


# Positioning Your Business for Franchising



Do you have a business in which customers, or even strangers, come up to you and ask if you are franchising your business? Have these comments started you thinking about entering the franchise arena? If so, then there are methods in which you can structure your business to make it more “franchisable.”

## **Business Planning**

You need to have at least one successful business location. It is extremely difficult to franchise if you only have a business idea. If you only have a business idea, then your prospects will be reluctant to invest their money when you have not invested your money.

Assuming that you already have your business operating successfully, a franchise business must be able to be duplicated by a variety of people in many states. Does your business primarily depend upon your personal strengths and skills? If so, you will need to evaluate yourself and determine what specific skills, education or type of person you must find and determine how to train this person to do what you do. Performing this now will save you time in the future when you are looking for prospective franchisees. If you believe your business is the type that could succeed with anybody who devotes the proper effort and goes through a training course, then you are one step closer to franchising.

## **Training Development**

You should put your theory to the test by training your replacement. This training provides you the opportunity to develop an operations manual with the information a prospective franchisee will need to know. The ultimate test will come when you can leave

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## **Are You Using the Right Deed?**

Are you buying or selling property? How should you leave property to a loved one upon your death? Before you sign on the dotted line, you should be aware of the benefits and potential risks that accompany the deed in front of you.

Deeds are used in some of your most important transactions, such as purchasing or selling real estate, transferring property to a trust, conveying all or a portion of the property to a spouse or child, or leaving property to a loved one on your death. There are several different types of deeds, each intended for a specific purpose. If a deed is used for the wrong purpose, you or your successor may encounter unwanted and avoidable problems. In the next few issues of this newsletter, we will outline several types of deeds and their use. This article discusses the newest type of deed in Arizona: the beneficiary deed.

### **What is a beneficiary deed?**

A beneficiary deed transfers property to another person upon the death of the owner. It is similar to the “payable on death” concept used for bank and brokerage accounts. The beneficiary deed avoids the probate process and preserves the title insurance for the benefit of the beneficiary.

SEE **DEED** ON PAGE 4

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# NEW FACES

## Kimberly A. Case

Kimberly focuses her practice on real estate law. She has assisted in multimillion-dollar real estate deals associated with corporate acquisitions, including drafting key legal documents and performing real estate due diligence. She has provided support for maintaining corporate governance. Kimberly graduated in 2002 from Arizona State University with a B.A. in English Linguistics. She earned a J.D. in 2005 from the Indiana University School of Law. She is admitted to practice in Arizona and California. **Phone: 602.257.7962 E-mail: [kcase@gustlaw.com](mailto:kcase@gustlaw.com)**



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Logan predominantly practices litigation, including commercial, construction, personal injury and professional liability. In 2002, he received a B.A. in Politics, Philosophy and Economics from Pomona College. In 2006, Logan earned a J.D. from the University of Arizona James E. Rogers College of Law. He is admitted to practice in Arizona. **Phone: 602.257.7452 E-mail: [lelia@gustlaw.com](mailto:lelia@gustlaw.com)**



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Jennifer focuses her practice on franchises and franchising, corporate and intellectual property law. During law school, she served as a judicial extern to the Honorable Mary Murguia in the U.S. District Court for the District of Arizona. Jennifer graduated cum laude in 2000 from the University of Arizona with a B.A. in Political Science. In 2006, she



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## Magdalena Osborn

Maggie focuses her practice on civil litigation spanning a variety of issues, including complex contracts, health care law, insurance defense, labor and employment law, and personal injury. She interned with the District Attorney of Colorado Springs, Colorado and with in-house counsel at an applications service provider in Denver, Colorado. Maggie holds a certificate in American Sign Language Interpretation. She graduated cum laude in 1999 from the University of Colorado with a B.A. in Psychology. She received a J.D. in 2002 from the University of Denver College of Law. She is admitted to practice in Arizona and the U.S. District Court for the District of Arizona. **Phone: 520.205.4778 E-mail: [mosborn@gustlaw.com](mailto:mosborn@gustlaw.com)**



MAGDALENA OSBORN

# Reverse Mortgages: A Forward Way of Thinking

Imagine a home equity loan with no payments due. Such a loan exists, in the form of a reverse mortgage (also known as "rising debt, falling equity"), and does not have to be repaid until:

- the home is sold;
- the borrowers permanently move out of the home; or
- the last surviving borrower dies.

At that time, the amount due will be all of the advances made under the loan plus interest that has accrued. Significantly, neither the borrowers nor their heirs can ever owe more than the value of the home, and a lender cannot look to any source other than the home for repayment.

Most reverse mortgages require that you:

- be at least 62-years-old;
- own your own home (or pay off an existing loan with the reverse mortgage proceeds); and
- use that home as your principal residence.

Once you qualify for the loan, you can receive the equity that you have converted into cash in a variety, or combination, of ways, including:

- a lump sum of cash;
- a line of credit that you can access at your option in the future; or
- regular monthly advances.

While reverse mortgages are available from private lenders and certain state or local governments, only Home Equity Conversion Mortgages (known as HECM) are federally insured. Reverse mortgage loan proceeds are not taxable income and generally do not affect Medicare or Social Security benefits. Other benefits, however, such as supplemental security income (SSI) and Medicaid, could be affected.

Most reverse mortgages require the payment of an origination fee and other closing costs, and sometimes servicing fees during the life of the mortgage. The homeowner remains responsible

for property taxes and other ordinary expenses.

Because a reverse mortgage may deplete some or all of the equity in your home, and therefore leave fewer assets for you and your heirs, you may wish to discuss getting a reverse mortgage with your family. Whatever you decide, you generally have three business days after signing the loan documents to cancel the loan. This can be done for any reason without penalty but should be done in writing.

For many people, their home is their greatest asset or nest egg. In the right situation, reverse mortgages can be a great tool for converting that home equity nest egg into needed cash while allowing you to still enjoy your home.

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## Recent Amendments to Bankruptcy Code Change Landlord/Tenant Dynamics for Commercial Real Estate Leases

Congress recently made changes to the Bankruptcy Code that affect commercial real estate leases. These new amendments include the following:

- A debtor is now excused from having to cure non-monetary defaults when it assumes an unexpired executory contract, *but only with respect to commercial real estate leases*. Impossible to cure, non-monetary defaults for commercial real estate leases must now only be cured after the fact and any monetary loss suffered by the landlord can be compensated in the form of damages.
- Unexpired commercial real estate leases must be assumed or rejected *within the earlier of* (1) 120 days from the petition date; or, (2) the date of the entry of an order confirming a plan of reorganization, otherwise the commercial real estate lease shall be deemed rejected. Prior to the expiration of the 120-day deadline to assume or reject the lease, the Bankruptcy Court may grant a motion by a debtor or a trustee to extend the deadline “for cause.” If a debtor or a trustee requires a further extension of the deadline to assume or reject the lease, the Bankruptcy Court can grant an extension *only if* the affected landlord consents to the extension in writing in advance.
- If a commercial real estate lease is initially assumed and then

rejected, the affected landlord will have an administrative expense claim, which is capped at an amount up to the monetary obligation due under the lease for two years after the later of the rejection date, or the date the leased premises are turned over to the landlord. The portion of the affected landlord’s claim that is not afforded an administrative expense priority would be subject to the cap imposed by 11 U.S.C. § 502(b)(6) and classified as an unsecured claim.

- One of the recent amendments clarifies that the special protections that 11 U.S.C. § 365(b)(3) affords shopping center landlords and other shopping center tenants (i.e., enforcement of restrictive use provisions contained in the lease) will be enforced against a debtor who proposes to assume and assign that lease. This issue frequently arises in connection with the sale of some or all of a debtor’s assets free and clear of all liens, claims and encumbrances pursuant to 11 U.S.C. § 363(f)(1).

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## FRANCHISING

FROM PAGE 1

your business for three weeks in the care of your trained person and the business does well.

Training your replacement will also free your time up to open a second or third location. Having a second or third location is even more proof to a prospective franchisee that your concept is marketable outside your particular geographic locale or loyal customer base. The effort of finding a new location will provide the basis for your site criteria for future franchising locations.

Another reason for having a replacement is that you are going to need time to operate a franchise program or sufficient capital to hire someone else to manage it. If your existing business is not profitable enough for you to save the capital for a new location, then it will be much harder to sell franchises and you may not have the existing capital to set up a franchise concept.

### Trademark Selection

A franchise name is one of the more important aspects to franchising. Your name should give an impression but not be descriptive. Your franchisees will be paying for a name

that is not only recognizable but is a name that is not being used in other states. If the name is not distinctive enough, chances are that other people will have had the same idea that you had. If your name is too descriptive of your business, it will also be difficult to obtain a federal trademark. If you already have a business name that is too descriptive, it is possible that you may have to change your name or open a second location with the new name.

Names that are built on certain popular phrases are especially difficult. While the initial customer appeal is present, you may spend a great deal of time and money trying to stop others from using the name, even if you have a federal trademark. The most protectable trademarks are 100% original. One prime example is Starbucks. There is nothing in the name Starbucks that makes you immediately think of coffee. However, through their business development, their trademark is very protectable.

### Financial Capitalization

You will need to evaluate your business and ask yourself if you could be profitable if you paid someone else a monthly royalty fee and a monthly advertising fee. If not, then what changes would you make? Your franchisees are going to have to be profitable for your

franchise system to survive and grow. Making those changes now will help to prove to a prospective franchisee that it can be done, and it can also provide a revenue stream for you to finance a new franchise system.

It should be no surprise that setting up a franchise system will take capital, time and effort. Franchising is a highly regulated industry because of prior abuses. The legal disclosure requirements are substantial and specific. A franchise system will have trademark evaluation and registration costs, as well as costs to set up a separate franchising entity. You will also need an initial audit and an annual audit. You may need to hire a consultant to help you prepare your training and operational manuals. Your current business must generate enough income for your new business. Considering all these costs, the recommended capitalization ranges from \$40,000 to \$120,000.

With proper planning and focus, franchising can be a vehicle to grow your business and be a good business decision for yourself and your future franchisees.

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*Christina leads our franchise practice group. She practices franchise and franchising, intellectual property and corporate law.*

# PERSONAL NOTES

Congratulations to **Emily Auckland, Jennifer MacLennan, Abbie Shindler, Christopher Schmaltz** and **Valerie Todorovich** who were elected to join the membership.

**Kimberly Case** joined the Urban Land Institute as a member of its Young Leaders Group.

**Jim Giel** and **Keith Hoskins** attended the National Association of Bond Lawyers Tax and Securities Law Institute in Austin, Texas.

**John Hay** spoke at the National Business Institute seminar *Helping Your Client Select the Best Entity Option* where he presented "S and C Corporation Basics," "Building an Ethical Foundation" and "Drafting Entity Formation Documents."

**Rick Hood** received the Solid Foundation Award from HomeBase Youth Services for his work with them.

**Jim Kaucher** received a Certificate of Recognition at the Tucson Mayor's Methamphetamine Summit for his work as a member of the Steering Committee and as the Chairman of the Neighborhood Task Force of the Meth-Free Alliance.

**Andrew McGuire** presented "Current Topics Relating to Development Impact Fees" at the Government Finance Officers Association of Arizona Annual Conference.

**Jennifer MacLennan** spoke at the Spring Legal Seminar for the Arizona School Board Association regarding handling difficult school board meetings and at the Arizona School Personnel Administrators Association Spring Conference on the

Americans with Disabilities Act.

**Scott Malm** and **Tim Barton** spoke about title insurance at the National Continuing Legal Education Conference sponsored by the Colorado Bar Association. Scott also presented "Dealing with Unwritten Title Transfers" and "Boundary Dispute Resolution" at the National Business Institute seminar *Boundary Disputes: Resolving Conflicts Without Going to Court*.

**Chris McNichol** presented on the topic of receiverships to the Arizona Trustee Association. He also presented a seminar on trustee sales to the North American Title Insurance Company/West Maricopa County Regional Association of Realtors, Inc. In addition, Chris presented title insurance issues to a Real Property class at the Phoenix School of Law.

**Christina Noyes** is a member of the ABA Forum on Franchising Women's Caucus's first Steering Committee.

**Sean O'Brien** was one of the attorneys selected to participate in the Strategic Planning Workshop presented by the United States Bankruptcy Court.

**Monica Rapps** is the president of the Maricopa County Bar Association Paralegal Division and holds seats on the Maricopa County Bar Association Board of Directors and the Phoenix College Paralegal Studies Advisory Committee.

**Margaret Robertson** is on the Board of Directors for Goodwill Industries of Central Arizona, Inc. She is also a member of the Arizona Commercial Real Estate Women and volunteers at the Family Law Assistance Program.

**David Rosen** volunteers for the Volunteer Lawyers' Program. He is also a Maricopa County Regional Coordinator for the Arizona High School Mock Trial Program and a Board member for Arizona's chapter of the American Jewish Committee.

**Christopher Schmaltz** co-presented Proposition 207 at the Continuing Legal Education Institute's 11<sup>th</sup> Annual Land Use Conference.

## DEED

FROM PAGE 1

With a beneficiary deed, the owner retains total control over the property. The beneficiary deed does not transfer any present ownership interest in the property and is revocable at any time by the owner. It must be recorded before the death of the last surviving owner to be effective. Likewise, any revocation of the deed also must be recorded before the last surviving owner's death.

### Who can be a beneficiary?

Beneficiary deeds can transfer property to one beneficiary or multiple beneficiaries, a business entity or trusts, including revocable trusts. If multiple beneficiaries are named, the deed

should indicate the type of co-ownership created (e.g. community property or joint tenancy).

### What are the disadvantages of using a beneficiary deed?

While a beneficiary deed is gift and estate tax neutral, such a deed may be too inflexible to carry out the wishes of the grantor and a trust may be a far better vehicle for the grantor to utilize. Where joint owners (such as spouses) own the property, one of the joint owners can revoke the beneficiary deed after the death of the first joint owner. Additionally, where there are multiple beneficiaries, all of the beneficiaries must agree to manage or deal with the property. Also, if a minor is the beneficiary, a conservatorship may be required to manage the minor's inter-

est, which can be costly.

In general, the beneficiary deed is a great tool for people wishing to leave property to another upon their death without sacrificing current control over the property. The beneficiary deed is only one of many types of deeds used in Arizona to transfer title in real property. If you are considering using a beneficiary deed in a current transaction, you should consult your attorney or a real estate professional to determine whether the beneficiary deed is right for you.

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# Viatical and Life Settlements

Many older Americans are discovering that their traditional retirement investments are insufficient to handle expenses incurred during their “golden years.” Many people are turning to less traditional forms of revenue, such as viatical and life settlements.

A viatical settlement is where a terminally ill individual transfers ownership in a life insurance policy to a third party in return for the third party’s immediate payment of a lump sum, typically much less than the death benefit under the policy. The third party assumes the payment of premiums, designates itself as the beneficiary of the policy, and upon the individual’s death, is entitled to receive the death benefit. For example, Daniel Smith, age 65, is the insured under a life insurance policy, which upon his death will pay his designated beneficiary \$1,000,000. Daniel is diagnosed with cancer, and his doctors do not expect him to live longer than one year. Daniel enters into a viatical settlement under which Insurance Company agrees to immediately pay Daniel \$200,000. Daniel then transfers the life insurance policy to Insurance Company. Insurance Company pays the premiums, designates itself as the beneficiary of the policy, and upon Daniel’s death is entitled to receive the \$1,000,000 death benefit.

A closely related counterpart to the viatical settlement is the life settlement, which functions in large measure as a viatical settlement for a healthy individual. Because there is a greater risk that the insured will live longer than statistically expected, the payout under a life settlement can often be much less than the

payout under a viatical settlement.

Dubbed by some commentators as “Death Sales,” viatical settlements and life settlements can provide an important benefit to the insured, namely, that the insured receives funds when he or she is alive and in a position to use them. The insured can use these funds to pay for medical expenses, create lasting memories with loved ones or finance the premium payments for another life insurance policy with a higher death benefit.

Before rushing into a viatical or life settlement, the insured should consider other, less risky, options. First, some life insurance policies offer accelerated benefits for those with a terminal illness. Second, some life insurance policies have a cash value, which the insured can borrow during his or her lifetime. Finally, the insured might surrender the policy for its cash surrender value if that value is sufficient to meet the needs of the insured.

Some providers of viatical and life settlements have been associated with fraud of one sort or another. The insured should contact the Arizona Department of Insurance ([www.id.state.az.us](http://www.id.state.az.us)) to determine whether the potential provider is in good standing and whether any former customers have filed complaints. As always, the devil is in the details, and the insured should have an attorney who specializes in viatical and life settlements review any documents before signing.

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## ET·Y·MOL·O·GY COR·NER

### Just Ask the Colonel

The word “franchise” comes from 13th century Old French meaning freedom. By the 1700s, it came to mean a legal right and then the right to vote. Its modern meaning — authorization to sell another company’s products and services — didn’t arrive until the late 1950s. One of the earliest examples of a franchise is Kentucky Fried Chicken.

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***Rick, our etymologist, practices in the areas of commercial law and commercial litigation.***



**On March 31, Gust Rosenfeld and family members participated in Rebuilding Together Valley of the Sun’s 2007 Rebuilding Day to help a local resident with her home.**

# George Pisaruk Begins a New Legal Chapter

George Pisaruk brings a unique blend of legal and business experience and perspective to the firm. For more than 15 years, he has served as in-house legal counsel for several companies and has held various



GEORGE PISARUK

management positions in the contracts/subcontracts, operations and procurement fields for Fortune 500 companies in both the commercial and avionics defense industries. In his career, he has formed and managed multimillion-dollar business operations domestically and in Europe, Asia, and the Middle East. In addition, he has provided business and legal counsel to both private and public companies in the areas of equity financing, the Sarbanes Oxley Act, intellectual property management and securities regulation. George concentrates his practice in the areas of business and corporate law (includ-

ing mergers and acquisitions, corporate financing, securities, and import/export), corporate governance, intellectual property protection and licensing, and international law. His practice also includes business formation, contracts, international business expansion and tax protection, and government contracts (including compliance with both FARS and ITARS).

Prior to joining the firm, George was General Counsel of iCrossing, Inc., a private search engine optimization company in Scottsdale. In addition, he was General Counsel and Secretary of Three-Five Systems, an NYSE technology company that manufactured liquid crystal displays and television light engines. George previously served as Senior Counsel at PetSmart.

When asked why he entered private practice, George said, "After working extensively as an in-house attorney, I felt it was an opportune time in my career to switch over to the private practice side. As part of Gust Rosenfeld, I am able to provide practical, in-

novative legal solutions and business advice to companies here in the Valley."

George received his B.S. in Purchasing, Operations and Materials Management (1986) and his M.B.A. (2000) from Arizona State University. He earned his J.D. from the University of Nebraska College of Law (1995). George lectures frequently at the State Bar of Arizona, Arizona State University, and the American Graduate School of Management (Thunderbird) on international business and trade law topics.

A native of New England, George describes himself as a die-hard fan of both the Boston Red Sox and Nebraska Huskers football. He is an avid animal lover (he has three Beagles, a Labrador Retriever and a cat) and shares his life with wife Nancy and daughter Delainey.

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