FAMILY TRUST COMPANIES IN NEVADA

BY MATTHEW D. SALTZMAN, ESQ.

Family Trust Companies (FTCs) have become an increasingly popular way for very wealthy families to manage and preserve great fortunes. In 2009, Nevada joined the small number of states that enacted legislation to allow a company to act as a trustee for family trusts, if the company does not market its services to the general public. These new laws are set forth in Nevada Revised Statutes (NRS) 669A.

While a retail trust company can provide fiduciary services to the general public, an FTC is a corporation or LLC formed to provide fiduciary services to a single family. The scope of the persons who can benefit from its services is limited and clearly prescribed in Nevada law.[1]

Nevada's FTC laws, together with its favorable tax and trust laws, make Nevada an increasingly popular jurisdiction for domiciling trusts and establishing FTCs.

The very wealthy have historically worked with their advisors to avoid the dissipation of their fortunes over time, and to preserve and even grow the family fortune for future descendants. People who make great fortunes are often people who take risks and demand a high degree of control in their business affairs. Super-rich families form FTCs to manage and invest their own wealth, maximize tax-planning benefits and control the family's money for future generations. An FTC can provide an environment where family members can work together to develop a family culture arising from the family business and provide a means for preserving a great fortune.

Why use a Family Trust Company as trustee of family trusts?

The trustee of a trust can be a natural person or a business entity. Selecting a natural person as trustee involves certain limitations. Individuals may be concerned about their personal liability for decisions as trustees. Issues will arise if a person becomes infirm, disabled or deceased. Nevada law generally requires a business entity to obtain a trust company license from the State of Nevada Department of Business and Industry's Financial Institutions Division (FID), to hold itself out to the public as being able to exercise fiduciary power. State or federally chartered banks also provide trust services. These larger, established trust providers are considered institutional trustees.

FTCs are particularly useful in managing the type of assets put into a trust by a creator of great wealth. While institutional trustees typically prefer managing diversified portfolios of readily marketable securities, a wealthy family typically funds trusts with interests in family-established businesses—securities that may or may not be readily marketable. Trusts with controlling interests in businesses place the trustee in the position of control of the business and potential liability for business activity. FTCs also manage assets such as private equity interests, hedge funds and real estate. FTCs are particularly suitable for management of interests in regulated businesses, such as gaming establishments for which the trustee could itself be subject to regulatory oversight because of its degree of control of the business.

Many institutional trustees may not be willing act as trustee of trusts holding these types of assets, while

others will accept these types of assets, but charge high fees commensurate with the risk.

Benefits of a Family Trust Company

The FTC can protect a family against the risks of an individual trustee who could die or become incapacitated; institutional trustees can undergo mergers, change services or even go out of business completely. The FTC allows the family and its employees to manage the family assets.

An FTC is a company that has officers and directors (or managers) and can employ both family members and outside experts to manage the assets in trust. Depending on the size of the family fortune being managed, it can be a robust business with many employees. Unlike an institutional trust company with a profit motive, the FTC only exists to serve the family and need not generate fees beyond its expenses.

Family Trusts Can Have Long Duration

An FTC can be the trustee of trusts designed to exist for centuries. In recent years, several states have taken steps to either eliminate or greatly extend the limits on a trust's existence. Many attorneys recall that the rule against perpetuities placed limits on the length of the existence of trusts. In recent years, states have made changes to these limits and, in some cases, abolished the rule against perpetuities. Nevada's law has been amended to allow for interests in assets in a trust to continue for up to 365 years.[2]

Considerations When Forming a Family Trust Company: the "Designated Relative"

An FTC may only provide services to family members and not the general public. The definition of a family member is detailed in Nevada law. The initial focus is on the identity of a designated relative. The FTC can act as trustee for trusts for the benefit of the designated relative and persons who are within a ninth degree of collateral kinship or a 10th degree of a lineal kinship, including non-relatives such as spouses, estates and trusts involving family members, and family members of officers, managers and directors of "family affiliates," businesses owned or controlled by family members.[3] Theoretically there would be a point at which an FTC would have to convert to a retail trust company, if the family's descendants grow and multiply beyond the degrees of kinship that are permitted under the statute.

Licensed vs. Unlicensed Family Trust Companies

Nevada law allows for both licensed and unlicensed FTCs.

An FTC can operate without a trust company license so long as it notifies the FID of the identity of the designated relative for which the non-licensed trust company is established. An unlicensed trust company avoids the time and expense associated with preparing an application, maintaining minimum capital and undergoing supervisory exams in future years. Changes arising from the Dodd-Frank financial reforms may require an unlicensed FTC to be owned or controlled by family members to be exempt from being deemed an investment advisor subject to SEC registration. As a result, many unlicensed FTCs once owned by non-family members became licensed FTCs or delegated investment management to qualified third parties.

A licensed FTC has several advantages, including the ability to use the word "trust" in its name and fewer restrictions on managing investments internally. A licensed FTC is necessary if trust agreements require the use of a licensed trust company as trustee, and certain types of trusts, such as Nevada's self-settled spendthrift trust, require that a corporate trustee be licensed in Nevada.[4] Licensed FTCs are supervised and examined by the FID in a similar manner to retail trust companies.

To become a licensed FTC, an application must be made with the Nevada FID identifying at least one officer who is a Nevada resident, and the FTC must have a Nevada office. It must maintain a bank account in Nevada with at least $300,000 of stockholders' equity. The initial licensing application includes payment of $3,000 in filing fees plus the submission of personal information, including fingerprints for principals of the licensed FTC who are investigated for their suitability. The FID has also recommended the inclusion of a business plan that outlines information about the proposed business activity.

There has been a surge in formation of FTCs in Nevada. As of December 2016, FID records indicate that there are a total of 26 licensed FTCs and 91 unlicensed FTCs in Nevada. Of these, four licensed FTCs and 26 unlicensed FTCs were established in 2016 alone.

Trusts with controlling interests in businesses place the trustee in the position of control of the business and potential liability for business activity.

The FTC ownership structure varies with each family. In some cases, the owner of the FTC is an LLC that is itself owned either outright by a family member or by a trust specifically

continued on page 16

continued from page 15

FAMILY TRUST COMPANIES IN NEVADA

designed to own the FTC during the entirety of its existence. While the FTC offers family members leadership opportunities, the degree of family involvement in ownership of the FTC must be managed in accordance with taxation goals, particularly where family members could be involved in discretionary distributions.

The FTC can be deeply involved with inter-family financial transactions.[5] These involve a variety of financial transactions between and among the FTC, the family trusts it administers, family members and family affiliates that could be prohibited as a conflict of interest for an institutional trustee. Privacy and confidentiality are important. An FTC may petition the court to order a variety of documents to be sealed from the public record, including inventories, listing of accounts, fiduciary statements and other documents relates to its activities.[6]

As of December 2016, FID records indicate that there are a total of 26 licensed FTCs and 91 unlicensed FTCs in Nevada.

The FTC provides an environment in which each generation has the ability to learn about the family businesses that led to the creation of the fortune within a family culture. The FTC can provide a place for generations of family members to go to work—not just for an office, but for the family office. **NL**

1. NRS 669A.070.
2. NRS 111.1031.
3. NRS 669A.070(1).
4. NRS 166.015(2)(b).
5. NRS 669A.225.
6. NRS 669A.256.

MATTHEW D. SALTZMAN is a shareholder at Kolesar & Leatham in Las Vegas. As part of his banking law practice, he assists clients with the formation and licensing of retail and family trust companies. He can be reached at msaltzman@klnevada.com or 702-362-7800.