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TOPIC: Flawed Buy-Sell Implementation Leads to Litigation

CITATION: [Broederdorf v. Bacheler](#), No. 15-2117 (U.S.D.C. E.D.PA. Sept 14, 2015).

SUMMARY: Amy Bosich was the founder and sole owner of Flying Nurses International (FNI). Robert Bacheler has been an employee of FNI since 2007.

In 2011, Bosich and Bacheler entered into an agreement that gave Bacheler a right of first refusal to purchase FNI upon the death of Bosich. To fund Bacheler's potential right to purchase under the agreement, Bacheler owned and was beneficiary of a policy insuring Bosich's life.

Bosich died in September of 2014, and Bacheler received the \$1 million death benefit from the insurance policy, but declined to exercise the purchase option for the company. Bosich's estate administrator, David Broederdorf, sued Bacheler under a number of different legal theories.

The federal court in Pennsylvania refused to dismiss the complaint, permitting the lawsuit to proceed.

RELEVANCE: The facts in this case illustrate a situation that might be tailor-made for a one-way buy-sell implementation. Under a one-way buy-sell, the 100% owner of a company promises to sell the business for an agreed price to a key employee in the event of the owner's death. The key employee, in turn, promises to buy the company at the agreed price at the owner's death.

The parties in this case decided NOT to make the buy-sell agreement's buyout mandatory in the event of the owner's death. That fact, by itself, might not have led to litigation. However, they allowed the key employee to be owner and beneficiary of a policy insuring the owner's life and gave him the right to change the beneficiary of the policy to himself, without the owner's consent, even if he did not exercise his option. When the owner died, the key employee collected and kept the proceeds - *without* exercising his right to complete the buyout. The decedent's heirs, presumably frustrated by that fact, are suing the key employee in an attempt to get the insurance proceeds. The case is ongoing and the litigation meter is running.

This decision reminds us that a successful buy-sell implementation requires the client, the agent, and the client's tax and legal professionals to work together. It would have been easy to prevent this kind of dispute, if there had either been a required purchase or the owner of the business had been the owner of the policy.

FACTS: The original agreement for FNI was drafted in September of 2011, and it gave Bacheler a right of first refusal to purchase FNI upon the death of Bosich. It also provided for Bacheler to purchase a life insurance policy on Bosich as a means of paying for the purchase of FNI:

A life insurance policy in an amount to be determined in the Sole Member's sole and absolute discretion may be initiated within sixty (60) days of the adoption of this Company Agreement. This life insurance policy shall be payable to the Sole Member's estate as all or a portion of the purchasing funds required for Mr. Bacheler to purchase the Sole Member's membership interests in the Company. In order to use the life insurance policy to cover all or a portion of the purchase price for the Sole Member's membership interests, Robert Bacheler shall pay any and all premiums due on such policy during its term. In the event that Robert Bacheler waives his right of first refusal and another buyer is found to purchase the Sole Member's membership interests in the Company, Robert Bacheler shall be reimbursed for the premium payments made for such life insurance policy.

Bacheler signed a page on at the end of the agreement which read:

In light of the importance of the specified parties' cooperation in implementation of the succession plan set forth in Article 14 of this Company Agreement to ensure the continuous operation of the Company and transfer of the Sole Member's membership interest in the Company the undersigned hereby join in and consent to the provisions of this Company Agreement. Such joinder and consent shall not be [sic] affect the powers of the Sole Member nor restrict the Sole Member from modifying the terms of this Company Agreement in her sole and absolute discretion.

Bosich applied for a life insurance policy in the amount of \$1 million on April 20, 2012. In applying for the policy, Bosich designated "Amy Bosich's Estate" as the primary beneficiary of the policy in accordance with the Original Agreement. Broederdorf was designated the contingent beneficiary of the life insurance policy.

Finally, Bosich had Bacheler sign the application as the owner of the policy. The \$1 million insurance policy on the life of Bosich was issued shortly thereafter. Bacheler paid the advance premium for the policy and all subsequent premium payments.

In September of 2014, the original buyout agreement added the following amendment:

A life insurance policy has been put in place, which is payable to the Sole Member's estate as all or a portion of the purchasing funds required for Robert Bacheler to purchase the Sole Member's membership interests in the Company. In order to use the life insurance policy to cover all or a portion of the purchase price for the Sole Member's membership interests, Robert Bacheler has been and will continue to pay all of the premiums due on the life insurance policy. In the event that Robert Bacheler waives his right of first refusal and another buyer is found to purchase the Sole Member's membership interest in the Company, he shall be reimbursed for the premium payments actually paid at the time of the sale of the Company to the third party purchaser ... Robert Bacheler shall receive a credit towards the Fair Value of the Company up to one hundred percent (100%) of the proceeds received from the life insurance policy but, in no event, will Robert Bacheler be entitled to receive any portion of the life insurance proceeds if the Fair Value of the Company is less than the amount paid from the life insurance policy after the death of the Sole Member.

Bacheler again signed a page at the end of the Amended Agreement which read:

In light of the importance of the specified parties' cooperation in implementation of the succession plan set forth in Article 14 of this Amended and Restated Company Agreement to ensure the continuous operation of the Company and transfer of the Sole Member's membership interest in the Company the

undersigned hereby join in and consent to the provisions of this Amended and Restated Company Agreement. Such joinder and consent shall not affect the powers of the Sole Member nor restrict the Sole Member from modifying the terms of this Company Agreement in her sole and absolute discretion; except that the Sole Member may not amend (the right of first refusal provisions) without the written joinder and consent of Robert Bacheler.

Shortly after signing the Amended Agreement, Bosich fell ill with cancer. In early December, Bacheler unilaterally changed the named primary beneficiary of the \$1 million life insurance policy on Bosich from her estate to himself. Bosich was unaware that Bacheler made this change and she did not consent to it.

When Bacheler kept the insurance proceeds without exercising the option to buy the business, the executor sued under eight different legal theories. The central point to each aspect of the complaint was this: If Bosich had known that Bacheler would decline to purchase FNI and attempt to keep the proceeds for his own use, she never would have permitted him to acquire an insurance policy on her life.

The court refused to dismiss the complaint, and the lawsuit will continue.

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