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# Planned and Unplanned Business Transactions

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Thursday, November 5, 2015

Thursday, November 12, 2015



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# Communication

- Understand what your expectations are of your employees
- Communicate expectations to employees
  - Handbook, policies, job descriptions
  - Evaluations
  - Write-ups and other disciplinary tools

# Employment Agreements

- Communicate expectations
- At Will vs. Term
- Restrictive covenants
- Compensation

# Restrictive Covenants

- Non-Compete
- Non-Solicitation
- Confidential Information

# Deferred Compensation Agreements

- A portion of an employee's income is paid at a set date which is later than when it was earned
- Qualifying-401k, profit sharing, pension plans
- Non-Qualifying-Top-Hat Plan-Golden Hand-Cuffs
  - Employer may select employees
  - Tax deferral
  - Vesting schedule

# Internal Transfer of Business Interests

Planned internal transitions – Who should it be?

- Inside the family
  - Is transferee employed by the entity?
    - What is the family member's knowledge of the business operation?
    - How long has the family member been employed by the business?
  - What level of business acumen or sophistication does the family member possess?
  - If the transferee is not employed by entity:
    - Does the family member possess the relevant skills and abilities necessary to purchase and operate the business?
    - Are there other high level management personnel in place to assist if the family member lacks the necessary skills and abilities?
- Outside the family
  - Is there a key employee or management personnel well suited to purchase the entity?



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# Internal Transfer of Business Interests

## Planning for the Unplanned Transitions

- Each entity must have an updated:
  - Shareholder's agreement
  - Operating agreement
  - Limited Partnership agreement
  - Other buy-sell agreement



# Preplanning

## Assemble a Team

- Accountant, attorney, financial professionals, board of advisors, business mentors, spouses, children, etc.
- Obtaining spousal consent
- Review prenuptial or post-nuptial agreements

# Preplanning

## Planning for Business Real Estate

- Title & lien searches for real estate and business assets
- Does seller own real estate where business is currently located?
- Does the entity have a current lease with the seller?
  - If so, what are the terms?
  - Is it desirable to stay at that location or not?
  - Should the lease be renegotiated as part of the business transfer?
- Valuation
  - Agreed value – a recommended exhibit to shareholders, operating, or partnership agreements
  - Alternative - Business appraisal - \$3K -\$40K

# Preplanning

## Structuring the Transaction:

### Asset sale or stock/membership purchase?

- Asset sale (advantage for buyer) – buyer gets the “stuff” (including tangibles and intangibles, but NOT liabilities) to transfer to its own “box”
  - ❑ Seller Disadvantages - may be left with an empty box yet still receive mailings from government agencies, need to file Final Return and Out of Existence Affidavit with Pa. Dep. of Revenue
  - ❑ Buyer Advantages – less risk of hidden/unknown liabilities, retains depreciation, amortization, renewed cost basis, and deductions
- Equity Sale (stock/membership sale) (advantage for seller) – buyer purchases the ownership interest in seller’s “box”
  - ❑ Seller Advantages – simple and generally better tax treatment (LT CG 20%/23.8% vs. 39.6% highest ordinary income tax rate)
  - ❑ Buyer Disadvantages – can’t pick and choose assets, loss of depreciation, amortization, cost basis/deductions.
  - ❑ Buyer Advantages - easier when entity holds licenses – fewer registrations/renewals to complete



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# Preplanning

## Giftting a Portion of the Equity

- Gift equity interest to buyer
- To other family members of the same class (i.e. children, grandchildren) to equalize gift to buyer
- Current Federal Estate Tax Exemption is \$5.43 million, \$10.86 million for married couples (projected to be \$5.45 million and \$10.9 million in 2016)
  - Take advantage of any unused exemption, important for surviving spouse to elect portability by filing IRS 706 upon the death of the first spouse.
- Family Limited Partnership is one strategy for passing business interests to the next generation
  - Discounted value on a limited partnership interest due to lack of business control and difficult valuation means less of a reduction in the gifting parent's Federal Estate Tax Exemption Credit
  - Can be used in conjunction with the Uniform Transfers to Minors Act

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# Who Will be Purchasing Business if not Insider

- Current competitors
- Similar/complementary business(es) seeking to expand breadth of goods and/or services
- New entrants

# The “Getting to Know You” Phase

- Acquaintance and evaluation
- Letter of Intent
- Confidentiality or Nondisclosure Agreement
- Due diligence
- Engage professionals along the way

# How the Deal Will Be Structured

- Stock sale
- Asset sale
- Accountant/Attorney to assess

# Moving to Sales Agreement - Timeline

- Steps/Timeline from beginning to end
- Preparation of the sales agreement
  - Assets purchase agreement terms
  - Stock purchase agreement terms
  - Both will include the structure, detailed terms of the sale, liabilities, obligations, and the ongoing relationship between buyer and seller post-closing, if any



# Draft/Review of Ancillary Documents

- Note(s)
- Security agreements
- Mortgage
- Personal guarantees
- Employment Agreements/Consulting Agreements/Noncompete Agreements
- Bill of sale
- Good standing certificate
- Tax lien certificate
- Resolutions
- Assignments
- Consents
- Legal opinion
- Funds flow memorandum
- Others

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# Timeline Continued

- Negotiations
- Closing
- Post-Closing

# Legal Considerations for Asset Sales

- No legal filing with the PA Department of State relative to the asset purchase
- Bulk sale requirement
- Entity actions – approval
- Owner actions – approval

# Further Legal Considerations

- How will the buyer be paying?
- What will buyer be purchasing?
- Is real estate involved?
- What will buyer be assuming by way of debt?
- Will seller have a role post-closing?
- What will allocations look like?
- Who needs to be notified/consent?

# PA Inheritance Tax

Assessed based on the beneficiaries relationship to the decedent:

Spouse	(0%)
Children and Lineal Descendants	(4.5%)
Siblings	(12%)
Others	(15%)

Inheritance tax made it difficult for beneficiaries receiving valuable farm property or business interests to pay the tax due without liquidating part of the property.





# Family Farm Exemption from PA Inheritance Tax

- Transferred property must be devoted to the business of agriculture for 7 years following the decedent's death.
  - “business of agriculture” does not include recreational activities (fishing, hunting, camping), breeding dogs, fur farming, stockyard and slaughterhouse operations.
- Must produce a minimum yearly gross income of at least \$2,000.
- The property must be transferred to members of the same family (defined broadly to include descendants, brothers and sisters, aunts and uncles, grandkids, or a spouse of any of the foregoing).

# Family Farm Exemption from PA Inheritance Tax

- This exemption can also be used when transferring an agricultural commodity, real estate subject to an agricultural conservation easement, agricultural reserve property, agricultural use property or forest reserve property.
- Certain improvements may be excluded; the exemption applies to the value of the land.



# Qualified Family Owned Business Exemption from PA Inheritance Tax

- Applies to small family businesses (fewer than 50 employees, net book value of less than \$5 million).
- Transferred interest must be continually held by a qualified transferee (spouse, children, nieces and nephews) for seven years.
- Annual certifications need to be filed with the Dep. of Revenue to maintain exemption.
- Exemption cannot be used if the business purpose is management of investments or income-producing assets.





# From “Bruce” to “Caitlyn”

Occasions when a legal entity, whether a business or a nonprofit, changes its name:

- Rebranding or changing identity
- Upon a merger or conversion of entity type (e.g. changing from a general partnership to an LLC)
- When selling all its assets and the purchaser is buying the business name
- When receiving a valid cease and desist for trademark infringement
- When a partner dies, whose name is part of the business name

# PA DOS is not Equal to USPTO

- The Pennsylvania department of state and the United States patent and trademark office are parallel dissimilar systems
- In other words, just because you have registered your business in Pennsylvania does not mean that you own the federal trademark to that name
- Federal trademark clearance is significantly more complex than name availability confirmation in Pennsylvania

# Steps to Change a Legal Entity's Name

- Apply for a fictitious name or submit an amendment to the existing entity's governing documents Pennsylvania to update the name
- The legal authority overseeing this process is the Pennsylvania Department of State
- Pennsylvania Department of State's official forms are all available online at its website
- Tax exempt nonprofits should never change their name without also alerting the IRS to the change
- Because we have seen many mistakes by persons attempting an entity's name change without legal help, we would suggest you use an attorney when you want to change an entity's name

# Some Key Advantages of obtaining a Federal Trademark

- Exclusivity to use that mark in a given commercial niche in the entire United States of America
- Statutory damages plus attorneys fees for “willful infringement”
- Constructive notice – notice of your claim of ownership and evidence of ownership
- Jurisdiction of federal courts may be invoked
- Evidences rights for the purposes of scrutinizing debt or sale of those rights
- Superior status for website recognition

# Cybersquatting and ICANN

- Cybersquatting generally
- Mechanisms to combat Cybersquatting
  - Litigation
  - ICANN (Internet Corporation of Assigned Names and Numbers) Arbitration – Favors trademark registrant of active brand

# Obtaining a Federal Trademark (Application Support and Prosecution)

- Searching - Mark clearance
- Application with USPTO
- Examining Attorney review
- Publication for opposition
- Opposition period – 30 days
- Registration

# Federal Trademark “First Use” Evidence

If you would consider applying to the USPTO to federally register your trademark to your entity’s name, save evidence of when you first used that name

- A trademark is a designator of the origin of your goods or services, which designator usually is your entity's name
- For the sale of goods or services under your trademark of your entity's name
- “First use in commerce” is the trigger for USPTO jurisdiction, because nothing is “federal” here unless there is “interstate commerce”
- “Commerce” is entry into buying or selling transactions, or advertising for that
- “Evidence” includes published ads, business cards, signage, pamphlets or leaflets, even websites that show “commerce” occurring (e.g. a way to purchase)



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# Why Register a Federal Trademark at the USPTO

**"Offense"** -- to stake your territory, to assert expansion territory across the US, to obtain a website domain name that someone has registered but is not using, to stop a confusingly similar mark from being used by another

**"Defense"** -- to avoid C&D letters from others, to avoid losing a website domain, to discourage competitors from passing themselves off as you

**Benefits** -- statutory damages for willful trademark infringement means \$150,000 plus attorney's fees potential recovery in a federal lawsuit brought by you against an infringer, clear certification of your rights, simpler to sell your "goodwill" as an asset when certified in a federal trademark



# If you receive a C&D Letter

- Contact your attorney!
- A Cease & Desist letter is not a court order, but is written by an attorney familiar with intellectual property laws
- “Confusing similarity” to another trademark is the trigger for infringement
- You cannot infringe a brand unless that brand is actually trademarkable (areas of argument are personal names, descriptive activities of operations or goods, or a word or phrase that is incapable of being exclusively claimed)
- Often results in compromise, not lawsuit
- Compromise can mean:
  - A "consent agreement" to split territories, customers, product lines or types of business
  - Neither party registers at the USPTO
  - One party ceases all use

# Trademark Junk Mail

- Many services advertise to "help" businesses or organizations with trademark matters
- Beware recurring service fees
- Advantages of "grassroots monitoring"
- Contact your attorney before using an unfamiliar trademark service

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QUESTIONS & ANSWERS

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