Lowenstein Sandler's Trusts & Estates Podcast: Splitting Heirs

Episode 15:
All in the Family: Succession Issues in Family-Owned Businesses

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Warren Racusin: Welcome to the Lowenstein Sandler podcast series. Before we begin, please take a moment to subscribe to our podcast series at lowenstein.com/podcasts. Or find us on Amazon Music, Apple Podcasts, Audible, iHeartRadio, Spotify, Soundcloud or YouTube. Now let's take a listen.

Warren Racusin: Sometimes the client's story has so many facets that it deserves more than one episode. You might remember our client who came to New York from Italy with nothing but $24 in his pocket and a dream and built one of the most successful retail businesses in the country. A few episodes ago, we talked about how his ongoing love for his native soil and the tax planning that's necessary to have your heart and your property in more than one country.

But the business he built here was a family business, a unique animal, and boy, did he have a unique way of planning for it. When I first met him, he had a will, but he told me that he wanted to prepare a codicil, an amendment to the will that he'd used to bequeath control of his company to his children at his death. But he didn't want to name the child who would get it. He told me that he wanted to leave the name blank until he was on his deathbed so that he could decide at that point, and at that point only, which of his children had given him the most, wait for it, respect.

I was able to talk him down off that cliff by telling him we needed to look at his entire estate plan, the pieces of the business, and decide what made the most sense. But he never got a chance to do that. Shortly after my first meeting, he died suddenly. And his will, which had been done years before, left his entire estate, including the business and a trust for the benefit of his wife naming his trustee, the one child of his who wasn't involved in the business at all and who hated her siblings who were running the company. What could possibly go wrong?

From the law firm, Lowenstein Sandler, this is Splitting Heirs. I'm Warren Racusin. Got a lot to unpack here today, but we've got some really good unpackers to help us do that. My partner, Nick San Filippo, has been practicing law for almost 30 years, and he's represented entrepreneurs, often family-owned businesses serving as their strategic advisor or their outside general counsel and deal counsel. That's exposed him to hundreds of unique business disputes between parents and children, between siblings, lifelong friends, paternity brothers, sorority sisters, and the list goes on and on.

And the frequency of those disputes led Nick to create and co-lead Lowenstein's Business Divorce group, a multi-discipline group of attorneys who regularly lead business owners through the high-stakes battles between business partners. And Jeff Savlov. Jeff's, a partner in Blum & Savlov, a family business and wealth consulting firm. Jeff himself grew up in his family's commercial printing business, groomed himself in the corporate world outside of his family business, and then studied family and group dynamics before treating as a family therapist and psychoanalyst.

He speaks and writes and consult in the US and beyond and works with families sharing businesses to maintain family harmony and build a high-functioning family team while continuing their successful wealth creation and making generational transitions. All wonderful goals, but life can get in the way sometimes. So let's look at the view from 10,000 feet. Nick, you've said that there are a number of common themes that run through family businesses and common themes that create common issues and common problems. Let's talk about those a little bit so we get ourselves oriented to what the issues are that we have to deal with.

Nick San Filippo: Yeah, I often start... What I see often, I should say, is a general unwillingness to put the time and effort to unpack and document all of the most likely issues that are associated with family business ownership. And they all become particularly important and highlighted after the matriarch or the patriarch passes away, leaving it to the next generation, and essentially leaving this void in governance with things not specifically spelled out, not talked about in advance of the passing of the leader. And as a result of that, invariably, there's going to be conflict. And that's where we come in in the hopes of trying to clean up the conflict, avoid a litigation and find the right solution that balances appropriately the business interests and the family interests.

Warren Racusin: And Jeff, those issues, those fault lines in the family, talk to us a little bit about those. A family business, somebody once said, "Family business is equal parts family and business, and sometimes maybe not even so equally." Talk us through generally what kind of issues come up, particularly when you're dealing with somebody like our client who built the business from nothing.

He's the founder, he's the visionary, or she is the founder and the visionary. What kind of emotional and psychological issues do you have to deal with or confront or focus on? And why don't people want to talk about governance and succession, all the things that Nick touched on? Why don't they want to talk about them while the founder's alive?

Jeff Savlov: Well, it is changing. There's a real movement in the last 30 years for families to develop family governance and to take a real long-term view. So as opposed to 50 years ago where you're on your deathbed, like your client that you described, and then people find out who's going to run the company and who's going to get what, families are really taking a long-term view. And they're really having a lot of open communication to try to look at, "What are the different scenarios? And how do we want to be as a family?"

Every family is complicated, I like to say. When there's no wealth, when there's no business, family is complicated all on its own. When you have family and wealth, family and business combined, it's a lot more complicated. So while some people say you need to separate out the family issues from the business issues, I say that you can separate them out. You need to manage the interplay between them. And so something that's really becoming popular in the world of family business and family wealth, and where I really focus is governance.

Not so much governance for the business or the operating entity, which is really important, but governance for families, formal meetings and formal structures for how the family communicates with each other and interfaces with the assets that they own. From a high level, that's what's happening in the field.

Warren Racusin: I agree with you that there has been much more focus on family businesses, family governance talking about these issues. But we certainly still see reluctance on the part of families, a number of families, many families that we represent to confront these kind of issues. Where does that reluctance come from?

Jeff Savlov: I'm interested, Nick, what you have to say, but in my experience, they're afraid that it's going to make things worse if they talk about the different conflicting viewpoints and issues and feelings about: who's going to be a leadership? Who's going to get ownership? And how much ownership are they going to get? And what are the percentages going to be? Who's good at what? For example, if you want your business and your wealth to flourish, you need people who are competent to be involved in managing and making decisions about it.

And not everybody in a family, not all siblings or all cousins have the same level of competence. And so families are hesitant to have real discussions about who deserves to be a leader and who doesn't, who's competent to make decisions with other professionals about the family's wealth communicating with the rest of the family, but maybe who's not competent. And that can really cause a lot of conflict and pain in families that they'd rather avoid. The truth is avoiding it usually causes a lot more pain for the family and the business and the wealth than if you try to tackle this in an intentional way.

Warren Racusin: Nick, do you see that also?

Nick San Filippo: Yeah. To pick up on Jeff's point, when a new client comes in and they want to talk about succession, they want to talk about governance, there's the parent in the business owning the business and they have children in the business. I can almost invariably gauge who's actually going to move forward and get everything right and actually put the hard work in to get the documents right, to have the hard conversations that Jeff's talking about, and those that are going to start a process and not finish it.

And invariably, the barometer comes down to how close were they to a family business through a friend or a contact, colleague that blew up as a result of a failure to address these issues. The closer in relative proximity they've been and they've witnessed what happens when you don't do this right, that greatly enhances the chances of them actually putting the time, the effort, and going through the angst that Jeff just described, and having those difficult conversations, and actually getting to a proper and well-thought-out solution.

Almost invariably, people think it's a great idea, but unless they've had some level of a close to experience with what happens when you don't do this right, so many of them, they start the process, and they never conclude it because of exactly what Jeff said. They get to a point where they actually have to have one or more difficult conversations. Those conversations don't go according to plan, they cause a little bit more acrimony.

And instead of finishing it and getting through the hard discussions and getting it down onto paper, they throw their hands up and they say, "I don't want to have to deal with this. Let somebody else deal with this after I die." Candidly, that's really what happens.

Warren Racusin: And so unless they've seen or experienced firsthand through friends or other business relationships, the horror story of what happens if it goes wrong, they may fall back on the notion that you said, Nick, is that we're a family, we don't need documents, right?

Nick San Filippo: Absolutely. One of the things that I often hear because I'm a golfer is this guy I'm golfing with is going through this process with his brother, or with his father, or with his sister, or with his mother. And they're doing it because of another experience that somebody else in the foursome had in terms of a bad experience. You need that proximity.

You need to see the angst and how it hurts the business, how it hurts the family, how much more costly it is not only from a mental anguish, but from a legal fee and accounting fee perspective to do this all after the fact when everybody's fighting with each other. Doing it when everybody's in good health and everybody can rationally engage in difficult conversations is key.

Warren Racusin: Nick, I've seen all that also, and for me, golf is much more a business development exercise than an athletic endeavor. It is very easy for me to play business golf and let the client win. It comes naturally. Jeff, you had a thought you wanted to jump in on.

Jeff Savlov: Yeah, just to join in what Nick was saying, I can often come into a family system situation and see who are the competent family members who've had the education, the background, the development. They paid their dues and can really do a good job with the leadership that the family needs on the family side as well as the business financial side. And often, that family member doesn't have the power within the family itself.

As an example, I worked with a really large construction company recently, and everyone thought the firstborn of all the cousins in the cousin generation, where it really gets complicated, was just going to be the president going forward. He was the firstborn. He had been told since he was six or seven years old. Imagine telling a six or seven-year-old, "You're going to be president one day." People don't forget this. This guy was 40 years old. He never forgot that he's been told since he was six or seven he's going to be president.

They brought me in to coach him and guide him and develop him. And the truth was he did not have the skills and was really a toxic cancer, as the non-family executives described him, to the company. And they were just avoiding speaking that truth. And I helped the family speak that truth and it was really, really brutal.

So where Nick, you and I can see, and Warren, I imagine you too, you can see sometimes who is in a position to be the next leader and get things done and who isn't. Often, the family's not ready to tell that person because of the emotional family dynamics part of it. And that can be really tricky, to your question, Warren, of why do people avoid this stuff?

Warren Racusin: Right. And we're going to come back and talk about that in a few minutes when we talk about some tools for dealing with these kinds of situations. Talk to me also a little bit, because I know the answer to this question's going to be yes. But you must have seen, because I know we do, situations of which one of the other issues is that the founder of the business, the visionary, the person who started it, has a hard time letting go. Talk to us about how that works.

Jeff Savlov: Yeah, it's pretty common. The kind of personality of an entrepreneur, it's energetic, it's believing in your own decisions, trusting your gut, making tough decisions and just moving ahead. That's a different skill set than developing a family culture where a family's going to own things together. I like to say that family business, family wealth is a team sport, and some people in families are singles tennis players, right?

An entrepreneur is more of a singles tennis player, and family business is more of a hockey scenario where you're really interrelated. And so the personality of an entrepreneur, not always, but the majority of entrepreneurs have one personality. And it's very different than the personality style that it takes to really make a generational transition from parents to kids, which isn't nearly as difficult as when those kids get married to people from other families with other cultures, and then they have kids which are really different in a lot of ways, and that takes a special kind of leadership.

Warren Racusin: We find, and I'm sure, Nick, you back this up, is the visionary, the person, the singles player, Jeff, that you talked about is often or sometimes or certainly, it's not unusual to see those people who almost view the business as one of their children, if not their most important child. And that creates all kinds of psychological and emotional issues that have been working their way through the family for years, right? Nick, I'm sure you've seen situations like that.

Nick San Filippo: Without a doubt. My feeling on that entrepreneur owner who is the visionary is I take a tactic candidly with all my entrepreneur-owned clients that we need to define what a successful entrepreneur is. And I define a successful entrepreneur as someone who could build a business that does not need him or her. And to me, the goal of every entrepreneur should be building that business that does not need him or her.

And when you have family members in the business that are capable of taking on all or a part of the executive leadership, that training them and grooming them to be able to do that is the most important job of that entrepreneur owner, to be able to get to the point where they can make a decision: do the family members that are in the business have the ability?

And if they don't have the ability, supplementing the executive team with outsiders so that one way or another, whether it's all family, it's all outsiders, or it's a hybrid of executives from inside the family and outside the family that could run this business without the founder. And that should be the constant goal of every founder. And that's irrespective of whether the founder is 30 with no children in the business, 40 with young children coming up, 50, 60, 70 or 80.

Because whether you're going to pass it on to your next generation or whether you want to sell the business, the highest and best value of that business is going to be achieved, and the business will be tremendously de-risked once it could be operated without the founder.

Warren Racusin: And after you explain that to the founder, and he smacks you across the face, does he or she start listening to you and come around and realize that that really makes some sense?

Nick San Filippo: What I find with founders and entrepreneur owners is that they tend to surround themselves in their friend groups with similarly situated people that also own businesses. And when you start talking to them about essentially managing themselves out of a position, they start looking at their friend group or even their industry group, and they realize that those that are most successful in their friend group, in their business or in their industry group have done exactly that.

And those that can achieve getting the business to operate without them are living much more fulfilling lives because they could step away from the business. When you open up their mind to seeing the business and their goals of the business in a different way, they could start seeing that not only could this business continue to generate free cash flow, but I could also be enjoying myself. I could be going on vacation, I could be golfing, I could be doing other things. And that their highest and best use of their time is to mentor that next generation of leadership to essentially manage themselves out of a position.

Warren Racusin: Let's talk about some tools. Nick, I'm going to go out on a limb here and say that when you first meet with a new family business client, one of the first questions, if not the first question you'll ask is, is there a shareholders' agreement in place? Talk to us a little bit about shareholders agreements, what they can do, what kind of features they can have that can navigate the issues that we've been talking about and what can happen if there isn't a shareholders' agreement?

Nick San Filippo: Sure, I'll try to do that quickly. Certainly, if there's more than one owner in the business, and when they come to me as a new client, I'd certainly ask whether they have a shareholders' agreement. Every business that has more than one owner should have a shareholders' agreement.

If they don't have a shareholders' agreement, principally, because there's a single owner, but their estate plan, which I will also always ask about, contemplates them leaving the equity of the business to more than one child or more than one beneficiary. I then also ask, "Okay. Well, you're going to go from single ownership yourself to multiple owners. Let's talk about the shareholders' agreement that should be attached to your will that your children, who are going to inherit the business, must sign prior to inheriting the equity of the business."

The shareholders' agreement will ultimately address governance, who leads the business, will address how people who are in the business get paid, will address how distribution should be made out of the business to cover taxes and to distribute profits. It will handle how equity can be transferred or whether it cannot be transferred outside of the family. It could also address who has the right to force the sale of the company. And also, if there's a bad actor. Someone has equity and they're a bad actor, they're acting in contravention of the best interest of the business. How do we get that person's equity back?

There's a whole host of issues, and it's a process into and of itself to get a shareholders' agreement in place. But for any business that has more than one owner or will have more than one owner in the future, neglecting to have that shareholders' agreement in place is just a recipe for litigation at some point in time in the future.

Warren Racusin: And so what can happen without a shareholders agreement is the situation that we confronted here where you have a vindictive sibling who, all of a sudden, controls the business because she's the trustee of the trust that owns the stock of the business, unboundaried by any agreements, any understandings about governance, about pay, about selling the company, et cetera. She essentially has complete control and can do whatever she wants.

There may be remedies of law, but now, when you talk about remedies of law, that's a fancy way of saying you're lurching towards litigation to resolve these issues. All those things: who's going to run the company? Who's going to inherit the company? How compensation is going to be dealt with? All of that can be handled through a well-drafted shareholders' agreement. And if you don't handle that, you open the door to a world of problems like we have here, right?

Nick San Filippo: Without a doubt. In the instance we have here, I would say it's very likely that the two siblings that are running the business, if an agreement can't be reached with the sibling that's not in the business, the siblings in the business are not going to stay long in the business. They're not going to operate under the thumb of a sibling that they don't have respect for, they don't have a relationship with and has no real understanding of the business.

So absent the three of them being able to come together post the passing of their father in order to come up with a proper governance structure, you're essentially looking at a high degree of likelihood that those two siblings in the business are going to leave. And they're going to essentially say congratulations to the sibling who's running it and who has no idea how to run it, try running it without us.

Warren Racusin: So you're going to end up killing the goose that's been laying the golden eggs.

Nick San Filippo: And not only that, whatever aspect of legacy that the father was hoping for is going to be gone within months of his passing, because he failed to put a structure in place that guarantees the continued success of the business.

Warren Racusin: Co-ownership of a business, a business co-owned by some people who are involved in the company and some people who aren't involved in the company is another recipe for disaster. Jeff, we often advise client to do, wearing my estate planning hat, is to say, "Listen, if it's possible to do this in an equitable way, let the people who are running the business own the business, or inherit the business and compensate the people who aren't in the business in some other way with other assets, with life insurance, et cetera." Do you see that as a way out for situations like this?

Jeff Savlov: When families come to me, they're really concerned about the family piece as much or more so than even the business. And so that's really their main concern. And there are families for whom that works. Let's buy out the siblings or the cousins that don't really offer anything to the business, and let's have ownership of the business be in the hands of people who are really contributing.

Some families want the ownership to go to everybody in the family and future generations. And that really comes down to governance and education is a form of family governance, and really getting non-working, non-voting owners to understand what does it mean to have ownership in a business where you don't have a vote necessarily, where you're not working there. And developing a culture in the family where you have regular meetings and communication to explain to those folks who are not going to be working owners, what does it mean?

What kind of information do they have access to? What kind of power do they have or not have when it comes to making decisions about the business? If the idea is to not be giving the kinds of dividends that people could live off of without having to work, if the founders want to avoid that, they can make that clear so that expectations are in line with what the owner's looking to do.

So I don't think there's any one right way or wrong way. It's about looking at the family. What are they trying to accomplish? And again, remember when they come to me, I'm not an attorney. They're looking to really keep a strong, harmonious family along with a healthy business. And so sometimes having ownership in the hands of people who don't work there, but getting really clear about what that means.

And just another quick thought that I wanted to add to what Nick said, if that's okay, I have families come to me all the time where the documents are done, and the will and the estate plan is done and the shareholder agreement is there, but it doesn't fit for the reality of who the family members are. I have two siblings now. The older sibling is all documented up to get the majority of the ownership and control and all this stuff.

And it is perfectly clear to everyone, even the founder, to his dismay, that it's the younger sibling, that this business is going to fall apart without the younger sibling, who's now angry that they're getting compensated less, they're getting less ownership, and they know that the business can't survive without them. So even when you do these documents, which are absolutely necessary and important, there has to be a fit between the documents and the plan, and then the ability of the family members and then the culture of the family, if that makes sense.

Warren Racusin: Right. As we often say, and we've said many times in this podcast series, communication is key and there's no one size that fits all. Because again, in a perfect world, or as perfect as we can get it, the people who run the business should own the business. The other people who aren't going to run the business should get other assets, and good fences make good neighbors. If that doesn't work, if the family doesn't want that to work, if the family wants everybody to be an owner, then there's got to be clear communication.

Because you're right, Jeff. You touched on it, the goals of the owner, of the people who are running the business, which is to make the business grow and thrive and possibly reinvest earnings so that the business continues to grow are a different set of goals than the non-working owners whose goals may well be to get distributions out of the company so they can live.

And each side is right, and each side has interests that need to be pursued and need to be protected in a reasonable way. And you can only do that with communication and everybody talking this out, what they want, what they need, and creating flexible structures, as you said, so that the documents don't necessarily outgrow or the family doesn't, the business don't outgrow the documents.

Nick San Filippo: I think Jeff's point is also to pull those documents off the shelf every two or three years, because what you drafted two or three years ago could have been absolutely perfect two or three years ago, but life circumstances change. You might be a grandparent for the first time, and now that might change whether the child that you've had that has children is still going to be running the business.

Maybe that person's whole ideology has changed on what he or she wants to do with his life now that they have children. You got to pull them off the shelf. You got to battle test them and make sure that they're still consistent with the current reality. And I also recommend that if anybody put documents together without asking all the deep, penetrating questions that Warren and Jeff have asked and inquired about, and really have we allocated equity appropriately, have we really addressed what everybody's expectations are?

Just because you have a document done doesn't mean that document was done well. So we should really be pulling it out, putting it in front of professionals that are in this space, do it all the time. And candidly, in this situation, answering the first five questions correct is not enough. You really have to answer the first 50 to make sure you're doing this right.

And as you go down the funnel of answering all those questions, what you're going to discover is that as long as you're able to effectively communicate your wants and desires and you're dealing with the right professionals, there's a tremendous amount of creativity that can be put into these documents to accomplish whatever it is that you want.

You just have to be willing to sit, think, and answer questions and provide direction, and the professionals around you will craft something that meets every one of your needs. You just got to put the time in to think, and put the effort in to really figure out what do you really want should something happen to you tomorrow?

Jeff Savlov: Yeah, Nick, I'm glad you said that because that's so true. So many really successful families and entrepreneurs and leaders of these families aren't totally familiar with how things are set up. They need to regularly look at it. And I would say that it's certainly essential to have your good professionals around you, but you're going to be having major effects.

Your decisions are going to have major effects of all kinds on your children. And for really large families, grandchildren, and great-grandchildren, it's important, in my view, and the families I work with really appreciate this mindset of making sure that they have some input. I like to say with these families, a voice does not equal a vote. You can talk deeply with your kids and grandkids as they're older about how this wealth is likely to affect them and what do they want out of it, and incorporate that into a plan.

And so while yes, I agree, you need to definitely take things off the shelf, your documents and look at them, every generation, especially in families that are looking at generational wealth, every generation needs to take a moment to get together as a generation sharing wealth together and say, "What do we want to achieve? Maybe the previous generation was giving dividends to everybody and nobody had to work. Maybe we want kids that have to work and maybe we're going to put more money into the operating business or investments long-term and really make sure that we don't have a culture of family members who never have to get a job." Those kinds of conversations.

Warren Racusin: Nick, what happens if despite everybody's best efforts or not best efforts, this family can't get to yes and things start going south? What kind of protections and rights and laws do family members have that they can rely upon and push to try to protect their interests?

Nick San Filippo: So now we're talking about an instance in which there is no shareholders' agreement or the shareholders' agreement that was drafted as insufficient in some meaningful way and the business has been passed on to the next generation and we have multiple owners. In this situation and in the situation that... in our example where you have one owner who's not involved in the business but making decision and the other two are minority owners, to the extent that they feel aggrieved whether from a governance standpoint, decision-making standpoint, compensation standpoint, for example, maybe the sibling in control starts taking meaningful compensation out of the business because he or she's in control of the business and the other siblings believe that compensation to be unwarranted and unearned, there's a whole bevy of case law that would allow those agreed shareholders to sue their sibling and sue the company over breaches of fiduciary duty, claims of minority oppression.

And candidly, there's a host of law firms out there just waiting, absolutely waiting to represent those aggrieved shareholders because they know that at the end of the day there's a pot of gold at the end of the rainbow because you have this business that's making money. And one way or another, once those claims get asserted, they're going to get resolved through a buyout. They're going to get resolved through some sort of cash settlement, and that litigation will come, you create the atmosphere for them to argue. They'll argue for a little while, but sooner or later, one of them is going to get in touch with one of these attorneys and the litigation ripping apart the business and ultimately ripping apart the family will come.

Warren Racusin: And when things go bad, that's when people like Nick and I make a lot of money. And we're way better off having people other than your business and your family generating that money for us. So it's always a lot less expensive to resolve things amicably than not.

Nick San Filippo: I'll end it with a quick story. Before we had the Business Divorce group at Lowenstein Sandler, we had a group of attorneys, including myself, that went out trying to push the importance of shareholders' agreement, push the importance of partnership agreements. What we learned is that it's very difficult to get business owners to purchase those kind of precautionary legal services. They don't want to put the time, they don't want to ask the questions that Jeff was talking about. They don't want to deal with the acrimony potentially inside the family. And they put it off, put it off, put it off. And as a result, we've really stopped tremendously marketing shareholders agreement despite that they're a fabulous thing and everybody should have one. And we market the business divorce because, so few people do it right, and so few people do it at all. Then they come to us and saying, "I'm aggrieved, what do I do?" And as Warren mentioned, there's a tremendous amount of money to be made by all the professionals in the world of acrimony where we much rather be making our money is keeping the families together.

Warren Racusin: Well, we say sometimes that property is inherited, compensation is earned. And that's a discussion that some families have to have. I think it was Tolstoy who said, "Every happy family is the same. Every unhappy family's unhappy in its own way." We like to deal with happy families, or at least to get them to be happy, because that's better for the family, it's better for the business. It'll also cost them a lot less in professional fees.

And that's okay because we think what's best for the family and best for the client is best for everybody. So listen, thank you to Nick. Thank you to Jeff for a really fascinating discussion. We could spend a lot more time talking about these issues, but hopefully we've given everybody at least a good overview of the stakes here and what people have to deal with and to confront to keep their families and their businesses running smoothly.

Thanks to everybody at Lowenstein Sandler and at Good2bSocial, who make this possible. Thanks mostly to all of you for listening. We'll see you next time. Until then, as we say in these parts, have a good one.

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