Summer 2019

Estate Planning newsletter

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INSIDE THIS ISSUE

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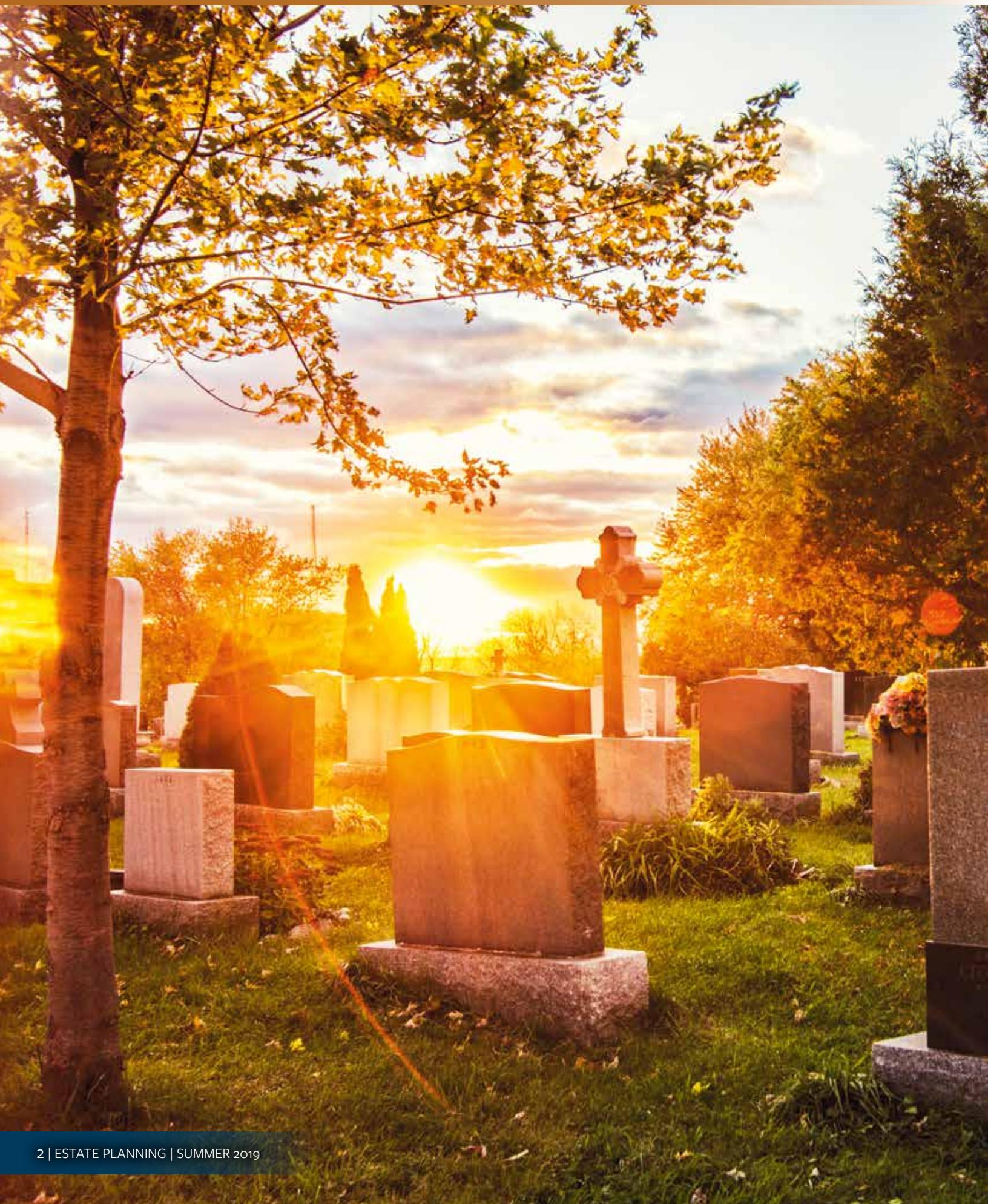
MINNESOTA CEMETERY LOTS – REAL PROPERTY

Do you, your parents, siblings or spouse own a Minnesota cemetery lot? Ownership and disposition of cemetery lots are often overlooked during the processes of estate planning and probate of an estate. The inheritance of unused cemetery lots are addressed by Minnesota statutes, and if not considered and addressed, may conflict with your assumptions and result in unintended consequences.

An individual cemetery lot (as well as the cemetery graveyard) constitute real property under Minnesota law. However, the ownership and inheritance rights of individual cemetery lots are unique and limited as compared to other real property. The ownership rights of the cemetery association or private cemetery itself are broader than those of the individual lot owners.

continued on pg 2



MINNESOTA CEMETERY LOTS – REAL PROPERTY continued from pg 1

Generally, fee (simple) ownership in real property is defined as in inheritable interest in land which represents the greatest potential legal title available under the law. In contrast, there is no fee simple title ownership of an individual Minnesota cemetery lot. The "bundle of sticks" analogy is often used to describe those various rights which, together, comprise the complete total fee simple ownership of Minnesota real property ownership. A cemetery lot owner (other than the cemetery association or private cemetery) however, holds very few of these sticks in an individual cemetery lot. Those limited ownership rights basically include the right to be buried in the lot and a limited right to make a testamentary transfer (by Will), to a specific individual, or in trust to the public cemetery association or private cemetery for the use and benefit of any person or persons designated in a Will.

In order to effectively convey ownership rights under your Will, there must be specific reference the subject cemetery lot and the name just one person to inherit it. Both of those conditions – lot reference mention and one person for that lot - must be addressed. If they are not, and even if the Will is accepted for probate by Minnesota probate court, the directive will be void. Instead, the provisions of Minn. Stat. Section 525.14 will apply, as if the decedent had passed without a Will.

Consequently, any lot(s) in question will descend, subject to the right of internment of the decedent in the lot and free of all debts, in the following order:

1. Life Estate or Fee Title to the Surviving Spouse with a Right of Internment in the Cemetery Lot: If there is a surviving spouse, such person shall have at least a life estate in the cemetery lot, with the right to be buried there. The remainder interest (if the surviving spouse is not interred in the lot), goes to the person who would be entitled to the fee if there were no spouse. If there is no such remainder person, the entire fee ownership goes to the surviving spouse with right of interment. That is, if no other option described below applies, then the surviving spouse may direct conveyance of the lot by a Will.

2. If No Surviving Spouse, Right of Internment to the Eldest Surviving Child: If there is no surviving spouse, or if the surviving spouse decided not to exercise the right of interment and be buried there, then the oldest surviving child inherits the cemetery lot, with a right of interment.

3. If No Surviving Spouse or Child, Right of Internment to the Youngest Surviving Sibling: If there is no surviving spouse or child, the cemetery lot is inherited by the decedent's youngest surviving brother or sister.

4. If there is no surviving spouse, child or sibling: In this event – and if the lot is not sold during the administration of your estate — the lot is transferred to the relevant cemetery association or private cemetery. The cemetery association then holds the cemetery lot in trust as a burial lot for the decedent and such of the decedent's relatives as the governing body thereof shall deem proper. The cemetery association or private cemetery, or, with its consent, any person to whom the lot shall descend may grant and convey the lot to any of the decedent's parents, siblings or descendants.

These statutory provisions apply to both public cemeteries and private cemeteries. A grave marker, monument, memorial, or other structure lawfully installed or erected on the cemetery or lot are part of and descend with the lot. In addition, a crypt or group of crypts or burial vaults owned by one person in a public or community mausoleum is deemed a cemetery lot. ■

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NEW LAWS – AN UPDATE FROM THE 2019 LEGISLATIVE SESSION

By Wade R. Wacholz
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The Minnesota Legislature completed its work almost on time with final budget negotiations concluding essentially at the wire and the short special session to wrap up all the details. Two important pieces of the legislation relating to planning your Minnesota estate were included in the final tax bill.

Qualified Farm and Small Business Exemption

Under the Minnesota estate tax, certain qualified small business property and qualified farm property is exempted from Minnesota estate tax up to a certain value. The law requires that the property only receives the exemption if it was owned by the deceased owner for at least three years before death. More often than not, when a person dies, they leave their small business or farm property to their spouse. Previously, the Minnesota Department of Revenue took the position that in order for the surviving spouse's estate to claim the exemption, the surviving spouse needed to live at least three years beyond the death of the first spouse. The Legislature determined that this arbitrary result was not consistent with the original purposes of statute. Part of the presentation to the Legislature was the history of one family who had to pay more than $100,000 in estate tax on farm property that would have otherwise been exempt except for the fact that the spouses died within three years of each other. To remedy the problem, the statute was amended to treat spouses as a single economic unit for purposes of the three-year holding period requirement. Thus, there is no longer a "penalty" if spouses die within three years of each other and otherwise meet the qualifications for holding exempt small business or farm property.

Agricultural Homestead

Minnesota law lays out requirements for certain real property held in trust be eligible for property tax classification as homestead property. The designation results in a lower tax rate and also is an essential feature for agricultural property to qualify as "qualified farm property" for the Minnesota estate tax. For some years, the Minnesota Department of Revenue held that property held in a trust created for a spouse under an estate plan should not qualify for agricultural homestead status. Individual counties made separate decisions on handling this interpretation, some following the Department of Revenue guidance and some not. To provide for uniform interpretation, and to recognize that spouse's trusts are an important means of efficiently planning estates, the Legislature adopted a clarifying amendment to law which allows taxpayers to link all of their contiguous and noncontiguous agricultural homestead properties together, whether they are titled in an individual's name or in separate trusts created by the individuals and, therefore, obtain homestead classification.

The two bills passed by the Legislature did not represent wholesale reform. They did, however, take a practical approach to resolving two troublesome areas of inconsistency in the application of the Minnesota estate tax and, therefore, provided a clearer path for families to adopt effective estate plans. ■

GUARDIANSHIP AND CONSERVATORSHIP

By Rhett P. Schwichtenberg
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When caring for loved ones, the terms "guardianship" and "conservatorship" come up frequently. The two are used together so often that many people do not realize they are actually separate tools. The relationship between guardianships and conservatorships is similar to that of a married couple: the two have many similarities and enjoy each other's company—but, they each have distinctive characteristics.

This article explains the purpose of guardianships and conservatorships, provides the procedural steps to establish a guardianship and conservatorship, and discusses the tools every estate plan should incorporate to decrease the need for a guardianship or conservatorship.

Purpose and Incapacity

The purpose of guardianships and conservatorships is to protect an "incapacitated person." Minnesota Statutes § 524.5-102, subd. 6, defines an incapacitated person as an individual who "lack[s] sufficient understanding or capacity to make or communicate responsible personal decisions, and who has demonstrated deficits in behavior which evidence an inability to meet personal needs for medical care, nutrition, clothing, shelter, or safety, even with appropriate technological assistance."

Although implemented to help and protect, the decision to grant a guardianship or conservatorship is not made lightly. This is because the nature of guardianships and conservatorships involves stripping an incapacitated person of certain rights and vesting the power to exercise those rights with a guardian or conservator. Courts generally employ what is called the least restrictive alternative when deciding what powers to guardian or conservator. The law favors allowing the ward to retain his or her autonomy and self-determination to the maximum extent possible.

What's the Difference?

The main difference between guardianship and conservatorship is simple: guardianship deals with the person while conservatorship deals with their estate. Stated differently, a guardian guards a person while conservator conserves their estate.

continued on pg 6

GUARDIANSHIP AND CONSERVATORSHIP

continued from pg 5

A guardianship is a tool used when the incapacitated person, or "ward," can no longer care for their basic, non-financial needs. A guardian has the duty to provide for the ward's care, comfort, and maintenance needs, including food, clothing, shelter, health care, social, and recreational requirements. These basic needs are funded by the ward's estate or through government benefits, not the guardian's personal funds.

A conservatorship, on the other hand, is a tool used when the ward is unable to manage his or her personal financial affairs due to an impairment limiting the individual's ability to receive and evaluate information or make decisions.

How to Establish a Guardianship and Conservatorship

Guardianships and conservatorships are established in court. An interested person, such as a member of the ward's family, must file a petition in the district court of the county where the incapacitated person resides at the time of filing. The petition must include certain information including the names of all parties involved; a narrative detailing the reasons why a guardianship, conservatorship, or both are needed; and the name of the proposed guardian and conservator and their qualifications to act as such. After receiving the petition, the court will schedule a hearing to determine whether a guardianship and conservatorship are necessary and either grant or deny the petition.

Petitions for guardianship and conservatorship can be brought on an emergency basis when immediate action is necessary to protect the ward. To grant a guardianship or conservatorship on an emergency basis, the court must find that the ward would suffer substantial harm (guardianship) or immediate loss or dissipation of assets (conservatorship) if subjected to the standard court procedure. Emergency petitions forego the hearing requirement, at the court's discretion, and require the court to act swiftly. This allows the court to grant or deny an emergency guardianship or conservatorship as soon as a petition is filed. Within five days after an emergency appointment, the court must hold a hearing to decide whether the appointment was appropriate.

Emergency guardianships and conservatorships may not exceed a term of 60 days (this period is extended to 90 days if a county is bringing the petition on behalf of a vulnerable adult). The purpose of the 60-day limit is to provide the ward with immediate protection, giving the petitioner time to file a new petition for a general (i.e., permanent) guardianship and conservatorship where the court can more accurately determine if such protections are necessary.

Powers of Attorney and Health Care Directives

Powers of attorney and health care directives are estate planning tools that function similarly to a guardianship and conservatorship. Unlike guardianships and conservatorships, powers of attorney and health care directives must be set up before an individual is incapacitated.

A power of attorney is a powerful document used in most estate plans and allows an individual (the "principal") to designate one or more individuals to act as the principal's "attorney-in-fact." The document authorizes the attorney-in-fact to perform a broad range of powers while also allowing the principal to select which powers the attorney-in-fact is authorized to perform. Closely related to a conservatorship, the powers conveyed by a power of attorney relate to the principal's estate. A power of attorney does not grant any powers to make health care decisions.

A health care directive, on the other hand, is a document used to convey health care instructions for the principal's end-of-life care. In the health care directive, the principal designates an agent to carry out the principal's health care instructions and make health care decisions on his or her behalf.

Using both a power of attorney and health care directive in an estate plan alleviates the likelihood that a guardianship and conservatorship will be necessary upon incapacity.

Conclusion

Guardianships and conservatorships are useful tools when an individual becomes incapacitated and no longer has the means to care for his or her basic personal or financial needs. Unfortunately, the procedures to establish guardianships and conservatorships can be both timely and costly. Most individuals can avoid the need for such protections by including a power of attorney and health care directive in their estate plans. ■

Save the Date!

To Be Our Guest For A Complimentary Seminar Presented By:
Gislason & Hunter LLP & CliftonLarsonAllen

Building Your Financial Plan
A Road Map for the Future

Wednesday, December 4, 2019
Courtyard Marriott
901 Raintree Road
Mankato MN 56001

10:30 a.m. – 3:30 p.m.

RSVP: jdonner@gislason.com

A complimentary estate and succession planning seminar presented by:

GISLASON & HUNTER LLP
ATTORNEYS AT LAW
www.gislason.com

CliftonLarsonAllen

10:30 – Covering the Basics a document checklist – Jim Heilman, CLA
(transfer, gifts, sales)
Are all of the pieces in the right place?

11:30 – The Tax Piece –
Kaitlin Pals, Gislason & Hunter LLP
Estate
Homestead
Income

12:30 – Lunch

1:15 -The Future of the Land and Business – Jim Marzolf, CLA
Succession Planning

2:15 Charitable Giving and Donor Advised Funds – Wade Wacholz, Gislason & Hunter

3:00 Estate Planning Panel
Moderated by Wade Wacholz
Panel Members: Rod Mauszycki, Jim Heilman, Kaitlin Pals, Andy Willaert

3:30 – Social

By Christopher J. Kamath
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INTESTATE SUCCESSION – DYING WITHOUT A WILL

Most people have never heard of Minnesota's laws of intestate succession. Those who have heard of intestate succession probably don't know exactly how it works. In essence, the laws of intestate function as a default, statutory will, determining how your property will be distributed if you die without having first created a valid will. The intestate laws represent the state legislatures best guess for how you would want your property to pass to your heirs. And while intestate succession works as a good safety net, it is a poor substitute for an actual will.

The Intestate Estate

The laws of intestate only control what happens to your Intestate Estate. In order to understand what your Intestate Estate is comprised of, you first need to understand the difference between probate and non-probate assets. In general, probate assets are assets held solely in your individual name and need the help of a probate court to transfer title to your beneficiaries. Probate assets include tangible personal property, bank accounts, stocks, bonds, certificates of deposit, and real estate titled solely in your name. Non-probate assets do not require the help of a court to transfer title and are not subject to intestate succession. Non-probate assets include jointly owned property and assets with a beneficiary designation, such as life insurance proceeds, funds in a 401(k) or other retirement account, and real estate that has been conveyed by a transfer on death deed.

Your Intestate Estate is comprised of all your probate assets, excluding your family residence; up to $15,000 in certain exempt property which your surviving spouse or children can claim (household furniture, appliances, personal effects, etc.); and a certain amount of money set aside for your dependents called a family allowance. Consequently, the laws of intestate, just like a will, only control what happens to your probate assets.

The Intestate Succession Plan

Minnesota's intestate laws determine who inherits your property if you die without a will. The end result depends on whether you are married or have children, parents, or other more remote relatives living at the time of your death. In general, the people most closely related to you will inherit your property.

continued on pg 10

INTESTATE SUCCESSION – DYING WITHOUT A WILL continued from pg 9

Intestate Succession for Married Individuals. If you are married at the time of your death, your surviving spouse will inherit your entire Intestate Estate if you die without any surviving children or descendants. Your spouse will also inherit your entire Intestate Estate if all of your descendants are from you and your spouse, and your spouse has no descendants from a prior relationship. The law presumes that this is a fair distribution of your assets because most people would want to provide for their spouse's comfort and there is little risk of your spouse disinheriting his or her own children.

Things become a little more complicated if either you or your spouse have children, grandchildren, or other more remote descendants from a previous relationship. In such a situation, your spouse is entitled to the first $225,000 of your Intestate Estate, plus one-half of the remaining balance. Your surviving children will share equally in the other half of the remaining balance of the Intestate Estate; however, if any of your children predecease you leaving behind surviving descendants, the share that would have gone to your deceased child will be split equally between his or her children—your grandchildren. When a grandchild receives a portion of your Intestate Estate in this manner it is commonly referred to as taking "by representation".

Intestate Succession for Unmarried Individuals. The laws of intestate succession give preference to the lineal descendants of an unmarried person. As a result, your Intestate Estate will be divided into equal shares for your surviving children and any deceased children who left behind descendants who also survive you. The share allocated to your deceased child will then be divided equally among his or her descendants in the same manner as described above.

Your parents are next in line to take your individual property if you don't have any living descendants. If both your parents are alive, your Intestate Estate will be split equally between them; otherwise, the entire estate will go to your sole living parent. In the event your parents are no longer living, your Intestate Estate would pass to your siblings with their descendants taking by representation.

Tracing the distribution of your Intestate Estate to other relatives can get a little messy. Depending on the circumstances, your individual property could end up in the hands of your grandparents, aunts, uncles, cousins, and other relatives. A flow chart is provided at the end of this article to better illustrate the process of intestate succession.

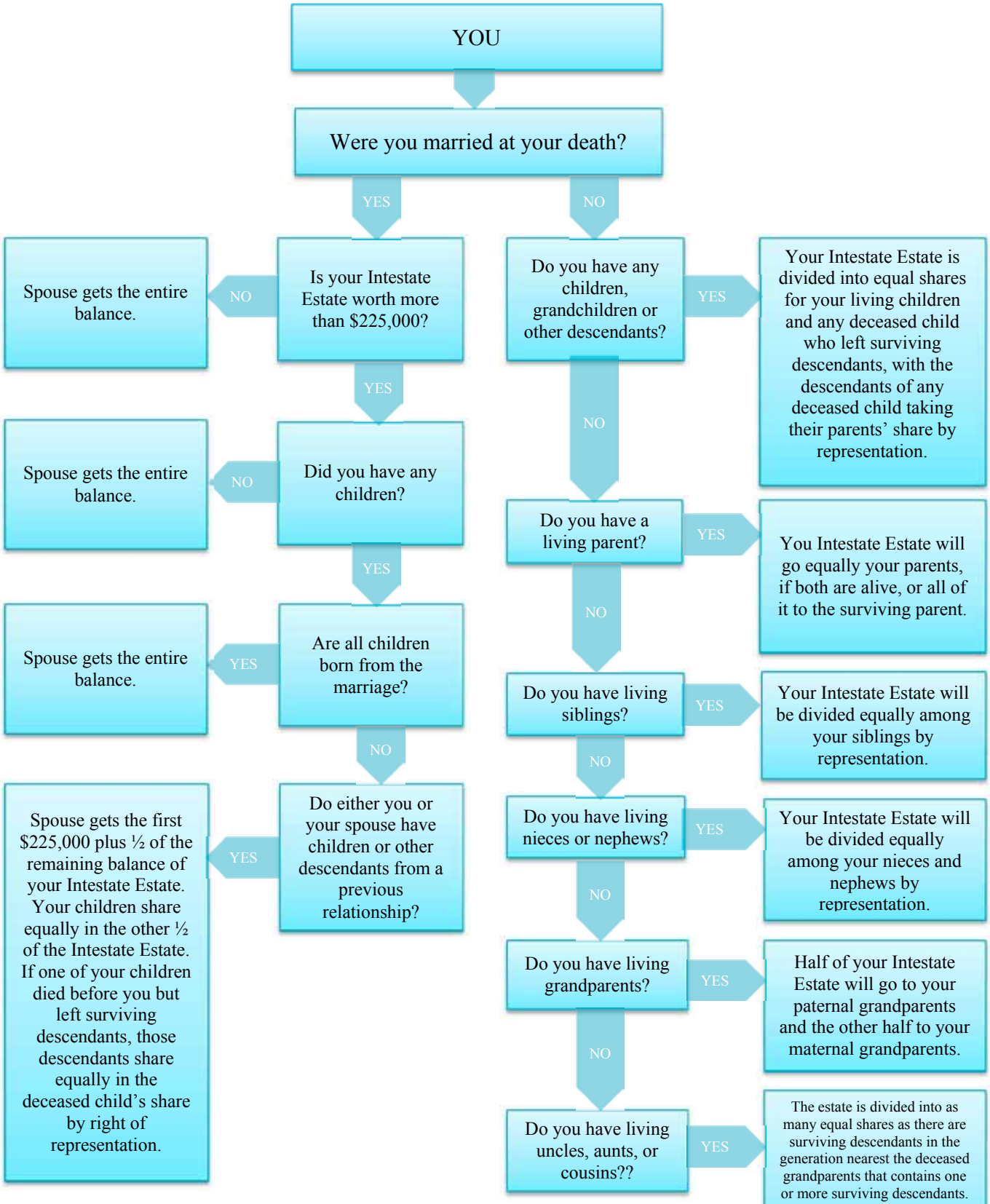
Why You Still Want a Last Will and Testament

The default rules of Minnesota's intestate laws are a poor substitute for a will because these rules apply equally to estates without regard to the value of a person's assets or the number of beneficiaries a person leaves behind. This one-size-fits-all approach can lead to some unfair results. For example, suppose Marnie passes away without a valid will, leaving behind her husband, Doug, and a son from a previous marriage, Gared. The only assets Marnie owns at her death is a primary residence valued at $300,000 and cash in the amount of $225,000. Under the laws of intestate, Doug will receive use of the family home for the remainder of his life and $225,000 in cash, less funeral expenses, taxes, and expenses of Marnie's estate. Gared will not receive anything.

If you don't like the default plan the government has created for you, it may be time to think about creating your own estate plan. Estate planners can do so much more with a will that simply direct assets to your intended beneficiaries. Creating a last will and testament will allow you to designate your own Personal Representative to administer your estate, as well as name a guardian for any minor children should you meet an untimely demise. Your will can also incorporate provisions that place conditions on gifts, grant life estate interests, or establish a trust for the benefit of your descendants until they reach a certain age.

Conclusion

The laws of intestate are designed so that a spouse, descendant, or other remote relatives have an opportunity to inherit your property if you fail to create a will before your death; however, these intestate laws can lead to some unfair outcomes and don't allow for the specialized planning most families need. If you would like more control over what happens to your estate, it is recommended that you consult with an attorney to create your own individualized estate plan.



"By representation" means the Intestate Estate is divided into as many shares as the decedent has surviving children and deceased children who left living descendants. Each surviving child receives one share and the share for each deceased child is divided among its descendants in the same manner.

Gislason & Hunter Estate Planning Services

Estate Planning is important to ensure the orderly transfer of family assets, as well as to protect those assets from unnecessary taxation. The Gislason & Hunter Estate Planning Practice Group offers a variety of services to assist you in creating the best plan for you, your family, your business or your farm.

Some of the many services our attorneys offer include the following:

- Drafting wills, trusts, codicils and powers of attorney
- Preparing health care directives and living wills
- Creating family business succession plans with emphasis on each family's particular goals and values
- Farm estate and succession planning
- Evaluating estate and gift tax issues and structuring planning options to minimize tax obligations
- Administering and assisting clients with probate proceedings, conservatorships and guardianships
- Advising on Medicaid, Medicare, nursing home and elder law issues
- Handling disputed estate and probate matters in litigation, arbitration or mediation formats

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