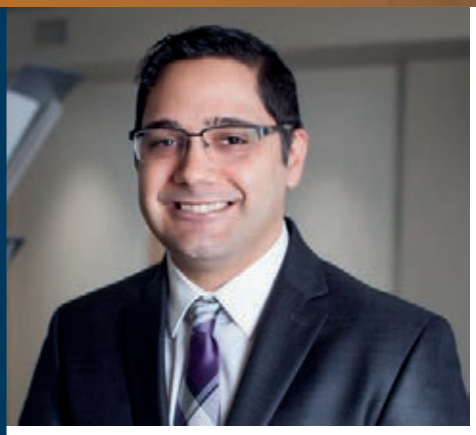
Summer 2021

Estate Planning newsletter

Expertise
Common Sense
Integrity
Fairness
Hard Work

shared values. firm results.

INSIDE THIS ISSUE



By Christopher J. Kamath
507-387-1115
ckamath@gislason.com

A PRIMER ON PRESIDENT BIDEN'S PLAN FOR ESTATE TAX REFORM

2020 was one of the craziest years in American history. And just when we thought 2021 might grant us a slight reprieve from all the insanity, this year has witnessed election controversy, capitol riots, and a 43-year-old Tom Brady win his seventh Super Bowl. It's only fitting that taxes, one of the constants in our lives, may now be subject to major reform in 2021.

As you may recall, President Biden campaigned heavily on the promise to reform Trump era tax policies and to make wealthy Americans and corporations pay their "fair share." President Biden has proposed making changes to the federal estate tax, repealing the step-up in basis on property acquired at death, and increasing the tax rate on long-term capital gains. Although it is not time to panic just yet, his proposed tax policies could have significant implications for your estate plan (this article does not discuss broader income tax proposals).

continued on pg 2

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

A PRIMER ON PRESIDENT BIDEN'S PLAN FOR ESTATE TAX REFORM

continued from pg 1

ESTATE TAX CHANGES

The federal government currently exempts the first $11.7 million of a person's assets from the federal estate tax through what is known as the Unified Credit. The value of any property owned at your death (after taking into account lifetime gifts) exceeding the $11.7 million exemption is taxed at a rate of 40%. The 2018 Tax Cuts and Jobs Act doubled the amount of the Unified Credit from $5.6 million to $11.18 million, adjusted for inflation. As a result of the Unified Credit, the vast majority of Americans do not pay estate tax at their death.

President Biden put forth a campaign proposal to reduce the Unified Credit to $3.5 million and to increase the estate tax to 45%. While it may be possible to lock-in the current exemption amount by making lifetime gifts before any changes to the estate tax take effect, caution and patience are generally the best approach when trying to plan around tax reform. It is unclear whether moderate democrats would support such a proposal or whether such a proposal would be retroactive to the beginning of 2021.

It should also be noted that President Biden's most recent proposal, the American Families Plan, did not include provisions for increasing the estate tax rate or reducing the Unified Credit. These proposals were most likely omitted because of the revenues that would be generated from reforms related to the capital gains tax.

STEP-UP IN BASIS

The step-up in basis provisions of the federal tax code are an important feature used by estate planners to avoid income tax liability on the appreciation of assets. In general, when you sell an asset, you are required to pay income tax on the difference between the price you paid for it ("basis") and the price you sold it. The sale, itself, is the "realization event" that triggers your income tax liability. However, the current tax code incentivizes holding highly appreciated property until death because your heirs will receive the asset with a step-up in basis to the asset's current fair market value.

To illustrate how basis works in simple terms, assume that John purchases a piece of land for $100 in Year 1. This $100 represents John's cost basis in the land. In Year 10, the land has appreciated in value to $1,000. If John were to sell the land, capital gains tax would be due on the $900 in appreciation. However, if John were to pass away in Year 10 owning the land, his heirs would receive the land with a stepped-up basis of $1,000. John's heirs could turn around and sell the land without incurring capital gains tax.

President Biden has proposed significant changes to how capital gains are taxed. First, he wants to repeal the step-up in basis for capital gains and make death a taxable event. Under this policy, an individual would pay tax on unrealized capital gains that exceed $1 million; however, the Biden Administration has stated that protections will be included so that "family-owned businesses and farms will not have to pay taxes when given to heirs who continue to run the business." See https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/28/fact-sheet-the-american-families-plan/.

CAPITAL GAINS TAX

If an asset is held for a year or less before being sold, any taxable gain on the asset is taxed at your ordinary income tax rate. In contrast, taxable gain on assets held for more than a year are generally taxed at preferential capital gains rates. Long-term capital gains rates vary between 0%, 15%, or 20% depending on your income and filing status (single, married, or head of household). High earners also pay an additional 3.8% net investment income tax.

President Biden has proposed taxing long-term capital gains and qualified dividends at ordinary income tax rates for income above $1 million (Minnesota also taxes net capital gains as ordinary income). The top income tax rate for individuals is currently 37% but would be increased to 39.6% under President Biden's proposals. This change would essentially double the top tax rate on capital gains.

As the below table illustrates, the increased tax on capital gains, coupled with the federal estate tax and the repeal of the

step-up in basis rules, could result in a large tax liability at death.

Value of Asset in Estate (in millions)	$25.00
Less $ 1 million Exemption	$24.00
Capital Gains Tax (39.6 + 3.8% NIIT)	($10.416)
Value of Remaining	$14.584
Less $11.7 million Unified Credit	$2.884
Estate Tax Owed (Rate 40%)	($1.1536)
Total Taxes Owed at Death	($11.5696)
Effective Tax Rate	46.27%
Total Assets Passed to Heirs	$13.43

Although this result might seem like excessive taxation, the Biden Administration estimates that the increase in capital gains taxes will only affect 0.3% of American households.

CONCLUSION

While some tax changes can certainly be expected in the coming years, it is unlikely that President Biden's proposals will remain fully intact. Democrats have a narrow margin of control in both the House and Senate. Democrats do not have the 60 votes needed to defeat a Republican filibuster. Although reconciliation remains an option to pass some of Biden's tax reforms, any such legislation would require the support of moderate Democrats. In all likelihood, significant tax reform will be put off while the economy continues to recover. For now, the best approach is to wait and see ■

ADVANCED CARE PLANNING THROUGH THE MINNESOTA HEALTH CARE DIRECTIVE

By Andrew A. Willaert, Jr.
507-387-1115
awillaert@gislason.com

Advanced care planning is not just for the elderly. A medical emergency can strike anyone at any time, leaving you unable to communicate medical decisions. Have you thought about what kind of treatments you would want to receive? Is quality of life more important than quantity? What does comfort look like to you at the end of life? In Minnesota, a health care directive (sometimes referred to as a living will or medical power of attorney) is authorized by statute, providing you with an essential and underused tool that will ensure your wishes are carried out if you become incapacitated or incompetent and unable to make those decisions for yourself.

Designating a Health Care Agent

The first and most important decision you will need to make is whom to name as your health care agent. Typically, most people will name a spouse, if living, followed by one or more successor health care agents to serve if the primary agent is no longer alive or is otherwise unable to serve. Children, siblings, and close friends are also good options for health care agents, provided that the nominated person knows you well. Regardless of who or how many agents you name in your health care directive, you should always discuss your wishes with them first and make sure they are willing to be an agent.

If you elect to use multiple agents at the same time, the co-agents can be given the power to act independently or be required to act by unanimous agreement. There are pros and cons to each option. Independent authority is the most flexible for obvious reasons—each agent can make decisions with, or without, the need to consult the other agents. Independent authority can be useful in emergency situations where a decision on treatment needs to be made quickly. However, issues may arise if the agents disagree about the proper course of treatment.

continued on pg 6

ADVANCED CARE PLANNING THROUGH THE MINNESOTA HEALTH CARE DIRECTIVE

continued from pg 5

In contrast, unanimous agreement is important when you want each of the agents to have a role in the decision-making process, something that is often appreciated when children are named as co-agents. Using multiple agents will also help ensure that your wishes are honored. However, treatment can be slowed or delayed when one of the agents is unavailable. For that reason, it is often a good idea to allow a co-agent to make health care decisions when the other agents are not reasonably available.

Powers of a Health Care Agent

As the "principal" under the health care directive, you can grant broad or limited power to your health care agent. However, the acting health care agent is always designated as the "Personal Representative" for purposes of the Health Insurance Portability and Accounting Act of 1996 ("HIPPA"). Otherwise, health care providers would not be able to share medical records and other protected health information with your agent.

Other routine powers of your agent include the ability to make health care decisions for you when you lack decision-making capacity, the ability to access you at all times and at any location, and to determine where you are going to live if you are medically unable to return to your home. Although not required, you may authorize your agent to make funeral arrangements, to consent to intrusive mental health treatments such as electroshock therapy, and to note your preferences concerning burial, cremation and organ donation. You can even nominate the agent to serve as your legal guardian in the event that someone or some authority commences guardianship proceedings, in order to avoid a circumstance where an otherwise unknown third-party paid professional might be appointed by a court.

Instructions for your Agent

Every health care directive should contain a statement about your wishes concerning terminal conditions and life prolonging treatment. A terminal condition is usually defined as an incurable or irreversible condition that is expected to result in death or for which medical treatment will only prolong your life. Depending on your age or spiritual beliefs, you may prefer to receive exceptional life saving measures or be made comfortable and pain free, even if those treatments hasten death.

It should be noted that a health care directive spells out your wishes in general terms; it is impossible to account for every circumstance one might face in a medical emergency. Accordingly, the agent is provided the opportunity to make decisions based upon understanding and knowledge of your wishes, even if not specifically stated in the directive, and the medical professionals may rely on your agent to make decisions accordingly. As such, it is very important to discuss your wishes with your agents. You should carefully consider and discuss a number of possible end-of-life decisions with your agents: for instance, do not resuscitate orders, tube feeding, mechanical ventilation, blood transfusion alternatives, dialysis, and persistent vegetive states (to name a few).

Conclusion

A health care directive spells out what kind of treatment you would like, whether that treatment includes extreme life-saving measures, and may also specify how your remains should be handled. Healthcare directives not only help your family make these decisions, but also helps avoid family disagreements regarding end-of-life decisions. You should not wait until you need major medical treatment. Everyone over the age of 18 can benefit from advance care planning through the use of a health care directive. ■

By Jennifer Gish
507-387-1115
jgish@gislason.com

ESTATE LAW 101

Estate law is a wide and varied practice. The following should serve as a brief primer and will help you learn some of the lingo and potentially what documents you'd want to draft now to ensure that your wishes are written down, easily accessible, and binding. Keep an eye out for future articles as well, which expand on these topics and cover much more.

Estate Plans are all of the documents you've had drafted. This can include things like wills, health care directives, and powers of attorney, which are described further in this article. It can also include your funeral plans, trust funds, and much more. While the topic is uncomfortable, creating an estate plan gives you peace of mind that your family and loved ones have a clear path, eliminating difficult decisions down the road.

Estate plans are not set in stone. They can be drafted and redrafted as often as you want them to be. You should always review your documents in light of major events: the death of a loved one who is named in your documents, a marriage or a divorce, moving in with a partner (or moving out), the birth or adoption of children, an inheritance, etc. It's also important to keep your documents both in a safe place and a place where someone knows to go looking for them. Your attorney may offer to keep the original or a copy of your documents at their office.

Wills are your way of deciding how your property is divided after you've passed. Without a will, your estate (everything you own at death—cash, land, jewelry, childhood toys, etc.) passes by Minnesota's law of intestate succession. Minnesota has drafted law saying how your estate should be divided up if you die without a will, completely removing any control you may have. To the contrary, a will essentially lets you pick who gets what. This is especially helpful when you have family heirlooms that pass by tradition or gifts you want to give outside of a marriage (for example a book or a car to a friend or partner that is not a spouse). It can also help ensure that your things don't go to certain people. Wills can vary dramatically in length and complication. A well-thought-out estate plan can help you pick a vehicle for your wishes that is appropriate for your budget and your intentions.

continued on pg 10

ESTATE LAW 101

continued from pg 9

While wills manage your property after death, they do not control what happens between now and then. **Health Care Directives**, or "living wills" establish your personal choices regarding end-of-life medical treatment. It appoints a designated person to make medical decisions on your behalf when you are incapacitated. Health care directives provide instruction for the problems we usually think of (neurodegenerative diseases like Alzheimer's or physical events like strokes and heart attacks) but also the problems we don't think of (car accidents, the onset of a disease you were unaware you had, or complications from regular medical treatment). These instruments specifically state your wishes, such as treatment preferences, organ donation, and even how your remains should be handled. They help your family make decisions, avoid disagreements, and allow you to give power to someone you feel comfortable with making these decisions for you.

While health care directives control medical decisions, a **Power of Attorney** gives another person broad control over your finances. You, the principal, can give powers that fit your needs to an attorney-in-fact, or the person who you want to make certain financial decisions for you. The options for power of attorney are many, such as requiring your incapacity for the attorney-in-fact to begin acting, or going so far as to require the attorney-in-fact to prove incapacity in a legal proceeding. If you give your attorney-in-fact permission to act now, you both can sign documents, complete financial transactions, and manage property. A power of attorney allows your attorney-in-fact to "skip the application process" should you become incapacitated. Without this document, parties would have to go through the process of acquiring a conservatorship (described below) which, if contested, can become expensive quickly. It also removes your choice from the equation. If another person intervenes, and the court thinks they'd be better at managing your finances, the court could choose that person. A power of attorney gives you the opportunity to spell out exactly who you want to manage your finances.

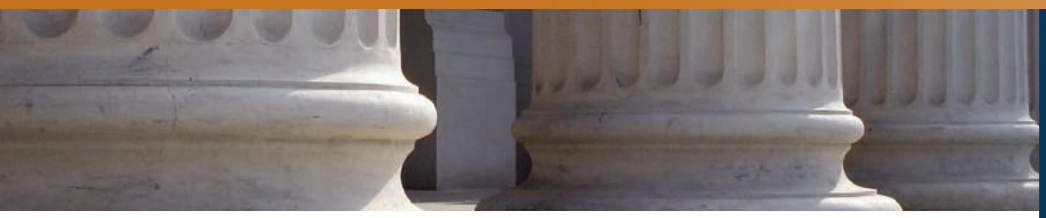
An important note. Knowing what an attorney-in-fact can do is as important as knowing what they can't do. They can't go against the principal's best interest, change the principal's will, or transfer the powers to someone else. They also cannot act outside of the powers the principal gives to them.

Guardianships and Conservatorships are established through legal proceedings. A petitioner asks the court to appoint a person (a conservator or guardian) to act as the decision maker for another person (the person subject to guardianship/conservatorship). Before appointing a person, the court must "make a finding of incapacity." A person should seek a guardianship or conservatorship for their loved one if their judgment or decision-making abilities are a major threat to the individual's welfare.

Guardians make decisions such as where to live, what medical treatment to receive, what kind of education should continue, etc.—they guard the person. Conservators typically have the power to contract, pay bills, invest assets, and perform other financial functions—they conserve the estate. You can get one, the other, or both. While wills, health care directives, and powers of attorney are your methods to choose your future, guardianships and conservatorships allow you to step in and help a loved one. The rules for these roles are quite strict, given how invasive they are. However, they are important to know about given the uncertainty of the future.

Estate Attorneys draft these documents. Not only do they know the ins and outs of the law, but they also provide counsel on what you can and can't do, and if those tricks you read about online actually work. They help you navigate the complicated minefield of family dynamics, coach you on having difficult conversations with those you love about your future, and help you plan for the worst-case scenarios. A good attorney will likely ask you some questions that are uncomfortable, and then dig a little deeper. While it can seem like prying, an attorney asks these questions because there might be a different clause or document that would better fit your needs. Being open and honest will allow you access to the full wealth of estate planning tools.

The attorneys at Gislason & Hunter know the laws, the best practices, and exactly what questions to ask to ensure you get an estate plan that is right for you. ■



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:

Jennifer Gish	jgish@gislason.com
Reed H. Glawe	rglawe@gislason.com
Chris Kamath	ckamath@gislason.com
Kaitlin M. Pals	kpals@gislason.com
Rhett Schwichtenberg	rschwichtenberg@gislason.com
Andrew A. Willaert	awillaert@gislason.com

LOCATIONS

Mankato Office
111 South 2nd Street, Suite 500
Mankato, MN 56001
507-387-1115

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

www.gislason.com

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