

Feuding Twins

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LAST February, Van Bernhard brought a lawsuit against his sister, Jean Bernhard Buttner, seeking to dissolve the holding company that gives her control of his inheritance and of the family business. The irony of the lawsuit in the New York Supreme Court of Manhattan is that the family business, Value Line, is nationally known for its investment surveys on how well other public companies are managed. In addition to financial publishing, the company manages mutual funds and provides investment advisory services.

The poignancy of the court battle is that Van Bernhard and Jean Buttner are twins. They grew up together on a lush estate in Connecticut where, as children, they shared the secret language and intimacy typical of many twin pairs. Both are now 61 and have been at odds for years. So bitter is their breach, according to the New York Times, that a few years ago, when their mother was dying, their separate visits to her had to be scheduled through legal contract.

Jean is chief executive officer and chairman of Value Line as well as of Arnold Bernhard & Co., the holding company created by her father, the founder of Value Line, who died in 1987. She owns a slim majority of the voting stock in the holding company, which controls approximately 80 percent of the \$87 million investment advisory firm. Van was employed at Value Line for 12 years, leaving in 1972 to pursue an interest in ecological studies. The trust from which he receives an income is a minority shareholder in the holding company. He owns 49.9 percent of the voting shares in the holding company, according to his lawyer, Andrew Levander.

The lawsuit brought by Van and two co-

trustees of his trust alleges misconduct by the managers and directors of the holding company in violation of their rights as minority shareholders. What makes this more than just another messy family feud is that Value Line is a publicly traded company on the Nasdaq stock exchange. Jean Buttner's lawyers sought—unsuccessfully—to seal records of the case on the grounds that the publicity might “spook the marketplace.” Corporate lawyers interviewed by The New York Times in an article on the case suggested that this effort to suppress information about the court battle was improper for a public company whose shareholders are entitled to information that affects their investment.

In a news release issued the day of the New York Times report, Jean noted that the suit was against the holding company, not the publicly traded Value Line. Concluding that the lawsuit was “frivolous”—and the chance of the holding company being dissolved therefore remote—her lawyers advised that Value Line shareholders did not have to be informed. “After consulting with counsel,” Jean said, “we concluded that it would be inappropriate to give publicity to baseless claims that might mislead the public.”

Whatever the merits of the suit, the family business was clearly what had led to the tragic breach between this pair of once-close twins. The question is whether the breach could have been avoided if their father had structured the ownership arrangements differently or handled the succession with more sensitivity. To be able to speculate on these issues, it is necessary to review the family's history and the charges in the case, as described in the Times article.

In his years at Value Line, Van Bernhard—

his full name is Arnold Van Hoven Bernhard—was a portfolio manager and, according to his lawyer, led the computerization of the company's backroom operations. Van says he left Value Line in the early 1970s because he was restless and worn out by the pressures of the paperwork backlog on Wall Street in those days. He moved to an outpost in the Bahamas called Humming-bird Cay, to pursue his newfound interest in ecology. He remained a director of both Value Line and the holding company and expected to support himself on dividends from his stock in the family business.

His twin sister had for years been running an interior design firm in California with her husband. In 1982, however, Jean Bernhard Buttner returned to New York to work for her father at Value Line, eventually divorcing her husband. She and her father, according to Times sources, were kindred spirits—"workaholics with a fierce family pride." By April 1985, Jean had risen to president and chief operating officer. At about this time, the father called Van into his office at home to announce his estate plan. Arnold had decided to leave Jean two more shares than he was leaving to Van, which meant that Jean would control the business after the father's death.

"I was stunned," Van recalled in his interview with the New York Times. "All our lives our parents had gone out of their way to make everything even. I pleaded with my father, 'Please don't do this.' But his response was, 'I think she would take better care of you than you would of her.'"

Arnold Bernhard died in 1987, and Jean soon succeeded him as chairman and CEO of Value Line. According to the Times, "the inevitable power struggle" between her and her brother did not emerge openly until their mother died in February 1992 and left her estate divided among the twins, with Jean as executor. ("I would venture to say," the lawyer for her brother noted in an interview with Family Business, "that the mother had an effect on keeping things civil.") Afterward, Van accused his sister of delaying distribution of his share of the estate. Jean did not want to pay out anything until all taxes and expenses were taken care of. The estate has apparently still not been settled.

The dispute spilled over into the board meet-

ings of both Value Line and the family holding company. Both boards are family-dominated and lack outside directors "without professional or personal ties to Mrs. Buttner," the Times report said. Van was eventually voted off both boards and was not allowed to appoint a surrogate to represent his interests—one example, he says, of his "oppression" as a minority owner. But Donald I. Strauber, the New York attorney who represents Jean Buttner, said that the acrimony between the two had gotten to the point that "made it virtually impossible to consider naming someone else to represent him on the board."

Van charges that Jean has paid herself excessive compensation, while cutting dividends for several quarters, to his disadvantage. (In 1985, Jean earned total compensation of \$1.1 million; the company's annualized rate of return from December 1987 to June 1996 was 5.74 percent.) The Times cited other questionable actions by the board. For example, it said the board had set up a compensation committee consisting entirely of Jean and two Value Line executives who work for her. Jean was also appointed to the board's audit committee, which could impair its independence as the shareholders' watchdog on expenditures.

Van, who now lives in Connecticut and has filed a related suit in that state, also alleges that his sister has shut him off from information about the family business. That charge may reverberate with shareholders who were not informed of the lawsuit. The judge in the case, Stephen C. Crane, was also critical of the company for seeking to suppress information about the charges. Denying a motion to seal the records, Justice Crane lectured Jean's lawyers: "If you were an investor in these securities, wouldn't you want to know that this proceeding is taking place and that the Connecticut proceeding is occurring, to better inform yourself as to whether to hold, sell, or buy?"

If Van's suit succeeds and the family holding company is dissolved, the Value Line shares would be distributed to the various shareholders and no one would have a majority of the investment publishing and management firm's stock. Jean, who would lose control in such a case, described the lawsuit as "one more chap-

ter in a series of frivolous litigations commenced by Van Bernhard that seek to harass the family business interests built successfully by others. Sadly, my brother continues to hire lawyers to attack the very corporate structure created by his father that has always supported him and protected the family interests.”

As for Van, he sees the proposed dissolution of the holding company from the public company as one step toward healing the breach with his twin sister. “I think I could be a good brother to my sister,” he told the Times, “but only after I get out from under her thumb.”

How did the family reach such an impasse? What, if anything, could be done to pave the way for a reconciliation between the twins? What are shareholders of a publicly traded company entitled to know about squabbles among controlling family shareholders of a holding company? What broader lessons for succession can be drawn from the Value Line case?

WHAT THE EXPERTS SAY

Charles W. Murdock

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The founder of Value Line did what many business advisers would counsel: He gave a controlling interest in the business to the successor. This eliminates any ambiguity about who is in control, and enables the successor to run the business without interference from other family members.

Unfortunately, there are at least two drawbacks to this very common approach to succession. The first is often overlooked and may not have even been raised by the brother:

While Jean may be better attuned than Van to running the business in this generation, that doesn't mean her offspring will be more competent than his to run it in the future. Assuming the business is passed on in the family, there are more flexible ways of giving one sibling current control, without putting the business in

the hands of one side of the family for generations to come.

The second drawback is power tends to corrupt and absolute power corrupts absolutely. From the brother's perspective, this is what has happened. Dividends were cut, Jean's salary was raised, and the brother's voice was muted by his removal from the board. When power is employed in such roughshod fashion, it is highly likely that a court will find such conduct legally “oppressive,” thereby entitling the aggrieved party to have the court dissolve the corporation.

One test for the doctrine of oppression in New York State is whether the sister's actions have frustrated the reasonable expectations of the brother. The other test is whether the sister's conduct reflected a lack of probity and fair dealing. A trier of fact could well find that cutting dividends, raising her salary, and muting his voice was oppressive under either test. The brother's expectations and charges of unfairness would be bulwarked by the father's statement that she would “take better care” of the brother than he would of her—assuming that the father's statement could be substantiated in court. In addition, charges of a lack of probity and unfairness (oppressive behavior) have been upheld by courts in other jurisdictions based on evidence of “overbearing and heavy-handed conduct” and an “imperious attitude” on the part of majority owners. The efforts of Jean's lawyers to seal the court file, which had the effect of preventing news of the family dispute from reaching shareholders of the publicly held corporation, could be interpreted as reflecting an imperious attitude.

The succession issue could have been handled in other ways. The case does not disclose exactly when the antipathy between brother and sister first became manifest. If it occurred while the father was still alive, the family should have attempted at that time to resolve it; clearly, the conflict festered and ballooned after the father's death. Like many workaholics, however, the father may have scoffed at dealing with the “soft” concepts emphasized by family business consultants.

One approach that might have avoided the present litigation would have been to give the twins equal shares—but in trust rather than

outright. The father could have designated three trustees: the daughter, or her nominee; the son, or his nominee; and an independent person in whom the father had confidence.

The third person under this approach serves, in effect, as an arbitrator who can break deadlocks—except that this arbitrator is called a trustee so he has a mechanism to enforce his decision. Of course, the independent trustee would be expected to defer most of the time to the judgment of the sister, whom the father designated as CEO of the company. But the third trustee could, if need be, act as a brake on arbitrary treatment of the passive shareholder by the sister because he would be able to control the composition of the board of directors. It isn't always easy to find an independent trustee who is not only knowledgeable about business affairs but also willing to confront and resolve conflict rather than avoid it. Arnold Bernhard might have spared his descendants and his company of lot of grief, however, had he taken the trouble to do so.

Fredda Herz Brown

Family business consultant with the Metropolitan Group in Leonia, NJ.

This is another potential family business disaster that might have been avoided if the parents had considered the long-term implications for the family of their estate and ownership-transfer decisions.

It seems that secrecy and exclusion are the predominant ways that members of this family have dealt with one another. Allegedly, Jean not only keeps information from her brother, a large minority shareholder, but judging by her lawyers' efforts to seal the records of the case, she is also inclined to treat the public shareholders in the same manner.

When people are denied information or a voice in matters that they perceive affect their interests, their natural tendency is to do everything they can to be included. If these attempts fail, their sense of injustice grows and they resort to more serious, often negative, attempts to be heard—such as bringing a lawsuit. The majority owners who are targets of such lawsuits may view the release of such information

as unnecessary, believing that only they are entitled to it and that to share it risks a loss of control. For the minority who are excluded, however, the question is not usually one of substance or control but the need to be recognized in the decision-making process.

Issues of secrecy and/or exclusion are not unusual in family firms. Most often they are raised by nonworking family members or shareholders who as a group feel left out of the information flow and operation of the company. It is the responsibility of those who are working in the family firm to inform nonworking shareholders of developments that affect their investment and especially board members who cannot perform their fiduciary responsibilities unless they know what is happening.

Which brings us to the question of the role of the board in the Value Line case. This is a second-generation, public company which has nonfamily, public shareholders who are entitled to representation. It is suggested that Jean has packed both boards with people who have “personal or professional ties” to her. If so, she seems to be running the firm as if it were a first-generation family business, without independent directors. It is difficult to get a clear picture from the case of how the board of either the holding company or the public company is truly functioning. But by what process can Van, a 49.9 percent owner of the holding company, which controls 80 percent of Value Line, be voted off both boards?

The fact that a 49.9 percent owner could be considered a minority shareholder, when other family firms would consider that person a partner, is probably indicative of Van Bernhard's position in the family. We know only that Arnold Bernhard informed his son about his plan for the future of the ownership only after the decision was made; he did not involve the son in the decision-making process itself. The son seems to have experienced his father's decision as a direct contradiction of the family's previous “equal treatment” of him and his sister. The manner in which the decision was handled suggests that the son was, in fact, treated as a black sheep. Was the father, when he announced his ownership/estate decisions to his son, making a point about their relation-

ship? Perhaps the senior Bernhard was still resentful about his son's earlier decision to leave the business and was making a point about Van's lack of commitment.

Even with the apparent inequity of the father's decision, the twins did not really begin their legal battles until their mother died, leaving her estate equally divided but not equally controlled. The impact of the loss of a parent or other family member may well explain the deep roots of many grievances and lawsuits that arise in family businesses. In my experience, parents often serve as witting or unwitting moderators of their children's relationships. Sibling rivalries often do not erupt until after the death of both parents. One wonders why, in view of the emerging difficulties in the relationship between the twins, Mrs. Bernhard would leave control of her estate in the hands of her daughter rather than an outside executor.

Richard L. Narva

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Success has many fathers, as they say, but failure is an orphan. In this case one can identify some of the failures that have made Value Line an orphan. If the culture of the Bernhard family had, in fact, been "to make everything even" between the twins, then the parents and their advisers should have been able to anticipate the disturbance that would occur in the family if one of the twins was placed in control. Passing judgment on the father in hindsight for giving his daughter voting control, however, would be an exercise in self-indulgence. What can be said is that the parents and their advisers failed to perceive: 1) the clear conflict between their family culture and the arrangement they chose for continuing family control of the business; 2) the value of talking about these matters in the family, either directly with one another or with the assistance of a facilitator trained in family systems, and 3) the predictable consequences for a public company of ignoring either 1) or 2).

The company's legal advisers can be faulted for either proffering or buying into the idea (perhaps favored by the elder Bernhard) that the family holding company could be legally in-

sulated from the publicly held company, that an unbridgeable chasm could be built between the two. This stance fails to recognize the power of emotions in a family to erupt with a force that legal strategies cannot contain.

Regardless of who owned a controlling interest in the family holding company, a board made up of a majority of directors who were independent of both family and management might have provided the son with an effective check on his sister's power and enabled the daughter to validate her performance with shareholders. If the New York Times report is correct, a rubber-stamp board deprived them both of the surety that the affairs of a public company were being competently managed.

The twins and their parents appear to have conspired to maintain silence around the problems of transferring ownership control and providing for management continuity. Although the son professes surprise and shock when informed that the father was giving control to his sister, he may have been as responsible as his parents and his sister for the conspiracy of silence around succession. Did he ever raise the issues with his father? Did no one in the family think of raising them? Weren't any of the four Bernhards brave enough to suggest a family meeting to talk about the issues, with or without a facilitator?

Family businesses have to anticipate potential problems and learn to solve them—if they wish to avoid the train wreck that Value Line has become. ■

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