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SPOUSAL ELECTIVE SHARE

By Reed Glawe
866-760-3429
rglawe@gislason.com

Prior to 1875, land in Minnesota and elsewhere was almost always universally owned by men. When a landowner died, he would typically pass the land to the eldest son or other male children thereby perpetuating the land in the family name and continuing the tradition of land passed from father to son. However, this custom had a devastating effect on surviving spouses. Land was, by far, the most significant, if not the only, asset which the family had. By passing the land to male children, the surviving wife often was left disinherited and financially destitute. Surviving spouses would be at the mercy of the children or would depend heavily upon other family members for support. In 1875, Minnesota enacted the first elective share statute establishing certain rights of homestead for the surviving spouse plus providing that the surviving spouse was entitled to an undivided one-third (⅓) interest in all lands that the decedent possessed. Over the years, the elective share has evolved.

The right of a surviving spouse to take an elective share is sometimes referred to as "electing against the will," or in other words, electing against the will of the decedent. However, a surviving spouse's right to take an elective share applies not only in the case where a decedent has a Will, but also where the decedent has a trust or other written document which directs where the decedent's assets are to go following death. The surviving spouse's elective share is not limited to just

continued on page 2

IN THIS ISSUE

p. 1 Spousal Elective Share
p. 4 A Seismic Shift – the IRS Rattles the Valuation Rules
p. 8 Buyer Beware

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SPOUSAL ELECTIVE SHARE

continued from page 1

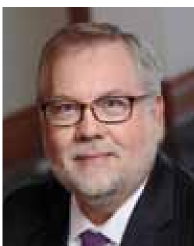
Wills; it applies in all cases where the decedent had some written document providing for disposition of his or her estate. However, it does not apply in the case of intestacy where the decedent had no Will or other written disposition of any kind; the elective share is intended to allow the surviving spouse to elect against the expressed written directives of the decedent. In the case of intestacy the decedent has no written directive, and accordingly, Minnesota law provides what the surviving spouse will take from the decedent's estate.

In general, the amount of the elective share depends on how long the decedent and the surviving spouse were married. If they were married less than one year, then the elective share is the "supplemental" amount (e.g. no less than $50,000.00 roughly), and increases incrementally until it caps out at 50% of the decedent's estate for marriages of 15 years or more. The elective share is in addition to and separate from the surviving spouse's right to a homestead (to guaranty he or she has a place to live), a personal property exception not exceeding $10,000.00 in value, and the right to an exemption of one automobile of any value.

The spouse elective share is automatic. It is a right given by Minnesota law to the surviving spouse simply for being married, however, to make the election, there is a deadline. The deadline for making the elective share is basically nine months from the decedent's death or six months after decedent's Will is accepted for probate, whichever is later. The election needs to be made in writing. If the surviving spouse fails to make the election by the deadline, the ability to make the election expires or terminates. In other words, if the surviving spouse fails to timely claim the elective share, he or she is bound to receive only that portion (if any) of the decedent's estate directed in writing by the decedent.

There are ways for a spouse to waive an elective share. In the case of a Will or a trust, the spouse can sign a waiver or "consent" to the Will or trust, after appropriate disclosures. In other words, if the spouse has a fair opportunity to review the Will and trust, understand the consequences thereof and is told about the assets involved, then the execution of a consent by the spouse to the decedent's Will or trust will be effective to waive the elective share. In addition, where a second or third marriage is involved, typically an antenuptial/prenuptial agreement will include waiver language such that each spouse waives their rights to elect against the Will or trust of the other. Without such a waiver or consent, even in the case of a second or third marriage with separate children from separate families involved, the spousal elective share will still be effective, and upon the death of one of the spouses, the surviving spouse will have the option to elect against the Will. So, for example, if you have a second marriage where both spouses have children from prior marriages, and each of them have Wills which give their estates, largely to their own children, without a waiver or consent by the other spouse, upon the death of the first spouse, the surviving spouse will still have the right to elect against the Will of the decedent. If that second marriage has been in existence for 15 years or more, that means that if the surviving spouse elects against the Will, he or she will receive roughly 50% of the decedent's estate. This may be a result totally unintended or unanticipated by the decedent or the children of the decedent. For that reason, it is important to consider obtaining a waiver or consent from both spouses when doing Wills or trusts, particularly where a second or third marriage is involved, to ensure that the intent of both decedents is implemented vis-á-vis their respective families, upon the death of the first spouse.

A SEISMIC SHIFT – THE IRS RATTLES THE VALUATION RULES



By Wade Wacholz
763-225-6000
wwacholz@gislason.com

By Kaitlin Pals
507-354-3111
kpals@gislason.com

Estate and gift tax discounts for lack of control and lack of marketability in family-owned entities are under attack. The IRS released proposed regulations under Section 2704 in August, which could go into effect as early as December 1, 2016. Depending on whom you ask, these regulations could spell the end of valuation discounts for family-owned businesses as we know them today.

The basic IRS rule for for estate or gift tax purposes is that the value of any transferable asset is equal to the price at which the asset would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. For years it has been permissible to consider certain

factors such as holding less than 50% ownership or a buy-sell restriction such as a right of first refusal, or the lack of a trading market to lower or "discount" the value of an asset such as corporate stock or a partnership share.

The newly proposed regulations affect how Section 2704 of the Internal Revenue Code will be applied in valuing such assets. The new Section 2704(a) provides that certain lapses of voting or liquidation rights are deemed to be transfers if a single family controls the entity both before and after the lapse. New Section 2704(b) states that certain restrictions on liquidation and other rights are completely disregarded for valuation purposes if a business interest is transferred between family members. In short, the IRS is looking to value transactions between family members without regard to the rules that commonly govern non-family transactions.

No one is really sure how these proposed regulations will ultimately work. We are still in the middle of the 90-day public comment period, which means the IRS may issue explanations or make changes to the proposed regulations in response to comments from various public sources. Because of the regulations' scope and impact on family owned businesses, it is likely they will be challenged in court as well.

continued on page 6

Though no one knows exactly how and when the new regulations will finally work out, the following appear to be the major changes to current law:

- The new regulations will make it clear that "corporations and partnerships" as referred to in Section 2704 will include LLCs, even if the LLCs are "disregarded entities" for tax purposes.
- The new valuation rules will be applied consistently both for inclusion in the taxable estate and for deductible items, such as marital and charitable gifts or bequests.
- Transfers that result in the lapse of a "liquidation" right (i.e., where a majority shareholder gifts enough shares so she no longer has the right to unilaterally liquidate the company) will be subject to a claw-back if the transferor dies within three years of the date of the transfer.
- State law will no longer be considered in determining valuation discounts, unless the state law restrictions are mandatory. For example, if state law requires the majority of the partners to approve a partner's withdrawal from the partnership (i.e., cashing out), but the law can be overridden in a partnership agreement, the state law restriction will not be considered binding in valuation of the partnership shares.
- The regulations create a new class of "disregarded restrictions." This is the most far-reaching and least clear part of the proposed regulations. One view is that the value of interests in family-owned businesses will be looked at as if the holder has the right to be bought out in cash or property no less than six months after demanding to withdraw from the entity. This would essentially eliminate minority discounts in family-owned businesses. Others take the view that the "disregarded restrictions" only mean that explicit terms, such as those in a buy-sell agreement, limiting an owners withdrawal or redemption rights to less than their pro rata share of the entity's value are disregarded (i.e., a provision assessing a 10% penalty if an owner withdraws within the first five years of ownership would be disregarded, but the economic reality that a minority owner does not have the power to unilaterally liquidate the company and cash out their investment would still be taken into account).

These proposed rules, if finally adopted, will change valuation and related planning for closely held family owned businesses in significant ways. Some business owners are moving now to complete transfers and related planning before new rules go into effect. Readers are encouraged to consult with their attorney and tax advisors on the best response to this shifting environment.

BUYER BEWARE

By Sara Wilson
763-225-6000
swilson@gislason.com

With the advent of the Internet have come online services that allow people to create their own last will and testament. These online services provide a template form of a legal document and the person creating the will fills in the information requested to complete the document. This process is often referred to as a "do it yourself" option in writing a will. While use of these online services may at the outset appear easy, convenient and less expensive than seeking services from an attorney, there are serious limitations associated with the use of such products.

Perhaps the most important limitation is that an online form cannot foresee issues specific to you and your family. Face to face interaction with an attorney allows for an attorney to ask questions relevant to your personal situation and address issues you may not have considered in writing your own will. The experience of an attorney allows them to draw out specific priorities from you and identify issues that may not have been on your radar prior to their meeting with an attorney.

Moreover, an online form may not be as comprehensive as you would like it to be. An online form is simply asking predetermined, broad questions solely in order to complete the document as written. Therefore it may not, in the end, satisfy your expectation to deliver the specific type of legal document needed. Every person and situation is different, and by not having the opportunity to ask the right questions, an online document may have unexpected negative impacts.

continued on page 10

Nor will all online forms allow you to address personal issues such as providing for a family member with special needs, digital assets or special bequests. Blended families, families with children from a previous relationship, and specific tax issues are all further examples of how an online form may fail to address your personal situation. For better or worse, the law is often not black or white, but contains grey areas that must be tailored to your individual situation. These areas simply cannot be addressed by a computer program.

Online services may contain a form with outdated or improper information related to the laws of the State of Minnesota or your personal situation. State laws regarding will creation and execution vary and some sites may not take such laws into consideration when preparing a will. Some forms are not specific enough and may therefore fail to convey the wishes of the person drafting the will. And some sites may unintentionally allow for a user to introduce a clause that might contradict other elements of the document or may not make sense legally, leaving your will open to dispute.

Any of these limitations may inadvertently make a will invalid. So while you may think that you are saving money now by using an online service, you may be costing your heirs in the long run if the will is not drafted correctly. You and/or your heirs may end up paying more than you bargained for if the will isn't valid or its validity ends up being contested because it wasn't written well enough to withstand objections.

Family situations are often complex and the law can be complicated. Often online wills are not a proper fit for the complications of real life. While as attorneys we are mindful of the fact that our clients value ease and simplicity, a will that is properly drafted can address unforeseen circumstances, ensure the law has been properly considered, and help protect not only your wishes but the financial futures of your family and loved ones.

Our attorneys will work with you to properly create the estate plan that is right for you in a cost efficient manner. Let us help you make the best decision for you, your family and loved ones as part of your estate planning.

Gislason & Hunter LLP & CliftonLarsonAllen
Invite You to Be Our Guest

ESTATE PLANNING SEMINAR

Thursday December 8, 2016

Courtyard Marriott
901 Raintree Road
Mankato, MN 56001

To Register, fill out the form below and return to:
Gislason & Hunter LLP
Attn: Julie Donner
PO Box 458, New Ulm, MN 56073
or email to: jdonner@gislason.com

Name ______________________________

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City ______________ State ______ Zip ________

Phone ______________________________

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Please RSVP by November 30, 2016.

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CliftonLarsonAllen

10:00 Registration

10:30 Year End Tax Planning & Tips – Andy Biebl

11:30 Farming Entity Options and Related Tax Considerations – Reed Glawe and Andy Biebl

12:30 – 1:15 Lunch

1:15 MN Estate Tax Issues for Farmers – Kaitlin Pals

2:30 Farm Succession Planning Strategies and Valuation Issues – Nick Houle and Wade Wacholz

3:30 Social Hour

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

Gislason & Hunter Wills, Trusts, Estate Planning & Probate Practice Group:

Daniel A. Beckman dbeckman@gislason.com

Reed H. Glawe rglawe@gislason.com

David Hoelmer dhoelmer@gislason.com

Kaitlin M. Pals kpals@gislason.com

Abby Pettit apettit@gislason.com

Andrew M. Tatge atatge@gislason.com

Wade R. Wacholz wwacholz@gislason.com

Andrew A. Willaert awillaert@gislason.com

C. Thomas Wilson twilson@gislason.com

Sara N. Wilson swilson@gislason.com

GISLASON & HUNTER LLP

ATTORNEYS AT LAW

www.gislason.com

LOCATIONS

Minneapolis Office
Golden Hills Office Center
701 Xenia Avenue S, Suite 500
Minneapolis, MN 55416
763–225–6000

Des Moines Office
Bank of America Building
317 Sixth Avenue, Suite 1400
Des Moines, IA 50309
515–244–6199

Mankato Office
Landkamer Building
124 E Walnut Street, Suite 200
Mankato, MN 56001
507–387–1115

New Ulm Office
2700 South Broadway
New Ulm, MN 56073
507–354–3111

www.gislason.com

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