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Italy: Of ownership, stewardship and purpose in family businesses—the role of foundations (and trusts)

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ABSTRACT

This article explores the challenges of succession into family businesses, particularly in Italy, where over 70% fail to survive the second generation. It highlights the effects of two alternative approaches: a tactical one, focusing on immediate transfer and tax optimization, and a strategic one, prioritizing the purpose of long-term continuity. The importance of “stewardship” and “purpose” in family businesses is emphasized. Foundations and trusts are the legal tools to dedicate assets to a purpose so that they can engrave upon ownership the features of stewardship. They can functionalize property rights to ensure the continuity and growth of the business as well as the prosperity of the family, reduce family conflicts and promote the coordination of family and business toward a common purpose, but they should not serve as a means to impose the will of the deceased one ‘beyond the grave’.

CHALLENGES IN FAMILY BUSINESS SUCCESSION

In Italy, more than 70% of family businesses do not survive the second generational transition. This statistic represents a crucial challenge.

Succession is one of the most complex and delicate tasks for an entrepreneur. It involves more than the transfer of ownership: it requires the setting of a stable balance between family and business. Many and interconnected issues must be tackled. One might feel overwhelmed by the task and leave everything to chance and hope for the good sense and good faith of the successors in exercising their ownership rights to pursue growth and continuity of the business.

Because of that, the standard Italian approach to succession into family businesses is “tactical”. It encompasses managing the transition in itself: the transfer of shares from one generation to the other, the governance of the family business after the transition, the remuneration of family members not involved in the business and tax savings on this transfer. Under this approach, the focus is on the change of control, not in governing the change in order to ensure that the transferred ownership remains stably dedicated, as a form of stewardship, to the purpose of the success of the family business.

This approach underestimates the fact that the success of the family business over time is a life- and generation-transcending project that requires the cooperation of several generations of family members, born and unborn, to achieve it. The family, considered as an intergenerational community, must contribute to this project. To realize it, family members must act harmoniously, inspired by and dedicated to the purposes of business continuity and growth. Individualistic expectations and egoistic impulses of family members must be subordinated to the achievement of these purposes.

A “strategic” approach prioritizes these goals and aims to “functionalize” family ownership accordingly to ensure that family members behave as “stewards” rather than individual owners driven solely by self-interest.

OWNERSHIP AND STEWARDSHIP

Stewardship is a concept that is well known to family business scholars,¹ less to lawyers.

In family business research, stewardship is about building, nurturing and passing down an enhanced legacy to future generations. It requires clarity of vision, purpose and a family-wide commitment to the idea that common family interests

¹ The relevance of this view is attributed to C Aronoff & J L Ward, *The Critical Value of Stewardship*, 1992 *Nation* 49.

outweigh the interests of individuals. Stewardship also embraces broader concepts like trustworthiness, honesty, and a sense of responsibility.² Reinforcing stewardship is considered essential in any family business. Stewardship requires the idea that the business is a shared asset to be developed for the long-term benefit of the family.

At first sight, it seems to conflict with the legal concept of “ownership”. Indeed, much like in its legal formulation, the concept of ownership inherently carries a sense of individualism and selfishness: the owner is entitled to use the asset to satisfy all his individual needs, and he also may destroy the asset.

While the idea behind legal ownership may suggest to the owner to focus on short-term profits and retain personal control of the business regardless of the economic results reached, stewardship focuses on ensuring the long-term success of the company and the benefits for future generations. By embracing this perspective, family businesses can provide a foundation for lasting growth and prosperity, ensuring that the legacy is passed on to future generations.

Normally, the founder of a family business exercises its ownership with a profound sense of responsibility. He exercises his ownership for a purpose: the continuity and prosperity of the business. Instinctively, he primarily considers the interests of all the stakeholders (employees, suppliers, customers, etc.) of the business and naturally defers his own personal interests. He primarily focuses on the long-term value of the business for his descendants more than on the short-term benefit for himself. As a matter of fact, in doing this, he “self-limits” his ownership and devotes it to these purposes. Only nominally his ownership couples with the model set out in Article 832 of the Italian Civil Code, which describes ownership in terms of a right to “enjoy and dispose” of things, fully and exclusively for the owner’s benefit.

He does not behave as an owner but as a steward.

Specifically, the right of ownership is exercised and enjoyed in a way that differs significantly from the paradigm enshrined in the classical legal conception of property rights. Ownership is closer to the phenomenon of ownership in the interest of others.³

Successors do not naturally adopt the same approach. They inherited the property and did not build the business from scratch. They became owners of the family business because they are “chosen” as heirs. Normally, succession is reminiscent of the coronation: the heirs instinctively feel endowed with the absolute power of the king over the kingdom. Heirs receive absolute property rights over houses, financial assets, pieces of arts, cars, yachts, and shares. Succession affects legal rights. It does not transfer purposes, values, or practices. Therefore, the heirs receive property rights, but not necessarily a sense of stewardship to guide them in exercising their rights. They need to develop it, but they are not obliged to. Normally, they do not adapt their ownership to stewardship in favor of long-term purposes of growth and stability for the family business. Only after a good deal of education and long-term control of the family business do they understand how

essential stewardship is. However, not all family members who received an inheritance will be able or willing to inject a sense of stewardship into the ownership they inherited. Furthermore, the fragmentation and multiplication of family owners make this harder. Often, after succession, self-driven behaviors prevail over the common interests of the family and of the business.

On the contrary, continuity of the family business requires an approach that places the “functionalization” of ownership at the service of the purpose of continuity and value growth of the business in the long term: interests and rights of individual family members should be weighed against the pursuit of such purpose. The real challenge is inducing the successors to embrace the role of stewards and abandon the idea of behaving as absolute owners. More than education and faster than experience, the law is an effective tool for changing individual behavior.⁴ By law, stewardship can be engraved upon ownership. This requires legal instruments that can anchor policies, principles, and standards for administration and engrave them in the ownership.

The crucial point in family businesses, therefore, is supporting the entrepreneur in identifying those policies, principles, standards and values and in choosing the legal tools to ensure that these principles are applied over time in the exercise of the property rights. These policies, principles, and values rooted in the past must be able to evolve to promote stewardship in the future with a certain degree of freedom, which in any case must be exercised with a deep sense of responsibility toward the heritage that has been received and its conservation for the next generation. Once this is done, the answers in terms of management, leadership, and organization will follow and be simpler. Each situation is unique, and in practice, different approaches are adopted, often without a clear rationale.

TRANSFER OF OWNERSHIP IN FAMILY BUSINESS SUCCESSION IN ITALY: GIFTS, FAMILY PACTS, AND WILLS

As mentioned before, in Italy, a tactical approach is widespread. Clients and practitioners concentrate exclusively on the transfer of shares and stocks of the family business from one generation to the other.

Such an approach works in situations where the boundaries of the problems are defined by straightforward facts. For example, consider the case of an entrepreneur with only one adult child already involved in the family business.

Donations (gifts) can be used to transfer shares and stocks. Under Italian law, donations are contracts and several types of conditions can be imposed in them.

With the donation, the transfer of ownership can be carried out immediately, during the entrepreneur’s lifetime, while if the entrepreneur wishes to continue running the business for as long as possible, they can regulate the transition by means a will that takes effect upon death or by retaining the usufruct right to the shares.

² IFB Research Foundation, Family Business Challenges, Developing Stewardship, 1, www.familybusinessuk.org/wp-content/uploads/2023/09/Developing-Stewardship.pdf.

³ A Saturno, *La proprietà nell'interesse altrui*, Napoli 1999, 145 e ss.

⁴ World Health Organization, Changing cultural and social norms supportive of violent behaviour, 2009.

However, normally, the facts are more complex. For example, if there are several descendants and not all wish or are apt to be involved in the business, a decision has to be made about who should run the company, and there may not be enough money to pay out the others. Under the Italian forced heirship rules, the close relatives of the entrepreneur must receive a reserved share in case of his succession. If one of the descendants who does not take over the company claims a breach of his reserved share, this could affect the stability of the company's management and operations.

To balance these situations, the law has recently intervened by introducing a new contract: the “family pact” (*Patto di famiglia*).⁵ With the family pact, the business is transferred to one child, while the others are financially compensated or can renounce to liquidation, waiving any rights and actions for the reserved share in the family business. This solution makes the ownership in the business more stable for the future, but it might require a significant financial outlay to compensate the other children and the spouse.

In all these situations, the transition must be managed anew by each generation, and the same problems may arise with each transition, without any guarantee that one of the descendants taking over the family business will run it with the aim of growth and continuity, rather than drawing on its value to satisfy individual needs.

TRANSFER OF STEWARDSHIP IN FAMILY BUSINESS SUCCESSION IN ITALY: FOUNDATIONS AND TRUSTS

As we have seen, the tactical approach cannot be sufficient in certain cases. It is never possible to ensure the long-term continuity of the family business, as it leaves many “empty spaces” in which individuality, egoism, life cycles, and fate can create occasions or opportunities for disruptive conflict. To prevent wasting values, these “empty spaces” need to be filled with principles, standards, values, and purposes.

For businesses with intricate family dynamics and/or long-term objectives of continuity and growth, a strategic approach may be necessary. This approach involves planning to ensure the stability of the business across multiple generational transitions. Therefore, a mix of traditional legal tools with more sophisticated “cross-generational” solutions, such as trusts and foundations, is crucial for managing ownership and governance in a stable and lasting manner.⁶

Transforming ownership into steward-ownership therefore requires, from a legal point of view, its stable configuration and its functionalization to a purpose through appropriate legal tools, unknown to corporate law. A company or a corporation—even if it is used as a holding company—does not involve any idea of property configuration or functionalization. As Pierre Lepaule emphasized more than a century ago, in corporate law the idea

of functionalization of ownership to a purpose has only a strictly limited field defined by what can be put in the by-laws. Hence, the adaptation and functionalization of property for a specific purpose requires different legal tools, but legal instruments are still required to allocate the assets to a specific purpose.⁷

Foundations⁸ and trusts⁹ are the instruments for dedicating shares and stocks of a family business to a purpose.

Policies, principles, standards, and values promoting efficient business continuity and growth can be embodied in the legal documents regulating the operation of the trust or the foundation. In this case, ownership is configured across generations, which serves the purpose of continuity, as the trustees or foundation board are obliged to follow them.

Trusts or foundations can be used to place the ownership of the shares and stocks in the family business under the control of a trustee or foundation board responsible for managing them according to the directives set out in the trust or foundation deed, balancing the interests of both the business and the family, after planning their needs in parallel. Conflicts between family members cannot interfere with the governance of the family business and its prosperity, because no individual family member holds shareholders' rights. In this way, the impact of family conflicts is reduced and disagreements among family members do not affect the realization of the continuity and growth of the business, as individual members are deprived of tools they can use to impose their own individual views.

The trustee(s) or the foundation board operate independently of the will of individual family members, but according to precise guidelines. The benefits derived from the business, such as dividends, can be partially maintained in the trust fund or in the foundation to finance future needs of the family business, partially used to ensure the well-being of family members and, if the family so wishes, partially applied to charitable purposes or sustainable development goals.¹⁰

Depending on the intended distribution model, different types of foundations (private or public purposes) or trusts can be used. When adapting property in terms of stewardship and its functionalization for a specific purpose, trusts or foundations can be used in different roles. They may hold the entire ownership rights in the family business or only the majority or the controlling voting rights. Economic rights can be split into the direct or indirect ownership of the family and that of the trust or foundation. Each steward-ownership model serves a different purpose depending on the company's goals, mission, and legal framework.¹¹ Several examples of these types of structure can be found around the world.¹²

Italian law regulates domestic foundations under the Civil Code (Articles 14, 15, 16, 18, 25, 28, 42 bis), the Decree of The President of the Republic 361/2000, and under the Legislative Decree 117/2017. Italy recognizes trusts under the 1985 Hague Convention on the Recognition of Trusts and

⁵ Art. 768-bis of Italian Civil Code.

⁶ These instruments effectively avoid “multiple succession” to the assets. Since, as already mentioned, Italian law does not permit the “compression” of the expectations of certain heirs, their “strategic” use limits the risk of claims against the first heir and stabilizes the company for the future.

⁷ P Lepaule, *An Outsider's Viewpoint of the Nature of Trusts*, 14 Cornell L. Rev. 52 (1928)

⁸ C Priele (ed.), *Development in Foundation Law in Europe*, 2014.

⁹ The idea that the trust can be considered as asset dedicated to a purpose can be traced to P Lepaule, *Traité Théorique et Pratique des Trusts en Droit Interne, en Droit Fiscal et en Droit International*, Paris, 1932. On the modernity of Lepaule's view, see R Valsan, *Trusts and Patrimonies*, Edimburg, 2015.

¹⁰ <https://www.undp.org/sustainable-development-goals>

¹¹ For examples of models of stewardship-ownership structures, see <https://purpose-economy.org/en/whats-steward-ownership/>

¹² Bosch (Germany), Patagonia (US), Globus (Germany), Novo Nordisk (Denmark), Zeiss (Germany), Carlsberg (Denmark), Ecosia (Germany), Sharetribe (Finland), Wildplastic (Germany).

foreign foundations under Article 25 of the Law 31 Maggio 1995, n. 218. Under Italian tax law, foreign private foundations are treated like trusts.¹³ A significant tax exemption applies to the transfer of control of the business to a descendant of the founder¹⁴ even if this transfer occurs through a trustee or family foundation. Transfers to foundation with a public purpose can be exempted from estate and gift tax.

CONCLUSION: “PURPOSE”, RATHER THAN IMPOSING WILLS ‘BEYOND THE GRAVE’

Property rights have always had a relational dimension, and this implies the existence of a community, but sometimes this dimension implies relations between generation and an intergenerational community.¹⁵

If we recognize that the family is an intergenerational community and the family business is a life-transcending project of such a community, it follows that the transfer of ownership from one generation to the other should go together with the imposition of obligations relating to such a process. The general obligation is to provide future generations with the basic material conditions necessary to carry out life-transcending projects relating to the family business that their forebears’ ancestors have transmitted.¹⁶ Each generation should accept such life-transcending projects and make reasonable efforts to carry those projects forward into the future. They are based on the fact that the members of the previous generation are dependent on their successors so that the projects can be continued. In substance, family business founders give property rights in the family business to their successors expecting that they will make all reasonable efforts to carry out such life transcending projects.

In terms of family business language, this means that, in the long term they expect that family members be transformed from owners to stewards for this purpose.

In legal terms, this presupposes that the property is affected by and dedicated to a purpose.

Foundations and trust are “tools par excellence” to achieve this: hence, they are the proper tool to transform ownership into stewardship.

Purpose is the guiding principle for their operation; standards, policies, rules of stewardship can be embodied in the trust deed and in the foundations deed of incorporation.

Foundations and trusts should be tools to promote stewardship and to ensure the flourishing of the family business over time, but not to exercise the will of the deceased one beyond the grave.

When family business founders transfer their family business into foundations and trusts, they extend the duration of the foundation for very long periods of time, over many generations of future beneficiaries who are given only limited autonomy in the projects.

In these cases, the founder’s aim is to control the family business project for many generations after his death, rather than to promote the continuity, well-being and growth of the family and business. A classic problematic example of restrictions imposed by the founder or settlor in a foundation or trust are prohibitions on the sale of the family business that was originally transferred and later loses value, jeopardizing the interests of the beneficiaries.

In these cases, the settlor usually regards the family business as a “personal” project and merely wants this project to be continued in the interests of his personal symbolic continuity and not in the interests of the prosperity of the family business and the family. A good example of this problem is the case of Joseph Pulitzer’s testamentary trust.

Pulitzer, after whom the prestigious American journalism prizes are named, left a will that entrusted the majority of his shares in the family business he founded and owned to his trustees under a trust established for the benefit of his sons.

Pulitzer’s will explicitly forbade the trustees the sale of the family business “under any circumstances whatsoever ...” He further elaborated on his reasoning, emphasizing that the family business was his life’s most significant undertaking.

Years after Pulitzer’s death, the family business lost revenues leading to a significant decrease in the value of its stocks.

The trustees petitioned the court for permission to sell the stock, arguing that unforeseen changes in circumstances threatened to undermine the trust’s primary purpose: benefiting Pulitzer’s sons.

The court ruled in favor of the trustees, asserting that it had the inherent authority to address emergencies that could lead to the complete loss of the trust’s assets. Regarding Pulitzer’s express prohibition on selling the shares, the court remarked, “A man of his [Pulitzer’s] sagacity and business ability could not have intended that ... out of mere vanity, the publication of the newspapers, with which his name and efforts were associated, should be continued until the entire trust asset was destroyed or wrecked by bankruptcy or dissolution”.

In this case, the family business was certainly a life-transcending project of Joseph Pulitzer, as his restriction clearly shows, but his project was not based on the prosperity of the family over generations, but on his own personal project based on vanity. However, the court denied that this personal project was binding and would override the wording of the trust deed.

This underscores the idea that foundations and trusts are useful tools to promote purpose and stewardship and align the needs of the family and the business so that the family and the family business thrive but should not be used to further the personal and selfish objectives of the founder or settlor.

¹³ In the following text, what is referred to “trust” is therefore applicable also to Private Law Foreign Foundations.

¹⁴ Article 3, paragraph 2 of Law No. 383/2001.

¹⁵ G S Alexander & E M Penalver, *Properties of Community*, 10 *Theoretical Inq. L.* 127 (2009); S Kreiczler-Levy, *Past and Present: The Dialectics of Property*, 29 *CORNELL J. L. & PUB. POL’Y* 607 (2020).

¹⁶ G S Alexander, *Intergenerational Communities*, 8 *L. & ETHICS HUM. RTS.* 21 (2014).

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