Summer 2022

Family Law & Estate Planning newsletter

Expertise
Common Sense
Integrity
Fairness
Hard Work

shared values. firm results.

INSIDE THIS ISSUE

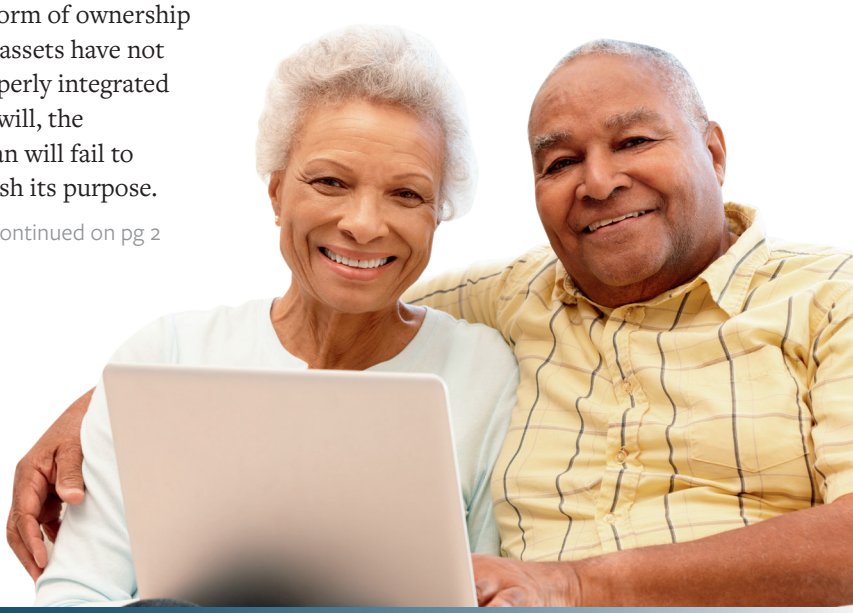
Andrew A. Willaert, Jr.
Gislason & Hunter Attorney
507-387-1115
awillaert@gislason.com

PURPOSES OF ESTATE PLANNING

The primary goal of estate planning is to assure the transfer of a decedent's property to the beneficiaries of his choice at the smallest possible financial and emotional cost. During the course of a lifetime various types of property are accumulated and many personal relationships are developed. The twin foundations of all estate plans are the assets comprising the estate and the characteristics of the intended beneficiaries.

Without estate planning, an estate owner may die without a will or with an out-of-date will. In addition, if the types of property comprising the estate and the form of ownership of estate assets have not been properly integrated with the will, the estate plan will fail to accomplish its purpose.

continued on pg 2



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

PURPOSES OF ESTATE PLANNING

continued from pg 1

Some results of an unplanned estate include: the "wrong" beneficiaries inherit; the property is transferred in an unsuitable form, e.g., it passes outright to beneficiaries incapable of handling property, or it is tied-up in trust when the circumstances at the time of death warrant outright distribution; children inherit portions of a parent's estate, leaving the surviving spouse with insufficient funds; unnecessarily high estate taxes diminish the estate; unnecessary estate administration expenses are incurred; and a lack of liquidity may result in the forced sale of estate assets to raise money to pay expenses and taxes. The final result is that the decedent's survivors, in addition to the normal trauma caused by his death, often experience intra-family bitterness and reduced financial security.

A properly planned estate, on the other hand, produces positive results and reduces conflict and hardship. For example, an up-to-date will, based on the circumstances existing at the time of death should result in the orderly, sensible and effective disposition of the testator's property to the desired beneficiaries and in the appropriate form. A will also avoids the application of local intestacy laws which can require the outright distribution of portions of a decedent's estate to his aging parents, who may not need it, or to his children, who may not be able to handle it, all to the detriment of the surviving spouse. A will can also reduce estate administration costs by relieving the fiduciaries of the necessity of obtaining costly bonds and by providing for guardians, when necessary. In addition, a testator's appointment of a competent Personal Representative who is given proper powers will facilitate the orderly administration of the estate and prevent potential disagreement or litigation about who should be the estate's representative and how he should carry out his duties.

In addition to the will itself, a well planned estate can achieve other significant benefits. An estate which contains a closely-held business provides a good illustration of the value of proper planning. Since the valuation of a small business is always difficult and usually leads to controversy and possible litigation with Internal Revenue Service, taxes and administration costs, (e.g., legal fees) can be saved if efforts to fix the value of the business are made prior to death e.g., providing for buy-out or stock redemption at a pre-determined price. Also, when a small business constitutes a major asset of an estate, it is necessary to provide for liquid funds with which to pay the estate's taxes and administration expenses in order to avoid the necessity of a forced sale of the business itself. A simple method of providing

such funds is through the purchase of adequate amounts of life insurance, on the estate owner's life, the proceeds of which will be available to pay the estate's expenses.

Consideration should also be given to the qualification of the estate for the payment of estate taxes in installments. Pre-death transfers of some of the estate owner's non-business property to insure that the business will constitute the required percentage of the value of the estate to qualify for installment payments should be considered by the estate planner.

Finally, estate planning can result in reducing the potential income taxes of the estate owner and his beneficiaries and the estate tax itself. Tax saving involves informed decisions on such issues as who should own property and what property to own, whether it should be owned jointly or separately, whether and when lifetime transfers should be made, whether bequests should be outright or in trust, and whether the fullest allowable marital deduction should be taken and how to be sure it will be allowed.

The successful achievement of the results which estate planning is designed to accomplish depends completely upon the willingness of the estate owner to provide his advisor with honest and complete information as to his assets and his intended beneficiaries. In order to convince a client to spend the time, effort and money required to obtain a properly planned estate, the estate planner must be able to 1) describe the benefits to be attained and 2) design an effective plan. This service intends to provide the answers to the "whys" and "hows" of estate planning and administration.

Andrew Tatge
Gislason & Hunter Attorney
507-387-1115
atatge@gislason.com

THE GREAT WEALTH TRANSFER IS HERE. HAVE YOU DIVORCE-PROOFED YOUR CHILDREN'S' INHERITANCE?

It is estimated that in the United States over the next 20 years more than $50 *trillion* in wealth will transfer from the Baby Boomers to Generation X and the Millennials. That is a lot of money. This Great Wealth Transfer is not going to occur just through inheritances when Baby Boomers die. Baby Boomer farmers, business owners, and others with significant wealth or income are also looking to help their kids earlier to buy houses, pay for school, acquire farmland, and build businesses early on and before mom and dad die. That means more and more *inter vivos* (while alive) gifting will occur in the coming years.

In my divorce practice, I see numerous examples of wealth transfers done wrong. Typically, the gift at issue involves farmland, a cash gift to buy a home, or other large gifts incident to a marriage, or birth of a child. While there's nothing wrong with gifting wealth to your child and your child's spouse jointly, people usually don't see the risk created in doing so—particularly when half of all marriages end in divorce.

The problem usually plays out in some version of the following scenario: Joe and Sue own a large farming operation. They want their son, Beau, to take over the family farm eventually and they want to get him started now. To do that, they gift 80 acres to Beau so he can get started. But Beau is married to Jane. So, Joe and Sue quit claim the 80 acres to Beau and Jane together. Fast-forward 15 years and Jane is unhappy. She's never been, in her mind, a part of the farming operation and resents the relationship Beau has with his parents. She files for divorce. Joe and Sue want all of their farm (including the 80 acres they gifted to Beau) to stay in the family. However, since they gifted the land to Beau and Jane together it is now "marital property" in Minnesota, and it will get factored into the divorce. Depending on what else Beau and Jane own, Jane may even end up with it. To avoid this, Joe and Sue could have done some additional planning and documentation on the front end for very little cost. Those efforts would have paid off handsomely in resolving Beau's divorce.

In Minnesota, for a gift to be valid, the person making the gift must have a donative intent, there must be delivery of the gifted property (for real property, this means delivering a deed transferring the property), and absolute disposition of the property. Donative intent is demonstrated by the surrounding circumstances, including the form of transfer. In the divorce-proofing context, the key is to be able to prove the nature of the gift and the intended recipient. Also important is that in Minnesota, the increase in the value of a gift that's labeled as "nonmarital property" through market forces or inflation retains its nonmarital property characteristics. If "marital effort" is expended (such as martial money used to improve the property or if the money is used as general seed money for Beau's business) then the increase in value is "marital property" and needs to be addressed as such. Here are some options and things to consider in order to protect gifted wealth:

1. **Antenuptial and Postnuptial Agreements.** The best layer of protecting assets from divorce is an antenuptial (sometimes called a prenuptial agreement or a "prenup") or a postnuptial agreement. An antenuptial agreement is done before marriage and a postnuptial agreement is completed while the parties are married. Both require significant formality and information sharing. These should not be done without consulting a qualified attorney.

2. **Affidavits and Deeds of Gift.** Sometimes, we counsel clients to draft an affidavit, which is a signed statement

under oath, when they provide a gift of significance and to provide that with the gift. A deed of gift is another tool to prove the gift and the intended recipient.

3. **IRS 709 Gift Tax Form.** If a gift requires filing a gift tax return with the IRS, we typically advise to provide a copy of the return to the gift recipient to hold in case a divorce occurs. This can be conclusive evidence of the nature and recipient of the gift.

4. **Document Everything.** If nothing else, keep all other documents you have related to the gift. If the gift was a check for $25,000 to Beau, he should keep a copy of the check. Even better, give the check and write on the memo line "gift to my son Beau." And Beau should keep all documentation showing what he did with the money. And he's much better off using that money to buy an asset—preferably an appreciating asset—as opposed to using this nonmarital money to take a trip, pay living expenses, or otherwise spend the money in a way that can't be accounted for in the property division that will occur as a result of his divorce. If possible, he should keep the money in a separate account and not comingle the funds with other funds or assets.

5. **Just Talk it Through With an Attorney.** Shameless plug, I know. But I am amazed at the amount of inherited or gifted wealth that gets lost in divorce simply because the donor or the recipient failed to keep proper documentation or obtain it in the first place. Litigating a nonmarital property claim is exponentially more expensive than correctly documenting it in the first place and probably the best investment you can make to ensure that generational wealth can continue to grow and transfer to the next generation.

Jonathan M. Janssen
Gislason & Hunter Attorney
(507) 387-1115
jjanssen@gislason.com

A well-trained litigation attorney can walk you through the process of challenging or defending challenges to the validity of your Wills and other estate planning documents.

COMMON CHALLENGES TO TESTAMENTARY DOCUMENTS

Life is full of uncertainties. One essential way to establish a sturdier footing is to maintain an up-to-date estate plan. However, even seemingly-solid testamentary documents (e.g. Wills) that are executed as part of an estate plan may encounter a number of challenges. Some of these challenges are fairly simple to manage—for example, by ensuring the location of a Will is understood by trusted individuals, a court can more easily enforce the Will. Unfortunately, other challenges can be legally intense and often require the assistance of an attorney to resolve.

Consider John. John was a bachelor with no children and one brother, Mark. John drafted and signed a Will about thirty years ago which gave all of his property to Mark and gave a copy to Mark. More recently, John faced some health challenges and his neighbor, Susan, took it upon herself to stop over and help John take care of his home, drop off meals, and run errands. Susan asked John if he had a valid Will. John replied that he had signed his Will thirty years ago, but he had decided that he would like to review that Will and draft a new one. He contacted his attorney, reviewed his old Will, made some changes, and signed a new Will. John passed away shortly after signing the document.

After the funeral, Mark contacted the court to enforce the old Will. Susan filed a challenge to the old Will and stated that it was not enforceable because John had executed the new Will before he passed. To Mark's surprise, John's new Will said that Susan received everything and Mark got nothing. Suspicious of Susan's recent involvement in John's life, Mark does not believe that John intended for Susan to get everything and wants to challenge the new Will. There are a number of ways he may do so.

Testamentary Capacity

Mark might object to the new Will because he believes that John did not have testamentary capacity. Minnesota law requires a party executing a Will to be "of sound mind." In other words, John must have known and understood the nature of his property, claims against his property, and be able to keep both the nature of his property and claims against his property in his mind long enough to make rational decisions about them. Capacity is typically a factual, not a legal, question and the court reviews a number of factors, which include:

(1) How reasonable is the property disposition in the Will? Would it be reasonable for John to give all of his possessions to Susan, given their relationship?

(2) What was the testator's conduct around the time they signed the Will. Did John regularly appear confused? Did he get up in the morning and discuss going to school, even though he hadn't attended in many years?

(3) Have there been any prior adjudications of mental capacity. Did a court previously find that John lacked the understanding or capacity to make responsible personal decisions and appoint a guardian for him?

(4) Did any experts testify about the testator's physical and mental condition. Did John's doctor diagnose John with severe dementia prior to signing his new Will?

The fact that John made a dramatic change to his Will does not automatically prove whether or not he had capacity, but it is another factor the court can review. If the court finds that John lacked the capacity to make his Will, then his new Will is not valid and is void for all purposes.

Undue Influence

Mark might also object to the new Will because he believes that John was unduly influenced by Susan. In order to succeed in this argument, Mark would need to prove that Susan was so dominant, persuasive, or controlling, of John, such that John stopped acting of his own free will and instead was essentially Susan's puppet. In other words, a Will is unduly influenced if it expresses the influencer's intent and purpose rather than the testator's intent and purpose.

Mark is unlikely to find any email or letter where Susan explicitly states that she is influencing John to give her all of his property. Instead, Mark can prove undue influence by circumstantial evidence. If Mark can prove that John was unduly influenced, the outcome varies on whether the influence extended to the entire new Will or just a portion of the new Will. Depending on the answer, the court may tailor a unique solution based on its findings.

Duress

Mark may object to the new Will because he believes that John executed it under duress. Duress typically involves unlawful threats or coercion to induce another to act in a manner that they usually would not. For example, Susan may have threatened to physically harm John, who was quite frail after his health scare. Or Susan might have threatened to withhold food, water, or medicine from John, who relied on Susan to run errands and provide those items for him in the short-term. The court would review Mark's claim of duress in light of John's specific characteristics and not by the characteristics of a person with ordinary courage and firmness. If the court found John signed the new Will under duress, the court may void the Will.

A Will is unduly influenced if it expresses the influencer's intent and purpose rather than the testator's intent and purpose.

Fraud

Mark may object to the new Will because he believes that John signed the will as a result of fraud. Susan may have given John false or misleading information about the terms of the Will, the beneficiaries, or other important facts relevant to the creation or drafting of the Will. Susan also might have forged John's signature or misled John on the content or intentions of the Will in order to get John to execute the Will. Or, if Susan was appointed as the personal representative of John's estate under the new Will, she might take deliberate actions in her administration to mislead the court or others about the contents of the Will. If Mark can prove that fraud is occurring or has occurred regarding the new Will, then it will not be admitted to probate.

Takeaways

While there are frameworks do the different potential challenges to testamentary documents, each challenge is ultimately subject to the unique factual scenario in which the documents were drafted and signed. A well-trained litigation attorney can walk you through the process of challenging or defending challenges to the validity of your Wills and other estate planning documents.

However, a stronger confidence is available. The best defense to bulletproof your estate plan from potential challenges is to retain an experienced estate planning attorney to carefully draft these documents to ensure that your true intent is reflected by your estate plan.

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

Family Law Services

Your family's legal issues are unique. At Gislason & Hunter, we strive to develop customized strategies for your family's particular legal needs and will help you prioritize your goals to efficiently achieve a favorable outcome. You will receive the full range of legal experience and expertise offered by a large, full-service law firm along with individualized attention to guide you through what for most is the most difficult time of your life and move your life forward.

- Adoption
- Assisted Reproductive Technology
- Court Orders
- Custody, Parenting Time and Child Support
- Divorce
- Farm Ownership & Divorce
- Order of Protection and Harassment Restraining Orders
- Prenuptial and Postnuptial Agreements

Gislason & Hunter

ESTATE PLANNING AND FAMILY LAW PRACTICE GROUP

Reed H. Glawe	rglawe@gislason.com
Jonathan M. Janssen	jjanssen@gislason.com
Christopher J. Kamath	ckamath@gislason.com
Kaitlin M. Pals	kpals@gislason.com
Andrew A. Tatge	atatge@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