

# 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 10.1.109(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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