

Breaking Up Is Hard to Do... Without Good Documents

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Buy/Sell Basics

- Buy/ sell discussions with multi-owner entities
 - Every client is the next great business team – the next Ben & Jerry
 - Just as likely to be the next Tom & Jerry
- Lawyer plays the role of the spoiler and killjoy
 - Clients admit bad things can happen, but nothing acrimonious
 - Lawyer focuses on the proverbial “bus”
 - Client gets lost in the flood of options
 - Client asks for the “standard” buy/ sell
- Resulting buy/ sell provision
 - Death, disability, divorce, etc.
 - Address exit strategies with right of first refusal and push/pull

Statutory Background

- Definitions
 - Membership Interest – TBOC 1.002(54) – includes a member's share of profits and losses or similar items and the right to receive distributions, but does not include a member's right to participate in management.
 - Partnership Interest – TBOC 1.002(68) – includes a partner's share of profits and losses or similar items and the right to receive distributions, but does not include a partner's right to participate in management.
- Drafting issues
 - Important to distinguish between membership interests/partnership interests and rights as a member/partner.
 - May want to include definitions in buy/sell document

Statutory Background (Cont.)

- Transferability
 - TBOC 101.108
 - ✦ Membership interest may be wholly or partly assigned
 - ✦ Does not entitle assignee to:
 - Participate in management and affairs of LLC
 - Become a member of LLC
 - Exercise any rights of a member of LLC
 - TBOC 153.251
 - ✦ Partnership interest is assignable wholly or partly
 - ✦ Does not entitle the assignee to become, or exercise rights of, a partner
 - ✦ Entitles assignee to be allocated income, gain, loss, deduction, credit, or similar items and to receive distributions to the extent assigned

Statutory Background (Cont.)

- Admission as member/partner
 - TBOC 101.109(b) – assignee of a membership interest is entitled to become a member of the LLC on the approval of all of the LLC's members
 - TBOC 153.253(a) – assignee of a partnership interest, including the partnership interest of a general partner, may become a limited partner if and to the extent
 - ✦ The partnership agreement provides
 - ✦ All partners consent
- Drafting issues
 - Important to distinguish between transferability of membership interests/partnership interests and restrictions on assignment of management rights
 - Pay particular attention if utilizing corporate buy/sell forms where assignee status is not an issue

Right of First Refusal

- Opportunity for non-selling owners to match offer received by selling owner from third party
 - Advantages
 - ✦ Takes advantage of transferability of ownership interests
 - ✦ Simplifies issues related to valuation by allowing third party transaction to set price
 - Disadvantages
 - ✦ Requires there to be a third-party market for the interests
 - Affected by control and assignee issues
 - Is a right of first offer an alternative?
 - ✦ Raises issues on how to match the third party offer
 - Consideration
 - Collateral

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