

Spousal Consent – What Does That Mean?

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The spousal consent form is a standard exhibit in virtually all franchise agreements. It protects the franchise interest from becoming implicated in a property dispute during a divorce. In short, this form is designed to protect franchisors from ending up in business with an ex-spouse of a franchisee. But, is the standard form getting this done? There are important business reasons to take a fresh look at this document.

Definition of Spouse and Corresponding Rights

Who is a “spouse?” Seems simple enough – a spouse is a partner in marriage. Traditionally, this meant that when two people married, they joined their households – and finances – and thus enjoyed state-recognized rights because of that marriage. In the current legal landscape, however, things are a little more complicated.

For example, the meaning of “spouse” and the consideration of marriage is particularly complex when considering same-sex couples. Since the Supreme Court’s decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), same sex couples may be married and have their marriages recognized in all US states and territories. However, there are vast discrepancies across the states regarding whether sexual orientation is a protected classification for employment and housing discrimination laws. For example, twenty-eight states do not have laws prohibiting housing discrimination based on sexual orientation, and twenty-eight states do not have laws prohibiting employment discrimination based on sexual orientation. See http://www.hrc.org/state_maps. In addition, state courts are still grappling with whether same-sex couples in long term relationships before *Obergefell* are eligible for common law marriage recognition. See G.M. Filisko, *After Obergefell: How the Supreme Court ruling on same-sex marriage has affected other areas of law*, A.B.A. JOURNAL (Jun. 1, 2016). http://www.abajournal.com/magazine/article/after_obergefell_how_the_supreme_court_ruling_on_same_sex_marriage_has_affecte. These

considerations often weigh heavily in marriage decisions for same-sex couples.

Moreover, there are legal and economic considerations that affect the decision to marry and what it means to be a “spouse” for couples of all orientations. For example, there are federal programs that still look to state definitions of who is a spouse for determining benefits eligibility. Accordingly, many couples are looking more closely at the economic implications of their family decisions. Some couples choose to rely on (the less formal and public) common law marriage statutes to commemorate their unions. Other couples choose to be in domestic partnerships. With the multiple options available for couples when considering their unions, it is crucial for all parties entering into franchise agreements to make sure that they are broadly protected.

Business Purpose – Call it What It Is

The purpose of the “spousal consent” form is to provide some predictability to the franchise relationship. However, with all the factors complicating even the definition of a spouse, this form may provide less predictability than the parties intend. Where marriage grants spouses property rights to commonly held marital property, most franchisors either require the spouse of an individual franchisee to guarantee the obligations of the franchise – to join the deal – or disavow any interest. This is the document by which a spouse gives up his or her rights to an interest in the franchise. This means that the spousal consent form is actually a post nuptial property transfer. Making some relatively small changes to the form will help clarify the parties’ intent, broaden protection for franchisors, and lower the risk of challenge to its validity. Calling the document a “Property Interest Consent and Waiver” form also aligns with the goal of providing appropriate disclosure to prospective franchisees.

Practice Considerations

Consider the following practice considerations for revising the spousal consent form to a “Property Interest Consent and Waiver” form in Franchise Agreements:



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- Identify what it is – a property transfer.
- Provide notice to the “spouse” about what the form does and what interests are being waived.
- The waiver should be witnessed.
- The waiving party’s signature should be notarized.
- The franchisor should maintain the original signed document with the franchise files.
- Consult with your estate planning and family law colleagues to tailor your forms to your particular state law.

Sample Language

Below is language that was accepted in a franchise registration last year in California. The regulator requested that we continue to use the term “Spousal Consent” so that people encountering this form are not confused.

PROPERTY INTEREST (SPOUSAL) CONSENT AND WAIVER

The purpose of this waiver is to affect your property rights. This waiver operates effectively as a post-nuptial agreement as it supersedes and amends any prior understanding or agreement between you and the Franchise Owner (as defined below), whether written or oral. You are advised to consult with counsel of your choosing before executing this Waiver.

Initials: _____

I hereby represent that I reside in _____ (the state where you reside) and am the spouse, partner, civil union participant, (however our relationship may be defined under applicable state law) or recognized spouse under common law marriage of _____ (“Franchise Owner”).

I acknowledge and understand that Franchise Owner or a corporation, partnership, or limited liability company in which Franchise Owner is a principal owner (the “Franchisee”), will be entering into, or has already entered into a Franchise Agreement with [Franchisor] (“Franchisor”) to acquire a [Franchise] franchise and operate a [Franchise] location. I hereby waive any right, now or in the future, to assert a community property or quasi community property interest in the franchise, the Franchise Agreement, the [Franchise] location, or in the Franchisee

entity. I understand that in the absence of this Property Interest (Spousal) Consent and Waiver, the Franchisor, as a condition of granting the [Franchise] franchise to Franchise Owner, would have required me to personally enter into the Franchise Agreement or to execute a personal guaranty of all of Franchisee’s obligations under the Franchise Agreement. I represent and agree that the waiver of this condition by Franchisor is sufficient consideration for this Property Interest (Spousal) Consent and Waiver. I understand that if I did not wish to provide this Property Interest (Spousal) Consent and Waiver, I could have agreed to personally execute the Franchise Agreement or the personal guaranty. I hereby represent and acknowledge that I knowingly and deliberately elected not to do so and to instead provide this Property Interest (Spousal) Consent and Waiver.

If, notwithstanding this Property Interest (Spousal) Consent and Waiver, I claim or am awarded in a legal action a community property interest, quasi community property interest, or other ownership interest in the franchise, the Franchise Agreement, the [Franchise] location, or in the Franchisee entity, other than by way of a transfer approved in writing by Franchisor as provided in the Franchise Agreement, that I hereby agree, without further action or execution of further instruments, that at the Franchisor’s option, (i) I will be personally bound by all of the terms of the Franchise Agreement and be liable for the performance of all obligations thereunder, or (ii) the claim or awarding of such interest in the franchise, the Franchise Agreement, the [Franchise] location, or in the Franchisee entity constitutes grounds for termination of the Franchise Agreement as an unapproved transfer.

Conclusion

The definition of a family is evolving and the agreements used by those selling franchises need to adapt to these changes. With an additional layer of state-specific nuances impacting the rights and obligations of the parties to the franchise relationship, prudent franchisors will revisit the “spousal consent” form and make its terms more universal. The best way to protect all parties to the franchise agreement is to follow three simple steps: 1) call it what it is – a Property Interest Consent and Waiver; 2) follow the formality rules for your jurisdiction (or the most restrictive one); and 3) consider the laws of the state where the franchise agreement will be enforced. The business benefits of these changes are well work. ■