Winter 2022

Family Law & Estate Planning newsletter

Expertise
Common Sense
Integrity
Fairness
Hard Work

shared values. firm results.

INSIDE THIS ISSUE

pg. 1
How to Administer an Estate: The Personal Representative's Handbook

pg. 4
Can't I Just Get a Simple Postnuptial Agreement?

pg. 6
Life Insurance and the Taxable Estate

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

Christopher Kamath
Gislason & Hunter Attorney
507-387-1115
ckamath@gislason.com

HOW TO ADMINISTER AN ESTATE: THE PERSONAL REPRESENTATIVE'S HANDBOOK

Introduction

So, you've been nominated as a Personal Representative of someone's estate. Chances are that the estate you've been asked to administer belongs to one of your parents. You, as the most responsible (or physically closest) child, want to honor the decedent's wishes and fairly administer the estate. Do you accept or decline the nomination? What exactly does a Personal Representative do? While it is impossible to cover every situation that a Personal Representative might deal with, this article will guide you through the important parts of the probate process.

What is Probate?

Probate is a legal proceeding commenced by an interested party to administer a deceased person's assets. However, a probate proceeding only controls the disposition of probate assets. Probate assets can generally be thought of as assets held solely in the name of the decedent and which require the use of the probate process to transfer ownership from the estate to the intended beneficiary. Probate assets include tangible personal property such as clothing and household furniture; real property titled solely in the name of the decedent, including real estate held as a tenant-in-common; and bank accounts, stock, bonds, mutual funds, etc., if the accounts do not have a payable on death,

continued on pg 2

continued from pg 1

transfer on death, or survivorship designation.

In contrast, non-probate assets include, but are not limited to, assets held as joint tenants with right of survivorship; multi-party accounts; life insurance, annuities, and retirement accounts that are payable on death to someone other than the decedent's estate; and property titled in the name of a decedent's revocable trust. A decedent's last will and testament **does not** control the distribution of non-probate assets, even if the will contains contrary provisions dealing with the specific asset.

Probate is not necessary for all estates. In Minnesota, estates valued at $75,000 or less with no real estate do not have to be probated. Instead, the estate may be administered through what is known as an Affidavit for Collection of Personal Property. The probate code allows a person who is the successor of the decedent (heir, devisee, etc.) to collect the decedent's clothing, vehicles, bank account funds, and other personal property without being formally appointed as Personal Representative. Assuming that the estate is comprised of real estate or exceeds $75,000 in value, a probate proceeding must be started.

Commencing Probate

Probate comes in a variety of flavors. Probate can be informal, formal, unsupervised or supervised. Informal probate proceedings are commenced by filing an application for informal probate with the county's Probate Registrar. In addition to the application, itself, you must also file a copy of decedent's death certificate, the original will, if available , and various other documents. The Probate Register will review the application to determine whether it is appropriate to admit the decedent's will for probate and to allow an informal administration of the estate. Although an informal probate is generally easier and less expensive than a formal proceeding, there are situations where a formal proceeding may be desirable or even required. A formal probate may be advisable where:

(1) the identities of heirs or devises of the estate are unknown;
(2) the location of heirs or devisees are unknown;
(3) property will be distributed to a minor;
(4) disputes among the heirs or devisees are likely to occur;
(5) the validity of the will is in question;
(6) the terms of the will are in dispute;
(7) the estate owns real property that will be distributed to a class of persons that need to be determined by court order;
(8) the estate is insolvent, meaning the estate's debts exceeds its assets.

A formal probate is commenced by filing a petition with the district court for formal probate and appointment of a Personal Representative. Formal probate may be unsupervised or supervised. In an unsupervised probate, the Personal Representative can pay bills and distribute assets without approval of the court; however, any interested person, including the Personal Representative, may petition the court to settle a dispute or review an act of the Personal Representative. The Personal Representative can mitigate liability by seeking court approval of his or her actions. In contrast, a formal supervised probate is where the court exercises ongoing supervision of the estate until final distribution of its assets. Court approval is needed for any distribution of the estate's property to heirs or devisees. While a probate proceeding can be changed from unsupervised to supervised, you cannot convert a supervised probate into an unsupervised probate.

After the application or petition has been accepted, notice of the proceeding must be given by mail to interested persons and published in a local newspaper once a week for two consecutive weeks. Assuming no objections are received, Letters Testamentary will be issued from the Probate Registrar. The Letters Testamentary grant you authority to act on behalf of the estate.

Personal Representative Duties and Powers

A Personal Representative is the same thing as an executor, but Minnesota uses the term Personal Representative. Just because you've been named a Personal Representative in someone's will does not mean you have to accept the nomination. Anyone can decline a nomination to serve as Personal Representative. Most wills nominate a backup or successor for this role. If no successor Personal Representative has been named in the decedent's will, a qualified individual may seek appointment as Personal Representative, subject to persons having priority for appointment under Minn. Stat. § 524.3-203, such as a devisee, surviving spouse, or child of the decedent.

Okay, but let's assume that you want to accept your nomination, that you've commenced probate, and that you've been formally appointed by the court to serve as Personal Representative. What does the job entail?

As Personal Representative, you will have the same power and title over the estate's property as an absolute owner would have, except that your power must be used for the benefit of creditors, heirs, and other interested persons of the estate. Your primary duty is to gather the decedent's probate assets and **timely** distribute those assets in accordance with the terms of the decedent's last will and testament (or the laws of intestate). Until final distribution, the probate assets

[1] A Probate Registrar is a person designated by the court to perform various functions of a "registrar" under Minnesota's Uniform Probate Code, such as issuing Letters Testamentary.

[2] If a person dies without a valid last will and testament, their estate will be distributed according to Minnesota's intestate laws. Discussion of the laws of intestate is beyond the scope of this article; however, in general, intestate property passes to the decedent's surviving spouse or, if none, to the decedent's descendants in equal shares by right of representation.

must be properly managed and preserved. For example, as a Personal Representative, you do not want to become liable for failing to collect rents or allowing property damage to occur.

If you have special skills, knowledge, or experience, you will be expected use those things during your administration of the estate. Your conduct will also be judge in light of those special skills, knowledge, and experience. A personal representative is considered a fiduciary of the highest order in Minnesota. As such, you can be held liable for damage or loss resulting from a breach fiduciary duty; however, a Personal Representative typically won't be held liable for acts taken in good faith.

Personal Representatives are entitled to reasonable compensation under statute. There is no bright line rule for what constitutes "reasonable compensation". Factors relevant to determining a Personal Representative's compensation include (1) the time and labor required to administer the estate; (2) the complexity and size of the estate; (3) novelty of problems involved in administering the estate; and (4) whether you have any special skills used in the administration of the estate. Compensation is usually based on an hourly rate. Hourly rates typically range between $45 and $110, but can exceed $200 per hour in some circumstances.

The Inventory and Appraisement

Within six months after appointment, or nine months after the death of the decedent, whichever is later, a Personal Representative must complete and file with the court an inventory of the estate. The inventory must be reasonably detailed, describing the fair market value of the estate's assets as of the date of the decedent's death. The inventory should also list the type and amount of any encumbrances on the probate assets, such as a mortgage. A copy of the inventory must be mailed to the decedent's surviving spouse, and any persons entitled to receive distributions from the estate. The Personal Representative must prepare a supplemental or amended inventory if he or she learns that the original inventory is misleading because property was omitted or incorrectly valued.

There is no express requirement that you obtain an appraisal of estate property; however, appraisals are advisable when the size of the estate requires tax planning and you want to clearly establish the value of the asset and its stepped-up "basis". An appraisal may also be necessary to resolve a dispute between the Personal Representative and a distributee regarding the value of an asset and whether or not the distributee received his or her full share of the estate.

Creditors' Claims and Costs of Administration

Besides inventorying the estate's assets, one of your main jobs as a Personal Representative is paying valid claims against the estate, such as the decedent's outstanding medical bills, funeral costs, credit cards, utility bills, and other creditor's claims. These expenses, along with taxes and costs of administration, must be paid before final distribution of the estate.

Minnesota law requires that notice of the proceeding be given to all creditors by publication in a local legal newspaper. The notice must state the name and address of the personal representative and notify creditors that claims must be presented within four months or their claim could be barred forever. The published notice is really meant to notify unknown creditors of the estate. For that reason, the Personal Representative must also deliver or mail a copy of the notice to known creditors of the decedent. Known creditors must submit their claim to the estate within 4 months of the published notice or one month after receipt of the notice directed to them, whichever is later. Regardless of proper notice, most creditor's claims are barred if not presented one year after the decedent's death.

Notice should also be given to the Commissioner of Human Services if the decedent received public assistance that would subject the estate to a claim. After receiving notice, the Department of Humans Services will send a letter confirming the existence of a claim, or lack thereof, related to benefits paid to the decedent for Alternative Care, General Assistance Medical Care, and Medical Assistance.

As the Personal Representative, you will also be responsible for preparing the decedent's final income tax return and, if necessary, preparing an estate tax return. Federal and state law hold the Personal Representative personally liable for income and estate taxes if funds were distributed without reserving enough to pay the tax liabilities.

Valid creditor's claims should be paid; improper claims should be denied. And claims may be partially allowed and partially denied. A claim will be deemed allow if you do not respond to the creditor within two months of receiving its statement of claim. Care should be taken to ensure that all improper claims are denied. However, you can pay claims that you know are valid without waiting for the creditor to present its statement of claim.

Closing the Estate

One of the first things you should have done after being appointed as Personal Representative is open a bank account in the name of the estate. All financial transactions concerning the estate should go through this account. When it's time to close the estate, a Final Account of your administration will be furnished to all of the distributees. It is important to keep track of all receipts, invoices, and supporting documentation related to expenses of the estate. This includes a written log describing the dates, times, and services you performed for the benefit of the estate. At the end of the day, you want to be able to justify every line item on the Final Account. Running all receipts and disbursements through the estate checking account will enable you (or your attorney) to easily trace and verify the line items on the Final Account.

The remainder of the estate—all assets remaining after payment of valid claims and costs of administration—will be distributed in accordance with the terms of decedent's will or the laws of intestate succession. Distribution may be as simple as writing checks from the estate checking

HOW TO ADMINISTER AN ESTATE: THE PERSONAL REPRESENTATIVE'S HANDBOOK

continued from pg 3

account, but many times the residue will include physical assets such as cars, personal property, and real estate. It would be usual to liquidate all the property in an estate and distribute cash. To the extent that physical property exists, those assets can be distributed to specific persons. This is known as an "in-kind" distribution. However, property may be sold and the proceeds distributed as cash if a distributee objects to the proposed in-kind distribution.

When closing an informal probate proceeding, it is recommended that a plan of distribution be prepared and served on the distributees. The plan will become binding upon the distributees if they fail to object within 30 days. Thereafter, a statement to close can be filed with the court. The Personal Representative must serve the Final Account and statement to close on the distributees and unpaid creditors. Alternatively, a probate proceeding can be closed formally by seeking court approval of the final account and plan of distribution. Closing the estate formally protects the personal representative from subsequent claims based on actions that were approved by the court. Supervised probates cannot be closed, nor assets distributed, without court approval.

Conclusion

At some point in each of our lives we will be asked to serve as a Personal Representative for one of our deceased loved ones. Your job, as Personal Representative, will be to inventory the estate, pay valid claims, and timely and expeditiously distribute the assets in accordance with the decedent's wishes. Whether you chose to take on that responsibility is ultimately up to you; however, probate is nothing to fear, especially with the help of an attorney experienced in estate administration.

The information provided in this article is not intended to and does not constitute legal advice. The statements herein are for general informational purposes only. Should you have a question about your specific situation, it is recommended that you consult with a licensed attorney or other professional.

Chris Kamath is an associate attorney with Gislason & Hunter who focuses his practice in the areas of Estate Planning, Agricultural Law and Financial Law. Chris is dedicated to helping families and businesses achieve their best possible future through estate planning, succession planning and dealing with tax issues. Chris can be reached at ckamath@gislason.com or 507-387-1115.

Focused expertise for what matters.

Proper estate planning protects your family assets.

Estate planning is essential to ensure the orderly transfer of family assets. At Gislason & Hunter, we offer comprehensive services to provide you with an individualized estate plan.

- **Wills, trusts, codicils and powers of attorney**
- **Health care directives and living wills**
- **Farm estate and succession planning**
- **Estate and gift tax issues**
- **Probate proceedings, trust administration, conservatorships and guardianships**
- **Medicaid, Medicare, nursing home and elder law issues**
- **Handling disputed estate and probate matters in litigation, arbitration and mediation formats**

Last Will and Testament

ARTICLE I: Funeral expenses & payment of debt

GISLASON & HUNTER LLP

ATTORNEYS AT LAW

gislason.com

Call 507-354-3111 to schedule a meeting with one of our Trusts & Estates Attorneys.

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

CAN'T I JUST GET A SIMPLE POSTNUPTIAL AGREEMENT?

From time to time, I receive phone calls from potential clients who just want a "simple" postnuptial agreement. Usually, the situation involves an inherited business or other income-producing property—or some other (usually unforeseen) life-changing event that significantly impacts financial circumstances. Usually, the caller has briefly discussed the situation with his or her spouse and the spouse isn't really on board, but the caller thinks a "simple" document may seal the deal.

If only life were that easy. In Minnesota, a postnuptial agreement is a contract between married persons to determine what rights each party has to property in the event of divorce or death. It is different from, for example, a will, since a will can be changed unilaterally. A postnuptial agreement cannot. Postnuptial agreements can also address circumstances such as spousal maintenance and the right to use property during and after marriage. However, it cannot determine child support, child custody or parenting time rights.

Seems simple enough. But there are serious complexities involved. For instance, a postnuptial agreement is presumed to be unenforceable if either party commences an action for a legal separation or a divorce within two years of the date of its execution, unless the spouse seeking to enforce the postnuptial contract or settlement can establish that the postnuptial contract or settlement is fair and equitable. Also, in order for a postnuptial agreement to be valid and enforceable, at the time of its execution each spouse has to be represented by separate legal counsel. This obviously complicates matters.

Further complicating matters is that for a postnuptial contract to be valid, it must also comply with all of the requirements for an antenuptial agreement (an agreement signed prior to marriage) including the requirements that it be both procedurally and substantively fair and equitable both at the time of its execution and at the time of its enforcement. This is a significant burden that also requires a full and fair disclose of all assets, income, and debt in order for the postnuptial agreement to be valid. As a result of this, many people simply give up and do not move forward with a postnuptial agreement. However, in some cases, if the proper disclosures and other items are included, such as both parties having an attorney, the document can be well worth the cost and expense.

Know too that sometimes there are other documents or ways to accomplish the same or similar goals, or at least mitigate some of the risk of not having a postnuptial agreement without actually having to draft the document. So, a conversation with an attorney about what it is that you are looking for and how to go about making it happen is worthwhile.

Andrew M. Tatge is Gislason & Hunter's Managing Partner and chair of the firm's Family Law and Divorce Practice Group. He represents farmers, business owners, professionals, and other individuals in divorce and related actions. He also writes and speaks regularly on divorce issues related to business owners and family farms. Andrew can be reached at atatge@gislason.com or (507) 387-1115.

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

LIFE INSURANCE AND THE TAXABLE ESTATE

An often overlooked component of an estate for the purpose of calculating estate tax are the death benefit of and cash value in a life insurance policy. Even though these benefits may go to a child or other third person designated as a beneficiary on your policy, you and your spouse should take the value of these benefits into consideration in attempting to minimize or eliminate estate tax.

There are ways to be sure that the life insurance benefits your family will receive after your death will not be includible in your estate, so the benefits will not be subject to state or federal estate tax. Under the estate tax rules, insurance on your life will be included in your taxable estate if either:

- (1) your estate is the beneficiary of the insurance proceeds, or
- (2) you possessed certain economic ownership rights (known as "incidents of ownership") in the policy at your death (or within three years of your death).

Avoiding the first situation is easy: just make sure your estate is not designated as beneficiary of the policy.

The second rule is more complex. Clearly, if you are the owner of the policy, the proceeds are included in your estate regardless of who the beneficiary is. However, simply having someone else possess legal title to the policy will not prevent this result if you keep "incidents of ownership" in the policy. Rights that, if held by you, will cause the proceeds to be taxed in your estate include:

- . . . the right to change beneficiaries,
- . . . the right to assign the policy (or to revoke an assignment),
- . . . the right to pledge the policy as security for a loan,
- . . . the right to borrow against the policy's cash surrender value, and
- . . . the right to surrender or cancel the policy

Keep in mind that merely *having* any of the above powers will cause the proceeds to be taxed in your estate even if you never exercise the power.

Other vehicles are available in formulating your estate plan that will remove the benefits of a life insurance policy from being part of your taxable estate:

Buy-sell agreements. Life insurance obtained to fund a buy-sell agreement for a business interest under a "cross-purchase" arrangement will not be taxed in your estate (unless the estate is named as beneficiary). For example, say Alice and Barb are partners who agree that the partnership interest of the first of them to die will be bought by the surviving partner. To fund these obligations, Alice buys a life insurance policy on Barb's life. Alice pays all the premiums, retains all incidents of ownership, and names himself or herself as beneficiary. Barb does the same regarding Alice. When the first partner dies, the insurance proceeds are not taxed in the first partner's estate.

Life insurance trusts. An irrevocable life insurance trust (often referred to as an "ILIT") is an effective vehicle that can be set up to keep life insurance proceeds from being taxed in the insured's estate. Typically, the policy is transferred to the trust along with assets that can be used to pay future premiums. Alternatively, the trust buys the insurance itself with funds contributed by the insured. As long as the trust agreement gives the insured none of the ownership rights described above, the proceeds will not be included in the insured's estate.

The three-year rule. If you are considering setting up a life insurance trust with a policy you own currently or simply assigning away your ownership rights in such a policy, it is important to act early. Unless you live for at least three years after these steps are taken, the proceeds will nevertheless be taxed in your estate. For policies in which you never held incidents of ownership, the three-year rule doesn't apply.

Andrew Willaert is a partner at Gislason & Hunter and is a true counselor to his clients and believes that strong representation is the product of good listening. For over 36 years, he has helped his clients understand their options and make informed decisions in the areas of finance and banking, real estate, environmental law and land use and trusts and estates. Andrew can be reached at awillaert@gislason.com or 507-387-1115.

Guarding what matters most.

Family Law expertise for life-changing moments.

Every family's legal issues deserve the best legal expertise and attention available. At Gislason & Hunter, we develop customized strategies for your family's particular legal needs, help you prioritize your goals, and strive to achieve a favorable outcome for what matters most.

- **Divorce**
- **Antenuptial and Postnuptial Agreements**
- **Personal, Business, and Farm Asset Protection**
- **Custody, Parenting Time, and Child Support**

GISLASON & HUNTER LLP
ATTORNEYS AT LAW
gislason.com

Call 507-354-3111 to schedule a meeting with our Family Law Group.

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

This publication is not intended to be responsive to any individual situation or concerns as the contents of this newsletter is intended for general informational purposes only. Readers are urged not to act upon the information contained in this publication without first consulting competent legal advice regarding implications of a particular factual situation. Questions and additional information can be submitted to your Gislason & Hunter Attorney.