

Dealing with Franchisee Trust Ownership Arrangements

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Introductions



Gaylen Knack is a Partner who assists franchisors in structuring domestic and international franchise and distribution programs. He advises clients on related business and regulatory issues, as well as on international trade regulation, trademark, Internet and corporate law matters. Gaylen's combined experience in private practice and as a franchise executive provide him with a unique understanding of the complex business and legal issues that companies face in establishing and operating franchise and distribution systems.



Scott Malin is an attorney known for offering value-added counsel to clients. A savvy navigator of the ever-changing tax landscape, he assists with sophisticated issues in the area of wealth strategies and ownership transitions for businesses and individuals. He is a frequent speaker on succession planning, estate planning and tax issues. At Lathrop GPM, he is a leader — both as a Partner and as a member of the firm's Executive Committee.



Edward Tully is a Partner who serves clients in the areas of estate planning, trust administration, business planning matters and corporate law. Edward has extensive experience in estate, business succession and asset protection planning. He is skilled at drafting and negotiating partnership agreements, shareholders' agreements and asset purchase agreements. He is known for implementing sophisticated techniques, including the utilization of closely held business interests and valuation discounts.



Topics we are going to cover

- What is Business Succession Planning?
- Overview of trust structure, fiduciary roles, and types of trusts
- Understanding the benefits of trusts
- How to handle franchisee trust ownership
- Discussion of triggering events as applied to trusts
- Pitfalls, red flags, and other trust ownership issues
- Takeaways



What is Business Succession Planning?

- 30% of family businesses survive to second generation, 12% to third
- Ownership succession
- Management succession



Overview of Trust Structure – What is a Trust?

- Fiduciary arrangement under state law
- Usually created under a trust agreement
- Only controls property that is transferred to and held by the trust
- Directs how trust property is invested and who manages it
- Directs how and when trust property passes to one or more beneficiaries
- Establishes powers and duties of the trustee and rights of the beneficiaries



Overview of Trust Structure – What are the Roles?

- Settlor / Grantor / Trustor
- Trustee
- Trust Advisors
- Trust Protectors
- Beneficiaries

Overview of Trust Structure – Categories of Trusts

- Revocable trust (living trust)
 - Will substitute
 - Established and in effect during life
 - Can be amended or revoked at any time by the settlor
 - Settlor is usually the trustee
 - Not a separate tax entity until death of settlor
- Irrevocable trust
 - Usually created for tax planning, asset protection planning, and/or business succession planning
 - Can be established during life or at death
 - Intervivos
 - Testamentary
 - Generally cannot be revoked or amended
 - Could be its own tax entity

Understanding the Benefits of Trusts

- Types of Trusts
 - Revocable trusts
 - Irrevocable gift trusts
 - Insurance trusts
 - Asset protection trusts
 - Charitable trusts



Benefits/Purposes of Trusts – Single Purpose versus Multi-Purpose Trusts

- Avoiding probate
- Privacy
- May be amendable
- Assets available immediately
- Tax planning
- Controlling inheritance for heirs
- Asset protection

How to Handle Franchisee Trust Ownership - Lifetime Transfers to Trusts

- Review and analyze applicable documents prior to transfer
 - Trust agreements, trust amendments, trustee succession documents
 - Ownership of franchisee entity post transfer
 - Franchisee entity organizational documents
 - Assignments and consents
- Identify who controls the franchisee entity ownership interest held by trust
 - Initial control
 - Change of control events
- Track the franchisee entity ownership interest under the trust agreement

How to Handle Franchisee Trust Ownership - Transfers to Trusts at Death

- Determine whether franchisee entity ownership interest is:
 - Owned by the decedent;
 - Owned by the decedent and subject to a transfer-on-death (TOD) designation; or
 - Owned by the decedent's revocable trust
- If owned by the decedent's revocable trust:
 - Follow steps described in previous slide regarding lifetime transfers to trusts
- If owned by the decedent and subject to a TOD designation:
 - Confirm TOD designation is permitted under state law
 - Follow steps described in previous slide regarding lifetime transfers to trusts
- If owned by the decedent:
 - Probate proceeding may be necessary to transfer the interest in the franchise entity
 - If probate is necessary, also need to review and analyze: (1) decedent's will; (2) letters testamentary; and (3) any documents signed by personal representative or issued by Court regarding the franchisee entity



Triggering Events as Applied to Trusts – Consent Requirements under the Franchise Agreement

- Transfer from settlor to trust
- Transfer from trust to trust
- Transfer from trust to beneficiary
- Change of trustee
- Change of other fiduciary role that impacts control
- Death
- Incapacity

Evidencing Transfers Involving Trusts

- Assignment and consent agreement
 - Franchisee representations regarding trust structure
 - Conditions to consent
 - Franchisor protections
- Addendum to franchise agreement
 - Modifications to address future trust activity
 - Who should sign on behalf of the trust?
- Personal guarantee
 - Identifying guarantors under a trust scenario

Pitfalls, Red Flags, and Other Trust Ownership Issues

- Properly identify who controls the franchisee entity ownership interest under the trust agreement
- Transfers at death:
 - Confirm that the franchisee entity ownership interest is actually owned by the decedent's revocable trust
 - Existence of a revocable trust is not enough!
 - Confirm that probate requirements are satisfied
 - Simply updating the corporate records is not enough!
- Ensure that the transfer is consistent with the terms of the trust agreement
- Ensure that the transfer complies with state law
- Risks of noncompliance:
 - Other beneficiaries
 - Creditors



Advanced Strategies in Addressing Trust Issues

- Franchise agreement – review assignment provisions to address trust scenarios and need for franchisor consent.
- Franchise operations manual – consider inclusion of trust ownership policy.
- Communication to franchise system.

Contact Us



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