introduction

One of the important consequences of the considerable transfer of wealth from the baby boom generation to their children and grandchildren is the individual impact it will have on those beneficiaries. Having said that, in our experience, the "problems of wealth" resonate at all levels, even when relatively modest inheritances are passed on to the next generation(s). The extent of this phenomenon is illustrated by the fact that new terminology has surfaced in the United States to describe the baby boomer children as "trust babies", and the enjoyment of the new wealth as the epidemic of "affluenza".

As a result, it may be worthwhile to explore the concept of how one can deal with the potentially unmotivated child that has received the financial protection of being named as a beneficiary in a substantial trust. The key, of course, is to incentivize that beneficiary.

Essentially, by using the traditional trust mechanism, some suggestions have been made to revise that existing structure to help encourage or discourage certain types of behaviour on the part of the particular beneficiary. Of course, no matter what legal arrangements are created, the fundamental questions are the same: What does it take to motivate people and what is the best way to facilitate the development of a productive individual?

The Current System

To date, trusted advisors have generally focused their attention on creating an estate plan that is fundamentally based on avoiding tax and, typically, if there is a need to either protect the surviving spouse during his or her lifetime or the children of that relationship, a life interest arrangement is created. In this situation an individual (*i.e.* executor/trustee) is charged with the management of the capital and, at all times, balancing the interests of the life tenant and the capital beneficiary.

A recent trend coming out of the United States is to add a twist to the traditional estate planning process by trying to draft into trust documents language that will control the behaviour of the beneficiaries.⁴ Essentially, the suggestion of those who propound the incentive trust approach is that estate planners need to move away from the traditional approach of drafting an estate plan with the goal of tax savings, creditor protection and estranged spouse protection, and begin to draft trust documents that will assist to modify the behaviour of the beneficiaries.

Trusts for Children

In considering adding a new layer to the whole trust drafting process, some thought must be given to the fundamentals behind the creation of a trust and why trusts themselves are used for the protection of children.

The obvious goals of a settlor/testator are to protect the financial interests of minor beneficiaries, and while many clients do not like to admit it, an obvious result of any trust arrangement is the fact that the settlor and/or testator is given the privilege of, in some measure, “ruling from the grave”.

⁴ For a comprehensive review of the incentive trust concept see Marjorie J.D. Stephens, “Incentive Trusts: Considerations, Uses, and Alternatives”, (2003) ACTEC Journal 5.

In her article, “Incentive Trusts: Considerations, Uses and Alternatives”⁵, the author, Marjorie Stephens, considers those the traditional reasons for creating a trust for children. She notes that there are obvious problems that come from this traditional estate planning technique, which include the fact that the money received by the children/beneficiaries may act as a disincentive to future education. Furthermore, those children may begin to depend on the trust money and not rely solely on their own personal resources. The author goes on to say that the most important consideration in respect of distributing the wealth, in the context of a trust environment, is a determination as to when the particular child becomes mature enough to handle both the income and the capital of the trust.

Obviously, it is up to the estate planners and lawyers to create a protection system that typically results in the income and capital being given to the beneficiaries, with a view to eventually having them receive the money without any “strings attached”. In fact, ideally, most settlors and/or testators would prefer that the income, and capital if necessary, of the trust be used for support of the children up to the age of 20, and then focus the spending, when the children are in their 20s, solely on education. The prospect that the child will enjoy the income for any other purpose, during their 20s, is not as desirable for many clients. However, it is difficult to control the use of the income, and capital, even in the best of circumstances.

Drafting Challenges

Historically, motivating the child beneficiary was not something that was typically addressed in the structure of the trust document. The concept underlying an incentive trust is that the trustee will reward certain behaviour. For example, the trust could be drafted in such a way that the more productive the child is financially, the more money she will receive from the trust. The purpose is obvious, namely, encouraging the child to live a productive life.

The concept of the incentive trust was, in part, first developed in a *Wall Street Journal* article dated November 17, 1999, entitled “Trust Me, Baby”. Some suggestions made in that article included the idea of matching earned income and creating a specific fund to set up a business or professional practice. Another suggestion was that the monthly income could be paid to a stay-at-home mother or father, or specific language could be included to deny distributions if the child did not enter into a premarital agreement when he or she married. More dramatic suggestions included drafting trust clauses which provided that the child would be denied any

⁵ *Supra* note 4

money from the trust if he or she failed a drug test, and in an effort to incentivize the child, the trust could include a clause that provided for more money to the child if he or she was receiving therapy.

Obviously, these types of clauses create their own problems and consideration has to be given to whether or not they are capable of being administered. This is presumably the lawyer's challenge. As with any trust document, broad language usually needs to be incorporated so that unknown future events can fall within the confines of the drafting language. Therefore, it is difficult to draft in all of the desirable behaviour in the context of an incentive trust.

From an administration standpoint, if the specific benefit is tied to specific behaviour, then it is not that difficult for the trustee to attend to the administration of the assets. However, given the necessity for broad and vague language in the drafting, encouraging a productive child can be much more difficult to administer.

At the outset, it is suggested that the following steps be considered:

- (1) The objects and purposes of the trust need to be defined;
- (2) Consideration must be given to broad and specific behaviours that need to be encouraged; and
- (3) Consideration must also be given to whether or not the provisions of the trust, as drafted, can indeed be administered.

Psychological Considerations

In her article, Marjorie Stephens⁶ sets out some of the psychological considerations that are relevant to the structure of a trust designed to incentivize behaviour. The starting point for any incentive trust is the idea that the settlor/testator is trying to motivate an individual. The two presumptions are that (a) money can motivate that particular individual; and (b) the settlor/testator will use his or her power wisely and that the individual appointed to administer those powers will do so judiciously.

⁶ *Supra* Note 4 at page 14.

Marjorie Stephens⁷ notes that, in her view, one should not try to use the reward method to control an individual as that does not motivate a beneficiary. In fact, the key to success is that the child takes control over his or her own life and that the use of the exercise of control enables or encourages the child to do such.

The foundation to any incentivizing behaviour is confidence that the child believes he or she can get things done. In the process of motivating the child and creating a confident child/beneficiary, there must be economic independence for that individual.

In Marjorie Stephens⁸ view, one should not draft “bail out” provisions in the trust. Rather, every effort should be made to foster a feeling that the child must take responsibility for his or her own conduct. Encouraging independent decision-making, accepting responsibility for the consequences of one’s actions and establishing and fostering strong relationships are the foundations to creating economically independent and competent beneficiaries.

Practical Considerations

In an effort to reach the goal of a financially independent and confident child/beneficiary, practical considerations need to be addressed when drafting the trust provisions.

Obviously, the greatest need for economic assistance for the child is usually between the ages of 20 to 40, and therefore a careful distribution scheme needs to be set out during this period of the child’s life.

Marjorie Stephens⁹ notes that:

Money is not the “problem”. Individuals are not “de-incentivized” by money, but rather by the dynamics around the money. Money means control over the individual, not by the individualThe solution to this problem, as is suggested, is proper, comprehensive communication.

As a consequence, it is recommended that one start, at an early stage, to discuss the financial arrangements and the emotional issues surrounding financial support. Sometimes it is useful to involve the child directly in the decision-making process, including investments and distribution.

⁷ *Supra* Note 4 at page 12-13.

⁸ *Ibid* at page 13.

⁹ *Ibid* at page 14.

Knowledge is a form of control and releasing that information is an important part of the shift in control. Essentially, as the beneficiary matures, so does trust in that beneficiary and therefore a pro-active approach to involving the beneficiary in the process is important.

Conclusion

In summary, while the concept of incentivizing beneficiaries and influencing behaviour through the trust mechanism is novel, it seems to us that small steps can be taken to develop an estate plan that moves toward creating confident and financially independent children. This process involves both creative drafting and important psychological considerations in the confines of the family unit – and requires the unified assistance of one's trusted advisors

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TAB 18a

Part 7: Putting It All Into Practice

Planning for Family Meetings

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Special Lectures 2010
**A Medical-Legal Approach to Estate Planning, Decision-Making,
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PLANNING FOR FAMILY MEETINGS

Julie A. Morton PhD
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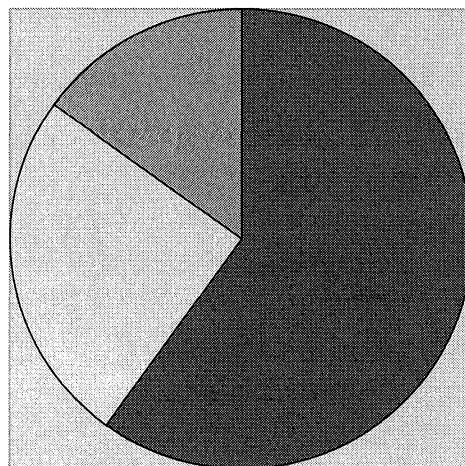
QUESTIONS FOR FAMILY MEMBERS

- Do you ever avoid a difficult conversation with family members or colleagues?
- Do you ever feel that your family members, or colleagues, ever react to something in your conversations more than just the issue at hand? How about you?
- Would outsiders say your family/family enterprise is more supportive or critical of one another?
- Do disagreements ever become fights about how you are talking, not what you are talking about?
- Do you trust that your family members have your best interest at heart, or do you each have your own agenda?
- Do you even know what goes on at your family company?
- Do you know the goals and responsibilities of each family member?
- Do you discuss the obligations to each other and the expectations of each other?
- Do you ever wish your family was more connected or supportive in important ways?
- Do you know how to get your family from where they are now to where you want them to be?

Most family-owned enterprises, and most families, run into crisis not because of external pressures but due to internal pressures. In fact, in data collected over a 26 year period, of every

"1000 estates that were studied through transition, 700 failed. Of the 700 that failed, 420 (60%) failed due to a breakdown in trust and communication in the family. A consequential failure to prepare the heirs for responsibility caused another 175 failures, and only 105 failed for 'all other' causes. Within the final category, out of the 105 families that failed for all other causes, only 20 failed because of errors and oversight from all categories of professional."²

WHY THE HIGH FAILURE RATE?



- 60% = Breakdown of Communication and Trust Within Family
- 25% = Heirs Unprepared for Required Roles & Accountability
- 15% = All Other Causes

Obviously trust, communication and heir preparedness potentially have a huge impact on families and family enterprise. However, what exactly are communication, trust and heir preparedness? How do we immunize ourselves, our families, and our family enterprise against these failures? One way to do this is through Family Councils and the family meetings which support them.

Definition - Communication:

- Communication is the ability to speak openly, honestly and freely about the things that matter to you and to others in the family;
- Good communication involves talking and listening; it is a learned skill requiring both empathy and practice.
- Effective communication enables family members to articulate thoughts, feelings and emotions to more clearly understand their own and each other's perceptions. This increased awareness helps unify the family/family enterprise or colleague relationships. Ineffective communication includes misinformed gossip, loss of trust, anger, and inappropriate emotional or verbal responses to situations, events, persons or circumstances.

Communication breakdown:

Communication breakdown occurs via one of three ways:

- **No communication** – we don't speak, or we don't speak about things that are important;
- **Miscommunication** – the spin, misunderstandings, and extraneous "noise" not related to the issue, but which somehow manage to cloud the issues, occurring in our family/family enterprise settings;
- **Poor communication** – we don't know how to have effective conversations, or we keep having same old conversations that go no where and leave everyone feeling frustrated.

Definition – Trust:

Trust is based on empirically validated data (data we derive through our senses). The components of trust are:

- **Competence** - family members have the skill and capacity to live up to any commitments we make;
- **Sincerity** - family members mean what we say, and we tell the whole truth to our knowledge without gaping holes of omission;
- **Reliability** - when a family member is in trouble, we help them; additionally, when we say we will do something, we meet our commitments and our timelines.

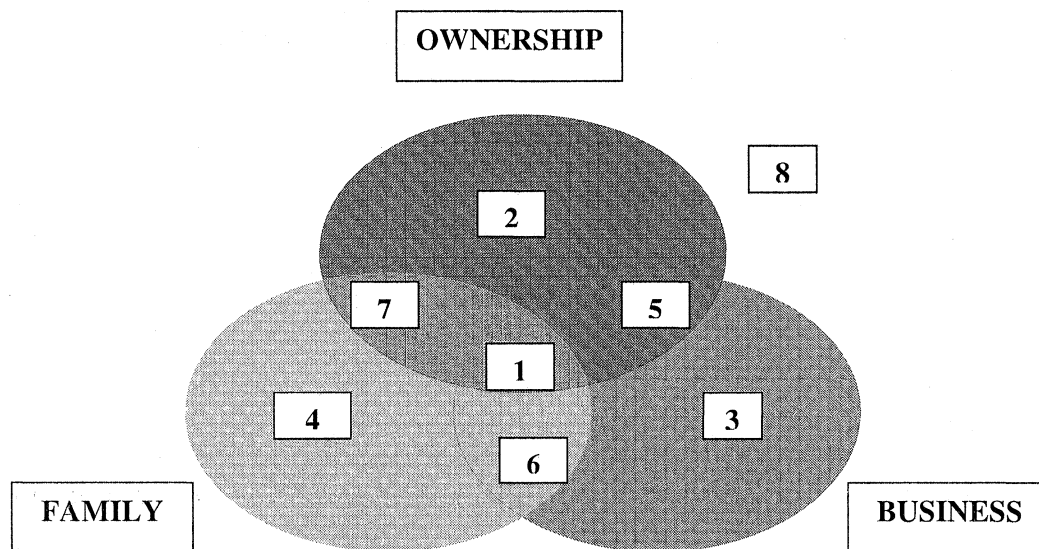
Trust breaks down when any of the aforementioned components are absent. A concrete example of trust breakdown occurs when a family/organizational member holding certain communal assumptional sets (personal or business) changes one (or more) of the assumptions without informing the other stakeholders. The family/organizational members are now on a trust collision course because there is no way, without a discussion of what has occurred (and why), that the behavior/actions/etc. of either party can be seen to be engaged in good faith actions. Each party, working from his or her own

assumptional framework, will negatively assess the other party's actions. The first because s/he is working from a new set of assumptions with concomittal data associated with it. The second because s/he is working from the original set of assumptions with all the concomittal data associated with it. When assessing our own actions, we take into account our intent (and our assumptions), yet when assessing the actions of others, we only look at their behavior (not their intention or assumptions). There is now a communication gap which if left unattended, will erode trust.

At the basis of communication, trust and heir preparedness, is an ability of family members to clearly articulate their individual and collective goals and roles, expectations and obligations. Part of what impedes effective communication is the fact that there are three circles family members can engage in (family, business and ownership) and they may be standing in one, two or all three circles.

In most families, communication and trust breakdown occurs because there is a dearth of clarity regarding who stands in what circle, the roles, rights, expectations and obligations associated with each circle, and the conversations which should happen between and among people in each quadrant. As you can see in the diagram below, depending where you sit, will impact what you see, hear and have the right to discuss in different forums.

WHO STANDS WHERE: THE 3 CIRCLE MODEL IN FAMILY ENTERPRISE



1. **FAMILY OWNER-MANAGERS:** family owners working in the enterprise
2. **OWNERSHIPS:** Non-family external investors/owners not working in enterprise.
3. **BUSINESS:** Non-family managers/employees working in enterprise.
4. **FAMILY:** Family members not involved with the enterprise.
5. **BUSINESS/OWNERSHIP INTERSECTION:** Non-family employees with ownership working in enterprise.
6. **BUSINESS/FAMILY INTERSECTION:** Family members without ownership working in enterprise.
7. **FAMILY/OWNERSHIP INTERSECTION:** Family members with ownership not working in enterprise.
- 8: **EXTERNAL STAKEHOLDERS:** customers, advisors, suppliers etc.

Mechanisms of Communication in different Circles

In the Business circle, the Board of Directors provides a mechanism through which appropriate discussion of relevant information can flow to and from pertinent stakeholders. This is a mechanism commonly used and understood in business entities.

In the Ownership circle, personal advisory groups like Young President's Club or Vistage, or a group of professional or personal trusted advisors, are common and accepted mechanisms through which owners can communicate and share important information.

In the Family circle, the Family Council (and the family meetings supporting it) provides the mechanism through which discussion occurs. It is in this format where family issues and/or tensions can be discussed. This mechanism, while less commonly used and understood than other business and ownership mechanisms, plays a vital role in family and family enterprise health. This is the place where family members can safely communicate with one another – even when they disagree.

The Role of the Family Council

The role of the Family Council is to facilitate communication, promote family trust, and prepare heirs for their future. A well-run Family Council ensures that there is a set of understood rules or policies (explicit or implicit) guaranteeing a shared understanding of what it means to be a family member in the context of the family enterprise. This may include: regular communication; understanding of roles, mutual expectations and obligations; awareness of individual and shared goals; comprehension of individual and common values; comprehension of issues related to the family; comprehension of issues related to the business as it impacts the family; comprehension of issues related to governance as it impacts the family; family conduct; and a solid grasp of what it means to be a member of the family as it relates to the rights, obligations and roles of enterprise ownership, shareholders, and business management. To effectively enact a Family Council we engage in a series of family meetings.

Many Family Councils informally start with a founder (Generation One or G1) sitting around his/her kitchen table and talking to his/her family about business issues. Through the discussion of issues, opportunities and threats...through the listening to offspring and spousal ideas and comments (both positive and negative)...through the asking of questions and the giving of responses, the G1 educates his/her family about the business and the family values. This 'kitchen-table' education informally prepares the next generation to play their roles in the family business. These family members are referred to as "insiders". However, as it is a system based on proximity, this process begins to become unwieldy as adult children mature and move out of the house. It is a system that also disempowers the extended family members of the enterprise who do not live in the house, and are therefore not part of these family and/or family-enterprise discussions. These family members are referred to as "outsiders". The more insider/outsider relations that exist, the more opportunities occur for miscommunication and mistrust to begin to accumulate.

The Family Council is a formalization of the 'kitchen-table' meeting experience and can convert outsiders to insiders. In this forum, family members formally share experiences

as they might around the kitchen table, formally receive information and mutual support, formally become educated on key issues, formally discuss and seek solutions to common concerns and, formally establish meaningful lines of communication between families, and between family members and organizational members.

It is also in the Family Council that the Family Participation Plan is created. This plan articulates the family values, beliefs or goals, roles, expectations and obligations; the vision for how the family interacts with each other, clients, customers and the community; the policies/guidelines for family involvement, entry/exit, ownership expectations, family employee performance measurement, compensation, consequences of actions, and philanthropic initiatives.

At its heart, the purpose of a family meeting can be summarized in the following acronym: ACAS²

- **A=Aware.** The purpose of family meetings is to make family members aware of relevant information that might impact them now, or in the future with regard to the family or the family enterprise.
- **C=Capable.** Family members need to be taught how to be capable with regards to their role/goals/obligation/expectations in the family enterprise. Depending which of the seven sectors (highlighted in the Three Circle Model in Family Business) a person falls in s/he will have different role, goals, obligations and expectations. However, at the fundamental level, there are core items for which all members should have basic capabilities (e.g.: how to read an income statement, understanding of the roles of others etc). It is the obligation of the family to educate, mentor, provide seminar and other learning opportunities to the family so that members will be capable of performing their roles.
- **A=Agree.** Members must agree with what others are doing. They must find ways to communicate and resolve problems effectively. They should readdress the issue of goals/roles/obligations/expectations at least twice a year to make sure that everyone is still on the same page. With increased goal/role awareness comes a better clarity vis-à-vis responsibilities. With increased (and mirrored) obligation and expectations relationships will be defined as how individuals interact with one another as people. If the relationships fall apart, ultimately, so too will aspects of the business.
- **S=Support.** Family members must find ways to support one another. If they don't have the support needed or desired, the family meeting is the place to bring up the issue and collectively problem-solve solutions.

Five simple rules for family meetings:

In order to be effective the Family Council must hold regular family meetings. At the foundational level for the family meetings to be effective, the family must consider, establish, and commit to:

1. Mandatory meetings.
 - No one else can schedule anything else for that time.

2. Respectfulness.
 - If you are present, be present. (E.g.: don't send text messages or take phone calls during the meeting.)
 - No belittling, no name calling, no shouting, no storming out, no nasty asides to the person next to you.
3. An open mind:
 - Come to every meeting assuming that everyone has something of value to say and be prepared to find out where the value is.
4. Criticizing the act not the actor.
 - Make sure you focus on a behavior you don't like, not on the person engaging the behavior. Engage in depersonalized or neutralized comments.
5. Ending on a good note.
 - Understand that as family and organizational members you don't always have to agree, but you do have to keep talking and maintain open lines of communication.
 - Try to ensure that meetings include humor, are based in family values, and even if they are emotional or pain-filled, always find a positive note on which to end the meeting.

The objectives and details of how to enact the “ 5 simple” rules are outlined in depth below:

- Membership entitlement.
 - Who is allowed to attend family meetings? E.g.: Every family member, anyone over 16, sons- and daughter-in-laws, just direct descendents...
- Confidentiality.
 - If family members are going to feel free to speak openly about things that are important, emotional or contentious, they will have to know that there is a strongly maintained level of confidentiality. It is the family equivalent of “what happens in Vegas stays in Vegas.” Family members will have to define and agree to what information is permissible to share beyond the confines of the family meeting, under what circumstances, and with whom can it be shared. E.g. can you share information with your spouse if s/he is not part of family meeting?
- Attendance.
 - Is attendance is mandatory or optional, and what, if any, are the consequences if mandatory attendance is not upheld?
- Meeting frequency.
 - The family has to decide how often they want to meet and the purpose of the family meetings. However, it is best that meetings are held on a

regular basis (e.g.: quarterly) and once a time and date is chosen, the family should stick to it.

- Know your meeting goals because that will help determine what, where and how often your family should meet. (E.g.: If the purpose is for reasons of family bonding, meetings may be held more irregularly, perhaps on long weekends so that recreational activities can be included into the other topics of discussion. If the purpose is for reasons of education and information exchanges, it may be that family members want to meet bi-monthly or quarterly.)
- Structure.
 - Agenda: Have an agenda and stay on topic.
 - Airtime: Have a gavel (or talking stick or some makeshift object utilized each session) denoting who has the floor. This will help to increase air time and minimize misunderstandings regarding whose turn it is to talk.
 - Appoint roles: A moderator, a secretary and perhaps committee chairs and members are needed. Every member of the family should be assigned a role in the family meeting structure. These roles can have an established time period (e.g. yearly) or they can rotate each meeting so as to give different family members the experience of the different roles.
- Communication.
 - In order for families to be able to find and maintain an effective balance between individual, family and organizational needs it requires productive conversation and enough time booked off to have it. Sometimes this means learning how to communicate more effectively because we all maintain negative and unproductive habits that can be improved. Experts can be brought in to both help families learn to communicate and/or to communicate more effectively.
 - Positive communication involves active listening. This means having focused conversation, and listening and hearing as well as speaking. It involves the giving and receiving of feedback in a productive manner. It means being open and curious to what someone else is saying and not mentally or emotionally shutting down. It includes goal setting, reframing, reflecting and knowing the 'triggers' that set you/others off and trying to avoid these triggers. It means recognizing and acknowledging positive occurrences – what is going right – and not expending all of your energy on what is going wrong. It also includes the fine art of goal setting, compromise, consensus building and finding ways that everyone in your family can win, instead of looking for traditional win-lose formats.
 - Family members must also send out complete agendas for meetings (weeks in advance). They may also want to distribute meeting minutes so everyone has written documentation of what was agreed to in the meeting and to keep track of decisions. If there is disagreement, then it can be highlighted at that time.

- A means of communicating between meetings must also be established so that critical information doesn't get lost between meetings.
- Decision making.
 - Any time there are a group of people who have to make a collective decision, the decision-making rules should be agreed a priori to engaging in the decision-making process. This maintains the perception of fairness and increases the levels of trust among family members. Family members must agree to the manner in which decision making will occur in family meetings. (E.g.: consensus, majority rules, age appropriate democracy; fact gathering and leadership decision-making etc.)
 - Realize that you cannot bludgeon other people to accept your point of view and have them willingly act to implement the decision. In family meetings if you are the only dissenting voice, take time to reconsider if there is a possibility that you may be wrong about the issue.
- Conflict management.
 - When any group gets together there will be conflict. When a family, with a long-standing history and various agendas, gets together conflict at some point will be guaranteed. Nevertheless, conflict is not necessarily bad. Conflict at low levels can help air issues, bring to light different points of view, and help generate positive solutions. Just like a broken bone heals stronger than the original bone, conflict (even at high levels) if dealt with productively, can ultimately help the family and the family enterprise forge stronger bonds and establish new relationships.
 - Families must decide on protocols in the family meetings for how they will deal with conflict. Family meetings are not arenas for sweeping conflict under the rug and pretending it doesn't exist, or for blowing up, throwing chairs and screaming uncontrollably at one another. Each family will develop a system that works for them. Even if it is as simple as when conflict gets out of hand we can each call a ten minute break, no hard feelings, calm down and then come back and address the issue. Families require systems in place to deal with conflict.
 - The basics of conflict management including a written stakeholder agreement outlining the family mechanisms for conflict resolution and a willingness to adhere to this agreement; maintained respect for family members and their comments; time to safely discuss differences as well as specific and agreed upon timeframes for resolving differences; a problem-solving orientation focusing on the real and applied "needs" of individual/group members and not simply their "wants"; and an agreed upon mechanism which can kick in when family members find themselves at stalemate.
 - See Chart for how to prepare for difficult family conversations in the family meeting format.²

- Outside experts.
 - The most common way to begin running a family meeting (or to establish a Family Council) is with an outside expert. S/he will usually begin with a one or two day retreat helping the family to establish their collective thinking on the creation/institutionalization of ground rules, highlighting mutual areas of primary concern, the development of a family mission statement, and the first steps towards solution-finding. At the end of the retreat the family must have experienced “a win” in order for the first stage to be considered a success and to generate commitment to follow up.
 - The primary facilitator usually engages with the family throughout the first year or two of family council meetings to help with problem-solving and policy making. Families often maintain an “on-call” relationship with their primary expert for many years as issues arise where communication help is required.
 - Outside experts are also used in this forum to teach and educate family members on any array of items and are brought in on an as-needed basis to facilitate learning or bring in needed expertise.
- Generate excitement.
 - Families should try to engage family members in projects that excite its members, that speak to the passions and interests (individual and/or collective) of its constituents, and that contribute to collective family and family enterprise goals.

Common family meeting errors:

Frequently, family meetings called with the best of intentions end in disaster. Common stumbling blocks occur because families: fail to plan; fail to share air time; fail to share vital information; fail to deal appropriately with conflict as it arises; fail to have consequences (positive or negative) or follow through for action; fail to maintain appropriate boundaries; fail to maintain high levels of trust; fail to communicate appropriately (have poor, mis- or no communication); or, fail to engage a facilitator.

While none of the aforementioned failures ever has to occur, just because one (or more) has occurred doesn't mean that a situation cannot be remedied. Families recover from conflict, from miscommunication, from lack of trust and, from well-intended but rocky starts. It takes time, energy and a willingness to engage, but few problems are insurmountable. Often, it is the anticipation of the problem which most inhibits the family, not the actual problem itself. This anxiety is a future-based fear based on the premise that future events will be terrible/horrible/awful, and that we either can't control the event or that we will fail in our attempt to make it better. When we realize that we have a great ability to control our emotions, behavior, thoughts, and that each one of us is resourceful, capable, whole, we can let go of future-based fear and begin to engage in the present, to step into a family meeting and effectively communicate with other family members about the things that matter in our life and our family enterprise.

Summary:

Family members must be educated that the past does not determine the future and that each person is a process, and not a product. Change is always possible. An analogy to consider is one of a boat sailing straight from North to South. The wake behind the aft of the boat is a record of everything that occurred in the past. Because the boat is sailing straight, the past is believed to be a good predictor of the future. Relating the analogy to the family, this may include lack of trust, mis- poor or no communication, or a lack of heir preparedness. However, if a different goal and direction is set and the family-boat is turned, the wake of the past no longer reflects the new direction of the future. Next, consider the same boat, only this time look at the leak that it has sprung. If you are like most families, half the family goes to one side of the boat and thinks to themselves “thank god I wasn’t on that part of the boat with the hole in it!” The other half of the family is bailing furiously and trying to stay afloat. The underlying issue which most families forget is that we are all in the same metaphorical boat. We are all in the same family/family enterprise. If we identify common goals, understand our role and communicate with one another – if we use the family meeting as a vehicle for doing so – we can avoid having our family/family enterprise boat sink.

Conscious Legacy Coaching (CLC) is an organization dedicated to personal Legacy fulfillment. From large organizations to family businesses, and from business executives to couples dealing with fertility issues, our mission is to help our clients to identify, to create, and to have the tools to live the Legacy they want to leave. jmorton@CLCoaching.com www.CLCoaching.com

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DIFFICULT CONVERSATIONS PREPARATION WORKSHEET²

<p>1. UNDERSTAND ‘WHAT HAPPENED’</p> <p>○ <u>MY STORIES:</u> What is the problem from my point of view?</p> <p>What data is behind my story?</p> <p>What are my relevant past experiences?</p> <p>○ <u>MY CONTRIBUTIONS:</u> How have I contributed to the current situation?</p> <p>○ <u>MY IMPACT & INTENTIONS:</u> What impact has this situation had on me?</p> <p>What were my intentions?</p>	<p>1. UNDERSTAND ‘WHAT HAPPENED’</p> <p>○ <u>OTHER STORIES:</u> What is the problem from their point of view?</p> <p>What data makes their story make sense?</p> <p>What past experiences are relevant?</p> <p>○ <u>OTHER CONTRIBUTIONS:</u> How have they contributed to the current situation?</p> <p>○ <u>OTHER IMPACT & INTENTIONS:</u> What were their intentions?</p> <p>What impact might this situation had on them?</p>
<p>2. MY FEELINGS How do I feel about this situation?</p> <p>Which feelings make sense to share?</p>	<p>2. OTHER’S FEELINGS What might they be feeling?</p>
<p>3. MY IDENTITY What do I fear this situation says about me?</p> <p>What is true about this?</p> <p>What is not?</p>	<p>3. OTHER’S IDENTITY What might they think the situation says about them?</p>
<p>4. MY PURPOSE What’s my purpose for having this conversation?</p>	<p>4. OTHER’S PURPOSE Circle the purposes that are 1) in your control, and 2) helpful to you.</p>