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Planning And Litigation Lessons From Selling The Denver Broncos

The following article is based upon the authors' presentation at the 49th Annual Cleveland Metropolitan Bar Association Estate Planning Institute on October 21, 2022 in Cleveland.

Even billionaire NFL owners like Pat Bowlen can fumble business succession planning, and the probate litigation that surrounded the Denver Broncos' record-setting sale publicly outlined the difficult issues attorneys face when counseling business owners.

Like many who own a business, Pat wanted his family members to continue owning the Broncos after his death. Yet despite that desire and significant planning to that end, the team now has new owners. Pat's diminished capacity prior to death, family members fighting for franchise control through probate litigation, and tricky NFL ownership rules led to the Broncos' sale.

This article will outline the factual background and the two probate lawsuits—one of which his family filed before Pat's 2019 death—that led to the \$4.65 billion sale in 2022.¹ The article also will provide take aways for attorneys to consider when helping their clients with business succession planning.

MEET THE BOWLENS

Pat was a successful attorney and businessperson who joined his three siblings in purchasing the Broncos for \$78 million in 1984.²

From 1984 to 2014, the Broncos had 19 winning seasons, 12 division titles, and seven Super Bowl appearances, including two consecutive NFL Championships in 1998 and 1999.³ After Pat's death in 2019, the NFL posthumously inducted him into the Pro Football Hall of Fame for his franchise's success and his work expanding the league's television rights.⁴

Pat began making succession plans as early as 2002 in buying out his siblings' interests and consolidating himself as the team's main owner.⁵ Multi-generational ownership is difficult in the NFL as an individual must own at least 30% of the team.⁶ Yet Pat publicly announced that he wanted one of his seven children to succeed him as the Broncos' owner.⁷ Pat was married twice and had two children with his first wife, and five children with his second wife.⁸

The Broncos hired Pat's oldest child, Beth Bowlen Wallace, in 2012 to assist with special projects.⁹ Many expected Beth to succeed her father as owner until Pat's dementia led him to relinquish control of the team to a non-familial trust in 2014.¹⁰ Pat's family members told reporters they witnessed Pat's cognitive decline as early as 2006.¹¹

The three co-trustees administering the trust holding the Broncos also served as Pat's co-agents pursuant to his power of attorney.¹² The agents/co-trustees were Josiah Ellis (Broncos CEO and controlling owner), Richard Slivka (Broncos Executive Vice President and General Counsel), and Mary Kelly (Pat's personal attorney).¹³

While the co-trustees publicly announced Pat's intention for a family member to be the Broncos' new owner, they also stated all seven children had to agree to the succession plan.¹⁴ The co-trustees also sent a memorandum outlining the criteria to be considered.¹⁵ The children needed an advanced degree (such as an MBA or JD) and five years of senior management experience with the NFL, the Broncos, or the team's stadium management company.¹⁶ The memorandum made clear that meeting the criteria would not ensure appointment.¹⁷

In 2018, Beth announced her intention to become the Broncos' owner with support from two of her siblings.¹⁸ The co-trustees responded publicly that Beth was not capable nor qualified to own the team,¹⁹ and five months later Pat's third-youngest child, Brittany Bowlen, announced her intention to become owner.²⁰

PROBATE LITIGATION BEFORE AND AFTER DEATH

Only five days after Brittany declared her intention to own the team, Pat's brother, Bill Bowlen, filed a lawsuit to construe the agents' actions on Pat's behalf as their principal pursuant to the power of attorney.²¹

The power of attorney lawsuit is similar to what can be brought pursuant to Chapter 1337 of the Ohio Revised Code and alleged that the agents failed to act in Pat's best interests and/or in good faith, failed to act loyally for Pat's benefit as principal, created conflicts of interest that impaired their abilities to act impartially in Pat's best interests, and failed to preserve and implement Pat's estate and business succession plan.²²

The power of attorney complaint also alleged that the Bowlen siblings decided in the 1990s to consolidate ownership of the team in Pat to avoid a family dispute over control.²³ The complaint claimed Pat had created various trusts that he amended several times between 1994 and 2009 to ensure the Broncos remained within the family.²⁴

While much of the power of attorney litigation is sealed and not available for public review, the litigation likely was used for fact finding and to set up the second lawsuit after Pat's death. The first lawsuit should have allowed Bill's attorneys, who also represented Beth and one of her supporting siblings, to obtain medical records, financial records, and estate planning documents to evaluate Pat's intent and decision-making capabilities. The trust holding the Broncos reportedly had a no-contest provision,²⁵ so the power of attorney litigation allowed evaluation without directly challenging the trust.

Bill dismissed the power of attorney lawsuit shortly after Pat's 2019 death,²⁶ and Beth and her supporting sibling filed a lawsuit seeking to invalidate the 2009 trust holding the Broncos as a product of undue influence or lack of legal capacity.²⁷ After the lawsuit was filed, Brittany joined the Broncos as vice president of strategic initiatives,²⁸ and the co-trustees claimed that the team might be sold unless the other siblings agreed to Brittany as the next owner.²⁹

The Broncos struggled with a 5-11 record in 2020,³⁰ and estimates provided that COVID-19 restrictions cost the team more than \$100 million in revenue that year.³¹ Shortly after the NFL announced the Broncos needed to select a new owner to comply with league ownership rules or face millions in fines,³² Beth and her supporting sibling filed an unsealed Unopposed Motion for Voluntary Dismissal With Prejudice in their action to invalidate the trust.³³ The motion stated that the 2009 estate planning documents and the 2010 delegation of authority are valid and enforceable,³⁴ and the terms of any settlement reached are confidential and unknown.

On August 9, 2022, NFL owners approved the Broncos' sale for \$4.65 billion to the Walton-Penner ownership group.³⁵ At the time of the sale, the Broncos became one of the top 10 most valuable sports franchises in the world.³⁶

SUCCESSION PLANNING TAKE AWAYS

Celebrity estates like Pat's can help provide context to issues attorneys are assisting clients with and guidance on the difficult, emotionally charged issues those clients are evaluating. Some of the main take aways from Pat's situation are the following:

1. THERE ARE FATES WORSE THAN DEATH

While all business owners know they will die, many fail to consider they could become incapacitated before their deaths. Much of the Bowlen family feud for control of the team started because Pat reportedly started suffering from cognitive decline as early as 2006—before important changes were made to his estate plan in 2009.

Attorneys need to make sure business owners have plans should they become physically or mentally unable to perform their everyday activities. Not only must the business owner share these plans with people who will implement these, but the business owner must determine the process in which his or her own incapacity will be determined and who will make choices once the business owner reaches that point. These are difficult decisions that rarely receive the attention these choices warrant.

2. WHO YOU PUT IN CHARGE MATTERS

Most business owners dream about passing the companies they built to their family members without realizing the hard truths that their family members might not be up to the task. Pat was a Hall of Fame owner who helped both the Broncos and the NFL succeed. One person—even a member of his family—might have been unable to replace Pat at his job.

Pat's decision to have two Broncos' executives and his personal attorney serving as his co-agents and co-trustees could have been a savvy business decision. This allowed the three co-trustees/agents to share the load of managing the Broncos while trying to exercise their fiduciary discretion in the best interests of the Trust's beneficiaries.

If Pat wanted the team to remain with his family no matter what, he could have selected specific fiduciaries to ensure this occurred. Instead, Pat selected two NFL executives who Pat likely knew could make the difficult decision to sell the team if doing so was in the beneficiaries' best interests.

Many could argue that Pat's succession plan failed because his publicly stated goal of keeping the franchise in the family did not occur. This ignores the record-setting sale—in the middle of a pandemic—likely was best if the family members were unqualified or could not unite behind one person.

In short, business owners need to spend time evaluating—and reevaluating—who their fiduciaries will be. The right fiduciary now might not be the right fiduciary in three years, and business owners should regularly meet with their attorneys to discuss this important issue.

3. PEOPLE PLAN, AND GOD LAUGHS

Passing value from one generation to another can be a significant challenge, especially if the goal is to keep everything equal among the various beneficiaries. Each business needs its own estate plan, which often consists of updated beneficiary designations, trusts funded with company shares or units, buy/sell agreements, regularly updated operating agreements, management agreements, and key employee retention plans.

Following the plan Pat put into place, the co-trustees did select a family member in Brittany to lead the team going forward. The problem is the plan required the six other children to agree to Brittany, which never occurred. Whether the parties could not agree because of personal animosity or financial inequities is unknown, but the Broncos became easier to divide once the team was sold.

A good succession plan must make clear the business owner's intentions but also be flexible enough to adjust to unexpected situations. This is why business owners should consult with accountants, financial advisors, estate planners, and probate/commercial litigation attorneys when making their succession plans and continue to consult with these professionals to ensure the hand off results in a touchdown instead of a fumble.

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Footnotes

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