Burns & Levinson LLP

If You Will®

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SHORT TAKES ON ESTATES, TAXES AND TRUSTS

WHAT WE CAN LEARN FROM MARKET BASKET

By Christine Fletcher, Partner - Private Client Group

We have all watched as the Market Basket family and business dispute has played out in the media – customers protesting, employees on strike and secret family meetings behind closed doors. What began as a small family grocery store in Lowell, Massachusetts nearly 100 years ago has grown to 71 stores and 25,000 employees, and we have all been witness to its struggles over the years. One can't help but wonder whether those struggles could have been prevented with better succession planning. Market Basket's story illustrates the importance of doing everything possible to facilitate a smooth transition from one generation to the next.

Formulating and Executing a Succession Plan to Avoid Disruption and Disaster

As lawyers, we know all about the mishaps that can damage or destroy a closely-held business. Following are three typical scenarios that can change the fortunes of business owners, their partners and their families, along with some tips for proactive solutions that should be considered by current and future business owners.

1. Just a Little Too Late. It is not uncommon for the founder of a business to be so occupied with running the business that he or she has little time to think about ultimately selling or transitioning the business in the future. Years (sometimes decades) go by without any legal planning, and then the owner wants to sell the business to fund retirement and leave an inheritance to the next generation. Unfortunately, just as buyers line up to bid for the business, the owner suffers a stroke or becomes incapacitated for some other reason. In this situation, no one has the legal authority to manage or sell the business, making it necessary to seek a legal guardianship, which can take significant time and expense to obtain while the business is wasting.

Proactive Solution: Before it is too late, the business owner should make sure all the necessary documents are in place to allow a successor manager to be able to run the day-to-day operations of the business and to give control of the ownership of the company to the appropriate person in the event that something unforeseen happens to the owner. For instance, if the corporate structure is a limited liability company, the business operating agreement can name a successor manager and the ownership interest can be transferred to a trust, designating a successor trustee and directing the trustee how to transfer the business in the event of the owner's untimely death or incapacity.

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WHO NEEDS ESTATE PLANNING?

For many people, the value of an estate plan will far exceed its cost due to tax savings. Furthermore, estate planning is not just for individuals who have a net worth in excess of state or federal exemptions (currently set at $1 million for MA, and $5.34 million for the U.S., but subject to change). The following people can greatly benefit from estate planning with experienced legal counsel:

- Individuals or couples who have dependents or beneficiaries with special needs.
- Adoptive parents, who need to make special provisions for inheritance that differ from state law provisions applicable to those without a legally enforceable plan.
- Other non-traditional families, such as those of unmarried couples or domestic partners.
- Married persons who have previous spouses or children from a prior marriage.
- Those who have special charitable goals.
- Those who have ownership shares in a closely held business that could suffer grave disruption from an inheritance battle or significant death taxes on their estates. Such people can benefit from a well-structured agreement providing for life insurance on key owners in amounts adequate to fund the purchase of the decedent's shares, according to valuations set by agreement.

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2. Documents? What Documents? Generally speaking, business partners agree to handle the operation or sale of their business according to various corporate documents. These documents are normally formulated at or near the inception of the business. As time goes by, the partners sometimes begin running the company according to ad hoc oral agreements that vary with the terms of their original documents. They even agree orally on what to do with the business if a partner wants to sell, dies or becomes incapacitated. Unfortunately, none of their oral amendments to their original agreements have been memorialized in writing.

This situation is more common than you might think, and it can result in devastation when an event that is controlled by the legal documents rather than their oral understandings occurs. The affected parties might not be able to legally accomplish the results they intend after the fact, or might not be able to do so without significant expense. If one of the partners is not getting along with the others, the result can be worse, checkmating everyone's moves and stalling all business decisions.

Proactive Solution: This problem can be avoided with a periodic check-up to insure that all organizational documents and understandings of the parties are "in sync." A good lawyer can also update the parties on changes in the law that might facilitate the accomplishment of their objectives in newer, more effective and less expensive ways. It is relatively easy and painless.

3. 'Til Death, Disability or Feud Do Us Part. When two or more young entrepreneurs launch a business venture, they are rightfully focused on growing it successfully. They are not focused on passing their business interests to future heirs who may not even exist yet. So they execute some standard form documents, providing for dissolution or buy-out if one of the partners can no longer participate in the venture. They may even fund the buy-out agreement with a nominal amount of life insurance purchased by the company. But after the passage of years, the value of the company grows while the amount of the insurance coverage remains stagnate. Further, the formula to value the business in the buy-out agreement no longer accurately reflects the value of the company. One owner suddenly dies and his or her spouse is left feuding with the remaining business partner over how the company will be valued and where the funds will come from to fund the buy-out.

Proactive Solution: A solid buy-out agreement should be in place from the start, and it should be funded with adequate life insurance. The buy-out agreement and the life insurance should be reviewed by the company's attorneys and insurance advisors on a regular basis to ensure that both the agreement and insurance are adequate and reflect the parties' intentions.

So dust off those corporate records, grab your estate plan from the desk drawer and bring them in for review. With proper business succession planning, you can ensure a smooth transition in the event of life's uncertainty and keep your family business out of the media spotlight.

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Burns & Levinson is a full-service law firm with over 125 attorneys based in Boston. The firm has grown steadily and strategically throughout the years and has become a premier law firm with regional, national and international clientele. In addition, the firm has a wholly owned subsidiary office in Montreal, Quebec, to service its Canadian clients.

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