AN UPDATE ON DEVELOPMENTS REGARDING THE WISCONSIN AND FEDERAL RULES GOVERNING E-DISCOVERY

It has been estimated that more than 90% of all information created today is stored electronically. This electronically stored information, or ESI, is crucial information in most business disputes.

The Federal Rules of Civil Procedure were amended in 2006 to address ESI, and additional amendments to these federal e-discovery rules have been proposed that could go into effect in late 2015. The Wisconsin Rules of Civil Procedures were amended in January, 2011, and again in January, 2013, to address ESI too. The state and federal e-discovery rules significantly broaden the concept of what constitutes a "document" for purposes of discovery and confirm that discovery of ESI in civil lawsuits stands on equal footing with discovery of paper documents.

The Wisconsin e-discovery rules for the most part parallel the federal e-discovery rules, making it easier for federal authority to be used in discovery disputes in the Wisconsin courts. But the Wisconsin rules differ slightly from the federal rules. For example, unlike Fed. R. Civ. P. 26(a), Wisconsin documents have a rule requiring mandatory initial disclosures. The drafters of the Wisconsin rules decided that certain portions of the federal e-discovery rules would be better addressed by substantive law rather than procedural rules changes.

Highlights of the January 2013 amendments to the Wisconsin e-discovery rules include:

• Wis. Stat. § 804.01(2)(c), which provides that the trial materials privilege is not automatically forfeited because of the inadvertent disclosure of ESI and that claims of forfeiture of this privilege must be considered under Wis. Stat. § 905.03(5) as if they involved privileged attorney-client communications.
• Wis. Stat. § 804.01(7), which creates a Wisconsin "clawback" rule allowing for the recovery of privileged ESI inadvertently produced in discovery and establishes the procedure to be followed in order to recover such information.
• Wis. Stat. § 805.07(2)(d), which adds ESI to the materials which may be discovered by subpoena and permits subpoenas for inspection, copying, testing or sampling of ESI.
Highlights of the proposed amendments to the federal e-discovery rules include:
• A proposed amendment to Fed. R. Civ. P. 1 which would encourage cooperation by the parties as to the efficient determination of a case, including e-discovery issues.
• A proposed amendment to Fed. R. Civ. P. 26 which would add a new "proportionality" test to the scope of allowable discovery.
• A proposed amendment to Fed. R. Civ. P. 30 which would reduce the limit on the number of

depositions in a case from 10 to 5 and would reduce the maximum length of a deposition from 7 hours to 6 hours.
• A proposed amendment to Fed. R. Civ. P. 33 which would reduce the limit on the number of written interrogatories from 25 to 15.
• A proposed amendment to Fed. R. Civ. P. 36 which would limit the number of requests to admit to 25.
• A proposed amendment to Fed. R. Civ. P. 37 which would provide a uniform national standard for evaluating discovery preservation efforts and for the imposition of sanctions for failures to preserve discovery.

The public comment period for the proposed federal amendments runs until February 15, 2014. If approved, the federal amendments currently are expected to go into effect on December 1, 2015.

For more information about the state and federal e-discovery rules or ESI issues, please contact Grant Killoran at 414.276.5000, or at grant.killoran@wilaw.com.

PENDING LEGISLATION MAY MAKE FORECLOSURES MORE CHALLENGING FOR LENDERS

As reported in the Milwaukee Journal Sentinel, State Rep. Evan Goyke (D-Milwaukee) introduced five bills designed to alleviate what Rep. Goyke considers ongoing problems arising from the housing crisis that began in 2008. Lenders and their counsel would be wise to pay careful attention to a number of the bills in the package, as they could, if passed in to law, significantly affect future foreclosure actions.

Of particular concern to lenders is the proposal to require a plaintiff filing a foreclosure action to post a $15,000 demolition bond with the clerk of courts of the county in which the property is located. If the property in question must be demolished, the $15,000 would be applied to the cost of the demolition. Additionally, the $75 filing fee currently associated with a foreclosure action would be increased by $50. This fee increase would be used to install lighting at existing abandoned homes. Another bill in the package would give municipalities and lenders the right to enter foreclosed properties to address any potential problems. It is uncertain whether the bill is intended to create a requirement to do so.

Copies of the legislation can be read here. Further information about these bills, and the other bills included in the package, as well as the impact they may have on the decision to

bring a foreclosure action, can be obtained by contacting any member of our firm's Creditors' Rights Practice Group.

WISCONSIN'S "LEMON LAW" STATUTE HAS BEEN REVISED

Wisconsin's so-called "Lemon Law" statute, § 218.0171, Wis. Stats., has long been considered the most consumer-friendly Lemon Law in the country. The statute itself, and the numerous appellate court decisions which interpret it, made it extremely difficult for motor vehicle manufacturers who sold or leased new motor vehicles in Wisconsin to comply with the law on a pre-lawsuit basis and also made it very difficult to resolve lawsuits after they were filed. The revised law is intended to change this. The elimination of the double damages provision alone will create a much more level playing field for consumers and manufacturers. This and the other changes should hopefully result in a decrease in the number of lawsuits filed. Also, if a lawsuit is filed, the revisions to the law should make it more workable for manufacturers to resolve lawsuits, and encourage consumers' attorneys to do so as well.

Generally speaking, Wisconsin's Lemon Law was designed to protect consumers who purchased or leased new motor vehicles that turn out to be defective and the defects were not remedied within a reasonable period of time. If a new vehicle exhibited a warranty "nonconformity," a defect which substantially impaired the vehicle's use, value or safety, within the first year after the vehicle is delivered to the consumer and the consumer makes the vehicle available to the manufacturer or an authorized dealership for the necessary repairs, the manufacturer or dealership were required to make a reasonable attempt to repair the vehicle. If the manufacturer or dealership did not repair the vehicle after a reasonable attempt, such that the vehicle was "out of service" for at least 30 days due to warranty nonconformities or had a nonconformity that was subject to repair at least four times during that first year and the nonconformity continued, the consumer was entitled to request at his or her option that the manufacturer repurchase the vehicle and put the consumer back in the position he or she was in prior to purchasing the vehicle, or request that the manufacturer replace the vehicle with a comparable new vehicle. Significantly, the manufacturer was required to actually complete the vehicle repurchase or provide the comparable new motor vehicle within thirty (30) days from the consumer's request. That proved very challenging to manufacturers, especially when consumers were less than cooperative in providing all the necessary documentation and information which was necessary for the manufacturer to repurchase the vehicle or provide the comparable new motor vehicle.

If the manufacturer decided to comply with the consumer's request for a repurchase or a comparable new motor vehicle, but did not actually provide the refund or replacement vehicle within the aforementioned thirty (30) days, the consumer was entitled to file a lawsuit and, if successful, was entitled to recover double damages and reasonable attorney fees. Note that reasonable attorney fees were recoverable by consumers if they were successful with their lawsuit, but manufacturers were not entitled to recover their attorney fees if they were successful defending a lemon law lawsuit.

On December 13, 2013, Governor Scott Walker signed into law a revised Wisconsin Lemon Law. The following are highlights of the revised law, but a thorough reading of the revised statute here will be necessary to fully understand it and for consumers and manufacturers to be able to comply with it.

EFFECTIVE DATE: The new law takes effect for new motor vehicles which are sold or leased on or after March 1, 2014.

DOUBLE DAMAGES: Double damages have been eliminated and consumers are now only entitled to single damages if they are successful with their Lemon Law case.

OUT OF SERVICE: The prior law did not provide a definition of "out of service," but the Wisconsin Court of Appeals held that "out of service" "includes those periods when the vehicle is not capable of rendering service as warranted due to a warranty nonconformity, even though the vehicle may be in the possession of the consumer and may still be driven in the performance of other services by the consumer." *Vultaggio v. GM*, 145 Wis. 2d 847, 886, 429 N.W.2d 93, 97 (Ct. App. 1988). The new law creates a definition of "out of service" in paragraph (1)(g) as follows:

> "Out of service," with respect to a motor vehicle, means that the vehicle is unable to be used by the consumer for the vehicle's intended purpose as a result of any of the following:
>
> 1. The vehicle is in the possession of the manufacturer, motor vehicle lessor, or any of the manufacturer's authorized motor vehicle dealers for the purpose of performing or attempting repairs to correct a nonconformity.
>
> 2. The vehicle is in the possession of the consumer and the vehicle has a nonconformity that substantially affects the use or safety of the vehicle and that has been subject to an attempt to repair under sub. (2) (a) on at least 2 occasions.

DEFINITION OF MOTOR VEHICLE: The new law at paragraph (1)(bt) creates a separate definition for a "Heavy-duty vehicle," which means any vehicle having a gross weight rating or actual gross weight of more than 10,000 pounds. Different rules apply to heavy-duty vehicles, which are not addressed in this writing.

ELECTION OF REFUND: This section of the law is essentially unchanged and still requires the manufacturer to actually provide the refund to the consumer within 30 days.

ELECTION OF A REPLACEMENT VEHICLE: If a consumer requests a replacement vehicle, the manufacturer has 30 days to agree in writing to provide the vehicle or a refund of the full purchase price plus other taxes, fees and collateral costs. It then gives the manufacturer 15 additional days ("45 days total") to provide the comparable new vehicle or refund. The statute specifically states that "[u]pon the consumer's receipt of this writing, the manufacturer shall have until the 45th day after receiving from the consumer the form specified in sub. (8)(a)2. to either provide the comparable new motor vehicle or the refund." If the manufacturer agrees to provide a comparable new motor vehicle, the manufacturer retains the right to provide a refund if a comparable new motor vehicle does not exist or cannot be delivered within this 45-day period.

STATUTE OF LIMITATIONS: The prior law provided a six year statute of limitations based on contract law. The new law now specifies that the statute of limitations to file an action expires three years from the date the vehicle was first delivered to the consumer.

DAMAGES: Other than the elimination of double damages, this provision essentially stays the same and allows consumers who are successful at trial to recover pecuniary losses, together with costs, disbursements and reasonable attorney fees.

REQUIREMENT THAT CONSUMERS AND MANUFACTURERS COOPERATE: While the previous statute did not specify any such requirement, the new law at section 218.0171(7)(b) states that if a court finds that any party to the action has failed to reasonably cooperate with another party's efforts to comply with obligations under this section, which hinders the other party's ability to comply with or seek recovery under this section, the court may extend any deadline specified in this section, reduce any damages, attorney fees, or costs that may be awarded under par. (a), strike pleadings, or enter default judgment against the offending party.

SUMMARY

Hopefully the revised Lemon Law statue will help to facilitate what the law was originally intended to accomplish for both consumers and motor vehicle manufacturers.

NEW WISCONSIN CONSUMER PROTECTION

LEGISLATION WILL AFFECT HOME IMPROVEMENT AND REPAIR CONTRACTORS

On July 5, 2013, a new piece of consumer protection legislation was enacted in Wisconsin. The new law, 2013 Wisconsin Act 24, takes effect on January 1, 2014. It creates Wisconsin Statute section 100.65, which is similar to a provision of the Illinois Home Repair and Remodeling Act. It will apply to consumer contracts for residential roofing, and for any other exterior repair, replacement and construction respecting one and two family dwellings. The new law's purpose is to protect consumers, whose homes have been damaged, from being taken advantage of by home repair contractors.

The new law gives the consumer the right to cancel a contract for exterior repairs within three days after being notified by his or her insurer that the consumer's property insurance claim for the damage to the home has been denied, in whole or in part. The contractor must give the consumer a specific written cancellation notice form in duplicate, attached to the consumer's copy of the contract. If the consumer cancels the contract, the contractor must refund any payments received within ten days. However, the contractor is not required to refund the reasonable value of any emergency services, acknowledged in writing by the consumer to be necessary to prevent damage to the property that the contractor had performed prior to the cancellation of the contract.

The law will prohibit contractors from offering to pay or to rebate to the consumer all or any part of their insurance deductible as an incentive to enter into a contract. It will also prohibit the contractor from offering to negotiate on the consumer's behalf with the consumer's insurance carrier.

The scope of the new law is very broad. It will affect all contractors that do any type of exterior repair, replacement or construction work on one and two family dwellings. This would, for example, include painters, roofers, remodelers, siding contractors, glazing contractors, patio and driveway contractors, and emergency repair contractors. The law imposes a fine of between $500 and $1,000 for each violation. Contractors will need to either revise or to completely redraft their contract forms in order to comply with the law.

FACTORS TO CONSIDER BEFORE YOU AGREE TO SUBMIT YOUR COMPANY TO ARBITRATION

Arbitration is a procedure used in the resolution of legal disputes outside of the traditional

court system. In arbitration, the parties agree to submit their disputes to one or more persons, known as "arbitrators" or an "arbitration panel." An arbitrator is someone, usually a former judge or a lawyer with significant experience in an area of law related to the dispute, who hears and decides motions, rules on evidentiary matters, and ultimately decides the disputed case. The arbitrator's decision, known as the arbitration "award," is generally binding on the parties.

Before you agree to subject your business to arbitration in a commercial agreement, you should carefully consider the nature of any future dispute that may arise over that agreement and whether arbitration of any such dispute will be beneficial. Whether you anticipate that your company will be the plaintiff or the defendant may greatly impact your decision.

The following are some of the factors to consider when deciding whether to agree to arbitration:

- **Input into the selection of the decision maker**. In an arbitration proceeding, the parties typically have input into the choice of the arbitrator. The parties can agree on an arbitrator, or choose an arbitration company to select an arbitrator. A party does not have this luxury with respect to choosing a judge, who is randomly assigned to preside over a lawsuit. In addition, the parties to an arbitration are not subject to the same geographic limitations that exist with a judge. The parties can agree to select an arbitrator from anywhere in the world.
- **A firm date for the hearing**. Parties can generally better control the date of the arbitration hearing than the date of a traditional court proceeding. An arbitrator will likely provide more flexibility scheduling the hearing than a judge will provide.
- **Less formality.** Arbitration proceedings are not generally subject to all of the same rules of evidence or pretrial procedures found in a traditional court case.
- **Lack of full discovery**. Since arbitration is less formal than the traditional court case, the ability to conduct full discovery, especially third-party discovery, is potentially more difficult in an arbitration. In addition, non-parties are not subject to the arbitration agreement and, therefore, may have a greater ability to resist discovery efforts.
- **More costly filing fees**. The fees associated with initiating an arbitration proceeding are typically far more costly than the filing fees associated with a court case. In addition, arbitrators typically charge an hourly rate for the time spent working on the arbitration, including review of documents, attendance at hearings, and preparing decisions. In a court case, the judge presides over your case with no costs beyond the initial filing fee.
- **Takes less time**. The typical arbitration proceeding is resolved faster than the typical court case. Although there are exceptions to this, arbitration does not suffer from the same back-log of cases found in the traditional court system.
- **No jury**. Arbitration requires that the parties waive their right to a jury trial. The parties present their evidence and witnesses to the arbitrator, who decides the dispute.

- **Greater finality**. In arbitration, there generally is only a very limited right to appeal. As a result, most arbitrations will end with the arbitrator's decision and the parties are generally stuck with the decision, whether good or bad.
- **Greater ability to keep the dispute private**. Unlike a lawsuit filed with the court, parties to an arbitration have the ability to keep the proceedings, and the result, confidential. A court proceeding is almost always public.

If you have any questions regarding this article, please contact Greg Lyons at O'Neil Cannon at 414-276-5000.

WISCONSIN ELIMINATES BUILDING CONTRACTOR REGISTRATION PROGRAM

Effective July 2, 2013, Wisconsin eliminated its Building Contractor Registration Program.[1] The Building Contractor Registration Program was eliminated in connection with the passage of Wisconsin's Biennial Budget Act. A new statute was also enacted that prohibits the Department of Safety and Professional Services from creating or enforcing any administrative rule that would require any person engaging in the construction business to hold any license, except a license specifically required by statute.[2]

Under former law, no person or entity could legally work in the construction business in Wisconsin without being registered as a Building Contractor, unless the person or entity held a Dwelling Contractor Certification or some other Wisconsin construction license. The Building Contractor Registration requirement was therefore the "catch-all" credential requirement for those who held no other credential. In order to obtain the Building Contractor credential, the applicant was merely required to submit the appropriate application form, certify compliance with Wisconsin's statutory worker's compensation and unemployment compensation requirements, and pay the registration fee. The registration had to be renewed every four years. There was no requirement that an applicant possess any special skills or qualifications. The Building Contractor Registration Program had therefore been criticized as being little more than an excuse to charge a fee.

If you have any questions regarding this article, please contact Attorney Steve Slawinski at O'Neil, Cannon, Hollman, DeJong and Laing S.C. at 414-276-5000.

---

[1] 2013 Wis. Act 20 § 1708e, repealing Wis. Stat. § 101.147.

[2] 2013 Wis. Act 20 § 1708f, enacting Wis. Stat. § 101.1472(2) (2013).

CONSIDERATIONS OF DURABLE POWERS OF ATTORNEY

Historically, if a person is no longer able to make decisions regarding their health or finances, one had to commence a legal proceeding to have the person declared incompetent. The court then appointed a guardian and, to some degree, played a supervisory role over the guardian's decisions and actions.

People often created Powers of Attorney which would deal with financial issues in particular. So for example, if I was trying to sell my house but then moved out of town, I could create a Power of Attorney to have someone else sign the papers on my behalf. In a more permanent way, I could also create a Power of Attorney to have someone else sign checks for me or engage in other identified financial transactions.

A Durable Power of Attorney is a useful tool chosen by many people to give competent individuals the ability to choose a person to manage their affairs and assets in the event of incompetency. As people age and, for example, as increasing numbers of individuals suffer various affirmaties of old age, the Durable Power of Attorney avoids public court proceedings and provides an individual to help make these difficult decisions.

A Durable Power of Attorney is intended to delegate authority to another even if the person signing the Durable Power of Attorney became incompetent in the future.

In a recent Wisconsin Supreme Court case, one of the justices wrote an opinion to put Durable Powers of Attorney in a larger societal and legal context:

> A Durable Power of Attorney, unlike the Common Law Power of Attorney, survives the principal's disability or incapacity.

Many people now will create Durable Powers of Attorney and name their spouse as a person who can make financial decisions should that become necessary in the future. As the State Supreme Court said:

> [D]urable Powers of Attorney are intended to give competent individuals the ability to delegate to an agent broad power to manage their affairs and assets in the event of incompetency.

* * *

> The Durable Power enhances the autonomy of the principal by enabling a principal to make decisions for himself or herself while competent that will continue to be effective if the principal becomes incompetent.

> The Durable Power of Attorney can improve the living conditions of the elderly and provide security for their future care. A Durable Power of Attorney can help a competent principal to handle his or her financial and legal affairs and living arrangements and then can enable the attorney-in-fact, the agent, to handle the principal's finances and day-to-day quality of life without having to declare the principal incompetent and without having to seek court supervision.

Many people would not object to asking their spouse or other trusted family member or friend to serve as a Durable Power of Attorney. Having said that, by merely signing a Durable Power of Attorney, a principal is potentially giving the agent very significant power over one's finances and can even be authorizing the emptying of bank accounts. Further, as time goes by, things might change and the spouse's health might become questionable such that one would want to terminate the Durable Power of Attorney. In that case, one might consider naming an adult child to serve in that capacity.

While Wisconsin has a statute to address some of these issues, there is very little case law interpreting the statute or developing a body of law to assist individuals and attorneys with respect to Powers of Attorney. People considering these issues should contact an attorney who handles elder law issues to explore whether this type of document is appropriate for any individual's situation.

If you have any questions regarding this article, please contact Attorney Randy Nash at O'Neil Cannon at 414-276-5000.

WHAT CONSTITUTES "NET INVESTMENT INCOME" FOR PURPOSES OF THE 3.8% MEDICARE NET INVESTMENT INCOME SURTAX

Effective January 1, 2013, pursuant to the Patient Protection and Affordable Care Act, 26

U.S.C. § 1411 imposes a 3.8% Net Investment Income Tax on individuals, estates and trusts which have "Net Investment Income" and modified adjusted gross income above specified statutory threshold amounts. For individuals, the tax is imposed on the lesser of: (A) the Net Investment Income for the taxable year, or (B) the excess of modified adjusted gross income for the taxable year over the threshold amount ($250,000 for married individuals filing jointly; $125,000 for married individuals filing separately; $200,000 for single individuals). For estates and trusts which are subject to the tax, the tax is imposed on the lesser of: (A) the undistributed Net Investment Income for the taxable year, or (B) the adjusted gross income for the taxable year over the dollar amount at which the highest tax bracket for an estate or trust begins for the taxable year.

For purposes of the tax, "Net Investment Income" is defined as the sum of the following, less any applicable deductions:

- Gross income from interest, dividends, annuities, royalties and rents, which amounts were derived from a passive trade or business activity (as defined by 26 U.S.C. § 469), or from a trade or business involved in trading in financial instruments or commodities (as defined in 26 U.S.C. § 475(e)(2))
- Other gross income derived from a passive trade or business activity, or from a trade or business involved in trading in financial instruments or commodities
- Net gain, to the extent it is taken into account in computing taxable income, which is attributable to the disposition of property from a passive trade or business activity, or from a trade or business involved in trading in financial instruments or commodities

Applicable deductions may include expenses related to investment interest, advisory and brokerage fees, rental and royalty income, and state and local income taxes which are allocable to items included in Net Investment Income.

Net Investment Income specifically does not include such items as wages, unemployment compensation, operating income from non-passive business activities, social security benefits, alimony, tax exempt interest, self-employment income, Alaska Permanent Fund Dividends, and distributions from certain qualified retirement plans. However, these items may be subject to the .9% Additional Medicare Tax.

The following paragraphs highlight a few of the rules specific to particular types of income which may or may not be subject to the tax. The information provided herein is not intended to address all sources of income subject to the tax, or provide an exhaustive summary of the applicable rules.

S-Corporations. Generally, an interest in a pass-through entity such as an S Corporation is not property held in a trade or business, so that any gain or loss from the sale of such interest would be Net Investment Income. However, the IRS has limited the amount of gain or

loss from the disposition from an interest in an S Corporation to the net gain or loss that would result if the S Corporation sold all of its assets at fair market value immediately before the disposition of the interest.

Working Capital. Any income, gain or loss attributable to capital set aside for the future needs of a trade or business is Net Investment Income.

Child's Interest. Any amount included on a parent's Form 1040 as a result of filing Form 8814 for Parent's Election to Report Child's Interest and Dividends is included in calculating Net Investment Income, but does not include any amount excluded on Form 1040 due to threshold requirements.

Pension and Deferred Compensation Distributions. While Net Investment Income does not include distributions from certain qualified employee benefit plans, such distributions are included in determining the threshold amounts if they are included in the taxpayer's gross income.

The rules regarding the Net Investment Income Tax are complex and continue to evolve as final regulations are determined. In making a determination of how you may be impacted by the tax, it is important to contact a professional who may advise you as to the application of specific rules to your particular situation.

If you have any questions regarding this article, please contact Attorney Megan Harried at O'Neil Cannon at 414-276-5000.

USES OF MARITAL PROPERTY AGREEMENTS IN ESTATE PLANNING

Wisconsin is a marital property state, and the applicable laws are set forth in the Marital Property Act (the "Act"), codified in Chapter 766 of the Wisconsin Statutes. The Act determines the property rights of married spouses during life and at death. The Act applies to a married couple after their "determination date," which is the date on which the last of the following requirements is met: (i) marriage; (ii) both spouses are domiciled in Wisconsin; and (iii) 12:01 a.m. on January 1, 1986.

Under the provisions of the Act, marriages are generally considered equal partnerships, and after the determination date married spouses are treated as sharing equally in most assets acquired by either spouse during the marriage. Such assets, which include property acquired

from the earnings of either spouse, are presumed to be marital property. In effect, each spouse is presumed to own an undivided one-half interest in each item of marital property acquired during the marriage, regardless of how the property is titled. On the other hand, property acquired by a spouse prior to the determination date, and property acquired by a spouse during marriage by gift or inheritance from a third party, is presumptively classified as the individual property of the acquiring spouse. The non-acquiring spouse does not have ownership rights in the acquiring spouse's individual property during life or at death.

Importantly, the Act sets forth the "default" rules, but a married couple may enter into a marital property agreement to alter any of the provisions of the Act, including the classification of any or all assets as marital or individual property. There are many benefits to entering into such an agreement, especially because determining with exactitude the property classification of an item of property under the Act is at best an uncertain process. A marital property agreement provides certainty as to the classification of property, which is especially important when the couple has created a comprehensive and tax-conscious estate plan for the disposition of their assets at death.

In Wisconsin, it is common for a married couple to enter into a marital property agreement classifying all property of both spouses as marital property, including property which would otherwise be classified as the individual property of one spouse. These "opt-in" agreements are especially suitable for a first marriage where neither spouse has children from a prior relationship. Classifying all property as marital property simplifies estate administration because it is no longer necessary for the couple to keep marital and individual property separate, and because it will not be necessary to analyze which assets are marital property and which are individual property upon the death of a spouse. Additionally, there are ordinarily significant income tax advantages to opt-in marital property agreements. Classifying all of a married couple's assets as marital property as part of a comprehensive estate plan equalizes each spouse's estate, and will usually enable the couple to maximize the estate tax exemptions available for each spouse. Further, at the time of death, the basis of assets passing from a decedent for purposes of determining gain or loss for income tax purposes is "stepped-up" (or "down") to an amount equal to a fair market value of the assets as of the date of death. In the case of marital property, the basis of a surviving spouse's marital property interest is also stepped-up. "Opt-in" marital property agreements often also contain what is known as a "Washington Will" provision, which states that upon the death of either spouse, all or any of the property of one or both spouses passes to a designated person, trust or other entity by nontestamentary disposition, and without probate. As such, the provision is a simple mechanism whereby the spouses contract for the disposition of all or a portion of their community property at the time of each of their deaths, and simultaneously avoid probate as to that property.

Alternatively, a married couple may choose to enter into a marital property agreement reclassifying all property of both spouses as the individual property of each spouse, including

property which would otherwise be classified as marital property. In these "opt-out" agreements, the wages earned by each spouse, and all property acquired with the earnings, will be classified as the individual property of the earning spouse. The non-earning spouse will not have any ownership rights in such assets, either in life or at death. An "opt-out" marital property agreement may be advantageous in second marriage situations, where one or both spouses have children from a prior relationship, because the agreement will allow each spouse to bequeath his or her individual property to his or her own children at death.

Marital property agreements may also reclassify only certain assets. For example, a spouse may want to bequest a specific asset to a person other than his or her spouse at death. A marital property agreement could classify only the specific asset as the individual property of the spouse. As a result, the spouse would have full ownership rights in the asset during life, and the right to bequeath the entire asset to the third party at death. Without such an agreement, the spouse would only have the right to bequeath his or her one-half interest in the asset.

Marital property agreements are essential tools for creating a comprehensive estate plan tailored to the individual needs of the couple, and have a significant impact on the disposition of a couple's assets both during life and at death.

If you have any questions regarding this article, please contact Attorney Megan Harried at O'Neil Cannon at 414-276-5000.

GIFTING CLAUSES IN DURABLE POWERS OF ATTORNEY

In a durable power of attorney, the principal appoints someone to oversee his financial affairs, including in the event he becomes incompetent as a result of injury or illness. A broad durable power of attorney may authorize the agent to take any action as fully and effectually in all respects as the principal could do if personally present. However, even the most broadly stated power of attorney does not authorize the agent to make gifts on behalf of the principal unless the power of attorney expressly grants the agent such power. The law requires that gifting powers be expressly stated in the durable power of attorney in order to reduce the risk that the agent will engage in financial abuse of the principal.

Gifts are an important estate planning tool, as making gifts during life often results in significant tax savings at the principal's death. Therefore, it is advantageous for an agent under a durable power of attorney to be authorized to make gifts for estate planning

purposes. Generally, it is best if the scope of an agent's power to make gifts on behalf of the principal is limited, so as to reduce the potential for abuse.

If the durable power of attorney states in general language that the agent is authorized to make gifts, without express limitations, by law the agent is authorized to make a gift up to the amount of the annual federal gift tax exclusion, or twice that amount if the principal's spouse consents to a split gift, as defined by the tax code. Further, such general language authorizes the agent to make a gift of the principal's property if the agent determines doing so is consistent with the principal's objectives, if known, or if unknown, with the principal's best interest, based on all applicable factors, including: (i) the value and nature of the principal's property; (ii) the foreseeable obligations and need for maintenance of the principal; (iii) the minimization of all taxes; (iv) the principal's eligibility for any benefit, program or assistance; and (v) the principal's personal history of making such gifts.

A durable power of attorney may expressly provide that the agent is only authorized to make gifts to specified classes of persons, such as the principal's descendants. Such a provision may be advisable if the agent is someone other than the principal's spouse or family member, in order to reduce the risk that the agent will make gifts to himself or third parties he wishes to benefit, contrary to the principal's desires or best interest.

A durable power of attorney may also expressly require that the agent make gifts only in a manner which continues the principal's previously established pattern of gift-making for estate planning purposes. Such a provision helps ensure that the agent will make gifts which align with the principal's desires and objectives.

Further, a durable power of attorney may expressly provide that the aggregate of all gifts to any one recipient in any one year shall not exceed the amount of the annual federal gift tax exclusion. Such a provision provides the agent with the flexibility to maximize tax-free annual gifts for estate planning purposes, and reduces the risk that the agent will deplete the principal's estate.

It is also possible for the principal to expressly authorize the agent to make any gifts that the agent believes will benefit the principal or the principal's estate, including gifts to the agent himself. Such a provision grants the agent the broadest authority to make gifts on behalf of the principal, but it also provides the greatest potential for abuse. Therefore, it is crucial that a principal granting such broad authority trust the agent unconditionally.

In drafting a durable power of attorney as part of a comprehensive estate plan, it is important to consider what gifting powers should be granted in light of the principal's personal and financial situation. While gifting powers are useful for estate planning purposes, it is also important to limit gifts to those the principal might have made, and minimize the risk for financial abuse.

If you have any questions regarding this article, please contact Attorney Megan Harried at O’Neil Cannon at 414-276-5000.