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Planning Beyond the Buy-Sell – Ownership Structure Considerations for Closely Held Business Owners

Most closely held business owners recognize that a properly drafted and current buy-sell agreement is an important document that addresses what happens to an owner's interest in the company in the event of divorce, disability, or death. What is not commonly known is that *how* owners hold their respective interests in the company also requires close consideration.

For example, if owners hold their interest (stock, units, etc.) in their individual name, then upon an owner's death, the interest in the company may be subject to probate administration. Probate administration is a legal procedure whereby a deceased person's assets are inventoried, appraised, and distributed to the deceased person's trust or other beneficiaries. Ordinarily, estate planning clients prefer to avoid the publicity of probate administration and public disclosure of their assets; however, this becomes especially important for closely held business owners. When a deceased owner's interest in a closely held company is subject to probate administration, an appraisal is required, and that appraisal becomes a matter of public record available to any competitor or potential buyer – thereby significantly diminishing the bargaining power of the owner's surviving family and business partners. Even if a well-designed buy-sell agreement is in place, the shares may still require appraisal, and at a minimum, the probate court will administer the value derived from any buy-out of the deceased owner's interest.

By carefully evaluating the ownership structure with legal counsel, a closely held business owner can avoid probate administration of the business interest at death. The most common methods of achieving this are by: (1) owning the business interest in the name of a trust or (2) designating a transfer on death beneficiary of the business interest. The company's governing documents (e.g. the operating agreement for a limited liability company or code of regulations for corporations) must permit these ownership structures or be amended to allow such ownership structures.

By owning the business interest in trust, the business owner has the advantage of designating who will manage the business if the owner becomes disabled by naming a successor trustee. When deciding on the best option, the business owner must consider whether trust ownership has unintended consequences for the business owner. For example, for a variety of reasons, a women-owned/minority-owned business designation may be impaired or forfeited by directing the business interest to a trust. Moreover, if a trust is managed by both spouses, but only one spouse has traditionally been involved in the business, the owner's business partners may not appreciate a spouse being involved as trustee of the trust. In these situations, one might consider instead authorizing the owner to designate a transfer on death beneficiary.

For more information, please contact Andrea Costa Laden or any attorney in Frost Brown Todd's [Estates, Trusts and Wills Practice Group](#).

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