

Business Divorce: An Overview

By Robert A. Galanter, Esq.

When co-owners of a business enterprise can no longer work together, for whatever reason, one of the most difficult areas of law comes into play - Business Divorce. The causes are many and include, but are not limited to: differences in opinion on what direction the business should take; financial problems magnifying smaller disagreements; differences in management style; general dislike of each other; retirement; unequal work loads but equal pay; and in the worst cases, theft by one of the co-owners. In addition to the myriad of legal problems posed, these issues are usually highly personal, making business divorce emotionally charged.

The causes behind a business divorce may lead to resentment, anger and even desire for retribution. Theft is the most volatile of these situations and brings into play emotions such as betrayal of trust and feelings of "stupidity" for not having discovered the wrongful actions sooner. These feelings can be exacerbated by justification from the accused when confronted with the evidence: "I did most of the work and deserved the money." "I was the one who brought in all of the business and I wasn't being fairly compensated," etc. These "faux" justifications generally throw fuel on the fire and deepen the anger and resentment of the injured party. At this point, counsel must try to calm things down and find a solution which will not only financially compensate for the harm done but also not cause further financial harm. Unfortunately, the emotional damage never completely heals.

The second order of business for counsel is to examine the corporate documents in place which may help to direct the resolution of matters. For the various types of entities, this will include Corporate By-Laws, if a corporation; Operating Agreement if an LLC; or Partnership Agreement if a General or Limited Partnership. A Shareholder Agreement may include paragraphs on rights of first refusal, retirement, or valuation on buyout. Any existing Employment Agreement with confidentiality, non-solicitation and non-compete provisions may also be considered. In addition to existing documents, counsel must consider estate issues (in retirement situations) and tax implications of any Buy/Sell Agreement.

Pennsylvania statutory law provides two choices if the Civil Courts are chosen as the battleground: dissolution of the business enterprise or the appointment of a custodian to operate the business. In my opinion, neither of these choices may be optimal. Losing the business completely or turning it over to a third party seems excessively punitive to all parties. Especially in cases of "theft", the innocent party in particular winds up

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suffering compounded harm if either is chosen.

Alternate strategies include mediation, election of a neutral director or hiring of an outside management consultant. Mediation uses a third party mediator who tries to find an amicable solution to the problem during one or more negotiating sessions. A neutral director of the corporation can be elected to break ties in a stalemate situation between 50-50 corporate shareholders. Another alternative is to agree on an outside management consultant to resolve conflicts. Should none of these options be acceptable, the Corporate/LLC/Partnership Attorney may be used to negotiate an agreement where one party buys the other out. However, counsel must make full disclosure that he/she can not represent the interest of one party against the other and that each Partner/Shareholder may be best served to have separate representation. In the event that legal action must be taken, separate counsel for each combatant must be employed and corporate counsel retains representation of the interest of the corporation.