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Article

CORPORATE FAMILY LAW

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ABSTRACT—There is no such thing as corporate family law. But there are corporate families, and corporate families fight. What happens when corporate family members fight and the conflict is so severe that one or more of the parties wants out of the corporate relationship? Corporate law provides some solutions, but they are shaped by the assumption that all parties will bargain effectively for protections when seeking to exit a corporate relationship. Under this theory, family business is, after all, just business. The problem with this assumption is that corporate family members do not bargain the way that corporate law expects. Corporate family members are idiosyncratic bargainers who operate from a position of bounded rationality and self-interest. Consequently, they are unlikely to take steps to protect themselves against corporate oppression. The result is a mismatch between corporate law and its underlying assumptions for a substantial swath of family business owners who are subject to corporate law and corporate oppression. Thus far, lawmakers have not looked to family law to solve this problem. This Article argues that they should. Family wealth laws—divorce and inheritance—offer an alternate model of asset allocation at the end of a relationship, providing robust financial protections for parties who are vulnerable in light of their idiosyncratic bargaining position. Such laws provide the theoretical foundation for a more realistic and fair conception of protection for corporate family members subject to corporate oppression. There may be no such thing as corporate family law, but there should be.

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> *Happy families are all alike; every unhappy family is unhappy in its own way.*
>
> —Leo Tolstoy[†]

> *We sense that Tolsto[y] was less familiar with the American modern law of closely-held corporations . . . where the survival of a business association is so perilously tied to the continuing vitality of intimate personal relationships.*
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> —Judge Gerald J. Weber[‡]

INTRODUCTION

There is no such thing as corporate family law. But there are corporate families,[1] and corporate families fight. Siblings undermine one another in

[†] LEO TOLSTOY, ANNA KARENINA 3 (Constance Garnett trans., Random House 1939) (1877).

[‡] Orchard v. Covelli, 590 F. Supp. 1548, 1550 (W.D. Pa. 1984), *aff'd*, 802 F.2d 448 (3d Cir. 1986) (mem.), and *aff'd sub nom.* Appeal of Orchard, 802 F.2d 448 (3d Cir. 1986) (mem.).

[1] In this Article, I use the term *corporate families* to denote and discuss family-owned corporations that are closely held. A closely held corporation is a business organization typified by a small number of stockholders, the absence of a market for its stock, and substantial shareholder participation in the management of the corporation. The majority of closely held corporations are family businesses. *See* Robert T. Kleiman, updated by Laurie Collier Hillstrom, *Closely Held Corporations*, REFERENCE FOR BUS. (2017), http://www.referenceforbusiness.com/encyclopedia/Clo-Con/Closely-Held-Corporations.html [https://perma.cc/UP4D-5RAC] ("Most—but not all—closely held firms are also *family-owned businesses*."). Many family businesses are also, however, organized as partnerships or LLCs or in other noncorporate ways. I do not address these forms of organization in this Article but leave it for examination elsewhere. Moreover, I coin the term *corporate families* to focus on the fact

board meetings, children fire their parents, and warring parties use their corporate power to vindicate intergenerational feuds.[2] What happens when the fighting is so ruthless that it becomes corporate oppression and one or more of the family members want out of the corporate relationship? The question has vexed even the United States Supreme Court, and as the Justices in *Hobby Lobby*[3] recently recognized, there is no easy answer.

Corporate law provides some solutions to the problem of exit in the face of corporate oppression.[4] Most obviously, an individual family member can sell her shares as long as she can find a purchaser. The problem is that most family business shares have no market value because the companies are not publically traded, and in addition, family business shares often come with transfer restrictions.[5] Alternatively, most state corporate laws accord certain rights and remedies to minority shareholders in closely held corporations who are being oppressed and have no real exit

that family relationships are negotiated through the corporation, as opposed to using the more common term *family corporations*, in which *family* is merely a modifier and not the conceptual core.

[2] The frequency of infighting in family businesses has not been quantified. Many commentators suggest that the risk of corporate family conflict is high. Because family businesses ask individuals to "span multiple social categories . . . . tensions are particularly endemic to [these] businesses." David Whetten et al., *Organizational Identity and Family Business*, *in* SAGE, THE SAGE HANDBOOK OF FAMILY BUSINESS 480, 484 (Leif Melin et al. eds., 2014). Commentators also note that "when it does break out, the fighting tends to be more intense." Josh Baron & Rob Lachenauer, *Why Fights Erupt in Family Businesses*, HARV. BUS. REV. (Jul. 9, 2013), https://hbr.org/2013/07/why-fights-erupt-in-family-bus [https://perma.cc/BW2Q-F5QT]. Corporate family disputes are more intense, some authors speculate, "because they can [be]. In nonfamily businesses, there are barriers to keep things from escalating. Owning the business removes many of these barriers. Once a conflict starts, it can easily spiral out of control." *Id.*; *see also* D'Lisa McKee et al., *Conflicts in Family Firms: The Good and the Bad*, *in* SAGE, *supra*, at 514, 514 ("Conflict can be particularly taxing as family entanglements worsen stressful situations . . . . Overlapping family and business relationships may complicate how firms are managed and potentially increase the intensity and frequency of conflicts." (citations omitted)).

[3] The question was posed in *Burwell v. Hobby Lobby Stores, Inc.*, and Justice Ginsburg, in her dissent, remarked: "[T]he Court [does not] offer any instruction on how to resolve the disputes that may crop up among corporate owners over religious values and accommodations." 134 S. Ct. 2751, 2797 n.19 (2014) (Ginsburg, J., dissenting). The majority opinion noted this concern but left the question of corporate family conflict unanswered. *Id.* at 2774 (majority opinion) ("HHS and the principal dissent express concern about the possibility of disputes among the owners of corporations . . . ."). The Court concluded: "The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs." *Id.*

[4] Shareholder oppression, discussed further *infra* pp. 9–21, involves the majority shareholder(s) in a closely held corporation blocking the minority from having any real voice in corporate governance or extracting any value from their shares.

[5] The majority of family businesses organized in the corporate form are closely held. Robert T. Kleiman, updated by Laurie Collier Hillstrom, *supra* note 1. In this Article, I discuss this significant subset of closely held corporations. There are some publicly traded corporations that are family controlled; however, this is a small percentage of family businesses, and minority shareholder oppression is not a problem in these companies because shares are publicly valued and traded and, consequently, a minority shareholder can sell her shares for fair market value.

options.[6] The standard for what constitutes corporate oppression is, however, far from clear, and relief is not at all guaranteed. This lack of robust legal protections for minority shareholders is not an oversight. Corporate law protections are purposefully limited because corporate law is grounded in the expectation that parties will bargain efficiently and seek to maximize their own benefit.[7] Corporate law presupposes rational actors making rational choices, and consequently places the responsibility for self-protection squarely on the individual.[8]

Many times this set of rules and assumptions makes sense, particularly when it comes to those bargaining for and purchasing stock in public companies on the open market. These rules do not make sense when it comes to corporate families. Corporate family members do not bargain in the way that laws and norms expect them to bargain. From the outset, corporate family members—siblings, cousins, parents, and nephews and nieces—do not generally bargain to obtain the shares they possess. Rather, they inherit them or receive them as gifts. In addition, corporate family members are not the classic rational actors that corporate law and economic theory expect them to be. Corporate family members are, as behavioral economists understand, "bounded"[9] rational actors who are enmeshed in a complex set of interlocking relationships that intertwine the personal with the professional.[10] First, corporate family members operate from a position

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[6] *See* discussion *infra* Section III.B for examples of the kinds of protections afforded by various state laws.

[7] *See, e.g.*, STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 830 (2002) ("[P]arties who want liberal dissolution rights may bargain for them . . . before investing."). For further discussion about the norms that inform corporate law, see *infra* Section I.B., pp. 22–23.

[8] For examples of economists who propound rational choice theory, see A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 10 (2d ed. 1989); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3–4 (5th ed. 1998); Gary S. Becker, *Nobel Lecture: The Economic Way of Looking at Behavior*, 101 J. POL. ECON. 385 (1993).

[9] I use the term *bounded* as it is used in the behavioral economics literature, to indicate the limits of an individual's rational choice and agency. *See, e.g.*, W. Brian Arthur, *Inductive Reasoning and Bounded Rationality*, 84 AM. ECON. REV. 406, 406 (1994) ("The type of rationality assumed in economics—perfect, logical, deductive rationality—is extremely useful in generating solutions to theoretical problems. But it demands much of human behavior, much more in fact than it can usually deliver."); John Conlisk, *Why Bounded Rationality?*, 34 J. ECON. LITERATURE 669, 692 (1996) ("Psychology and economics provide wide-ranging *evidence* that bounded rationality is important . . . ."); Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449, 1449 (2003) ("[R]ational models are psychologically unrealistic.").

[10] In this way, corporate family members exemplify aspects of behavioral law and economics, acting in ways that rational choice theory does not expect. For a sampling of behavioral law and economics, see Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211 (2003); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

of bounded rationality, impacted by personal tensions, desires, and loyalties. That is to say, corporate family members do not act in the way that corporate law expects them to act because, as one court remarked, "many lawsuits arising from disputes among shareholders in closely-held corporations are characterized by the parties' inability to separate the business and personal aspects of their relationship."[11] In addition, corporate family members also operate from a position of bounded self-interest: they are idiosyncratic bargainers who may prioritize values over profits and family legacy over maximal efficiency.[12]

That corporate family members are treated like any other business co-owners and do not receive many financial protections in the face of corporate oppression is consequently problematic. And it is no small matter. Family businesses are ubiquitous in the United States and are often described as "the backbone" of the American economy.[13] These enterprises predominate in the marketplace,[14] constituting approximately 80% of business enterprises in the United States,[15] employing 60% of workers, and creating 78% of new jobs.[16] Family businesses have been a staple of American capitalism—just as entrepreneurialism has been a decidedly

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[11] Orchard v. Covelli, 590 F. Supp. 1548, 1550 (W.D. Pa. 1984), *aff'd*, 802 F.2d 448 (3d Cir. 1986) (mem.), *and aff'd sub nom.* Appeal of Orchard, 802 F.2d 448 (3d Cir. 1986) (mem.).

[12] Behavioralists might argue that all corporate actors are bounded in these same ways and that the classical idea of the rational actor is normatively flawed across the board. I would agree with that assertion, but I argue here that family members are even more "bounded" in their bargaining than other actors. Family businesses, as the business literature describes, are hybrid-identity organizations that require corporate stakeholders to negotiate not only workplace conflict but also social-role confusion. Ritch L. Sorenson, *Values in Family Business*, *in* THE SAGE HANDBOOK OF FAMILY BUSINESS, *supra* note 2, at 463, 472. Corporate family members are therefore called upon to exercise extra measures of care, diplomacy, and sensitivity as they go about the work of the corporation. As they well know, "family problems can become business problems, and business disagreements can further sour family relations." Benjamin Means, *Nonmarket Values in Family Businesses,* 54 WM. & MARY L. REV. 1185, 1212–13 (2013) [hereinafter Means, *Nonmarket Values*].

[13] ANDREA COLLI, THE HISTORY OF FAMILY BUSINESS, 1850–2000 8 (2003); *Family Business Facts*, CONWAY CTR. FOR FAM. BUS., http://www.familybusinesscenter.com/resources/family-business-facts [https://perma.cc/Y7NM-TXBY].

[14] *See* Benjamin Means, *The Contractual Foundation of Family-Business Law*, 75 OHIO ST. L.J. 675, 676 (2014) [hereinafter Means, *The Contractual Foundation*] ("Most U.S. businesses are family owned . . . ."); *see also* Joseph H. Astrachan & Melissa Carey Shanker, *Family Businesses' Contribution to the U.S. Economy: A Closer Look,* 16 FAM. BUS. REV. 211, 216 (2003) (finding that, according to the broadest definition of family business, 89% of businesses in the United States are family businesses).

[15] *See* DWIGHT DRAKE, BUSINESS PLANNING: CLOSELY HELD ENTERPRISES 274 (4th ed. 2013) (stating that over 80% of business enterprises in the United States are family owned).

[16] MATTHEW R. MARVEL, ENCYCLOPEDIA OF NEW VENTURE MANAGEMENT 190 (2012). *See generally* Benjamin Means, *Wealth Inequality and Family Businesses*, 65 EMORY L.J. 937 (2016) [hereinafter Means, *Wealth Inequality*] (suggesting that family businesses may disrupt entrenched hierarchies and create opportunities for many ethnic communities).

American value—since colonial America.[17] Small producers of craft products are predominantly family businesses, but many family-owned or controlled companies are also "economic powerhouses."[18] In fact, approximately "35 percent of Fortune 500 companies are family-controlled"[19] and major companies such as Cargill and Hobby Lobby are family-owned and controlled.[20] In short, the problem of family members exiting in the face of corporate oppression is one worth fixing.

Fortunately, models for treating corporate partners differently on the basis of their familial ties already exist for a subset of corporate family members: corporate spouses. When corporate spouses encounter severe conflict and seek exit, they have options in family law.[21] Divorce and inheritance law both offer models of asset allocation at relationship termination that differ from the traditional corporate law model. An unhappy spouse looking to leave the corporate relationship can always pursue a divorce. And through the equitable division of the marital estate, a corporate spouse can receive up to half of the couple's corporate assets.[22] Likewise, if one spouse tries to disinherit the other, the surviving spouse can still receive a substantial share of the deceased spouse's estate. Through intestacy rights or by electing to take the forced spousal share, the surviving spouse could receive between a third and a half of the deceased spouse's assets, including corporate assets.[23] Unlike other corporate family

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17 *See* Peter Dobkin Hall, *A Historical Overview of Family Firms in the United States*, 1 FAM. BUS. REV. 51, 60–61 (1988).

18 *See, e.g.*, *America's Largest Private Companies: #2 Koch Industries*, FORBES (Nov. 3, 2008, 6:00 PM), http://www.forbes.com/lists/2008/21/privates08_Koch-Industries_VMZQ.html [https://perma.cc/T232-3QD3]; *Our History*, MARS (2017), http://www.mars.com/global/about-us/history [https://perma.cc/W4QJ-T3N2] (explaining that Mars is still family owned but the leadership team is currently composed of nonfamily members).

19 CONWAY CTR. FOR FAM. BUS., *supra* note 13.

20 As Justice Ginsburg noted in her *Hobby Lobby* dissent:

> "Closely held" is not synonymous with "small." Hobby Lobby is hardly the only enterprise of sizable scale that is family owned or closely held. For example, the family-owned candy giant Mars, Inc., takes in $33 billion in revenues and has some 72,000 employees, and closely held Cargill, Inc., takes in more than $136 billion in revenues and employs some 140,000 persons.

Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2797 n.19 (2014) (Ginsburg, J., dissenting); *see also* Mirit Eyal-Cohen, *Down-Sizing the "Little Guy" Myth in Legal Definitions*, 98 IOWA L. REV. 1041, 1090–91 (2013) (explaining that the term *small* in the context of firm size, is not defined by its common usage and is instead used to describe larger, more powerful firms). According to one study, "[c]lose corporations account for most of American business" and "[f]amily-owned businesses alone represent ninety-five percent of all United States businesses." Steven C. Bahls, *Resolving Shareholder Dissension: Selection of the Appropriate Equitable Remedy*, 15 J. CORP. L. 285, 287 (1990).

21 I use *family law* in this Article to encompass both divorce and inheritance law. This may, more technically, be family wealth law because it draws inheritance into the family law domain.

22 *See* discussion of corporate assets and equitable distribution *infra* Section 2.A.

23 *See* discussion of corporate assets, intestacy, and elective share rules *infra* Section 2.B.

members, corporate spouses receive this privileged treatment based on their presumed inability to bargain at arm's length as well as the presence of a default marital bargain.[24] And while the marital relationship is certainly exceptional in many ways, the ways in which personal feelings can impact bargaining is not necessarily unique to spouses. Other corporate family members are bounded or impaired bargainers in the same way, and they, mistakenly, do not benefit from the presumption of idiosyncratic bargaining.[25]

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.[26] The work that has been done has addressed corporate law and family law in isolation. Corporate law scholars have addressed minority shareholder oppression in closely held corporations.[27] Business scholars have studied the subject, writing case studies about family businesses[28] and investigating questions such as whether business outcomes are better or worse in family-run enterprises.[29] Family law scholars have, for their part,

[24] Marriage law bases its protections on twin assumptions: a spouse's inability to explicitly bargain coupled with the acceptance of an implicit bargain. The implicit marital bargain is based on coverture rules and is an exchange of financial support for domestic care.

[25] It may be that all corporate parties are impaired bargainers, taking behavioral theory seriously. In addition, there may be other corporate parties who are especially bounded bargainers—friends who start businesses together, in particular. However, family members are the most obviously impacted by the overlap between personal and corporate roles just as they are also the easiest group to define and delimit. A next step, for consideration outside of this Article but based on the concepts introduced herein, might be to consider the law of "corporate friends."

[26] Means, *The Contractual Foundation*, *supra* note 14, at 676–77; *see also* COLLI, *supra* note 13, at 73 ("[D]espite the relevance of the subject, there is a surprising lack of theoretical, economic research . . . .").

[27] *See, e.g.*, Robert C. Art, *Shareholder Rights and Remedies in Close Corporations: Oppression, Fiduciary Duties, and Reasonable Expectations*, 28 J. CORP. L. 371 (2003); Douglas K. Moll, *Shareholder Oppression & Dividend Policy in the Close Corporation*, 60 WASH. & LEE L. REV. 841 (2003) [hereinafter Moll, *Shareholder Oppression & Dividend Policy*]; Douglas K. Moll, *Shareholder Oppression and "Fair Value": Of Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 DUKE L.J. 293 (2004) [hereinafter Moll, *Shareholder Oppression and "Fair Value,"*]; Samuel E. Neschis, *Reasonable Expectations of Shareholder-Employees in Closely Held Corporations: Towards a Standard of When Termination of Employment Constitutes Shareholder Oppression*, 13 DEPAUL BUS. & COM. L.J. 301 (2015).

[28] *See, e.g.*, Francesco Chirico, *Knowledge Accumulation in Family Firms: Evidence from Four Case Studies*, 26 INT'L SMALL BUS. J. 433 (2008); Bart J. Debicki et al., *Family Business Research in the New Millennium: An Overview of the Who, the Where, the What, and the Why*, 22 FAM. BUS. REV. 151 (2009); A. B. Ibrahim et al., *A Study of Succession in a Family Firm*, 14 FAM. BUS. REV. 245 (2001); Pramodita Sharma, *An Overview of the Field of Family Business Studies: Current Status and Directions for the Future*, 17 FAM. BUS. REV. 1 (2004).

[29] *See, e.g.*, Timothy G. Habbershon & Mary L. Williams, *A Resource-Based Framework for Assessing the Strategic Advantages of Family Firms*, 12 FAM. BUS. REV. 1 (1999); Danny Miller et al., *Stewardship vs. Stagnation: An Empirical Comparison of Small Family and Non-Family Businesses*,

pressed on the analogy between corporate and marital relationships as a way of better understanding spousal rights and responsibilities, particularly at divorce.[30] Few legal scholars, however, have addressed the entwinement of family relations with corporate ownership and governance.[31] This analysis therefore not only fills a gap but also builds a new bridge between corporate and family law scholarship.

This Article, then, examines the bargaining norms that shape both corporate law and family law and proposes that these norms be recalibrated in such a way as to provide increased financial protections for vulnerable corporate family members. The Article proceeds in three Parts. Part I discusses minority shareholder oppression and shows how corporate family members are particularly vulnerable to classic techniques of corporate oppression. Part I also offers an analysis of bargaining norms underlying corporate law and demonstrates why they are inappropriate when applied to corporate family members. Part II turns to family law and sets forth not only the rules for corporate spouses but also how and why these particular corporate family members receive relatively robust protections. Part III proposes several paths toward creating a new domain of corporate family law. Part III suggests several ways in which family law models solutions and offers ideas for statutory reform. At the moment, there is no such thing as corporate family law. But we can and should build it.

I. CORPORATE OPPRESSION AND BARGAINING

Corporate law and corporate governance rules provide a limited means of conflict resolution within a family business. This Section analyzes the legal framework of minority shareholder oppression as well as the norms that inform the basic judicial approach to corporate oppression claims. Using recent minority shareholder oppression cases, I emphasize why current protections are insufficient to protect corporate family members. I also explain why the bargaining norms that undergird the corporate law framework are misapplied in the case of corporate families,

45 J. MGMT. STUD. 51 (2008); Andy Yu et al., *The Landscape of Family Business Outcomes: A Summary and Numerical Taxonomy of Dependent Variables*, 25 FAM. BUS. REV. 33 (2012).

[30] *See, e.g.*, CYNTHIA LEE STARNES, THE MARRIAGE BUYOUT: THE TROUBLED TRAJECTORY OF U.S. ALIMONY LAW (2014); Mary Anne Case, Lecture, *Marriage Licenses*, 89 MINN. L. REV. 1758 (2005); Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79 (2001).

[31] For notable exceptions, see Benjamin Means, *A Contractual Approach to Shareholder Oppression Law*, 79 FORDHAM L. REV. 1161 (2010) [hereinafter Means, *A Contractual Approach*]; Means, *Nonmarket Values*, *supra* note 12; Means, *The Contractual Foundation*, *supra* note 14; Means, *Wealth Inequality*, *supra* note 16. Means is also critical of applying the rational actor model to family business members and proposes private ordering and contractual solutions that turn on good faith and fair dealing as well as shared understandings of family business values.

jeopardizing the ability of corporate family members to extract any value from their shares in the family business, thereby impairing their ability to exit a corporate relationship.

A. No Exit? The Plight of the Minority Shareholder

Corporate families can fight about corporate strategy, board composition, payment of bonuses, advertisement campaigns, and office space. Frequently, these disputes within a family business are intertwined with the minority shareholder status of one party. Minority shareholder status generates conflict and creates problematic results because the minority party will always be overruled or outvoted. Minority shareholders are consequently subject to oppression and mistreatment at the hands of the majority shareholder, and conflicts cannot be resolved through shareholder voting or board reorganization.[32] This Section explores the legal background for minority shareholder oppression, the few and insufficient remedies that are available, and why the existing framework is particularly bad for corporate family members.

1. The Classic Corporate Oppression Framework

Minority shareholder oppression is, as we will see, notoriously difficult to define. Compounding the problem, a minority stakeholder lacks not only agency within the corporation but also a practical way to exit the corporation.[33] Because a minority stakeholder's shares do not have a market value, the most likely purchaser is the majority shareholder. The majority shareholder can, consequently, force the minority shareholder into accepting a low price for the shares unless she wants to be "locked into" the corporation. Furthermore, even if the shareholder found another buyer

[32] Elizabeth Pollman states that *Hobby Lobby* is similarly silent on how these mechanisms might work (or not work): "The separate roles of the board and the shareholders inevitably lead to the question of whether the board has the power to determine a religious purpose for the corporation." Elizabeth Pollman, *Corporate Law and Theory in* Hobby Lobby, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 149, 166 (Micah Schwartzman et al. eds., 2016). Likewise, "[i]f shareholder consent is sufficient or required for determining the religious purpose of the corporation, must it be unanimous? Again, we face a question not as readily answered as the Court suggested." *Id.*

[33] Benjamin Means, *A Voice-Based Framework for Evaluating Claims of Minority Shareholder Oppression in the Close Corporation*, 97 GEO. L.J. 1207, 1217 (2009) [hereinafter Means, *A Voice-Based Framework*] ("[M]inority shareholder oppression in close corporations turns on one critical fact: minority shareholders have no practical ability to sell their shares and exit without the majority's consent."). *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 4–5 (1970) (identifying economic pressure (exit) and political influence (voice) as the two primary mechanisms a firm's members or customers may have available to protect their interests).

willing to accept a minority stake, transfer restrictions often apply.[34] The result of this oppression is that the minority shareholder in a closely held corporation is in a position that is "as unique as it is precarious" because she is subject to the "dual hazards of a complete loss of liquidity and an indefinite exclusion from sharing in the profitability of the firm."[35]

Faced with oppressive actions and a vulnerable position, minority shareholders do have some legal rights and remedies. However, while virtually all states, with the notable exception of Delaware, offer some kind of statutory or common law protection for oppressed minority shareholders,[36] the protections that do exist are far from uniform or robust. Instead, protections across states are "[a] true legislative and judicial patchwork."[37] Moreover, "[t]he current panoply of claims and relief does not efficiently address the underlying problems of majority power and minority illiquidity in the closely held business."[38]

A number of state statutes enforce a heightened fiduciary duty[39] for the majority shareholder in a closely held corporation. In a classic case interpreting these fiduciary duties, the Massachusetts Supreme Judicial Court sided with the minority shareholder in concluding that "stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another,"[40] namely utmost good faith. Shareholders in a close corporation, the court remarked, were more akin to partners because of "the trust and confidence which are essential to this scale and manner of enterprise, and the inherent

[34] "[B]ecause of the close personal relationship that characterizes the closely held business, the participants often affirmatively restrict who can join the enterprise in order to avoid being stuck in an intimate relationship with someone with whom they are not compatible." Robert B. Thompson, *Corporate Dissolution and Shareholders' Reasonable Expectations*, 66 WASH. U. L.Q. 193, 196 (1988) [hereinafter Thompson, *Corporate Dissolution*].

[35] J.A.C. Hetherington & Michael P. Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem*, 63 VA. L. REV. 1, 6 (1977).

[36] For more about the statutory landscape, see *infra* Section III.B.2.

[37] John H. Matheson & R. Kevin Maler, *A Simple Statutory Solution to Minority Oppression in the Closely Held Business*, 91 MINN. L. REV. 657, 661 (2007) ("Each state has a unique regime for addressing minority shareholder oppression in closely held businesses—a surprising state of affairs for such an important area of corporate law.").

[38] *Id.* at 690.

[39] A number of state courts "have imposed an enhanced fiduciary duty between close corporation shareholders and have allowed an oppressed shareholder to bring a direct cause of action for breach of this duty." Moll, *Shareholder Oppression & Dividend Policy*, *supra* note 27, at 851. These states include Indiana, Kansas, Maine, Massachusetts, Mississippi, Nebraska, New Hampshire, Ohio, Pennsylvania, Tennessee, West Virginia, and Wyoming. *See* Matheson & Maler, *supra* note 37, at 664, 700 app.

[40] Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 515 (Mass. 1975) (footnotes omitted).

danger to minority interests in the close corporation."[41] However, defining the type of heightened fiduciary duty and when it is breached has posed problems for courts faced with the question. In addition, courts are deferential to corporate decisionmakers, and the primacy of the business judgment rule—a presumption that a corporate decisionmaker acted in good faith and fair dealing—works against minority plaintiffs.[42]

Instead of heightened fiduciary duty, other states provide relief for a minority shareholder when her reasonable expectations are violated.[43] Using the reasonable expectations approach, "corporate decisions may be found oppressive because they violate the expectations that the minority reasonably maintained toward employment, remuneration, or control."[44] One benefit of this approach is that it is more flexible and allows courts to analyze expectations contextually. For example, "shareholder relationships in a family corporation may be quite different than those in a venture capital-funded start up."[45] Like with heightened fiduciary duty, the majority shareholder "owes additional duties to the minority,"[46] but under the reasonable expectations rubric, "those duties are defined by an account of what it is reasonable for the minority to expect from the majority."[47]

[41] *Id.* A number of corporate family cases involve fiduciary duty in the trust law context when corporate shares are held in trust. *See, e.g.*, Collins v. Nugent, 443 N.E.2d 277, 284–89 (Ill. App. Ct. 1982) (discussing fiduciary relationship between trust beneficiary and her half brother in case involving family-owned business); Jennings v. Murdock, 553 P.2d 846, 870–71 (Kan. 1976) (finding that institutional trustee did not breach its fiduciary duty by failing to restrain a cotrustee from urging the sale of family newspaper business, even though the purpose of the trust was to keep the newspaper in the family). The fiduciary duty analysis in the trust law context is similar to the analysis in this heightened fiduciary duty context. Moreover, a number of trust law cases explore what the appropriate fiduciary duty standard is in these scenarios. *See, e.g*., Copley v. Copley, 178 Cal. Rptr. 842, 864 (Cal. Ct. App. 1981) ("[A] trustee generally is duty-bound to exercise such care and diligence as a person of ordinary prudence would exercise." (citations omitted)). For additional discussion of fiduciary duty standards in trust law, see *infra* Section III.B.2.

[42] *See* discussion *supra* Section I.B.1.

[43] A 2007 survey found that twenty states applied the reasonable expectations standard and one additional state used reasonable expectations as a factor in assessing corporate oppression. Matheson & Maler, *supra* note 37, at 664, 700 app. (see appendix for grid and survey of state law).

[44] Art, *supra* note 27, at 373.

[45] Means, *A Voice-Based Framework*, *supra* note 33, at 1227.

[46] *Id.*

[47] *Id.* "In short, then, the 'rights or interests' of a shareholder in any given case will not necessarily be the same 'rights or interests' of any other shareholder." Meiselman v. Meiselman, 307 S.E.2d 551, 563 (N.C. 1983). In *Meiselman*, the court held:

> [A] trial court is: (1) to define the "rights or interests" the complaining shareholder has in the corporation; and (2) to determine whether some form of relief is "reasonably necessary" for the protection of those "rights or interests[."] For plaintiff to obtain relief under the expectations analysis, he must prove that (1) he had one or more substantial reasonable expectations known or assumed by the other participants; (2) the expectation has been frustrated; (3) the frustration was without fault of plaintiff and was in large part beyond his control; and (4) under all of the circumstances of the case plaintiff is entitled to some form of equitable relief.

The problem with these statutes is that the reasonable expectations approach "does not necessarily require strong protection of minority shareholders."[48] Interpretive leeway can and has led to great variability across the states, jeopardizing the minimal protection afforded to the minority shareholder. Moreover, courts also state an obligation to take into account the reasonable expectations of the majority shareholder. As the New Jersey Supreme Court observed: "The statute not only protects the minority stockholder, but I view it also as a protection, as well, perhaps not intentionally drawn, for the majority."[49]

And then there's Delaware. Most notably, Delaware courts do not enforce a higher fiduciary duty or reasonable expectations framework. Instead, they deploy general corporate law principles and rely on "entire fairness as a means of protecting minority stockholders."[50] Delaware courts have declined to offer more protection, suggesting that it is the responsibility of the stockholder (or purchaser) to bargain for protections before acquiring closely held stock: "[A] stockholder intending to buy into a minority position in a Delaware corporation may enter into definitive stockholder agreements, and such agreements may provide for elaborate earnings tests, buyout provisions, voting trusts, or other voting agreements."[51]

The bargaining expectation precludes legal remedies in the absence of self-dealing or any other similarly conflicted transaction on the part of the majority shareholder.

Accordingly, a minority shareholder is not totally without recourse. However, as a Pennsylvania court remarked: "We find ourselves struck by the unavailability or inadequacy of identifiable legal remedies to aid minority shareholders in redressing abuses by majority shareholders equipped with unfettered power over the management of the close corporation."[52] Shareholder options are limited by state statutory rules, judicial deference to the business judgment rule, and a related judicial resistance to reading oppression statues expansively. In addition, looking to Delaware, states like Oklahoma also offer no protection, expecting the parties to bargain and safeguarding contractual autonomy. None of these

Id. at 564.

[48] Means, *A Voice-Based Framework*, *supra* note 33, at 1227.

[49] Brenner v. Berkowitz, 634 A.2d 1019, 1024 (N.J. 1993).

[50] Blaustein v. Lord Baltimore Capital Corp., C.A. No. 6685-VCN, 2013 WL 1810956, at *14 (Del. Ch. Apr. 30, 2013), a*ff'd*, 84 A.3d 954 (Del. 2014).

[51] *Id.* at *15.

[52] Orchard v. Covelli, 590 F. Supp. 1548, 1550 (W.D. Pa. 1984), *aff'd*, 802 F.2d 448 (3d Cir. 1986) (mem.), and *aff'd sub nom.* Appeal of Orchard, 802 F.2d 448 (3d Cir. 1986) (mem.).

options for minority shareholders take into account the deeply difficult position of the oppressed corporate family member and they overestimate the capacity and inclination of these individuals to bargain for protections.

2. *Freezing and Squeezing out Family Members*

While minority shareholder oppression may be difficult to define, there are nonetheless hallmark indicators of oppression in family businesses. Majority shareholders use a range of common techniques to "freeze" or "squeeze" out the minority party, including "the refusal to declare dividends, the termination of a minority shareholder's employment, the removal of a minority shareholder from a position of management, and the siphoning off of corporate earnings through high compensation to the majority shareholder."[53] These are "devastatingly effective"[54] techniques that strip minority shareholders of their role, voice, and even income.[55] This Section analyzes how these cases arise in family businesses and how courts treat them. I focus on the obstacles that minority shareholders face when pressing their claims of corporate oppression and, ultimately, the absence of real remedies for these corporate family members seeking to exit the corporation.

a. *Challenging the Failure to Pay Dividends*

The decision to withhold the payment of dividends in a closely held corporation can be a significant action because the retention and reinvestment of company profits means that a minority shareholder in a family business loses her ability to profit from or even just capture the value of her shares.[56] Consequently, "[f]or the minority shareholder to receive a return on investment . . . dividends are needed, as capital

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[53] Moll, *Shareholder Oppression & Dividend Policy*, *supra* note 27, at 848; *see also* F. Hodge O'Neal, *Oppression of Minority Shareholders: Protecting Minority Rights*, 35 CLEV. ST. L. REV. 121, 121 (1987) ("Minority shareholders frequently are deprived of any income from the corporations, either in the form of dividends or salary; they are not allowed any effective voice in business decisions; and they are denied any information about corporate affairs.").

[54] O'Neal, *supra* note 53, at 126.

> Thus, in a close corporation, the minority stockholders may be trapped in a disadvantageous situation. No outsider would knowingly assume the position of the disadvantaged minority. The outsider would have the same difficulties. To cut losses, the minority stockholder may be compelled to deal with the majority. This is the capstone of the majority plan. Majority "freeze-out" schemes which withhold dividends are designed to compel the minority to relinquish stock at inadequate prices.

Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 515 (Mass. 1975).

[55] Means, *A Voice-Based Framework*, *supra* note 33, at 1208 ("Investing in a closely held corporation is a risky proposition unless you hold the controlling stake or have bargained for additional protections. Your investment is likely to be a large percentage of your total wealth, and, although you may rely upon family relationships or friendships, those are not legal protections." (footnote omitted)).

[56] Moll, *Shareholder Oppression & Dividend Policy*, *supra* note 27, at 860.

appreciation is difficult (if not impossible) to realize."[57] The importance of dividends in this context may decrease if all shareholders are salaried employees of the company;[58] however, the payment of dividends remains an important output of compensation for shareholders. Withholding dividends is, therefore, a simple way to put "great pressure on minority shareholders pressed for funds."[59]

The issue for minority shareholders faced with this problem is that "many courts apparently feel that there is a legitimate sphere in which the controlling [directors or] shareholders can act in their own interest even if the minority suffers."[60] The primacy and entrenchment of the business judgment rule works against the minority interest.[61] The Massachusetts Supreme Judicial Court, in a leading fiduciary duty case, pointed to this problem, stating: "[C]ourts fairly consistently have been disinclined to interfere in those facets of internal corporate operations, such as the selection and retention or dismissal of officers, directors and employees, which essentially involve management decisions subject to the principle of majority control."[62] That is to say, if majority shareholders can articulate a legitimate business reason for the failure to pay dividends, then the minority shareholder's claim is likely to fail.

In an exemplary case, *Davis v. Brockamp & Jaeger, Inc.*,[63] the Oregon Court of Appeals held that the defendant was not liable for majority oppression in a case about bonuses because he was able to advance a legitimate business purpose. Two friends, Brockamp and Jaeger, started a construction company (BJI) in 1985, and shares in that company eventually passed to Jaeger's sons and also son-in-law, who eventually became the

[57] *Id.*

[58] "It is generally acknowledged that, in close corporations, shareholders often work for the corporation, and corporate dividends are often paid in the form of a salary." Franchino v. Franchino, 687 N.W.2d 620, 628 (Mich. Ct. App. 2004).

[59] O'Neal, *supra* note 53, at 125.

[60] *Id.*; *see also* Comment, *Minority Rights and the Corporate "Squeeze" and "Freeze,"* 1959 DUKE L.J. 436, 437 (1959).

[61] Meiselman v. Meiselman, 307 S.E.2d 551, 559 (N.C. 1983) ("'[T]wo principal conceptualistic barriers to the courts' granting relief to aggrieved shareholders' in such a situation are: '(1) the principle of majority rule in corporate management and (2) the business judgment rule.'" (quoting F. O'NEAL, OPPRESSION OF MINORITY SHAREHOLDERS § 9.04, at 582 (1975))).

[62] Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 662 (Mass. 1976).

[63] 174 P.3d 607, 609 (Or. Ct. App. 2007) ("BJI is a construction company founded by John Brockamp and Roy Jaeger, who were initially the sole shareholders. In 1985, defendant, who was a company employee, became a shareholder. At that time, each of the three shareholders owned 50 shares, and all three served as corporate directors. Brockamp retired in 1993 and sold his shares to BJI. On several occasions thereafter, Roy Jaeger gave some of his shares to his sons, Craig and Chris, and to plaintiff, who is Roy Jaeger's son-in-law . . . .").

plaintiff in the case.[64] The son-in-law's claim against the company[65] centered on the relative amounts of bonuses distributed annually in lieu of dividends. The court observed: "Given that all of its shareholders were also employees, BJI distributed its profits as annual bonuses, rather than dividends, in order to reduce the company's tax liability."[66] Tax planning was, according to the court, a perfectly legitimate business reason for choosing to give bonuses rather than dividends.

When the two original partners had been working, the bonuses had been relatively equivalent. However, after the one partner departed, the other partner began to calculate bonuses based on determination of individual contribution, as assessed by him. According to this system, in 2000 the plaintiff received $131,325 as a bonus and the defendant received $934,267 or, as the court noted, 7.1 times the amount of plaintiff's bonus.[67] Two years later, using the same contribution theory, the plaintiff's contributions earned him a bonus of $20,000 while the defendant took home $525,000—26.3 times the amount of plaintiff's bonus.[68] Perhaps unsurprisingly, the plaintiff quit and thereafter filed a suit, claiming minority shareholder oppression, among other things.

At trial, witnesses established that the defendant majority shareholder had terminated the weekly management meeting as well as annual shareholder meetings. The plaintiff claimed that it was the defendant who had problems getting along with the others, stating: "[T]he meetings just weren't really productive anymore because nobody, you know—they couldn't agree with [defendant]. And so [defendant] just canceled them or he wouldn't show up and we would arbitrarily cancel."[69] The defendant himself admitted that he had stopped having meetings because the son-in-law "didn't get along very well" with his brothers-in-law.[70] In addition, one of the minority shareholders who had resigned and, in exchange, succeeded in redeeming his shares testified that "the minority shareholders were dissatisfied with the level of control they had over the company and that 'the majority' of the minority shareholders felt that they did not have a voice in the company."[71]

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64 *Id.*

65 At the time that the son-in-law made his claim, the company was being run by a former employee, Terry Greenman, who had obtained shares while Jaeger and Brockamp were still running the company.

66 *Id.* at 610.

67 *Id.* at 611.

68 *Id.* at 612.

69 *Id.*

70 *Id.*

71 *Id.* (footnote omitted).

Nevertheless, the appellate court affirmed the trial court's decision that there was no oppression, remarking: "[A] majority shareholder's fiduciary duties of good faith and fair dealing are discharged if the majority's decisions are 'made in good faith and reflect[ ] legitimate business purposes rather than the private interests of those in control.'"[72] Accordingly, under a good faith analysis, the court concluded "that the bonuses that defendant paid reflected a legitimate business purpose—namely, creating incentive for the shareholders to increase BJI's profitability."[73] The minority shareholder had no recourse because of the application of the business judgment rule in the context of shareholder oppression.

Freezing out a minority shareholder by the refusal to pay dividends is, therefore, a relatively simple tactic as long as the majority shareholder can present the court with some—any—legitimate business purpose.

b. You're Fired![74] *Termination as Oppression*

Another common squeeze-out technique is the termination of a minority shareholder's employment. Termination is a frequently deployed technique in family businesses because "shareholders in close corporations are often members of the corporation's management."[75] Moreover, employment termination in these companies is especially injurious because "[i]t is generally acknowledged that, in close corporations, shareholders often work for the corporation, and corporate dividends are often paid in the form of a salary."[76] Accordingly, if the minority shareholder does not hold a position in the company, the majority might choose to withhold dividends. If, on the other hand, the minority shareholder holds a paid position, the majority may be likely to choose employment termination.

The problems confronting a terminated family employee trying to prevail on an oppression claim, however, are numerous. As with failure to pay dividends, legitimate business reasons may justify termination of employment. Furthermore, if an employee does not have a contract that explicitly states the terms of employment, any employment is usually considered to be at will. Finally, courts sometimes throw out employment termination claims in the context of shareholder oppression because

[72] *Id.* at 615 (citing Zidell v. Zidell, Inc., 560 P.2d 1086, 1089 (Or. 1977)).

[73] *Id.*

[74] *See* Holly Hillis, *Donald Trump "You're Fired,"* YOUTUBE (May 6, 2012), https://www.youtube.com/watch?v=75SEy1qu71I [https://perma.cc/2JRW-WTW6].

[75] Franchino v. Franchino, 687 N.W.2d 620, 628 (Mich. Ct. App. 2004).

[76] *Id.*

"employment and board membership are not generally listed among rights that automatically accrue to shareholders."[77]

To begin with, any claim of minority shareholder oppression based on employment termination will likely fail if there is the possibility of employee fault. In *Grill v. Aversa*, a case about a conflict between two brothers-in-law who were both shareholders in a company that trained commercial truck drivers,[78] the court was unwilling to find that one of the brothers-in-law had been subject to minority shareholder oppression when his employment was terminated.[79] Based on the testimony of the two men, the court stated that the evidence permitted but did not "compel an inference that this termination arises out of family acrimony and attempts at shareholder oppression."[80] However, the court added, "it is equally true that substantial evidence was presented demonstrating that Sage was justified in terminating Grill's employment."[81] If a legitimate motive coexists alongside another, less legitimate one, then courts will generally decline to find oppressive behavior. In these claims, then, employment law and shareholder law intersect, reproducing the difficulties of "mixed motive" employment cases in the oppression context.

Terminated employees also encounter difficulties because, in the absence of a written employment agreement, most employees are considered at-will employees. Termination without warning or cause, then, is legally permissible, at least in the employment law context. Moreover, even though many family members consider employment in the family business to be a lifetime proposition, courts generally agree that lifetime employment is not a reasonable expectation. In the case of *Ford v. Ford*, for example, when a son fired his sister and mother from the family business, a golf course, and replaced them with his own wife and son, the court concluded that there was no oppression.[82] In their minority shareholder oppression claims, the sister and mother stated that the son,

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77 *Id.*

78 908 F. Supp. 2d 573, 593 (M.D. Pa. 2012).

79 Plaintiff filed wrongful termination and retaliatory discharge claims. *Id.* at 578.

80 *Id.* at 593.

81 *Id.* A plaintiff's chance of proving retaliatory discharge is greater if the majority shareholder cannot articulate a legitimate business reason for the termination. *See* Knights' Piping, Inc. v. Knight, 123 So. 3d 451, 459 (Miss. Ct. App. 2012) ("Benny admitted in his testimony that he unilaterally terminated Harold. Harold testified that Benny never gave him a reason for his termination, and Benny has offered no legitimate business purpose for terminating Harold.").

82 878 A.2d 894, 897 (Pa. Super. Ct. 2005) ("Riverview Golf Course, Inc . . . . a Pennsylvania corporation incorporated in 1961, owns and operates the Riverview Golf Course . . . . Initially the corporation had four shareholders, including William B. Ford ('William'), husband of Plaintiff Margaret B. Ford ('Margaret'), and father of Plaintiff Margaret L. Ford ('Peggy') and Defendant William K. Ford ('Bill').

Bill, "continued to manage the corporation for his own benefit while oppressing the minority shareholders."[83] Using a reasonable expectations framework to evaluate the claim, the court nevertheless determined that "[the sister's] expectation of lifetime employment was unreasonable, absent an express agreement to that effect."[84]

Finally, termination-as-oppression claims are challenging to win because courts do not count employment rights as part of the package of shareholder rights. In *U.S. Eagle Corp. v. Westphal* (*In re U.S. Eagle Corp.*), a brother who co-owned and managed a closely held corporation with his sister and other relatives brought a claim of improper termination through minority shareholder oppression, seeking reinstatement.[85] The brother, Scott, had been employed as secretary and vice president of the company starting in 2005 after a board reconfiguration and company restructuring.[86] Despite being "Chairman of the Board and highest ranking officer of U.S. Eagle and Vice President and Secretary of each subsidiary," however, he did not have an employment contract.[87] Consequently, when the board was once again configured in 2012, "the new board voted to terminate Scott's employment."[88]

When he was fired, Scott claimed that his sister had "orchestrated" his removal and that his termination "unjustifiably thwarted the understanding on which [he] became and has remained a shareholder."[89] Applying Delaware law, which offers no statutory protection for minority shareholders, the court remarked that Scott's termination was lawful because the company had not modified Scott's stock interest, reduced his shares, or violated any of his shareholder rights.[90] The court explained that: "[A]lthough majority stockholders have fiduciary duties to minority stockholders *qua* stockholder, those duties are not implicated when the issue involves the rights of the minority stockholder *qua* employee under an employment contract."[91] Thus, despite the fact that the board had been

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83 *Id.* at 898.

84 *Id.* at 903–04. The court did remark that "Peggy and Margaret do have a reasonable expectation to receive *some* benefit from their minority shares in this profitable corporation." *Id.* at 904. However, the court left the "proper measure of this benefit" to the custodian. *Id.*

85 484 B.R. 640, 644 (Bankr. D.N.J. 2012).

86 *Id.* at 645.

87 *Id.* at 644.

88 *Id.* at 646.

89 *Id.* Scott also claimed that his termination "was undertaken without any opportunity to be heard, or to discuss terms of severance." *Id.* To this claim, the court responded that Scott had been an at-will employee. *Id.* at 653.

90 *Id.*

91 *Id.* (quoting Riblet Prods. Corp. v. Nagy, 683 A.2d 37, 37 (Del. 1996)).

reconstituted specifically in order to vote for his termination and despite the fact that Scott had believed there to be an understanding regarding his continued employment, the court viewed him as ultimately nothing more than an employee who had been terminated, rather than a shareholder whose rights had been trampled on by the majority shareholder.

Ultimately, corporate family members who have been terminated have little recourse in addressing adverse employment decisions. Corporate family members can lose income, board participation, and employment status and be left with neither the ability to profit from nor the ability to enjoy the benefits that flow from being part of a family business.

c. Ritchie v. Rupe*: Redefining "Oppressive"*

In addition to recurrent problems with the judicial application of the current shareholder oppression framework, protections for minority shareholders may be in decline because courts are starting to define *oppressive* very narrowly. The Texas Supreme Court sent this signal very clearly in a 2014 decision.

In *Ritchie v. Rupe*, the Texas Supreme Court overruled both the trial court and the appellate court to conclude that majority shareholder actions are oppressive only when "they abuse their authority over the corporation with the intent to harm the interests of one or more of the shareholders, in a manner that does not comport with the honest exercise of their business judgment, and by doing so create a serious risk of harm to the corporation."[92] This definition of *oppressive behavior* is narrow and demanding, and it raises the bar for plaintiffs.

Ritchie v. Rupe entailed a classic blended-family conflict involving siblings and second wives, pitting a widowed second wife against her sister-in-law. Buddy Rupe and his sister, Paula Dennard, were two members of the four-person board of directors of Rupe Investment Corporation, a Texas closely held corporation.[93] Ownership of 72% of the voting stock was placed in three different family trusts and apportioned between Buddy Rupe, Dennard, and Dennard's children.[94] Another trust, created by Gordon Rupe—the father of Buddy Rupe and Dennard—named the two children, their mother, and Dennard's three children as beneficiaries. When Buddy Rupe married Ann Rupe in 1983 and they had a child, the couple "wanted their son to be added as a beneficiary of

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92 443 S.W.3d 856, 871 (Tex. 2014).

93 *Id.* at 860. The two other directors were family friends. *Id.* at 860–61. The court notes that, "A corporation is 'closely held' if it has fewer than thirty-five shareholders and its stock is not publicly traded." *Id.* at 860 n.1 (citing TEX. BUS. ORGS. CODE ANN. § 21.563 (2007)).

94 *Id.* at 860–61.

Gordon's Trust, but Dennard and her children refused, and this created some friction between [Ann] Rupe and Dennard."[95] Moreover, Ann Rupe stated that Dennard treated her "'as an outsider' from the very beginning, and told her that she would 'never get any money in this family.'"[96]

Subsequently, Ann Rupe began to consider pursuing legal means to reform Gordon Rupe's trust in order to add her son as a beneficiary.[97] While Ann was still considering this action, Buddy died and his 18% interest in the corporation passed into a trust established for the benefit of Ann Rupe and their son, with Ann acting as trustee. Ann claimed that Dennard and the two other trustees "immediately became 'hostile' towards her and feared that she would sue to reform Gordon's Trust."[98] Consequently, Ann sought to sell the shares held in trust.

Ann went to both of the nonfamily directors in an attempt to sell the shares, but both men made low offers and told her that the timing was not right. Ann then found an interested outside buyer, but the buyer wanted to meet with the directors, who refused to meet. The directors stated that, "because RIC would not be a party to the sale of her shares to an outside buyer, 'it would be inappropriate . . . to meet with your prospects or otherwise participate in any activities relating to your proposed sale of stock.'"[99] The buyer, however, wanted to "talk to the executives . . . as part of their due diligence."[100] Ann's attorney advised her that "it would be 'incredibly difficult' to market [her] shares without such meetings, and the likelihood of selling the shares was 'zero.'"[101]

Ann thereafter filed suit against Dennard and the other directors, alleging that they "engaged in 'oppressive' conduct and breached fiduciary duties to her."[102] At trial, the jury found in Ann Rupe's favor and the court rendered judgment requiring the corporation to redeem her shares.[103] The court of appeals affirmed this judgment and, using a test set forth in the 1988 case *Davis v. Sheerin*,[104] stated that the directors' actions "defeated

[95] *Id.* at 861.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.* at 862.
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.* at 862–63.
[104] 754 S.W.2d 375 (Tex. App. 1988). *Davis v. Sheerin* stated that the actions of majority shareholders are oppressive when they either (1) substantially defeat a minority shareholder's reasonable expectations or (2) constitute harsh or wrongful conduct that departs from the standards of fair dealing. *Id.* at 381–82.

Rupe's reasonable expectations" while also constituting a "visible departure from the standards of fair dealing and a violation of fair play on which each shareholder is entitled to rely."[105]

The state supreme court, however, disagreed with both lower courts, concluding that "neither the 'fair dealing' test nor the 'reasonable expectations' test sufficiently captures the Legislature's intended meaning of 'oppressive' actions."[106] Instead, the court held that "oppressive" under the relevant statute meant that a majority shareholder engaged in abuse of authority "with the intent to harm the interests of one or more of the shareholders."[107] Acknowledging that "difficulty in—and sometimes even the impossibility of—selling one's shares is a characteristic intrinsic to ownership of a closely held corporation," the court overruled precedential Texas cases and took the Delaware approach; the court expected Ann Rupe to have bargained for "shareholder agreements that contain buy-sell, first refusal, or redemption provisions that reflect their mutual expectations and agreements."[108]

Commentators note that "*Ritchie* will likely result in more abusive conduct toward minority shareholders . . . . Given this framework, freeze-outs and squeeze-outs will become highly attractive to majority shareholders."[109] Furthermore, based on the court's reliance on the ex ante bargaining expectation, "the real effect of *Ritchie* is to . . . leave the bulk of family businesses and small businesses exposed, unless they each had the foresight, funds, and tactical nous to hire lawyers to re-create the 'oppression' wheel for each new business that gets formed."[110]

The outcome of *Ritchie* underscores that a new group of minority shareholders (and a large one—those subject to Texas law) now have little real protection when it comes to shareholder oppression. *Ritchie*, as one commentator has also observed, may also have persuasive authority: "As other states continue to grapple with the contours of their own shareholder oppression law, they may be tempted to follow Texas and cut back on shareholder oppression."[111] The *Ritchie* ruling may, therefore, cast a long shadow on shareholder oppression law, leaving minority family

[105] *Ritchie*, 443 S.W.3d at 865 (quoting Ritchie v. Rupe, 339 S.W.3d 275, 297 (Tex. App. 2011)).

[106] *Id.* at 870.

[107] *Id.* at 871.

[108] *Id.*

[109] James Dawson, Ritchie v. Rupe *and the Future of Shareholder Oppression*, 124 YALE L.J.F. 89, 92 (2014).

[110] *Id.* at 93 (quoting Brief of Amicus Curiae Erwin Cruz Supporting Respondent at 12, Ritchie v. Rupe, 443 S.W.3d 856 (Tex. 2014) (No. 11-0447), 2014 WL 2788335).

[111] *Id.* at 94.

shareholders faced with an increasing number of blocked exits and narrow escapes.

B. What Corporate Law Expects from People

The protections that exist for minority shareholders in cases of oppression are hardly robust, and they may even be on the decline. However, corporate law does not see this dearth of protection as a problem because corporate law prioritizes individual bargaining over statutory buffers. Corporate law treats all corporate actors alike and offers limited legal protections because of the assumed power of all corporate actors to bargain. The absence of protections is not a blind spot. Rather, it is a strong signal of the bargaining expectation placed on all shareholders, including corporate family members.

These bargaining norms are, in large part, premised on classic economic principles that drive the expected utility theory and rational actor model. These principles can be summarized accordingly: "[A]ll human behavior can be viewed as involving participants who maximize their utility from a stable set of preferences and accumulate an optimal amount of information and other inputs in a variety of markets."[112] Corporate decisionmakers operating in this landscape "conduct an explicit or implicit cost–benefit analysis of competing options and select the optimal method of achieving their goals."[113] These corporate actors are presumed to be unaffected by competing social norms, idiosyncratic preferences, cultural formations, and family dynamics.

This expectation of freedom from competing norms and demands holds true for minority shareholders as well: "According to standard law and economics, minority shareholders in closely held corporations must bargain for protection against opportunism by controlling shareholders before investing."[114] In fact, some scholars mistakenly believe that bargaining is even easier and more desirable in closely held corporations. Frank Easterbrook and Daniel Fischel state, for example: "Participants in closely held corporations are better informed about their legal rights and obligations than participants in either partnerships or public corporations."[115] They mention that these investors often have great personal wealth at stake and that, in aggregate, there are sufficient

[112] GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 14 (1976).

[113] Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1063 (2000).

[114] Means, *A Contractual Approach supra* note 31, at 1162.

[115] FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 237 (1991).

inducements for these shareholders to "take care."[116] Some argue that because closely held corporations "contain relatively few shareholders," the cost of bargaining is lowered to "manageable levels."[117] Ralph Winter goes further and states that, in closely held corporations, "the participants kn[ow] each other and ha[ve] ample opportunity to protect themselves by charter provisions or by side contracts."[118]

Any attempts to override an individual's contracting autonomy, either by statute or judicial decree, are perceived, through this particular lens, to be dangerous: "One ought to tread cautiously in overriding the commercial arrangements of consenting adults."[119] In the rational choice model, therefore, bargaining and the autonomy of the contracting parties are indisputably paramount. Corporate family members are not, however, rational actors. Consequently, the rational choice model is misapplied to minority shareholders in closely held corporations.

C. Family Members' Bounded Bargaining

Corporate law presumes corporate family members are rational bargainers who prioritize profit maximization and treat the family business solely as a source of income and revenue generation, rather than a source of personal satisfaction and legacy generation. This Section explains why both of these assumptions are flawed, expanding on the notion that "expected utility theory is not a good description of actual decisionmaking,"[120] particularly in the context of corporate families.

1. Inheriting, Not Bargaining

Looking at corporate family members from the bargaining perspective—how much and how well they actually bargain—is revealing. One phenomenon is immediately striking: observed from up close, it is evident that corporate family members rarely bargain for their shares. In any given family business, it is quite likely that the corporate family members involved did not engage in any bargaining whatsoever for their shares. In closely held corporations, shares are not generally sold or traded but often instead passed down through families, from parents to children and between branches of the family tree. Corporate shares often constitute much of a family's wealth and the shares are part of intergenerational

[116] *Id.* The authors continue: "[I]nvestors have the option of bargaining for more protection. They don't, which ought to tell us something." *Id.* at 241.

[117] Means, *A Contractual Approach*, *supra* note 31, at 1162.

[118] Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 283 (1977).

[119] *Id.*

[120] Jolls et al., *supra* note 10, at 1478.

wealth transfer as opposed to being part of a bargained deal between two parties. Accordingly, in most family businesses, there is a distinct possibility that a shareholder inherited her minority shares from someone else, most likely a parent or spouse.

One of the most common scenarios in corporate families, as we have seen, is the transferal of corporate shares and ownership from a parent and founder to her children.[121] This type of intergenerational succession transfers ownership of shares outside of market-based systems and precludes any real bargaining. The *Ritchie* case provides one among many clear examples of how children inherit shares rather than bargain for them. Efficient bargaining is, consequently, not always present, and often individuals in a corporate family come to be stakeholders, both minority and majority, through means that do not require or even actively disallow bargaining.[122]

2. *Bounded Rationality in Family Bargaining*

Another fallacy, in addition to the assumption that all corporate family members bargain to obtain their shares, is that corporate family members bargain at arm's length, unencumbered by personal obligations or family intimacies. Critiquing the rational actor model, one scholar has remarked: "Both microsocial environments (family, friends, immediate neighbors) and macrosocial environments (associations, national culture) may affect an individual's behavior."[123] To think that family ties play a part in shaping an individual's bargaining ability and position would seem, to most people, intuitively correct. Behavioral economics, case studies, and case law all confirm this speculation.

Business partners who are siblings, cousins, or parents and children are deeply informed and influenced by their affective ties. Corporate family members have a range of personal histories, longstanding allegiances, feelings of guilt as well as love, and unaddressed hostilities. As commonly happens, "sibling [partners] must deal with . . . disagreements about

[121] STEPHANIE BRUN DE PONTET ET AL., SIBLINGS AND THE FAMILY BUSINESS: MAKING IT WORK FOR BUSINESS, THE FAMILY, AND THE FUTURE 6 (2012); *see also* Geraldine Fabrikant, *Redstone Family in Dispute over Share Sales*, N.Y. TIMES (Oct. 14, 2008), http://www.nytimes.com/2008/10/15/business/15viacom.html [https://perma.cc/2ZRL-7PES]; Matthew Toren, *5 Keys to Successful Sibling Partnerships*, ENTREPRENEUR (Aug. 4, 2014), https://www.entrepreneur.com/article/236080 [https://perma.cc/LWT7-VN8J] (suggesting that siblings entering partnerships "[s]et expectations ahead of time in writing" and "[c]ommunicate frequently and disclose fully" (emphases omitted)).

[122] For a different take on the gifting of business shares and minority shareholder oppression, see Douglas K. Moll, *Shareholder Oppression & Reasonable Expectations: Of Change, Gifts, and Inheritances in Close Corporation Disputes*, 86 MINN. L. REV. 717 (2002).

[123] Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 43 (1989).

ownership or growth and any lingering bitterness over deep-seated childhood rivalries."[124] For these reasons, "[s]ibling-partners' relationships are among the most challenging in family businesses."[125] The problems that occur in all families, including those between siblings, may also be increased or intensified in blended families.[126] Studies have found, in the blended family, that "disagreements often arise from conflicting loyalties and feelings of inequality."[127]

Corporate family members must, therefore, constantly navigate the overlapping of personal and professional identities and roles.[128] That is to say, as a "hybrid identity organization,"[129] a family business requires corporate family stakeholders to negotiate not only workplace conflict but also social role confusion.[130] For example:

> The CEO of a family enterprise may be the son of its founder, and he may also be dad to several children and granddad to several grandchildren. He is likely the husband of a spouse who helped him build the business and raise those children. He may be a brother to a vice president in the company or even a

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[124] Jennifer Alsever, *How to Run a Successful Sibling Startup*, INC. (Nov. 2014), http://www.inc.com/magazine/201411/jennifer-alsever/he-aint-heavy-hes-my-partner.html [https://perma.cc/ZFC7-G9SR]; *see also* Ed Kopf, *Am I My Brother's Keeper?: Brothers in Family Business*, BMC ASSOCS., http://www.bmcassociates.com/resources/blog/brothers-in-family-business/ [https://perma.cc/P77E-R7UQ] (explaining "[siblings] have a lifetime of emotions and experiences to deal with in their relationship in addition to the demands on all business partners").

[125] Kopf, *supra* note 124; *see also* Leslie A. Baxter et al., *Turning Points in the Development of Blended Families*, 16 J. SOC. & PERS. RELATIONSHIPS 291, 292 (1999) ("The blended family, or stepfamily, is a pervasive social unit in the American social landscape.").

[126] Blended families are those that result from second and third marriages when families from a first marriage "blend" with the new families. One business commentator has coined the term "blended family business" to talk about the opportunities and challenges inherent to these companies. *See* Michael Finnigan, *New Family Business Demographic Coined in New Research*, CAMPDEN FB (Sept. 17, 2014, 9:11 A.M.), http://www.campdenfb.com/article/new-family-business-demographic-coined-new-research [https://perma.cc/W546-ASGH]. She has also observed: "[T]he number of requests for advice from blended family businesses has increased in 2014." *Id.*; *see also* Baxter et al., *supra* note 125, at 292; Haya El Nasser, *With More Blended Families, Estate Planning Gets Ugly*, USA TODAY (Mar. 14, 2012, 3:35 PM), http://usatoday30.usatoday.com/news/parenting-family/story/2012-03-13/With-more-blended-families-estate-planning-gets-ugly/53516094/1 [https://perma.cc/4C6H-MHVB] (discussing family feuds over inheritance and other issues that arise from estate planning with blended families).

[127] Finnigan, *supra* note 126.

[128] Ben Means identifies "Incompatible Values" and "Spillover Oppression" as two of the main types of conflict in family businesses. *See* Means, *Nonmarket Values*, *supra* note 12, at 1212–16. Incompatible values are "[t]ensions between business goals and family values," whereas spillover oppression occurs when "[b]reakdowns in family relationships . . . cause havoc in the workplace." *Id.* at 1212, 1214.

[129] Whetten et al., *supra* note 2, at 481.

[130] *Id.* ("Conflict can be particularly taxing as family entanglements worsen stressful situations . . . . Overlapping family and business relationships may complicate how firms are managed and potentially increase the intensity and frequency of conflicts.").

> copresident with a sibling. In addition to being uncle to his siblings' children, he may also be their boss if they work in the family enterprise.[131]

Without an ability to compartmentalize, corporate family members may allow personal differences and conflicts to spill over into the workplace.

From a slightly different perspective, corporate family members may not bargain in the way they are assumed to because of their trust and faith in their corporate family colleagues. The court in *Brenner v. Berkowitz* remarked: "Shareholders of close corporations are often family or close friends. Those persons often fail to provide for involuntary dissolution because they do not expect irreconcilable differences to arise."[132] Family members, like those entering marriage, enter into joint and collaborative enterprises with other family members in the spirit of optimism and endurance.[133] Preexisting trust between the parties often means that corporate family members are less likely to bargain or bargain strenuously for their stake in the family business.

These corporate family members are, therefore, most emphatically not classic rational actors. In fact, as Benjamin Means remarks: "The rational actor model of human behavior bears at most an approximate relation to reality [in the closely held corporation]."[134] Contracting between these parties is a complicated matter, inextricably linked with the family framework and its characteristic qualities. The result, as Means has also observed: "It is no secret that minority shareholders in close corporations tend not to bargain for adequate protection, a problem that has been evident for decades."[135]

3. Bounded Self-Interest and Socioemotional Wealth

In addition to operating from a position of bounded rationality when it comes to bargaining with one another, corporate family members often operate from a position of bounded self-interest. Law and economics scholars have suggested: "Self-interest is bounded in a much broader range of settings than conventional economics assumes, and the bound operates

[131] KENT RHODES & DAVID LANSKY, MANAGING CONFLICT IN THE FAMILY BUSINESS: UNDERSTANDING CHALLENGES AT THE INTERSECTION OF FAMILY AND BUSINESS 13 (2013).

[132] 634 A.2d 1019, 1026 (N.J. 1993) (citation omitted).

[133] Means, *Nonmarket Values*, *supra* note 12, at 1240 (observing that higher levels of trust and loyalty benefit family businesses).

[134] Means, *A Contractual Approach*, *supra* note 31, at 1163. Moreover, that corporate law makes no accommodation for these relationships is problematic because "[m]any of these [corporate family] minority shareholders are not sophisticated actors or repeat players, and therefore they will not know that they need to negotiate for additional protections." Dawson, *supra* note 109, at 93.

[135] Means, *A Contractual Approach*, *supra* note 31, at 1172.

in ways different from what the conventional understanding suggests."[136] In the corporate family context, family members limit their self-interest in a number of ways. For example, in family businesses, feelings of love, loyalty, or spite may overcome the individual's self-interest in any number of situations.[137] More broadly, however, corporate family members bind their own self-interest by intentionally putting other values ahead of profit maximization. Corporate family members are, in this way, idiosyncratic bargainers.

Family members are idiosyncratic corporate actors because they start family businesses for a range of reasons, some deeply personal, such as to create a specialized workplace, to make real a shared entrepreneurial vision, or to pursue certain ideals through corporate activity. The corporate family may privilege certain competencies, cultural values, religious beliefs, or political philosophies in the way that they run and manage the corporation. Family firms and the closely held corporate form, therefore, allow family members to bring shared values into a workplace environment and shape the corporate environment through value-driven leadership.[138] Family businesses may "speak to people's hearts in a way that other businesses do not."[139]

Accordingly, business scholars have recognized "that family firms are motivated by non-financial aspects and family owners are committed to the preservation of their socioemotional wealth."[140] Other types of "wealth" that families may consider and value include "close identification of family members with the firm, preservation of a positive family image, concerns about the company's perpetuation, desires of family members to influence decisions, and care for acquaintances and community relations."[141] The drive to create and preserve socioemotional wealth may, then, "explain the family firm's substantial responsiveness to stakeholder needs as driven by non-economic utilities derived by dominant family owners."[142]

One example of how family businesses pursue values outside of and in addition to profit maximization arose in *Burwell v. Hobby Lobby Stores*,

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[136] Jolls et al., *supra* note 10, at 1479.

[137] *Id.* Striking a chord with family dynamics, these scholars note that "the agents in a behavioral economic model are both nicer and (when they are not treated fairly) more spiteful than the agents postulated by neoclassical theory." *Id.*

[138] Sorenson, *supra* note 12, at 464.

[139] MCKINSEY & CO., PERSPECTIVES ON FOUNDER- AND FAMILY-OWNED BUSINESSES 5 (2015).

[140] Pascual Berrone et al., *Family-Controlled Firms and Stakeholder Management: A Socioemotional Wealth Preservation Perspective*, *in* SAGE, *supra* note 2, at 180.

[141] *Id.* at 187.

[142] *Id.*

Inc.[143] In that case, the Court observed how the closely held corporate structure allowed the Green family to run its business according to specific principles: "Each family member has signed a pledge to run the businesses in accordance with the family's religious beliefs and to use the family assets to support Christian ministries."[144] Moreover, the Greens' business practices demonstrated a clear pursuit of noneconomic goals: "In accordance with those commitments, Hobby Lobby and Mardel stores close on Sundays, even though the Greens calculate that they lose millions in sales annually by doing so."[145] The Court observed that the Greens also refused to facilitate or promote alcohol use, thereby declining to participate in a number of profitable transactions.[146] In addition, the corporation contributed to Christian ministries and bought "hundreds of full-page newspaper ads inviting people to 'know Jesus as Lord and Savior.'"[147] Other companies, like Blue State Coffee, announce: "[W]e were founded on ideals, not just for profit,"[148] and support fair trade, fair wages, and sustainable practices regardless of whether these practices decrease the company's profit margin.

Family businesses enable families to give corporate form to their personal values and permit them to express those values through workplace culture, management practices, and organizational strategy. In addition, family businesses and closely held corporations allow families to pursue a particular entrepreneurial vision without regard to profitability. As some scholars argue, the closely held corporation might be an attractive and successful organizational form because:

> [An entrepreneur] can pursue her idea for as long as she wants and in whatever manner she prefers, even if the business is losing money and every expert in the field believes that she is pursuing a surefire failure of an idea. No matter how much money she loses, no one can force her to sell the business, hire a professional manager, or close the business down.[149]

Consequently, the way in which family businesses allow corporate families to pursue socioemotional wealth as well as entrepreneurial vision undercuts the dominant stereotype of the rational bargainer that corporate law

[143] 134 S. Ct. 2751 (2014).

[144] *Id.* at 2766.

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Mission*, BLUE STATE COFFEE (2017), https://bluestatecoffee.com/pages/mission [https://perma.cc/W6JJ-LUG2].

[149] Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560, 578–79 (2016).

assumes. Corporate family members may bargain, but they are bargaining for any number of benefits and types of return on their investments. Corporate family members are not only attenuated but also idiosyncratic bargainers. Consequently, the current bargaining model for these corporate actors requires a new theoretical basis.

II. DISPATCHES FROM FAMILY LAW

Minority shareholders who are corporate partners may not have a guaranteed form of financial protection at the termination of the corporate relationship, but corporate spouses do. Divorce and death trigger a range of rights for spouses and corporate spouses at these junctures, giving them automatic rights to corporate property that no other corporate partners have. If the corporate spouse is divorcing, she has a high likelihood of obtaining a fair share of corporate assets through equitable distribution. Furthermore, if the conflict carries through past the death of one spouse and into inheritance claims, the surviving corporate spouse has robust rights to corporate property in the form of intestate and elective share rights. This Part analyzes the myriad protections that are in place for corporate spouses and the property guarantees available to them at divorce and death, highlighting the ways in which family law understands bounded bargaining and, based on this understanding, offers protections to economically vulnerable parties.

A. Divorcing the Firm, Protecting the Spouse

As a result of the "divorce revolution"[150] and the elimination of fault divorce in most states, divorce is an always-available option for couples in conflict. Moreover, many divorcing couples are also business partners. Married couples start businesses together or work together in family businesses started by one spouse's parents. In addition, many spouses contribute indirectly to family businesses by playing a supporting role, managing the household and being a traditional corporate spouse[151] who entertains, networks, and advises. At the time of divorce, ownership of corporate assets will be in question for these corporate spouses. During the

[150] LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985).

[151] *See, e.g.*, Leslie Kaufman, *The Significant Other*, N.Y. TIMES (Sept. 26, 2008), http://www.nytimes.com/2008/09/28/fashion/28wives.html [https://perma.cc/AY4Y-V6FV]; Hal Lancaster, *A Corporate Wife's Job: From Those Who Know*, WALL ST. J. (July 29, 1997, 12:01 AM), http://www.wsj.com/articles/SB870125393714956500 [https://perma.cc/R5LD-8SJQ]; James B. Stewart, *A C.E.O.'s Support System, a k a Husband*, N.Y. TIMES (Nov. 4, 2011), http://www.nytimes.com/2011/11/05/business/a-ceos-support-system-a-k-a-husband.html [https://perma.cc/H7CH-XTM9].

divorce, the court must characterize all the couple's property, decide whether it is separate or marital, value that property, and then distribute it between the spouses. This Section explains how this process works with respect to corporate assets and explores the protections that are in place for spouses at every step of the process.

1. Characterizing Corporate Property

When spouses are equal business partners—sharing in corporate stock, management authority, and operational decisionmaking—the court's job of dividing corporate assets is relatively easy. In these cases, the corporate assets are generally all marital property and will be divided equally. Ownership of shares alone, however, is not dispositive. As the South Carolina Supreme Court stated in a 2015 equitable-distribution case: "Upon dissolution of the marriage, marital property should be divided and distributed in a manner which fairly reflects each spouse's contribution to its acquisition, regardless of who holds legal title."[152]

Consequently, even if one spouse owns all of the corporate shares, active partnering in the business will render the shares joint property. In *Floyd v. Floyd*, a Florida case in which the wife was "a housewife, mother, and business partner in the parties' family enterprise of acquiring rental and commercial properties,"[153] the husband held title to three of the couple's rental properties despite the fact that "[j]oint bank account funds were used to acquire them, and meet the mortgage and tax payments on them"[154] and the wife managed the properties. At trial, the wife testified that "she considered she had a 50% interest in these three properties; and the husband himself admitted she was entitled to some interest in the properties, although he denied her right to as much as a half-interest."[155] The trial court disagreed, but on appeal the court concluded that "the wife established a special equity in these properties,"[156] and awarded her 50% in the properties in recognition of her sizable contribution to the success of the business.[157]

Similarly, in a Tennessee case, a husband a wife worked together running a computer repair and refurbishment company, A & F, which they had started together.[158] The business was registered in the wife's name

152 Moore v. Moore, 779 S.E.2d 533, 552 (S.C. 2015) (quoting Morris v. Morris, 517 S.E.2d 720, 723 (S.C. Ct. App. 1999)).

153 383 So. 2d 773, 773 (Fla. Dist. Ct. App. 1980).

154 *Id.* at 774.

155 *Id.*

156 *Id.*

157 *Id.*

158 Baggett v. Baggett, 422 S.W.3d 537, 539 (Tenn. Ct. App. 2013).

because the husband "did not want the new company to be involved in his divorce case. Also, he did not want to report any income on his federal income tax return which might result in income tax consequences as a result of his receipt of Social Security old age benefits."[159] At the time of divorce, the wife therefore argued that the business was a sole proprietorship instead of a partnership.[160]

The trial court held in the wife's favor that the business was a sole proprietorship.[161] On appeal, however, the court reviewed evidence presented at trial that "both [spouses] did 'everything' at A & F."[162] The court continued: "Although the business was listed in Wife's name on its license and other documents, such as a car loan application and tax returns, it is undisputed that both parties devoted their time, experience, and effort into its operation and shared in the profits."[163] This evidence led the appellate court to conclude that the parties had a partnership and, furthermore, that "domestic relations law, and not partnership law, is controlling in the context of the parties' divorce."[164] The Revised Uniform Partnership Act had "no application to the case at bar."[165]

Finally, some courts are even willing to go outside of equitable-distribution rules and use equitable solutions to take into consideration time spent by spouses working together in a family business before marriage. In a Massachusetts case, *Moriarty v. Stone*, the woman started working for her future husband in 1975 at his family jewelry store, the Family Jewels. She began working as a clerk and "[w]ithin approximately one year, the wife was involved in virtually all aspects of the business."[166] For almost ten years, the two put in "tireless effort"[167] and the "business prospered."[168] In 1986, the two married, having accumulated "considerable savings and retirement benefits prior to their marriage."[169]

At the time of divorce, the trial court included "retirement-related benefits that were accrued prior to the marriage"[170] in the marital estate. On appeal, the appellate court affirmed this ruling, stating: "[I]t would not only

159 *Id.* at 543.
160 *Id.* at 538–39.
161 *Id.* at 539.
162 *Id.* at 545.
163 *Id.* at 545–46.
164 *Id.* at 546.
165 *Id.*
166 Moriarty v. Stone, 668 N.E.2d 1338, 1341 (Mass. App. Ct. 1996).
167 *Id.*
168 *Id.*
169 *Id.*
170 *Id.* at 1343.

be unfair and inequitable to disregard the parties' respective contributions during their ten-year period of cohabitation but also inconsistent with the concept of 'contribution.'"[171]

Thus, family law, unlike corporate law, looks outside of ownership to contribution as a guiding principle at the termination of a partnership.

2. *Considering Individual Contributions*

Spousal contribution, then, is the dispositive factor in determining what percentage each spouse receives of the corporate assets subject to equitable distribution.[172] An important protection for corporate spouses is that they have a claim to corporate assets not only for direct but also indirect contributions to the success of a business venture. If both spouses made direct contributions to the family business, they will likely be entitled to equal shares in the corporate enterprise. If only one spouse worked directly in the business, however, the other spouse is still entitled to compensation if that spouse provided support and caretaking services within the home—indirect contributions that allowed the working spouse to succeed with the business. Here, I explain how courts approach the question of both direct and indirect contributions to a family business and model ways to award shareholder rights outside of the narrow rational actor bargaining model.

a. *Direct Contributions: Equal Work, Equal Shares?*

Because marital property division, including the division of corporate assets, turns on spousal contributions, couples fight bitterly over what contributions each has made to their joint enterprises. Not all contributions are easily identified and valued, and as a result, courts must engage in fact-intensive inquiries in order to determine what contributions each party made and what percentage of the marital assets each spouse should receive.

The dispute over individual contributions was, for example, central to the proceedings in *Moore v. Moore*, a 2015 divorce case from South

[171] *Id.* at 1344.

[172] *Id.* at 1343 ("The parties' respective contributions to the marital partnership remain the touchstone of an equitable division of the marital estate."). For some representative cases, see, for example, *Cassiday v. Cassiday*, 716 P.2d 1133, 1136 (Haw. 1986) ("These decisions are consistent with the time honored proposition that marriage is a partnership to which both partners bring their financial resources as well as their individual energies and efforts."), *Williams v. Williams*, 354 S.E.2d 64, 66 (Va. Ct. App. 1987) ("The 'equitable distribution' statute, however, is intended to recognize a marriage as a partnership and to provide a means to divide equitably the wealth accumulated during and by that partnership based on the monetary and non-monetary contributions of each spouse."), and *Lacey v. Lacey*, 173 N.W.2d 142, 144–45 (Wis. 1970) ("The division of the property of the divorced parties rests upon the concept of marriage as a shared enterprise or joint undertaking. It is literally a partnership, although a partnership in which contributions and equities of the partners may and do differ from individual case to individual case.").

Carolina that went all the way to the state supreme court.[173] The wife had opened a lighting and design business, Candelabra, just before she married her husband.[174] The wife registered Candelabra as an S Corporation, with 51% of the stock in her name and 49% in her husband's name.[175] The wife served as the company's president and was "responsible for overseeing all business operations: financial forecasting and management, budgeting, hiring, scheduling, training, merchandising, and most importantly, selecting and displaying all of the products."[176] The husband held the title of vice president, however the trial court determined that, prior to 2005, he "was not actively involved in the business."[177]

In 2005, roles changed when the wife had complications with a pregnancy and was ordered on bed rest.[178] The husband took on a greater role in the company, although he and his wife fought over some of his sales-generation strategies.[179] In addition, as the business landscape changed and the company needed a web presence, the husband helped with the project, reading books on website design and branding.[180] The spouses had differing views, however, concerning the amount of work the husband put into the development of the website, a project that ultimately increased revenue significantly and moved 80% of the company's sales online.[181] Speaking about the husband's participation, the wife testified at trial: "If Sam Moore had not been my husband . . . he would have been out [of Candelabra] a long time ago because he didn't do enough to acquire even what a part-time position would do."[182] The husband, alternately, testified that he had been an integral part of the website-development team and a "purveyor of ideas."[183]

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[173] 779 S.E.2d 533, 537 (S.C. 2015).

[174] *Id.* at 537 n.1. "Candelabra is a retail business located on Coleman Boulevard in Mount Pleasant that sells trendy, high-end boutique lighting, home furnishings, and home accessories in a retail showroom." *Id.* at 537.

[175] *Id.* at 538.

[176] *Id.* "By all accounts, Wife is an experienced, successful businesswoman with an exceptional 'eye for design,' a knack for selecting specific products that appeal to her customers and consistently generate sales, and the ability to create long-term, positive relationships with vendor and manufacturer representatives." *Id.*

[177] *Id.*

[178] *Id*.

[179] *Id.* at 538–39 ("Husband determined that Wife's strategy aimed at contractor sales was too tedious and time-consuming, and Husband unilaterally determined that the better sales-generation strategy would be to pursue large corporations and multi-unit dwellings . . . .").

[180] *Id.* at 539–40.

[181] *Id.* at 540.

[182] *Id.* at 541.

[183] *Id.*

The trial court was sufficiently convinced of the husband's business contributions to award him half the value of the company. On appeal, the court remarked:

> In light of our review of the record, we find Husband vastly overstates his contributions . . . . [T]he record convinces us that Husband was a purveyor of ideas, but he left the details of putting his ideas into action to others with a solid work ethic, such as Wife.[184]

Nonetheless, the appellate court concluded that there had been no abuse of discretion and affirmed the award of half the company to the husband, observing that, "while awarding a greater share of the marital estate to Wife could be justified, we see no reason to set aside the family court's equal division of the marital estate."[185] The husband, then, received half of the corporate assets for his direct contributions, questionable as they were.

b. Indirect Contributions: Valuing Wives[186]

Even if a spouse does not contribute directly to the family business but instead provides indirect contributions by taking responsibility for child-rearing and housework, the court will award a percentage of the business assets to that spouse. The percentage of corporate assets that the spouse making the indirect contributions receives varies depending on the length of the marriage and the extent of the indirect contributions. Unlike most assets, family businesses are not generally subject to the presumption of equal division and are counted as "special" assets.[187] This special treatment is particularly evident if one spouse has put intensive work into building the business or if one spouse's family has strong historical associations with the business. In these cases, distribution of these assets therefore often diverges significantly from the equal division standard and ranges from

[184] *Id.*

[185] *Id.* at 552.

[186] I use the term *wife* to denote someone who, in the traditional usage of the word, is a caretaker and support system for her spouse, "someone in her (or his) life who will pick up the dry cleaning, keep track of appointments, do the laundry, take the kids to soccer practice, get dinner on the table, manage the social calendar, and vacuum, dust, and scour the tub." *See* Laura A. Rosenbury, *Work Wives*, 36 HARV. J.L. & GENDER 345, 381 (2013). This role has traditionally been fulfilled by women, but a person of any gender could be in the role.

[187] In some states, there is not only a presumption but also a rule that equitable distribution means equal, thereby requiring courts that do not divide assets equally to provide written explanations for the divergence from the standard. *See* 2 BRETT R. TURNER, EQUITABLE DISTRIBUTION OF PROPERTY § 8:2 (3d ed. 2015) (observing that while, "[a] majority of states hold that the division of property between the parties should depend only upon the trial court's balancing of the equitable distribution factors . . . . [a] respectable minority of state statutes presume that an equal division is equitable").

30% to as low as 10%.[188] It is particularly important for the spouse making indirect contributions to make the case for her role in the other spouse's corporate success.

Another divorce case that went to the state supreme court, *McCulloch v. McCulloch* turned on the question of a wife's indirect contributions to her husband's business.[189] When deciding what share of the family business to award to the wife, the trial court concluded that Hope "made little or no contribution" to the family business, which had been in the husband's family for multiple generations.[190] Nonetheless, the trial judge stated that "[Hope] served as a homemaker and as such [wa]s entitled to a share of the marital assets."[191] The judge consequently awarded the wife 25% of the two family companies, leaving the rest to the husband. In justifying this award, the judge remarked that

> [I]t would be completely inequitable for [Hope] to receive a portion of the share in Microfibres, Inc. equal to [James] whose blood, sweat and tears and contributions by his family ha[d] been the reason for both the past success and what hopefully w[ould] be the future success of th[e] corporation.[192]

Despite the court's clear sense, then, that the corporate assets were a special asset for the husband, whose heritage and hard work had built the companies, the wife received a quarter of the value of the companies for the support that she provided to her husband.

Recognizing this support role very explicitly, the trial judge in *Sykes v. Sykes*, a 2014 case from New York, awarded the wife 30% of the value

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[188] Family businesses are generally considered "special assets" and exempt from the presumption of equal division.

> Although the law often favors a distribution of marital assets that is as equal as possible, especially in a marriage of a fairly long duration such as this, it cannot be said that a fifty-fifty division of a titled spouse's business is the standard irrespective of the contribution by the non-titled spouse.
>
> Contrary to what defendant argues, case law has long confirmed that business assets are to be treated differently from other assets for purposes of equitable distribution.

Sykes v. Sykes, 313085/2010, 2014 WL 1797010, at *4–5 (N.Y. Sup. Ct. May 2, 2014); *see also* Ron Tweel & Elizabeth Coughter, *Deviations from a 50/50 Split of Marital Assets in Equitable Distribution*, MICHIEHAMLETT, http://www.michiehamlett.com/tweel-coughter-deviations-equitable-distribution/ [https://perma.cc/5PLX-X5WB] ("Therefore, the proponent for an unequal and greater award of a family business will succeed if there is proof of greater efforts made by the proponent in actually creating and pursuing the business enterprise. This unequal award is particularly true when the other non-employee spouse is active at home or in other efforts and has little to do with the business enterprise.").

[189] 69 A.3d 810, 818 (R.I. 2013).

[190] *Id.* (concluding "[Hope] ha[d] in no significant way done anything to contribute towards the acquisition, preservation or appreciation of the corporate assets").

[191] *Id.*

[192] *Id.*

of her husband's hedge fund.[193] Substantial trial time went toward establishing the extent of the wife's contributions, and the husband "took the position that even though defendant did not work outside the home and was very much a 'stay-at-home mom,' her contributions on the domestic front were ultimately quite limited."[194] He argued that his wife did not perform housework, did not cook or clean, and did not even perform the task of "removing the plastic from the dry cleaning."[195] The wife, he argued, "outsourced most domestic chores"[196] and was reliant on staff to perform most household chores as well as childcare.[197] The husband also presented evidence that the wife entertained infrequently and failed, therefore, to take on the role of "corporate spouse."[198]

The court nevertheless concluded that she had contributed to her husband's success in context-appropriate ways. The court observed that social norms prescribed that the wife employ a full staff, delegate a range of menial chores, and hire full-time help for childcare purposes.[199] Referencing household-management responsibilities taken on by women running great estates, the court remarked:

> Like a latter-day Cora Crawley, Countess of Grantham, who unquestionably runs the household at Downton Abbey despite the presence of Mr. Carson, Mrs. Hughes, Mrs. Patmore and Daisy, defendant unquestionably ran the Sykes household in New York, East Hampton and Paris despite the presence of cooks, personal assistants and the person who unsheathed the dry cleaning.[200]

The important thing, the court observed, was that she had been available to her husband, had provided him with the home he desired and the support he needed to be successful in his work life.[201] As the wife testified, their agreement was that it was her job "to make sure when he came home he could be rejuvenated and go back out and slay the dragons on Wall Street."[202] These were, then, the indirect contributions that the court recognized and rewarded.

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[193] 313085/2010, 2014 WL 1797010.
[194] *Id.* at *6.
[195] *Id.*
[196] *Id.* at *6–7.
[197] *Id.* at *7.
[198] *Id.* at *6.
[199] *Id.* at *7.
[200] *Id.* at *7–8.
[201] *Id.*
[202] *Id.* at *7.

Consequently, unlike a minority shareholder who can be completely barred from any relief, spouses generally have a guaranteed right to a certain percentage of corporate assets. The exact percentage varies according to contribution; however, even with no direct contribution and no title ownership, family law offers certain protections and a spouse is generally entitled to a share of the assets.

B. Surviving Spouses Inherit the Firm

Inheritance law, like equitable-distribution rules, protects spouses from financial distress when one spouse dies by giving the other spouse a claim to jointly acquired and maintained property. Surviving spouses have strong property rights through intestacy law should the spouse die without a valid will or should a court determine that a will is invalid.[203] Moreover, if one spouse tries to disinherit the surviving spouse, the surviving spouse may elect to take the forced spousal share and automatically receive a portion of the decedent's estate.[204] Intestacy and forced share rights underscore that, unlike a minority corporate shareholder, a surviving corporate spouse has a strong set of rights at the end of the corporate relationship, even if the relationship was fraught with conflict. This Section discusses how rights accorded to surviving spouses work to protect them in the face of financial insecurity, personal conflict, and adverse actions taken by the other spouse—in other words, in the face of oppressive behavior.

1. Surviving Spouses Win by Default

Intestacy rules are default rules meant to approximate the estate plan that most decedents would have chosen if they had been testate. The assumption is overwhelmingly that deceased spouses would want to provide for their surviving spouses (regardless of the truth of that assumption in specific cases). Accordingly, in all states, intestacy rules provide that a surviving spouse is entitled to a share of a decedent's estate if he dies without a will or if a will is ruled invalid. The percentage of the estate going to the surviving spouse depends on the jurisdiction.[205] In New York, for example, a surviving spouse would receive everything if there

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203 JESSE DUKEMINIER & ROBERT SITKOFF, WILLS, TRUSTS, AND ESTATES 70–71 (9th ed. 2013).

204 *Id.* at 512–20.

205 *See* UNIF. PROBATE CODE § 2-202 (amended 2010), 8 U.L.A. 75 (1991). A revised version of Article II of the Uniform Probate Code (UPC) was passed in 1990, and it adjusts the percentage of a surviving spouse's benefits according to the length of the couple's marriage, reaching a maximum of 50% after fifteen years. UNIF. PROBATE CODE § 2 cmt. at 61 (UNIF. LAW COMM'N 1990). Nine states have adopted the 1990 Revision of Article II in its entirety, and numerous other states have adopted the UPC in an incomplete form. LEGAL INFO. INST., *Uniform Probate Code*, CORNELL UNIV. L. SCH., https://www.law.cornell.edu/uniform/probate [https://perma.cc/63AP-F4ZY].

were no children but only $50,000 of intestate property if there were descendants of any kind.[206] In Virginia, the spouse would inherit everything in the absence of children as well but also everything if the couple had children.[207] The surviving spouse's share would only be diminished if the decedent had children from a previous relationship, and then the surviving spouse's share would decrease to one-third of the estate.[208]

If, for example, one spouse died without leaving a will, the surviving spouse would receive all the deceased spouse's shares of the business if the couple had no children. Even if they had children, or the deceased spouse had children from a previous marriage, the surviving spouse would receive a certain number of shares. Consequently, the surviving spouse could quickly go from being minority shareholder to majority shareholder in a family business, able to assert voice and leadership, potentially reshaping the company through her new majority ownership. A surviving corporate spouse might, therefore, find herself in an improved business position after inheriting additional shares through intestacy. The same would be true even if the decedent spouse had a will but a court determined that it was invalid due, for example, to a problem with the will formalities or a successful claim of undue influence.

Furthermore, a surviving spouse has a claim to her intestate share of the estate even if the spouses had been experiencing marital discord or were not living together at the time of spouse's death. Marital conflict, even after having filed for divorce, does not change a surviving spouse's intestate rights at all. The only claim that an estate can bring to bar a surviving spouse from receiving her intestacy share is abandonment.[209] Subsequently, what constitutes abandonment is a question that courts address with some frequency and have, generally, answered by setting a high threshold. For example, a New York appellate court upheld a wife's right to her elective share even though the wife had lived apart from her husband for twenty-three years.[210] Affirming this right, the court wrote:

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[206] N.Y. ESTATES, POWERS & TRUSTS LAW § 5-1.1-A (McKinney 2011).

[207] VA. CODE ANN. § 64.2-200 (2012).

[208] *Id.*

[209] *See* DUKEMINIER & SITKOFF, *supra* note 203, at 519; *see, e.g.*, VA. CODE ANN. § 64. 2-308 (2016). Other states have similar statutory provisions. For some representative cases, see *Boudreau v. Slaton*, 9 So. 3d 495, 499–500 (Ala. Civ. App. 2008) (where a spouse dies before a final entry of divorce, the divorce action abates and the surviving spouse can still take his or her elective share), and *Purce v. Patterson*, 654 S.E.2d 885, 886 (Va. 2008) (abandonment must continue until death of the spouse).

[210] *In re* Duplessis, 123 A.D.3d 927, 927 (N.Y. App. Div. 2014) ("In 1987, Jennie left the marital home, and she lived separately from the decedent until the decedent's death in 2010.").

> [M]ore must be shown than a mere departure from the marital abode and a consequent living separate and apart . . . . [O]ne who seeks to impose such a forfeiture must, in addition, establish . . . that the abandonment was unjustified and without the consent of the other spouse.[211]

One New York court even lamented the frequency with which a surviving spouse who had been separated from the deceased spouse received an intestate distribution, stating: "Such obviously unjust results are frequent and commonplace in these posthumous matrimonial trials in this Court."[212] The majority of state courts have, however, reaffirmed the traditional standard thereby enabling the surviving spouse to take her share of the estate even in the midst of marital conflict.[213]

In fact, only in the rarest of circumstances does a court bar the spouse from intestate rights. In a 2012 case from the Surrogate's Court in New York, *In re Estate of Hama*, the question of abandonment arose in the context of a wife's right to her intestate share of the husband's estate, which was worth approximately $1.5 million at the time of his death and included the value of his privately owned design business.[214] The husband and wife had worked together at the husband's business before getting married in 2006.[215] However, based on testimony from the husband's accountant, the court remarked that "[t]he reason for the marriage may or may not have been romantic" and may have been instead a way to avoid a tax burden for the decedent.[216] Adding weight to the speculation, the husband and his spouse had an open relationship, and she registered in marriage in Japan with another man.[217] Because of the instrumental nature of the marriage, and what looked like a form of benefits fraud, the court

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211 *Id.* at 928.

212 *In re* Lamos' Estate, 313 N.Y.S.2d 781, 782–83 (N.Y. Sur. Ct. 1970) ("[T]he parties had probably separated by mutual consent and [the wife] seemed neither to have desired or looked to her husband for support.").

213 *See* DUKEMINIER & SITKOFF, *supra* note 203, at 519 ("In a *minority* of states, the elective share is denied to a surviving spouse who abandoned or refused to support the deceased spouse." (emphasis added)); *see also* Naim D. Bulbulia & Jonathan W. Wolfe, *Dying to Get a Divorce?: Why Interim Wills Are Essential for Divorcing Clients*, AM. BAR ASS'N (Sept. 2005), http://www.americanbar.org/content/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/dyingtodivorce.html [https://perma.cc/HXG3-W5VR] ("[M]ost states' Intestacy Statutes do not explicitly exclude spouses who have separated or are in the process of divorcing, and there is little precedent elucidating how such a situation would be resolved.").

214 957 N.Y.S.2d 583, 584–86 (N.Y. Sur. Court 2012).

215 *Id.* at 585.

216 *Id.*

217 *Id.* at 586.

concluded that the wife had "forfeited the rights with respect to his estate that would otherwise accrue to her as his surviving spouse."[218]

Absent circumstances that call into question the validity of the entire marriage, all other conflicts are generally seen as ordinary and spousal rights to intestate property, including corporate assets, are relatively inviolable. Based on status granted by relationship rather than power accorded through bargaining, surviving spouses are entitled to property rights even when the decedent spouse failed to make any such property provisions.

2. *Elective Rights and Forced Sharing*

If the decedent spouse does have a will but either leaves the surviving spouse out of it entirely or leaves her with minimal assets, the surviving spouse still has rights to the decedent's estate, including corporate assets, through what is called either the elective or forced spousal share.[219] The share is generally equal to one-third of the estate but, as with intestacy rights, the rules vary by state.[220] In New York, if a surviving spouse takes her elective share, she will receive all of the estate assets if the decedent's assets consisted of $50,000 or less.[221] If the decedent's assets were more than $50,000, then the surviving spouse is entitled to the greater of $50,000 or one-third of the estate assets.[222] In Virginia, the surviving spouse receives one-half of the decedent's estate as her elective share if the decedent left no surviving descendants and one-third if the decedent left surviving children or their descendants.[223] The Uniform Probate Code, basing its rule explicitly on the economic partnership theory of marriage, provides that the surviving spouse receive up to half of the estate but also suggests conditioning the amount on the length of marriage.[224]

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218 *Id.* at 591.

219 Both terms are used to describe this share: it is elective from the spouse's perspective and forced from the estate's.

220 *See* DUKEMINIER & SITKOFF, *supra* note 203, at 513.

221 N.Y. ESTATES, POWERS & TRUSTS LAW § 5-1.1-A (McKinney 2011).

222 *Id.*

223 VA. CODE ANN. § 64.2-304 (2016).

224 UNIF. PROBATE CODE §§ 2-202 to -203 (UNIF. LAW COMM'N 2010). When the drafters of the UPC changed the elective share from one-third of a decedent's estate to one-half for marriages of a requisite length, they explained changes thusly: "The elective share of the surviving spouse was fundamentally revised . . . . to bring elective-share law into line with the contemporary view of marriage as an economic partnership. The economic partnership theory of marriage is already implemented under the equitable distribution system." UNIFORM L. COMM'N, AMENDMENTS TO UNIFORM PROBATE CODE pt. 2, at 1 (Jan. 12, 2008), http://www.uniformlaws.org/shared/docs/probate%20code/electiveshare_technicalamend_jan08.pdf [https://perma.cc/9G9G-S4PB].

Similar to intestacy disputes, relatives or the decedent's estate will sometimes try to bar the surviving spouse from receiving the elective share through claims of disqualification and abandonment. In *In re Estate of Post*, the estate tried to bar a surviving spouse from her elective share on the grounds that "prior to decedent's death, he and plaintiff had lived apart 'under circumstances which would have given rise to a cause of action for divorce or nullity of marriage.'"[225] The estate claimed that the wife "had been a habitual alcoholic," that the "decedent had become frustrated by plaintiff's demands for more money," that the spouses "had ceased having marital relations" almost ten years prior to the husband's death, and that the wife "had refused to take decedent to a hospital while he was allegedly demonstrating symptoms of a heart attack."[226] The court, however, found that there was insufficient credible evidence to support the estate's claims of abandonment and concluded that these claims did not preclude the wife from receiving her elective share.[227] Many abandonment claims, especially constructive abandonment claims, fail and the surviving spouse's rights prevail.

More often, conflicts over the elective share turn on what assets are included in the estate. Some states statutorily define what assets go into the estate for purposes of calculating the elective share, including nonprobate as well as probate assets.[228] Classic cases have addressed the question of whether life insurance proceeds, funds in pay-on-death accounts, and trust assets are includable in the estate. The composite of all the includable assets is called the augmented estate. With respect to corporate family shares, the augmented-estate question is acutely relevant because corporate shares are often held in trust, and questions arise about whether these assets count for the purposes of the elective share.

In *Johnson v. Farmers & Merchants Bank*, for example, the husband's wealth consisted of shares in three separate closely held family businesses.[229] His assets included a large working farm (which he owned completely), a coal company (in which he had a minority interest), and a steel supply company (in which he was the majority owner and his wife and son had small minority interests).[230] In addition to his ownership

[225] 659 A.2d 500, 502 (N.J. Super. Ct. App. Div. 1995) (footnote omitted) (quoting N.J. STAT. ANN. § 3B:8-1 (1982)).

[226] *Id.*

[227] *Id.* The wife did not, however, receive her elective share for other reasons concerning the valuation and inclusion of various trust interests.

[228] See, for example, Iowa's statute, IOWA CODE § 633.238 (2017).

[229] 379 S.E.2d 752, 754 (W. Va. 1989).

[230] *Id.*

interests, the husband also "worked primarily in a management capacity, overseeing the day-to-day operation of these three businesses."[231]

Six years before his death, the husband transferred his shares in these companies into a trust, with a bank as trustee.[232] When the husband subsequently died, the will entitled the wife "to receive tangible personal property valued at $12,750 and jointly owned assets valued at $7,250."[233] The probate estate was valued at approximately $158,000 while the trust assets had a purported value of nearly $1.4 million. The wife, not surprisingly, renounced her rights to take from the will and elected instead to take her statutory elective share.[234]

The question then arose as to whether or not the corporate shares in trust constituted part of the augmented estate. The court, restating the policy objectives of the legislature, wrote: "[Election] attempts to protect a surviving spouse against the possibility of disinheritance"; the court also recognized, however, that "numerous" forms of nonprobate transfer could easily be used to "diminish a surviving spouse's elective share."[235] The court concluded that, although the husband had transferred his shares into the trust, "he did not part with the incidents of ownership. Instead, Mr. Johnson was free to manage his business interests just as he had always done."[236] The transfer was "illusory" in the sense that he retained substantial if not entire dominion and control over the assets. Consequently, the assets in trust were part of the decedent's augmented probate estate and subject to the elective share and the surviving spouse received her portion of the shares in trust.[237]

Ultimately, there is only one secure way to safeguard corporate shares from a spouse: prenuptial agreement. In *In re Estate of Sorenson-Peters*, the wife was the owner of a family business and married to her third husband.[238] When the wife died three years into this marriage in a plane crash, her estate tried to disqualify the husband from asserting his right to the spousal share on the grounds that the marriage was failing. The estate brought forth witnesses who "testified the decedent described [her

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231 *Id.*

232 *Id.* at 755.

233 *Id*. at 756.

234 *Id.* at 755–56.

235 *Id.* at 756.

236 *Id*. at 761. The court analyzed the question using the traditional "illusory transfer" test as well as the intent to defraud and the present donative intent tests. *Id.* at 757–59. Ultimately, the court adopted a "flexible standard" that allowed the taking "into account all of the circumstances and . . . equities on each side." *Id.* at 759 (quoting Davis v. KB & T Co., 309 S.E.2d 45, 50 (W. Va. 1983)).

237 *Id.* at 762.

238 No. 11-1547, 2012 WL 5355712, at *2–3 (Iowa Ct. App. Oct. 31, 2012).

husband] as lazy, with no work ethic . . . using her for her income."[239] The court found the testimony unconvincing[240] and, accordingly, the husband received his elective portion of the estate.

Not subject to the husband's elective share, however, were the corporate assets because of a prenuptial agreement: "This was the third marriage for both parties, and prior to the marriage, [the husband] signed a prenuptial agreement, disclaiming any interest or right in the decedent's family's business."[241] Without any further intervention from the court or the parties, the corporate assets, worth approximately $1 million, went as directed by the prenuptial agreement to the decedent's children from previous marriages.[242] Contracting out of the rules governing the elective share is, therefore, not only possible but also the best way to ensure that a surviving spouse (or ex-spouse) will not have access to shares in a family business.[243]

Absent a prenuptial agreement—a limited bargaining opportunity for soon-to-be spouses—the rights of the surviving spouse are paramount, making disinheritance impossible and asset sheltering extremely difficult. These default, status-based property rights that spouses have at death, like at divorce, underscore that there are alternate theories and methods for allocating rights to family business stakeholders.

C. Bargaining in the Shadow of Marriage

The obvious question, then, is—why marriage is different? Why do corporate spouses receive greater protections than any other corporate partners? That marriage and marriage partners are treated differently may not surprise anyone; moreover, this privileged treatment may seem intuitively correct to some. After all, spouses share a certain type of intimacy, they endure more and different things than other partners, and they are expected to share in ways that business partners do not necessarily share. The reason that spouses receive greater protections than any other

[239] *Id.* at *3.

[240] The estate also tried to bar the husband from his share in the damages recovered from the wrongful death suit, while also barring the estate's portion of the same damages from being subject to the husband's elective share. *Id.* at *5. The court concluded, however, that wrongful death proceeds were counted as personal property under intestacy statutes in the Iowa Code and were, therefore, subject to the intestate share. *Id.* at *7. The damages were divided between the children, the husband, and the estate. *Id.*

[241] *Id.* at *3.

[242] *Id.* ("The children received the decedent's interest in the family corporation totaling $928,500 . . . .").

[243] This presents an interesting contrast with *Ansin v. Craven-Ansin*, in which the court discounted an agreement made between spouses during an intact marriage. 929 N.E.2d 955, 969 (Mass. 2010).

partners takes these assumptions into account indirectly, but the primary reason has to do with bargaining. This Section discusses marital bargains and bargaining in order to explain why spouses receive the legal treatment that they do at relationship termination. Understanding the way in which spousal bargaining leads to increased shareholder protections, subsequently, provides a fresh perspective through which to understand why certain corporate family members should also receive enhanced protections.

1. Excavating the Original Marital Bargain

Before any direct bargaining was routinely allowed between spouses—prior to spouses considering the option of explicit bargaining about marriage roles—the contours of a marital bargain were already present. Marriage law has been defined historically by a standard bargain, grounded in coverture and premised on a husband's duty of support and a wife's duty to obey and care for her husband. In this classic bargain, as described by Sir William Blackstone, the "legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband."[244] Women traded obedience and household labor for protection and provisioning. The "precise contours of this marital bargain," also "evolved over time,"[245] impacted by new developments such as the right of married women to own property.[246] Nevertheless, the traditional bargain remained one of support for care work, domestic work, and sexual relations.

This historical version of the marital bargain meant that law expected no bargaining from spouses within marriage not only because women had no bargaining power but also because there was an implicit marital bargain that women were seen as consenting to at the moment of marriage.[247] Family wealth law, outside of the parental bargaining over marriage settlements in the weeks leading up to a marriage, never expected spouses to explicitly bargain about earnings and property because a default template

244 1 WILLIAM BLACKSTONE, COMMENTARIES *58.

245 Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 81 (2016).

246 *See* Allison Anna Tait, *The Beginning of the End of Coverture: A Reappraisal of the Married Woman's Separate Estate*, 26 YALE J.L. & FEM. 165 (2014).

247 Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J.L. & POL'Y 225, 235 (2011) ("Not only could a married woman not make a contract with her husband, but also her ability to bargain with the outside world was severely restricted by coverture, in which rights over her property and the wages she had earned vested in her husband."). *See generally* Allison Anna Tait, *Divorce Equality*, 90 WASH. L. REV. 1245, 1269 (2015) (courts presumed an exchange as well as a unity between spouses and declined, as a general rule, to support a keeping of accounts between spouses).

was already assumed to be present and operative, embedded within coverture rules.

During the last decades of the twentieth century, the marital bargain began to transform from a relationship of support to one of economic partnership. No-fault divorce was the spur because this new regulatory regime necessitated a new theory of asset distribution at divorce—one not premised on fault—and equitable distribution became the new standard bearer. Equitable distribution helped provision divorcing housewives who were vulnerable because of the traditional income and wealth asymmetries that the structure of marriage produced. Courts stressed a couple's economic partnership in order to reach equal asset division, and, slowly but surely, the legal discourse around marriage settled on the idea of economic partnership.[248] Equitable distribution and economic partnership rewrote the marital bargain—or, at the very least, changed the terms of discourse. Nevertheless, the default marital bargain was still traceable. Even within the framework of economic partnership, marriage still entailed an exchange of household work and domestic contributions for the guarantee of financial remuneration in the event of divorce.

Whether the marital bargain is premised on older theories of support or newer ones of partnership, then, the result is the same: marriage law contains a default bargain that all other bargains, including pre- and postnuptial agreements, map over or onto. This implicitly sets forth ex ante limits, constructing the parameters of possibility for bargaining spouses. Moreover, because this implicit bargain is always present at the root of the legal relationship, spouses are not presumed either to have or to need full contractual autonomy. Robust bargaining autonomy is not considered desirable in the marital context and, for similar reasons, would be just as undesirable in the context of corporate family members.

2. *The Unique Nature of Spousal Bargaining*

A default marital bargain is in place, then, ordering legal understandings and expectation of marriage like the invisible hand, guiding individual and collective choices. Nevertheless, spouses also bargain on their own to bring clarity to shadow spots in the original bargain or to circumvent the default rules. In fact, most spouses are active bargainers who bargain informally on a regular basis.

Spouses bargain daily over the demands of running a household, keeping up with social obligations, and negotiating career paths. Someone has to pay the cable bill, buy groceries, and make appointments with the

[248] *Id.* at 1250–60.

dentist and doctor.[249] One spouse's new job may involve negotiating a move with the other spouse, who may be forced not only to relocate but also to change jobs.[250] Childcare, in particular, routinely requires scheduling flexibility and negotiation. Spouses, therefore, bargain to meet the immediate demands of a shared life.[251]

Couples also bargain formally when entering into and exiting from marriage. Antenuptial agreements have become increasingly routine, especially among high-wealth couples, and couples bargain over anything and everything in these agreements.[252] Most commonly, couples bargain before marriage about how certain assets will be characterized if they divorce, usually exempting specific assets from becoming marital property.[253] Frequently, couples bargain over the elective share as well, with the wife giving up her right to the elective share in return for a guaranteed financial benefit. But couples also bargain over fidelity, sometimes inserting "bad boy" clauses that bring penalties. Couples stipulate financial rewards that will flow to the wife upon the birth of children. And, if there is an earning asymmetry, the couple might specify a regular financial allotment for the nonearning spouse. Couples also bargain specifically to opt out of the conventional marital bargain: to rewrite gender roles, change implicit marital expectations, create alternative families, and clarify personalized family designs.[254] Couples also bargain at relationship exit over the terms of a divorce.[255] Couples bargain over who retains what assets, spousal maintenance, and child—or even pet—custody terms.

The fact that spouses bargain regularly and even vigorously does not, however, mean that they are free from competing desires and bounded self-

249 *See generally* ARLIE RUSSELL HOCHSCHILD WITH ANNE MACHUNG, THE SECOND SHIFT (2003); Elizabeth F. Emens, *Admin*, 103 GEO. L.J. 1409, 1414 (2015) (detailing the ways in which women take on household work even when employed in the paid labor market, thereby taking on an additional "second shift" of work).

250 *See* Beth A. Livingston, *Bargaining Behind the Scenes: Spousal Negotiation, Labor, and Work–Family Burnout*, 40 J. MGMT 949 (2014).

251 *See* RHONA MAHONY, KIDDING OURSELVES: BREADWINNING, BABIES, AND BARGAINING POWER 37–65 (1995).

252 Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 146 (1998).

253 WILLIAM P. STATSKY, FAMILY LAW 108 (6th ed. 2013) ("In premarital agreements, parties often give up . . . their right to an elective share.") (emphasis omitted).

254 *See* MARTHA M. ERTMAN, LOVE'S PROMISES: HOW FORMAL & INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES (2015); MAHONY, *supra* note 251; *see also* Case, *supra* note 247, at 251 (bargaining may "tend to benefit those in couples who have reached and seek enforcement of a bargain that departs from traditional gender roles").

255 For an analysis of how gender impacts divorce negotiations, see Tess Wilkinson-Ryan & Deborah Small, *Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining*, 26 LAW & INEQ. 109 (2008).

interest. Spouses may, in fact, be the most ubiquitous example of why the rational actor model is flawed: even though they bargain frequently, they are compelled by innumerable and varied motives, attachments, animosities, and desired outcomes. Because of the unique intimacy spouses share and precisely because of the complicated psychology of marriage, marriage law has built in protections for bargaining spouses.[256] Marriage law has traditionally presumed that spouses are idiosyncratic bargainers, understood to suffer from overly bounded rationality because their desired outcomes are formed by such varied and complex motivations. Unlike in the corporate context, personal knowledge is not thought to produce bargaining power. Instead, spouses are considered unlikely to bargain effectively or fairly because the opportunities for spouses to deploy psychological and emotional weaponry are too many and the chance of manipulation too great.[257]

The rule, therefore, has traditionally been: "Courts in this country have generally been closed to those who seek judicial enforcement of bargains or judicial resolution of disputes in an ongoing marriage."[258] Family law allows bargaining on the margins of marriage—antenuptial and divorce agreements are acceptable—however bargaining within marriage is either automatically disallowed or scrutinized with supreme care.[259] This rule may, in many ways, downplay or ignore the frequent and successful bargaining in which spouses engage. Nevertheless, the rule correctly recognizes that all individuals, whether spouses or not, are formed by and follow personal desires in bargaining and that when the bargaining parties are intimately connected, it is difficult, and sometimes impossible, to compartmentalize roles and avoid the professional becoming personal.

Accordingly, corporate spouses benefit from legal protections when their relationships terminate because legal norms and rules construct

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[256] Family law might also be seen, from a less optimistic point of view, to discourage marital bargaining because law continues to think in terms of the fiction of marital unity and consequently disallows either the appearance or the reality of separate interests within marriage.

[257] Ansin v. Craven-Ansin, 929 N.E.2d 955, 962–63 (Mass. 2010) ("A marital agreement stands on a different footing from both a premarital and a separation agreement. Before marriage, the parties have greater freedom to reject an unsatisfactory premarital contract. A separation agreement, in turn, is negotiated when a marriage has failed and the spouses 'intend a permanent separation or marital dissolution.' . . . The circumstances surrounding marital agreements in contrast are 'pregnant with the opportunity for one party to use the threat of dissolution "to bargain themselves into positions of advantage."'" (footnote omitted) (citations omitted) (first quoting PRINCIPLES OF FAMILY DISSOLUTION § 7.01(1)(c) (Am. Law Inst. 2002); then quoting Pacelli v. Pacelli, 725 A.2d 56, 61 (N.J. Super. Ct. App. Div. 1999))).

[258] Case, *supra* note 247, at 225.

[259] *Id.* at 251.

corporate spouses as bounded bargainers who will not always be able to fully or rationally bargain for their own protections.

III. BUILDING CORPORATE FAMILY LAW

Understanding that corporate family members do not bargain in the way that corporate law expects them to and are, in fact, more akin to corporate spouses who are bounded bargainers, the subsequent question is how to protect these corporate actors. This Part suggests paths to begin building a new corporate family law that will benefit all corporate family members. To do so, I suggest increasing legal and financial protections for minority shareholders in closely held corporations that are owned and run by families.[260] Closely held corporations are defined in a number of ways, usually by number of shareholders, but they can easily be defined by family participation as well. A central feature of these corporations, indeed, is that they are usually family controlled. Reform could be targeted, then, at family-owned, closely held corporations, and this descriptive requirement could be written into any statutory solution.[261] The following Sections propose solutions and reforms based both on family law jurisprudence and an enhanced understanding of the needs of corporate family members.

A. Bringing Family Law into Corporate Law

A first place to look for solutions is divorce and inheritance law. Many of those rules have relevance in the corporate arena and can provide useful models for corporate reform. The solutions that follow derive from family law—both divorce and inheritance law—and braid together rules from family and corporate law in order to better protect family members from corporate oppression by improving what happens for these individuals at corporate exit.

1. Taking Lessons from Divorce Law

Divorce law is, perhaps, the definitive source for rules governing relationship exit. Divorce courts possess great fluency in managing

[260] It is likely that these protections should be extended to family members in various other organizational forms, like partnerships and LLCs. I reserve that discussion, however, for another time.

[261] In the instances in which the shareholders in a closely held corporation are not family members, they are usually friends who have started a business together or who have decided to go in on a business venture together. As I mention *supra* note 25, corporate friends might also and perhaps should also benefit from these same protections, based on the notion of bounded bargaining. Corporate friends, like corporate family members, are likely bounded bargainers. Nevertheless, the concept of corporate friends requires a different and new discussion about line drawing and invites debate over what and who are friends. It is for this same reason that inheritance law never includes friends in intestacy laws or anti-lapse laws. Friends may be forever, but they are also notoriously difficult to define and, unlike family, even more difficult to keep.

relationship termination and the allocation of assets that accompanies it. This Section discusses two ways in which corporate law can look to family law—in providing buyout as a remedy and in eliminating discounts when they penalize the minority shareholder—to improve protections for corporate family members.

a. A Judicial Preference for Buyout

One reform that is already included in the Revised Model Business Corporation Act is to require fair-value buyout.[262] The Model Act states: "In a proceeding . . . to dissolve a corporation, the corporation may elect or, if it fails to elect, one or more shareholders may elect to purchase all shares owned by the petitioning shareholder at the fair value of the shares."[263] In this way, dissolution is not the sole remedy available to a minority shareholder, and the relationship exit can be executed with the least harm to the company. Currently, a majority of states allow buyout as a remedy; however, there are notable exceptions including Delaware and Virginia. Consequently, buyout as a remedy is not guaranteed and great debate still exists concerning whether or not a mandatory buyout should be available to minority shareholders.

Looking to divorce law, some form of buyout of shares is the most common way to deal with the division of corporate shares. The rules concerning corporate stock distribution at divorce are that stock in a closely held family corporation can be distributed by the court in a divorce proceeding in several ways, "including division of the stock, awarding offsetting property, or cash payments over time."[264] The majority of courts underscore that the first option, division of stock, is the least preferable method of distribution because it necessitates a continued working relationship between spouses.[265] The other two solutions, which essentially constitute a buyout, are the more frequent result.

[262] At present, a small number of states—including Alaska, California, Minnesota, New Jersey, New York, and North Dakota—include fair value language in their statutes. *See* Matheson & Maler, *supra* note 37, at 671; Moll, *Shareholder Oppression and "Fair Value," supra* note 27, at 309–10 (noting a number of states have "fair value" statutes but that "fair value" is not well defined).

[263] MODEL BUS. CORP. ACT § 14.34(a) (AM. BAR ASSOC. 2002).

[264] Weston v. Weston 773 P.2d 408, 409 (Utah Ct. App. 1989). The Utah rule is typical of other states as well.

[265] *See, e.g.*, Frandsen v. Frandsen, 564 P.2d 1274, 1275 (Haw. 1977); Berry v. Berry, 635 P.2d 68, 69 (Utah 1981); Read v. Read, 594 P.2d 871, 872 (Utah 1979); Wetzel v. Wetzel, 150 N.W.2d 482, 485 (Wis. 1967). "We agree that, whenever possible, continued joint ownership by divorced spouses of closely held corporate stock should be avoided, and acknowledge with approval those cases cited by the defendant which set forth the rationale for that principle." Savage v. Savage, 658 P.2d 1201, 1205 (Utah 1983). Nevertheless, in *Savage v. Savage*, the Utah Supreme Court concluded that because the varying valuations were all credible and because "any cash distribution risked doing substantial injustice to one party . . . . in-kind division of Savage stock was a proper solution." *Id.*

Courts avoid division of stock in order to facilitate a clean break between the parties. In *Smith v. Smith*,[266] for example, "[d]espite assigning a value to [two companies] . . . the court concluded that it could not determine an 'accurate accrual value of the stock' in either corporation and provided that the stock holdings in these corporations be divided equally between the parties."[267] On appeal, both spouses contended that the trial court had erred by not providing a different exit option.[268] The state supreme court agreed: "We cannot expect divorced parties to continue a business relationship that will optimize resources and profits"; it was, the court suggested, "particularly important to avoid creating situations where the divorced parties remain in joint management of the income producing property."[269]

Courts also avoid division of shares in order to avoid making one spouse into a minority shareholder. In *McCulloch v. McCulloch*,[270] the Rhode Island Supreme Court concluded that the trial court had erred by failing to value the corporate shares and subsequently awarding the wife 25% of the shares in the family businesses. On appeal, the state supreme court observed that assigning stock to the wife rather than some other form of compensation was incorrect.[271] The court reasoned that, by not placing value on the companies before assigning the shares, the wife's minority share would "likely not be the equivalent of 25 percent of the total value of the company."[272] Furthermore, the court observed that the "assignment of stock in a closely held corporation, which makes one spouse a minority shareholder, is generally disfavored and should be avoided whenever possible."[273]

The question, then, in the corporate context is whether a buyout should be mandatory or just available as a judicial remedy. Some scholars have proposed that because of the peculiar and precarious position of a minority shareholder, there should be a statutorily guaranteed buyout.[274] These scholars contend that "both involuntary dissolution and its

[266] 690 A.2d 970 (Me. 1997).

[267] *Id.* at 971.

[268] *Id.*

[269] *Id.* (quoting Berry v. Berry, 658 A.2d 1097, 1099 (Me. 1995)).

[270] 69 A.3d 810, 818 (R.I. 2013).

[271] *Id.* at 822.

[272] *Id.*

[273] *Id.* The state supreme court remanded the case for further inquiry. *Id.* at 830 ("[The trial justice] should have placed a value on the portions of the two entities that he assigned to each party to ensure that his distribution of the marital estate was truly equitable."). *Id.*

[274] *See* Moll, *Shareholder Oppression and "Fair Value," supra* note 27, at 308–10 (discussing the fair-buyout remedy).

alternatives are costly and ineffectual and that considerations of equity and efficiency justify permitting the minority to withdraw its investment for any reason."[275] A mandatory buyout, however, may prove to be unfair to the majority shareholder, who could be forced to keep an inflated asset base in order to execute a buyout at any time. Moreover, this guarantee might impact the company's ability to obtain credit or give the minority shareholder an unfair bargaining chip.[276] The third option, and the middle ground, is to "aggressively encourag[e] courts to grant buyout or dissolution, not merely where minority shareholders are the victims of the unfairly prejudicial misuse of control power by majority shareholders, but also in any circumstances where the minority shareholders are found to be in deeply embittered or grievously disappointing circumstances."[277] A judicial preference for buyout as an exit solution not only alleviates undue burden on the majority shareholder but also favors both equitable compensation for the minority and as permanence for the corporate enterprise.

With buyout available as a judicial remedy, minority interests are compensated and exit is accomplished with the least amount of disruption, both to the family members involved as well as to the business enterprise.

b. Eliminating the Friends and Family Discount

If fair-value buyout were a required option,[278] helping minority shareholders receive value for their shares without the total dissolution of the company, the question then becomes—What constitutes fair value?[279] Two questions in particular arise. Timing is a significant issue (similar to some divorce proceedings) because the value of a company can change dramatically in short time frames. The larger question, however, is whether or not "fair value" precludes the application of discounts.

With closely held companies, a discount for lack of marketability is often applied when valuing shares because of the relative difficulty of converting the shares to cash. Relatedly, a discount is also applied when valuing the shares of a minority shareholder because of the difficulty in

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[275] Hetherington & Dooley, *supra* note 35, at 6.

[276] For objections to the mandatory buyout proposal, see Robert W. Hillman, *The Dissatisfied Participant in the Solvent Business Venture: A Consideration of the Relative Permanence of Partnerships and Close Corporations*, 67 MINN. L. REV. 1, 70–72 (1982) (arguing against any assumption that a buyout is painless).

[277] Edwin J. Bradley, *An Analysis of the Model Close Corporation Act and a Proposed Legislative Strategy*, 10 J. CORP. L. 817, 837 (1985).

[278] "[S]hareholders may elect to purchase all shares owned by the petitioning shareholder at the *fair value* of the shares." MODEL BUS. CORP. ACT § 14.34(a) (AM. BAR ASSOC. 2002) (emphasis added).

[279] *See* Moll, *Shareholder Oppression and "Fair Value*,*" supra* note 27, at 310–11.

finding buyers who are willing to purchase such shares.[280] In corporate cases, discounts are routinely applied in buyout situations even when fair-value statutes exist, and minority shareholders are consequently penalized for ownership of shares that are difficult to both value and sell.

Divorce courts have typically understood the basic fairness of applying the valuation discounts only when it benefits the "minority" party. In *McCulloch v. McCulloch*, for example, the trial court awarded the wife 25% of the two family companies and, speaking to the valuation question on appeal, the Rhode Island Supreme Court applied both marketability and illiquidity discounts.[281] Discounts were appropriate, the court stated, not just because they reflected the lower value of these shares but also because they prevented the wife's share of the marital estate from being artificially inflated in value.[282] The court also observed that, "if the trial justice had awarded [the wife] the cash equivalent of her equitable ownership interest in the companies, or if he had crafted some other assignment, such discounts would not be necessary."[283]

In contrast, in *Moore v. Moore*,[284] when the wife retained ownership of the company, the court stated: "[W]e find no justification for discounting the value of Candelabra in this case due to lack of marketability. Because Wife will retain ownership of Candelabra, we see no legitimate reason to indulge in the fiction of a marketability discount."[285] Divorce courts therefore apply marketability discounts variably in order to protect the vulnerable spouse, looking at both the equities of dividing the marital estate as well as the likelihood of share resale.

In the corporate law domain, courts and legislatures should likewise resist the fiction of share resale and focus instead on equitable compensation for the minority shareholder. With these guideposts in sight—and because parties are not seeking to manipulate calculations pertaining to the marital estate—it may well be that "[m]inority and marketability discounts have no place in shareholder oppression

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280 McCulloch v. McCulloch, 69 A.3d 810, 822–23 (R.I. 2013) ("[A] minority shareholder lacks control over the company, and therefore, the value of his or her stock is diluted in comparison to that of a majority shareholder.").

281 *Id.* at 822.

282 In a similar situation, a New Jersey court concluded:

> We see no reason to reward the spouse who holds title to the shares by allowing him to retain the value of the entire bloc at a bargain price . . . . Here, allowing the marketability or minority discounts would unfairly minimize the marital estate to [the wife's] detriment and is inconsistent with the concept of equitable distribution.

Brown v. Brown, 792 A.2d 463, 477 (N.J. Super. Ct. App. Div. 2002).

283 *McCulloch*, 69 A.3d at 822.

284 779 S.E.2d 533, 551 (S.C. 2015).

285 *Id.*

disputes."[286] To this end, statutes should clarify that fair value means "enterprise value" rather than fair market value. Similarly, when faced with "fair value" language, even in the absence of a fair-value statute, courts can and should eliminate discounts if they serve no purpose other than to penalize the minority interest.

2. *A Parting Gift from Harry Winston*

While divorce law is one source of rulemaking expertise, inheritance law provides another. Inheritance law can offer models for corporate law with respect to the standards for enhanced fiduciary duty as well as the intervention of donor intent. The story of the rivalry and prolonged litigation between Harry Winston's sons is a good example and provides lessons for the development of new solutions in corporate law.

Harry Winston, who built the famous Fifth Avenue jewelry company from the ground up into a multimillion-dollar enterprise and locus of prestige, had two sons. The sons, Ronald and Bruce, had different personalities, passions, and aptitudes for work. Harry Winston is reported as having said: "I have two sons . . . one is a genius and one is a moron."[287] Because of these differences, Harry Winston planned his estate such that both sons would receive equal income from the business but Ronald was made one of the trustees of the trust holding the corporate shares while Bruce was not.[288]

Once Harry Winston and his wife died, Ronald undertook to squeeze Bruce out of the company. Ronald terminated Bruce's employment[289] and, at the same time, continued the corporate policy of not paying out any dividends. Bruce was left without any ability to extract value from his shares while Ronald's salary "steadily increased from $248,000.00 in 1979 to $1,138,000 in 1990," despite a decline in corporate profitability.[290]

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286 Moll, *Shareholder Oppression and "Fair Value," supra* note 27, at 318; *see also* Robert C. Art, *supra* note 27, at 405 ("Oregon case law is quite clear. Neither a marketability nor a minority discount should be applied in oppression cases.").

287 Nina Burleigh, *The Trouble with Harry Winston*, N.Y. MAG. (Jan. 18, 1999), http://nymag.com/nymetro/news/bizfinance/biz/features/1028/index2.html [https://perma.cc/X29D-39ZH]; *see also* Karen E. Boxx, *Too Many Tiaras: Conflicting Fiduciary Duties in the Family-Owned Business Context*, 49 HOUS. L. REV. 233, 268–69 (2012). Ronald was the studious son, graduating from Harvard with a chemistry degree before going into the family business. Burleigh, *supra*. Bruce, on the other hand, did not finish college and preferred sailing and the pursuit of leisure. *Id.*

288 Burleigh, *supra* note 287.

289 *In re* Estate of Winston, 631 N.Y.S.2d 999, 1007 (N.Y. Sur. Court 1995), *aff'd sub nom*. *In re* Winston, 636 N.Y.S.2d 635 (N.Y. App. Div. 1995).

290 *Id.* at 1002. During this eleven-year period, the corporation lost money in seven years and showed a profit in only four. *Id.*

Ronald also reorganized stock, over the wishes of the two other trustees and Bruce, such that Bruce's stock was rendered valueless.[291]

In the Surrogate's Court, Ronald argued that "his father's primary objective [in his will] . . . was to provide a mechanism for the 'preservation and perpetuation of the Winston family enterprise' under Ronald's management and control."[292] Furthermore, any "debilitating effect of an in-kind distribution upon the value of Bruce's half share of the trust and his corresponding inability to receive income was anticipated by the decedent as a natural consequence of his estate and business plan."[293] In other words, Ronald argued that he was appropriately exercising his best business judgment in following his father's wishes.

The court saw matters differently. The court concluded that Harry Winston had meant for Ronald to run the business but had also clearly intended to provide equally for the siblings. Consequently, the court stated:

> [F]or Ronald to conclude . . . that Harry intended to vest absolute control of the family enterprise in him for the balance of his career and to subordinate Bruce's inheritance to this alleged dominant and paramount intention . . . is simply not supported by a reasonable construction and interpretation of the Will.[294]

Invoking Ronald's fiduciary duties as a trustee, the court further stated: "The fiduciary responsibilities conferred upon Ronald do not evince Harry's intent to afford him special treatment, but to the contrary, impose on Ronald a special fiduciary obligation of fairness and undivided loyalty in his management of the family business and his dealings with family members."[295]

Faced with the same pattern of oppressive behavior as in the minority shareholder oppression cases, the result here was different for two reasons. First, the fiduciary standard used to evaluate Ronald's behavior was a trust law standard that presented a lower bar for breach than corporate fiduciary duty, especially with respect to self-dealing and conflicted transactions.[296]

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[291] *Id.* at 1003. "This scenario," one scholar has remarked, was "a classic squeeze-out." Boxx, *supra* note 287, at 272. "Ronald held only 50% of the shares, but his voting power over the trust's shares gave him the same power to freeze out Bruce as the extra 1% ownership would have given." *Id.*

[292] *Winston*, 631 N.Y.S.2d at 1004.

[293] *Id.*

[294] *Id.* at 1005.

[295] *Id.* at 1006.

[296] Directors, therefore, may have more discretion than trustees to manage the internal operations of an institution and may be more immune to claims of breach of fiduciary duty. Also, unlike trustees, directors are not subject to a complete prohibition on self-dealing. *See* Allison Anna Tait, *Publicity Rules for Public Trusts*, 33 CARDOZO ARTS & ENT. L.J. 421, 438–39 (2015); *see also* Patty

Traditional fiduciary duty in trust law has also focused on protecting the best interests of the beneficiary, not necessarily on judging the malfeasance of the trustee. This lesson is important for family businesses because business shares are often held and transferred, especially intergenerationally, through trusts.[297] Furthermore, some scholars have suggested that this enhanced standard of fiduciary duty be used in minority oppression cases whenever courts engage in a fiduciary duty analysis.[298] As one commentator has remarked:

> By shifting the inquiry from the beneficiary's best interests to a more limited focus on the fiduciary's malfeasance, these [new fiduciary duty] tests provide greater latitude . . . for corporate fiduciaries to pursue their own interests, and diminish the power of the law to inspire and enforce high standards of business ethics.[299]

A shift back to the traditional trust law framework in all fiduciary duty analyses could, therefore, help minority shareholders.

Second, the positive result for Bruce in the *Winston* case was a product of the court's determination that Winston intended to treat his sons equally, particularly in terms of income. Will construction intervened and provided the template for asset and income management. Although relevant primarily for shares held in trust or transferred by bequest, the *Winston* case suggests a role in these family business cases for the guidance that comes from instructional documents such as will and trust instruments. These documents can serve as evidence of a parent's desire for an equality norm to rule distributions and asset allocation among children, as in the *Winston* case. More broadly, these documents can provide crucial information about family governance that may help shape corporate governance in family businesses. These documents include not only wills and trust instruments but the family "charters" and "constitutions" that wealth management advisors commonly suggest families create to guide generational changes and wealth transfer.[300]

Gerstenblith, *The Fiduciary Duties of Museum Trustees*, 8 COLUM. J. ART & L. 175, 191 (1983**)** (discussing the need for museums directors to better understand problems of self-dealing).

[297] Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 U. PA. L. REV. 1675, 1677 (1990).

[298] *See, e.g.*, *id.*; Robert C. Art, *supra* note 27, at 372–73.

[299] Mitchell, *supra* note 297, at 1677.

[300] *See, e.g.*, BROOKE HARRINGTON, CAPITAL WITHOUT BORDERS: WEALTH MANAGERS AND THE ONE PERCENT 251 (2016) ("[H]igh-net-worth families create written constitutions to govern themselves."); JAMES E. HUGHES JR., FAMILY WEALTH—KEEPING IT IN THE FAMILY: HOW FAMILY MEMBERS AND THEIR ADVISERS PRESERVE HUMAN, INTELLECTUAL, AND FINANCIAL ASSETS FOR GENERATIONS 19 (2004) ("[A] family must form a social compact among its members reflecting its shared values . . . ." (emphasis omitted)).

Inheritance rules, then, can be instructive in determining a fiduciary duty standard for family businesses and may also help unearth information and instructions about a family's vision for its corporate presence.

B. Statutory Reform for Corporate Families

Apart from family law solutions for corporate law reform, there are also corporate statutory reforms that state legislatures can enact to better protect corporate family members based on the specific ways in which family businesses organize and operate. As discussed in Part I, virtually all the states have some kind of statutory protection for minority shareholders on the books, with the notable exception of Delaware.[301] The protections that these statutes offer range greatly. Statutes differ, for example, with respect to standard of liability (e.g., reasonable expectations, fiduciary duty, fraud, and illegality) and what remedies are available. Some states do, however, understand the predicament of corporate family members subject to shareholder oppression. These states provide model statutory language for other states moving forward.[302] In this Section, I suggest several statutory reforms meant to further bolster protection for corporate family members.

1. Working for the Family Business

One statutory reform with the potential to benefit corporate family members in particular entails adding language that protects minority shareholders not just as shareholders but also as directors, officers, and employees. The New Jersey statute, for example, provides for relief if company directors "have acted oppressively or unfairly toward one or more minority shareholders in their capacities as shareholders, directors, officers, or employees."[303] Few other state statutes, however, provide similar protections.[304]

When this language is absent, corporate family members are vulnerable. For example, in *Franchino v. Franchino*, a Michigan court concluded that the minority shareholder oppression statute did not cover employment termination when a father fired his minority shareholder

[301] Matheson & Maler, *supra* note 37, at 683–84.

[302] States with expansive statutes and model language are: Alaska, California, Illinois, Minnesota, New Jersey, North Dakota, and Oregon.

[303] N.J. STAT. ANN. § 14A:12-7 (1988). Discussed *supra* Section I.C.2., analyzing Brenner v. Berkowitz, 634 A.2d 1019, 1027 (N.J. 1993).

[304] Statutes in the following eight states have language similar to the New Jersey statute: ALASKA STAT. § 10.06.628(b)(4) (2015); CAL. CORP. CODE § 1800(b)(4) (West 2015); 805 ILL COMP. STAT. ANN. 5/12.56(a)(3) (2007); LA. STAT. ANN. § 12:1-1435 (2015); MINN. STAT. § 302A.751 (2015); N.D. CENT. CODE § 10-19.1-115(4) (2013); OR. REV. STAT. ANN. § 60.661(2)(b) (West 2015).

son.[305] When the father removed the son from the board of directors and terminated his employment, the son argued that his removal "constituted oppression of his rights as a shareholder because he received the bulk of his share of the corporate profits through his salary and expected to participate in [the company's] management."[306] The court disagreed. The court observed that the statute "only gives rise to a cause of action in cases where a minority shareholder suffered oppression in his capacity as a shareholder."[307] Other state statutes such as New Jersey's, the court mentioned, were drafted in such a way as to protect the rights of not only shareholders but also "directors, officers, or employees."[308] But not Michigan's. Consequently, the court held that the termination, because it did not implicate the son's shareholder rights, was not material to a claim of shareholder oppression.

This type of statutory reform is particularly important because of the ways in which family businesses typically choose to organize. In family businesses, as opposed to public corporations, the expectation of employment is much higher. In these companies, "a more intimate and intense relationship exists between capital and labor,"[309] and family members who are shareholders "usually expect employment and a meaningful role in management."[310] Moreover, many family businesses—Harry Winston, Inc. included—prefer to compensate family members as employees rather than paying dividends.[311] The drafters of the New Jersey statute acknowledged these phenomena directly in the comments to the 1972 amendments, stating: "These [amendments] reflect the fact that in a closely held corporation oppressive conduct often takes the form of freezing-out a minority shareholder by removing him from his various offices or by substantially diminishing his power or compensation."[312]

This statutory fix will not, of course, help all employment cases. Corporate family members will still encounter difficulties overcoming the at-will presumption inherent in most hiring situations, especially in the

[305] 687 N.W.2d 620, 623 (Mich. Ct. App. 2004). In that case, the father owned 69% of the company shares and his son the remaining 31%.

[306] *Id.* at 627.

[307] *Id.* at 630.

[308] *Id.* at 628 (emphasis omitted).

[309] Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 48 BUS. LAW. 699, 702 (1993).

[310] *Id.*

[311] See Nicholls, North, Buse Co. v. Comm'r of Internal Revenue, 56 T.C. 1225, 1227 (T.C. 1971), for such a case, in which plaintiff moved all expenses out of dividends, which he could not deduct.

[312] Matheson & Maler, *supra* note 37, at 666 (quoting N.J. STAT. ANN. § 14A:12-7 cmt. (1972)).

absence of an employment contract or ample evidence that the family member had reasonable expectations for continuing employment. Likewise, when a majority shareholder has a "mixed motive" for terminating the family member, reinstatement or compensation will likely be an uphill battle. These problems point to the difficulties of overcoming the business judgment rule (as well as potential deficiencies in the current understanding of a corporate family member's reasonable expectations).

Nevertheless, recognizing the distinctive ways in which family businesses organize both leadership and labor, legislatures should expand protections past those already available to shareholders and bring board leadership and company management into the fold.

2. Reasonable Family Expectations

The most common among reforms has been states adding the "reasonable expectations" language to their statutes in order to clarify what approach courts should take and how to evaluate oppression claims. The reasonable expectations language and standard has, as one scholar observed, "secured a firm toehold as the basis by which courts determine if minority shareholders are entitled to relief after dissension arises within a close corporation."[313] Currently, approximately twenty states use the reasonable expectations framework to evaluate minority oppression claims.[314]

Going forward, however, the concept of reasonable expectations needs to be sharpened. As one scholar has observed: "The Reasonable Expectations approach depends on the meaning of the word 'reasonable' and, therefore, requires a deeper theory of shareholder rights and obligations."[315] Courts have already recognized that "shareholders' expectations in a close corporation differ from shareholders' expectations in publicly held corporations and may not always be reflected in articles of incorporation, bylaws, shareholders' agreements or other writings."[316] Taking this inquiry one step further, however, it is equally important to understand and determine what the reasonable expectations of a family member are and how they might differ from the reasonable expectations of any other stakeholder. The North Carolina Supreme Court recognized this in a leading reasonable expectations case, stating that reasonable expectations "are to be ascertained by examining the entire history of the

313 Thompson, *Corporate Dissolution*, *supra* note 34, at 216.
314 Matheson & Maler, *supra* note 37, app. (listing states).
315 Means, *A Voice-Based Framework*, *supra* note 33, at 1227.
316 Thompson, *Corporate Dissolution*, *supra* note 313, at 214.

participants' relationship."[317] Understanding family histories and what family members expect based on those relationships helps to construct a theory of shareholder rights based on family status and belonging.

One reasonable expectation of corporate family members is participating in the management and governance of the company. That is to say, corporate family members expect to have a voice in the company's operations. Some courts have recognized this: "[T]he primary expectations of minority shareholders include an active voice in management of the corporation and input as an employee."[318] Family members in particular may expect to have a voice based on the fact that they have voice in the family context and that expectation spills over into the workplace. For these reasons, one scholar has suggested a "voice-based framework" for evaluating minority oppression claims, suggesting that when these shareholders are stripped of the opportunity to have a voice in the company that their oppression claims should receive increased scrutiny.[319]

Similarly, many corporate family members expect to benefit from some type of employment in the family business. Family members help build businesses together, they inherit businesses, and they help out as needed in the collective endeavor. Family businesses often thrive because of the willingness of family members to devote time and energy to the enterprise. Accordingly, "[p]articipants often expect to participate in management and that their contribution will be recognized in the form of salary even though those matters are not contained in any written document."[320] Moreover, because of the common practice in family businesses of not paying dividends and relying on salary to compensate corporate family members, employment takes on increased relevance. In some cases, with Harry Winston and his sons for example, both sons were on the payroll even though one son was not expected to contribute to the company in the same way as the other. Bruce Winston's salary was his benefit, his dividend, his monthly allotment. Employment in the family businesses takes on many meanings and serves multiple purposes. Consequently, lifetime employment may be a reasonable expectation; some form of employment may be a reasonable expectation; and, most importantly, it is likely that these expectations will not be recorded in a

317 Meiselman v. Meiselman, 307 S.E.2d 551, 563 (N.C. 1983).

318 Means, *A Voice-Based Framework*, *supra* note 33, at 1234 n.132 (quoting Pedro v. Pedro, 463 N.W.2d 285, 289 (Minn. Ct. App. 1991)).

319 *Id.* at 1241–42.

320 Thompson, *Corporate Dissolution*, *supra* note 34, at 214.

written agreement in family businesses where the foundation is built on preexisting relationships of trust and understanding.[321]

Ultimately, corporate family members expect to be able to extract value of some kind and in some manner from their shares. Whether through inclusion in governance or on the payroll, corporate family members expect to be a part of not only the family but also the corporation.

CONCLUSION

Legal norms of bargaining embedded in corporate law expect that self-interest and the desire to self-protect will inform the bargaining practices of corporate actors and that these individuals will behave as rational actors. And yet, corporate family members, who populate the majority of businesses, do not bargain the way that corporate law expects. Where does that leave siblings, cousins, children, in-laws, and steprelations? This absence of protections for a particularly vulnerable sector of corporate actors has led to unwelcome results: "Unfair treatment of holders of minority interests in family companies and other closely held corporations by persons in control of those corporations is so widespread that it is a national business scandal."[322] There is, however, a model for asset division at relationship termination that provides financial and legal protections to vulnerable parties based on an alternate understanding of bargaining: family wealth law. Both divorce law and inheritance law safeguard vulnerable spouses when marriage ends, guaranteeing financial benefits and entitlements, because marriage law considers spouses to be overly bounded bargainers. Taking lessons from family wealth law, then, corporate law can learn how to better treat and accommodate corporate family members. Ultimately, weaving together corporate and family law will benefit the millions of happy and unhappy families alike who build organizations, take risks, follow inspiration, and seek fulfillment in the family business.

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[321] *See id.* at 217 (discussing why expectations need not be documented in written instruments).

[322] O'Neal, *supra* note 53, at 121.