

## Chapter 128: Business Insolvency

By Scott B. Fleming

More of our clients are encountering business insolvency proceedings outside of the Federal Bankruptcy Code, 11 USC §101 *et seq.* These proceedings are conducted under Chapter 128 of the Wisconsin Statutes, are commonly known as Chapter 128 Receiverships and offer both advantages and disadvantages over Federal Bankruptcy.

A federal business bankruptcy is conducted under a fully developed set of statutes, rules and case law capable of addressing all the issues and circumstances arising out of either a liquidation, a sale of all assets and the distribution of the net proceeds to the creditors, or a Chapter 11 reorganization, a business restructuring and continuation. Chapter 128 Receiverships are more limited. For example, unlike a Federal Bankruptcy, Chapter 128 receivers can only sell the assets of a secured creditor if the secured creditor consents to participate in the proceeding and reorganizations are not permitted. However, Federal Bankruptcy proceedings can be both lengthy and expensive. Chapter 128 Receiverships can also move more quickly and at a much lower cost. Chapter 128 Receiverships can be used for the sale of the business as a going concern where such sale will achieve a greater benefit for creditors. For

these reasons, Chapter 128 Receiverships are frequently used by banks who hold a first position security interest in most of the Debtor's assets and are looking for quick action. Frequently such action comes in the form of an auction after the receiver insures that all potentially interested bidders are notified.

Chapter 128 Receiverships can be filed voluntarily by the business in question or involuntarily by its creditors. A Chapter 128 Receivership is commenced by filing a petition for the appointment of a receiver in the circuit court where the business is located. As in a Federal Bankruptcy, the filing of the petition acts as a stay of existing litigation and other collection efforts. Once a receiver is appointed, he/she may oversee operations of the business for a limited period and prepare for the sale of the business as a going concern or liquidation of its assets. The receiver acts under the supervision of the circuit court, which must approve a final disposition of assets. The business does not receive a discharge of its debts.

One substantive difference between a Chapter 128 Receivership and Federal Bankruptcy that some of you may have encountered has to do with the receiver's right to recover preferences from creditors. Preferences are

transfers or payments for existing debt prior to the filing of the insolvency proceeding. The purpose of preference recovery is to prevent the debtor from preferring one set of creditors over another by choosing who to pay before going insolvent. Any such preference can be recovered and equitably distributed among all creditors. Chapter 128 preference law extends the receiver's reach to payments to non-insiders made within 120 days of the date of filing, where under Federal Bankruptcy the period is 90 days. However, Chapter 128 preference law makes it much more difficult for the receiver to recover as he/she must prove the recipient intended the payments to effect a preference or actually put the creditor in a better position than other creditors. This presents a big advantage to any party defending a state court preference claim.

Chapter 128 Receiverships can be quicker and less expensive for business insolvencies where the assets are being liquidated or the business sold as a going concern with the consent of the secured creditors. In most other business insolvencies, Federal Bankruptcy Law presents the only viable alternative. Our clients need to be aware of the differences between the two sets of laws as they may significantly affect their rights.

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## Starting a Business - Choose Your Entity Wisely

By Mark W. Siler



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A friend of mine recently lost his job and has been looking for new employment for several months without much success. This lack of success led him to explore the prospect of starting his own business. This idea has been in the back of his mind for quite some time, however, the comfort afforded him by his old job was too good to let go. With that comfort gone, he is willing to take the risk that comes with starting a new business. He came to me and asked if I could help him set up an LLC (Limited Liability Company) to operate his business. The first question I asked him was why he had chosen an LLC. His response: the LLC is the easiest to set up. While an LLC is easy to form and is a useful entity, the assumption that the LLC is the proper entity in all cases can lead to difficulties for a new business in the future.

In the current economy, my friend's story is not an uncommon one because, as people lose their jobs and have trouble finding new employment, many will use the circumstances as an opportunity to explore starting their own businesses. Generally, those individuals will set up a new entity to operate the business. Seemingly simple, choosing the correct business entity can be difficult without a clear idea of your business goals, and making the correct choice can be paramount to a new business's success.

While there is no simple checklist for determining which entity is best for a new business, having a clear vision of the short term and long term business goals will lead the new owner a long way to choosing the appropriate business entity.

A new business can be operated using several business entities including sole proprietorships, partnerships, limited liability companies and corporations. Each entity has its own advantages and disadvantages and determining which is appropriate for a new business depends on the business the new owner plans to undertake.

When determining the appropriate entity for their businesses, new owners raise several common concerns. Which entity will provide the greatest protection from personal liability? How will I be paid? Which entity provides the best personal tax results? These are all important concerns; however, focusing on personal questions makes choosing an entity more difficult because the owner is not concentrating on business needs. More important than personal concerns are short and long term business goals. Understanding these business goals will generally lead to the proper entity choice.

To determine the short and long term goals for the

new business, some issues to take into account are: what type of business is being operated? Is it an active business or a passive investment business (e.g. holding investment real estate)? Will the business be selling goods (or providing services)? Will all of the investors in the company manage the day-to-day operations of the business or will there be passive investors? Do the owners have an exit strategy or vision for the future? Is the owner attempting to avoid self-employment tax?

Understanding the short and long term goals of the business will help the new owner avoid the mistake of choosing an entity for personal reasons before taking into account the needs of the business. Rather than choosing and forming an entity to calm personal concerns, compile a list of short and long term visions for the business. Armed with that information, the new owner should consult with an attorney and allow him or her to help you make a final decision on the appropriate entity with a clear view of the specific needs of the business. **WBB**

## Transfer of the Family Cottage: How do you get this done?

By David J. Roettgers

The transferring of the family cottage requires planning and a lot of discussion to come up with what will work now, as well as into the future. Before the planning begins, there are 3 basic questions that need to be asked:

- Do the parents want the family cottage to be transferred to the next generation?
- Does the next generation want to participate in the ownership (and the responsibilities) of the family cottage?
- Why should we do a plan now?

In answering the question - Why should we do a plan now? It is probably better to consider what could happen without a plan. Without a plan, the ownership of the cottage could be based upon a tenancy in common. Under tenancy in common a family member would own an undivided interest in the whole with no predetermined rules for dealing with the management of the cottage. For example, each family member, would, among other rights, (i) have the right to use the cottage at any time, (ii) have the right to sell his/her ownership interest to any other party, and (iii) at least potentially, the right to partition the property and cause a sale or division of the cottage. All of these problems and more could be resolved by

planning and properly documenting the terms of ownership of the cottage.

Typically, the parents that want the family cottage to be transferred to the next generation consider the importance of Family, Opportunity, and Memories. Family takes into consideration whether the parents want to have a place for their children to gather and maintain the family bonds. Opportunity can be described as the parents desire to provide an opportunity for all family members to have a private place outside their normal lives to be together. Memories relate to the parents desire to maintain great memories and have a place for more memories to be formed for generations to come.

In addition to the positives of transferring the family cottage to the next generation, parents must also consider the potential concerns of a transfer. These concerns include: Can the kids get along? Can the kids afford to maintain the cottage? What happens if someone wants out? Each of these is a valid concern; however, each of these concerns can be addressed in a well drafted agreement.

Assuming the parents want the family cottage to be transferred to the next generation, it is also important to determine whether the next generation wants to participate in the ownership. Do not

assume everyone wants the same thing. Some children may want to have their inheritance in money or other property rather than an interest in the family cottage. The children may not want to deal as "partners" with their siblings or they may decide, for financial reasons, that they cannot participate in the ownership. Owning a cottage certainly has benefits, but there are also responsibilities and costs.

Assuming the parents and the siblings choose to participate in the ownership of the cottage, there are numerous issues that need to be addressed. The most significant of these issues are financial issues of ownership, management of the cottage and the transfer of an interest in the cottage. The financial issues include: How do we fund the real estate taxes, maintenance, utilities, etc.? In addition, what happens if a child is an owner and later cannot afford the cottage?

The management of the cottage includes decisions concerning usage, maintenance and repairs, and improvements. With respect to use: Who gets the holidays? Are there time slots? Is it first come first serve? Are pets allowed?

With respect to the transfer of an interest in the cottage, can anyone sell their interest to another family member? Is there an agreed upon value and terms for payment if some-



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one wants to sell? What happens on death or divorce?

This article is intended to raise numerous questions. The answers to the questions must be decided by the parents and the family. There are no easy answers: That's why planning is so important.

Finally, as for *my* parents family cottage: still in process. We are down to some final issues that should hopefully be resolved in the near future. Luckily we know what questions to ask. **WBB**



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**Comments?** We'd like to hear from you. Please send an email to the editor: Megan Wiseman at [reporter@wbb-law.com](mailto:reporter@wbb-law.com).

### **AT THE FIRM...**

WBB welcomes **Sandy Swartzberg** to the firm. Bringing with him over thirty year's expertise in business law and estate planning, Sandy is a great addition to the team. A corporate strategist and IT pioneer, he was recently named 2011 winner of the Midwest Business Brokers and Intermediaries Collaboration Award. Sandy has hit the ground running and invites you to check out his blog, *Conversations With Sam* - which delves into the intersection of business and legal issues with family.

This spring, **Charles R. Stone** will be teaching *Organizational Development, East and West*, in Chinese, at an affiliate of Peking University Business School in Beijing, China.

Registration for the upcoming Business and Real Estate Conference 2012 will be opening up on our website soon. We're trying something different this year - a new location and a new format.

Watch the WBB website for further information or contact Megan Wiseman, 414-270-2559 ([mkw@wbb-law.com](mailto:mkw@wbb-law.com))

### **2012 Schedule of Events**

#### **REAL ESTATE CONFERENCE April 18, 2012**

To be held at the  
Westmoor Country Club at  
400 South Moorland Road,  
Brookfield.

#### **ESTATE PLANNING CONFERENCE June 5, 2012**

#### **30TH ANNUAL TAX & BUSINESS SEMINAR September 26, 2012**

#### **EMPLOYMENT LAW CONFERENCE October 17, 2012**

To be held at the Wisconsin Club at  
900 W. Wisconsin Ave., Milwaukee.

Please check our website  
([wbb-law.com](http://wbb-law.com)) for more event  
information.