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Five Commandments Of Family-Owned Business Divorce

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In a fit of rage, a man hurls a cell phone at his grandson, violently striking him in the chest.[1] An elderly woman prepares to flee the country to prevent her daughter from managing a cent of her multi-billion dollar fortune.[2] A man shoots his brother to death at point blank range. He then turns the gun on himself.[3] Apparently quite displeased with the way his uncle was treating him and running the family's well-known diner, a New Jersey man was recently charged with "putting out a hit" on his uncle (and allegedly directing the hitman to torture the uncle before killing him).[4]

No, these are not storylines from a scripted drama. These events played out on the real life stage and were the direct result of family-owned business disputes that spiraled out of control. Take the Gucci family, for instance. Maurizio Gucci, who inherited half of the family business after his father died in 1983, was forced to sell his shares in the family business after repeated losses, thus depriving his children of any inheritance and angering his ex-wife Patrizia. The result? In a sequence of events befitting a tragic Italian opera, Maurizio was murdered at the hands of an assassin hired by Patrizia and she was sentenced to 29 years in prison.[5]

As the foregoing "ripped from the headlines" events illustrate, family-owned business disputes contain all of the hallmarks of a compelling melodrama: greed, envy, long-simmering rivalries, vengeance. It is shocking, then, that although family-owned businesses account for 90 percent of all businesses in the United States,[6] only 29 percent of family firms have adopted procedures for resolving conflicts between family members.[7]

The consequences of intra-family battles can be utterly disastrous. Often the combatants are siblings who fight after the family patriarch or matriarch dies. The business often involves valuable real estate. The assets of the enterprise are usually significant, but can be dissipated rapidly if the parties litigate the matter emotionally and without regard for reasonable business judgment, which happens frequently. In family business divorces, the parties have known each other for their entire lives and therefore have more ammunition, much of which includes or implicates the parent whose death opened the floodgates of discord.

All of this makes for some very interesting cases in the business divorce arena. This area of the law is constantly evolving and growing, especially in New York. Successfully navigating this quagmire, especially in the family-owned business divorce context, requires a multitude of talents. A good business divorce lawyer must be an excellent litigator, negotiator, and psychologist, and a very trusted confidante. It is challenging work. Allow the following five commandments to be your guide.

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Commandment 1: Understand the unique challenges that are inherent to

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the family-owned business structure. Navigating the complexities of the cutthroat corporate world is a demanding undertaking in and of itself, and this Herculean task is further complicated when workplace values and family values intersect. The subjective expectations that individuals have of their family members—to be unconditionally supportive, nurturing, and understanding—do not comport with the objective business goals of maximizing efficiency and focusing on the "bottom line." This tension creates a host of problems that are unique to family-owned businesses.

First, meritocratic principles are often abandoned in favor of an egalitarian business model, which can lead to inefficient corporate governance and deep-seated familial resentments.

Second, emotional issues in a family system often influence decision-making in a business system. Professor Benjamin Means focuses his legal scholarship on family business systems and explains the role of social identity theory in this context:

> [W]e find our way in different social environments by relying upon roles that help us to define our place and our responsibilities. For most of us, our workplace identity is very different from the role that we play in family life. But in a family business, role separation becomes more difficult…. The expectations that we have of members of our family—that we put the family's interests first, that we take care of each other—may conflict with the goal of maximizing economic return in a business. To the extent social roles are incompatible, family business has a built-in conflict.[8]

Third, many family-owned businesses do not have business succession plans in place. In fact, roughly 30 percent of family-owned businesses survive into the second generation, only 12 percent are still viable into the third generation, and a mere 3 percent of all family businesses operate into the fourth generation or beyond.[9] This lack of planning and foresight can result in a veritable field day when power is up for grabs and often culminates in the ultimate destruction of the business. This area is thus rife with litigation.

Commandment 2: Develop a solid grasp of the most common causes of family business conflicts. Learn "the 5 C's." Dr. James W. Lea has identified the following five causes of destructive family business conflicts: compensation, competitiveness, control, confusion, and carry-over.[10] Since the root of conflict in family-owned businesses usually has more to do with the breakdown of personal relationships than with any insurmountable disagreement concerning business matters, it is essential that business divorce lawyers understand the psychology behind these disputes in order to provide the best possible representation to their clients.

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Compensation: As Dr. Thomas D. Davidow, psychologist and family business consultant, explains:

> Money—attitudes towards it and behavior surrounding it—is often the symptom of family members' discomfort and almost always represents underlying issues that exist within the family system. Money and how it is treated within the family system can send messages of fairness or lack thereof, disappointment, unfulfilled expectations, acceptance, love and the most powerful negative message—rejection.[11]

Compensation-based conflict takes on many forms, such as disputes over actual or perceived salary inequities and squabbles over who has the power to make compensation decisions. The one common denominator, however, is that these disputes are a destabilizing force that wreaks absolute havoc on family businesses.

Competitiveness: While it comes as no surprise that sibling rivalries run rampant in the family business landscape, an oft-overlooked form of competitiveness exists between generations and has the potential to be catastrophic to the fiber of the family. According to Lea:

> It's natural for children to try to model themselves after their parents and also to try very hard to differentiate themselves from their parents. Sons want to succeed like their fathers, even to be more successful, but they want to succeed in a way completely different from their fathers' way. Daughters who love their mothers and happily turn to them for personal advice refuse to be identified with their mothers' manners, traditions and values when it comes to business. Such competitive conflicts open gulfs between siblings and between parents and children that may over time, if they're left untreated, be impossible to bridge.

Control: There are many reasons why the senior generation in a family business may not cede control to younger members of the family. In some cases, parents may not trust their children's abilities to run the business competently. In other cases, parents may thwart any true succession from taking place because they are simply unwilling to relinquish control, even when their vision, ideas, and management styles have gone stale, thereby preventing younger members of the family from working their way up to leadership roles. This lack of autonomy can be so stifling for younger members of the business that they walk away for good, thus ensuring the eventual collapse of the entire enterprise.

Confusion: Lea contends that "[c]onflict is born of confusion when there is a failure of communication, or a reluctance to introduce and abide by systematic management processes, or a lack of transparency in the way the business is run and the reasons for running it that way." When there is a lack of certainty as it pertains to job duties, expectations, and aspirations for the future, a total breakdown of communication occurs and the resulting assumptions are toxic to the business atmosphere and the interpersonal relations of family members.

Carry-over: Carry-over conflict arises when family members do not forgive past transgressions. Instead of viewing one another as equals, these family members view each other through a static lens and perceptions become locked in time. For example, sometimes even the most prudent and successful business person can be unable to forgive a family member for mean-spirited comments that were made decades ago, thus sparking an ongoing, emotionally-fueled grudge match. This creates a perpetual cycle of conflict that is psychologically and emotionally exhausting.

Commandment 3: Be acutely aware of the emotional and interpersonal dynamics at play. As litigators, our focus is generally across the aisle (or, in the case of a negotiation, across the table) because, as zealous advocates, we want to outwit and outsmart the opposition so that we may gain the best tactical advantage for our client. However, when representing a party that is embroiled in a family-owned business divorce, it is imperative to pay close attention to what is happening on your side of the room.

In this context, the lawyer must analyze the issues from a professional perspective *and* through an empathetic lens. This is a delicate balance to achieve. To this end, it is absolutely crucial to unearth the impetus for your client's positions. What emotional stage is your client experiencing with regard to the business divorce? Blaming the other party? Denial? Mourning the loss of the business? Anger? Bargaining? Depression? A combination of the above? How do these emotions color your client's demands and inform your client's worldview? Business divorce lawyers should be cognizant of the fact that these emotional states are fluid. Your client's perception of family relationships may shift and permutate on a daily, or sometimes even hourly, basis.

The effectiveness of your representation in a family-owned business divorce hinges on your ability to manage your client's emotions and expectations throughout the representation, and this often requires you to keep a closer eye on your client than your adversary.

Commandment 4: When formulating a legal strategy, it is imperative to determine whether your client has any desire to salvage the familial relationship. The reality is that, all too often, intra-family rivalries, feuds, jealousy, selfishness, and greed are simply insurmountable. An essential inquiry for any attorney representing a party in a family-owned business divorce case is whether your client wants to salvage the familial relationship or whether the relationship has been irreparably damaged and your client is out for blood. The answer to this question often dictates the legal strategy that is employed: full-scale litigation warfare or negotiation.

In the litigation context, there is a "winner" and a "loser," which has the potential to exacerbate family rifts and, in many cases, permanently damage the relationship. After confirming that your client understands the potential lifelong ramifications of pursuing this route, the central inquiry is: "How much money are you willing to pay to punish and aggravate your family member?" While this notion may be offensive to some, the stark reality is that certain people do not want to keep family ties intact, and it is our duty as attorneys to provide effective representation for our clients, up to and including full-scale, five-alarm, scorched earth litigation.

It should be noted, however, that courts can be especially sensitive to tactics employed in scorched earth litigation that involves familial relationships. For example, Ronald Perelman, a billionaire, was engaged in a dispute with his ex-wife's family, whose large family business, Hudson Media, is known for newspaper and magazine distribution. In a "rare and stinging rebuke," a New Jersey judge sanctioned two law firms for improper conduct during the litigation. More specifically, Perelman attempted to have his father-in-law declared incompetent, and the judge in the case characterized Perelman's attorneys' cross-examination of the father-in-law as "harsh" and "painful." The judge then ordered astronomical sanctions that could potentially range in the millions.[12]

At the other end of the spectrum lies the strategy of negotiating a business agreement in an atmosphere that is devoid of all emotion. The main focus of this strategy is developing a plan to achieve an efficient result whereby the parties resolve their business issues while maintaining positive, productive family relationships. Negotiation grants the parties autonomy to craft a resolution that both sides can live with, and another upside of this approach is that it allows for relief that a court simply cannot order. A key to the success of this approach is to employ a skilled intermediary who is sincere and credible with both sides.

Commandment 5: Focus on the "children." In the family-owned business divorce context, the "children" are the entity's buildings, assets, corporations, and subsidiaries. Effective advocacy in the business divorce context involves progressive thinking about how to leverage the children to your client's advantage.

This can cause some difficult encounters between attorney and client. In many—indeed most—business divorces, the "best interests of the children" are overlooked by angry family members who typically have enough wealth to tell their lawyers "I'm already rich so do it my way (or I'll find someone else who will) and I don't really care if it diminishes the value of our assets as long as it hurts my idiot brother." A truly skilled business divorce lawyer finds a way to manage this tricky dynamic. Basic reverse psychology can be very effective. Telling a wealthy business divorce combatant that he or she must do something intelligent—and not emotional—doesn't usually go so well. Suggesting, however, that it's okay to do something dumb sometimes causes the person to do the smart thing (and protect the assets of the business).

Conclusion

An effective business divorce lawyer is thoughtfully proactive, not reactive, and most importantly understands—and pays attention to—the unique family psychological dynamic that drives these cases.

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