TAX AND WEALTH ADVISOR ALERT: ESTATE PLANNING CONSIDERATIONS FOR SECOND MARRIAGES

It is becoming increasingly common for people to get divorced and then remarried. In these situations, one or both spouses entering into a new marriage usually has children from a prior relationship. Anyone who has children from a prior relationship and remarries should review their estate plan and make any necessary updates to ensure their assets are distributed according to their wishes.

Under Wisconsin law, the assets of a deceased spouse who dies intestate will automatically pass to the surviving spouse. When there is a second marriage and children from a prior relationship, however, the assets of a deceased spouse will be divided between the surviving spouse and the deceased spouse's children. In these situations, complications frequently arise when the main asset of the deceased spouse's estate cannot easily be divided, such as a house. And even if assets can be easily divided, the surviving spouse and children may disagree about who should receive what.

Complications may also arise when people fail to update the beneficiary designations, transfer-on-death designations, or payable-on-death designations on their non-probate assets (click here to read about the difference between probate and non-probate assets). For example, if a person designates his or her new spouse as the beneficiary of a bank account, then the new spouse will inherit the entire account upon that person's death. Unless the surviving spouse names the deceased spouse's children as the primary beneficiaries of the account, the surviving spouse's children would likely stand to inherit the bank account rather than the deceased spouse's children.

Finally, disputes may arise in the event of incapacity. In those situations, a person's adult children and new spouse may disagree over who should be able to make financial or medical decisions and what those decisions should be.

There are many other issues that may arise and factors to consider, but the main takeaway is that it is very important to review and update your estate plan as a result of a major life event like a divorce and subsequent marriage. Failing to do so could frustrate your estate planning intentions and lead your loved ones to engage in litigation.

The attorneys at O'Neil Cannon have experience with creating estate plans for "blended" families and with updating old estate plans to correspond with new circumstances. If you would like to discuss your estate planning options further, please contact attorney Kelly M. Spott.

IN MEMORIAM: THOMAS A. MERKLE 1944–2020

It is with great sorrow we announce the passing of our colleague Attorney Tom Merkle, who served as a lawyer for more than forty-five years at O'Neil Cannon Tom was one of the founders of the firm and was instrumental to its growth and success.

He served as an Officer and a Director of the firm for many years. Tom was a friend, advisor, and confidant to his clients. He was a friend, mentor, and tremendous partner to all the lawyers and staff at the firm.

Tom was not only a talented attorney, he was highly respected by his peers. In 2007 he was appointed by the Wisconsin Supreme Court to serve on the Office of Lawyer Regulation's District Two Committee, and was selected as one of the Best Lawyers in America® for many years.

Tom will be fondly remembered and missed by all of us at OCHDL. Our thoughts and prayers go out to his family and friends.

21 FIRM ATTORNEYS RECOGNIZED BY SUPER LAWYERS

Each year, *Super Lawyers* surveys the State of Wisconsin's 15,000 attorneys and judges, seeking the State's top attorneys. In November 2020, *Super Lawyers* published its lists for 2020, which include the Top 10 Attorneys in Wisconsin, Top 50 Attorneys in Wisconsin, Top 25 Attorneys in Milwaukee, Super Lawyers (consisting of the top 5% of attorneys in Wisconsin), and Rising Stars (consisting of attorneys who are 40 years old or younger or who have been in practice for 10 years or less).

Twenty-one of our attorneys were recognized by *Super Lawyers*, which has referred to the firm as "the Milwaukee mid-sized powerhouse." Those attorneys are the following:

- Dean P. Laing:
    - Top 10 Attorneys in Wisconsin

  - Top 50 Attorneys in Wisconsin
  - Top 25 Attorneys in Milwaukee
  - Super Lawyer
- Seth E. Dizard:
  - Top 50 Attorneys in Wisconsin
  - Top 25 Attorneys in Milwaukee
  - Super Lawyer
- Douglas P. Dehler:
  - Super Lawyer
- James G. DeJong:
  - Super Lawyer
- Peter J. Faust:
  - Super Lawyer
- John G. Gehringer:
  - Super Lawyer
- Joseph E. Gumina:
  - Super Lawyer
- Gregory W. Lyons:
  - Super Lawyer
- Patrick G. McBride:
  - Super Lawyer
- Joseph D. Newbold:
  - Super Lawyer
- Chad J. Richter:
  - Super Lawyer
- John R. Schreiber:
  - Super Lawyer
- Jason R. Scoby:
  - Super Lawyer
- Steven J. Slawinski:
  - Super Lawyer
- JB Koenings:
  - Rising Stars
- Trevor C. Lippman:
  - Rising Stars
- Erica N. Reib:
  - Rising Stars

- Christa D. Wittenberg:
    - Rising Stars

Super Lawyers is a national rating service that rates attorneys in all 50 states. The selection process utilized by *Super Lawyers* is multi-phased and includes independent research, peer nominations, and peer evaluations. One court recently had this to say about *Super Lawyers*:

> "[T]he selection procedures employed by [*Super Lawyers*] are very sophisticated, comprehensive and complex.
>
> It is abundantly clear . . . that [*Super Lawyers* does] not permit a lawyer to buy one's way onto the list, nor is there any requirement for the purchase of any product for inclusion in the lists or any quid pro quo of any kind or nature associated with the evaluation and listing of an attorney or in the subsequent advertising of one's inclusion in the lists."

We are proud to be one of the few firms in Wisconsin that had over 50% of its attorneys receive recognition by *Super Lawyers.*

O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING S.C. RANKED IN 2021 "BEST LAW FIRMS"

O'Neil Cannon has been ranked in the *2021 U.S. News – Best Lawyers*® "Best Law Firms" list in 16 practice areas:

- Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law
- Business Organizations (including LLCs and Partnerships)
- Commercial Litigation
- Construction Law
- Corporate Law
- Family Law
- Litigation – Bankruptcy
- Litigation – Insurance
- Litigation – Labor and Employment
- Mergers and Acquisitions Law
- Personal Injury Litigation – Plaintiffs
- Product Liability Litigation – Defendants
- Real Estate Law
- Securities / Capital Markets Law
- Tax Law

- Trusts and Estates Law

Firms included in the 2021 “Best Law Firms” list are recognized for professional excellence with persistently impressive ratings from clients and peers. Achieving a tiered ranking signals a unique combination of quality law practice and breadth of legal expertise.

TAX AND WEALTH ADVISOR ALERT: WHAT PROPERTY IS SUBJECT TO PROBATE?

During the estate planning process, it is important to consider what types of assets make up your estate. Specifically, you should understand the difference between your “probate” and “non-probate” assets. As you might imagine, your probate assets are the ones that must go through probate, a time-consuming and costly process which we previously discussed here.

Contrary to popular belief, a Last Will and Testament will not, on its own, help your estate avoid probate. Whether or not your estate is subject to probate depends on whether your estate consists of probate assets.

Probate assets are those that are owned solely by the decedent, without any beneficiary designations, transfer-on-death designations, payable-on-death designations, or joint ownership with rights of survivorship. Assets titled solely in the name of the decedent must go through probate—a court-supervised process—to be transferred or distributed to your loved ones. The probate process is necessary for these types of assets because only a court can legally transfer title after a person’s death.

Non-probate assets are those with beneficiary designations, transfer-on-death designations, or payable-on-death designations. They also include assets that are titled in the name of a trust or titled as joint tenants with rights of survivorship. Unlike probate assets, non-probate assets will be transferred directly to your beneficiaries upon your death without any court supervision.

Many people seek an estate plan to avoid or minimize the probate process. Probate avoidance strategies can be personalized to your unique circumstances. If you would like more information on estate planning options to avoid probate, please contact attorney Kelly M. Spott.

TAX AND WEALTH ADVISOR ALERT: IRS CLARIFIES STANCE ON DEDUCTIBILITY OF EXPENSES COVERED BY PPP LOANS

Yesterday, the U.S. Treasury Department and Internal Revenue Service released guidance clarifying the tax treatment of expenses funded with forgiven Paycheck Protection Program loans. This guidance, Revenue Ruling 2020-27 and Revenue Procedure 2020-51, strengthened the Treasury's prior position in Notice 2020-32, as we previously wrote about here, which stated that expenses funded with forgiven PPP loan funds are not deductible.

In Revenue Ruling 2020-27, the IRS answered the question of whether a taxpayer who paid otherwise deductible expenses with PPP funds can deduct those expenses in the taxable year in which the expenses were paid or incurred if, at the end of that taxable year, the taxpayer reasonably expects to receive forgiveness of the PPP loan. The answer according to the IRS is "no," regardless of whether the taxpayer has submitted an application for forgiveness of the loan by the end of that taxable year.

The Treasury provided its rationale for this in a subsequent press release yesterday, stating "[s]ince businesses are not taxed on the proceeds of a forgiven PPP loan, the expenses are not deductible. This results in neither a tax benefit nor tax harm since the taxpayer has not paid anything out of pocket."

Nevertheless, if desired, Congress could override the Treasury's stance by passing a law that explicitly allows the deductions. Additionally, it is possible a taxpayer may decide to challenge this position in court.

However, based upon these current rulings, it is important for all taxpayers that are seeking PPP loan forgiveness to understand whether or not, and when, they can deduct expenses incurred with the loan proceeds and the tax impact that may arise from the lack of deductibility if the loan is forgiven. For questions or further information, please contact attorney Britany E. Morrison.

FEDERAL TRADE COMMISSION AND ENFORCEMENT OF PRIVACY LAW

As we have mentioned previously, there is no overarching federal data privacy law in the

United States. By contrast, the European Union’s General Data Protection Regulation (GDPR) regulates data privacy, including consumer data, in all sectors. Although there is no overarching federal data privacy law in the United States, there are a few sector-specific laws. In health care, for example, the Health Insurance Portability and Accountability Act (HIPAA) and the Health Information Technology for Economic and Clinical Health Act (HITECH) govern many aspects of privacy. Also, the Telecommunications Act and the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM) touch on privacy issues in marketing. Still, there is no federal law specifically regulating the use of consumer data.

Despite the lack of consumer privacy statutes in the United States, the Federal Trade Commission (FTC) has been active for years in protecting American consumers against certain unfair and deceptive practices involving data privacy. The Federal Trade Commission Act (FTC Act) includes an extremely brief section that serves as perhaps the most important provision in U.S. privacy law. Section 5 of the FTC Act states simply: “unfair or deceptive acts or practices in or affecting commerce . . . are . . . declared unlawful.” This single line, which does not specifically mention privacy, has been used by the FTC and Congress to make the FTC the de facto privacy enforcement agency of the federal government.

The FTC defines “Unfair Trade Practices” as any practice that results in a substantial injury, that lacks offsetting benefits, and cannot be easily avoided by consumers. In the privacy context, the FTC often looks at practices that unreasonably leave consumers’ data vulnerable to hacking or theft. Should a company collect the personal data of an individual in connection with a product or services and make inadequate efforts to protect that data, the FTC may seek enforcement for violation of Section 5 of the FTC Act. Conversely, “Deceptive Trade Practices” involve material statements or omissions that are likely to mislead consumers who are otherwise acting reasonably. Deceptive practices can include false representations or false promises. Importantly, the FTC has taken the position that failure to adhere to the steps, standards, and promises contained in a privacy notice is a deceptive trade practice. Thus, for example, should a company state in its privacy notice that it will not transfer a consumer’s data to a third party, any subsequent transfer of data to third parties is likely to be considered a deceptive trade practice.

The financial penalties for unfair or deceptive trade practices can be enormous. These financial penalties can be imposed through a consent decree or through fines imposed by the FTC and approved by the courts. In many instances, the FTC will seek a consent decree with the company through which the company agrees, without admitting guilt, to pay certain fines, stop the alleged practices, or implement new or improved privacy policies and practices. Alternatively, if the company refuses to enter a consent decree, the FTC can seek judgment through an administrative law judge. Should the company refuse to adhere to the FTC ruling, it may be fined up to $43,280 per violation and be liable for any damages caused by the alleged acts. Importantly, each instance of the alleged privacy violation constitutes a unique violation for the purposes of such penalties, leading to potentially substantial fines.

Over the past several years, the FTC has been increasingly active in enforcing unfair and deceptive trade practices that concern consumer data privacy. In 2019 alone, the FTC brought 130 spyware and spam cases as well as 80 general privacy lawsuits. The biggest privacy case of 2019 was *In the Matter of Facebook*, in which the FTC and the social media giant agreed to a consent decree requiring Facebook to pay a five billion dollar fine and institute a broad and privacy-related corporate restructuring. This year, the FTC has commenced 102 actions related to privacy, including cases against Zoom Video Communications, Inc., Williams Sonoma, Inc., and the Western Union Company.

The ability of the FTC to impose substantial penalties on companies who willingly or unwillingly deviate from the practices described in their privacy notices makes it extremely important to routinely review and update your company's privacy notice to ensure that it accurately depicts your company's privacy practices.

HEALTH CARE LAW ADVISOR ALERT: VACCINE INJURY CLAIMS AND THE FEDERAL VACCINE COURT

As the development of a potential COVID-19 vaccine continues, so too do questions about the types of vaccines being developed and how they will be administered. Vaccines offer overwhelming public health benefits, but a small number of individuals who receive vaccines are harmed by them. Most claims alleging health problems caused by vaccines must be brought in the "Vaccine Court" of the United States Court of Federal Claims under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-1, *et seq*.

The Act creates the National Vaccine Injury Compensation Program to handle vaccine-related claims. The program is administered by a secretary who may compensate a party who has suffered a vaccine-related injury or death. The Act largely preempts traditional tort claims against vaccine administrators or manufacturers for vaccine-related injuries and it limits claimants to only those sustaining injury or their legal representatives.

The Act creates a Vaccine Injury Table listing various vaccines and medical conditions that may result from them. Claimants must show, by a preponderance of evidence, that they suffered an injury listed in the Table or that a vaccine caused or significantly aggravated their injury within the time periods set forth in the Table. *Terran ex rel. Terran v. Sec'y of Health and Human Servs.,* 195 F.3d 1302, 1307 (Fed. Cir. 1999), *cert. denied,* 531 U.S. 812 (2000). If claimants do so for an injury listed in the Table within the time period stated in the Table, they are presumed to be entitled to compensation. *Knutson by Knutson v. Sec'y of Health and Human Servs.*, 35 F.3d 543, 547 (Fed. Cir. 1994). For claims not falling within the Table, claimants must prove the vaccine at issue caused their injury by a preponderance of evidence. *Golub v. Sec'y of Health and Human Servs.*, No. 99-5161, 2000 WL 1471643, at *2 (Fed. Cir. Oct. 3, 2000). Claimants are limited to a recovery of $250,000 for pain and suffering, but may recover additional damages for actual and projected un-reimbursable expenses, actual and anticipated lost earnings, and reasonable attorneys' fees and costs.

Claims made to the Vaccine Court are sent to the office of the Chief Special Master, who then assigns the claim to a special master to review and issue a decision to be entered as a judgment by the Federal Court of Claims. Either party can request that the Federal Court of Claims review this decision, and also can seek further review in the United States Court of Appeals for the Federal Circuit. Judicial review of the special masters' decision is limited; the decision can be set aside only if either court determines it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. If claimants choose to reject a judgment by the Vaccine Court, they then may pursue a tort action in state or federal court. However, the Act offers certain defenses and presumptions to defendants facing such claims.

For more information about the Vaccine Court, or other legal issues relating to the COVID-19 pandemic, contact Grant Killoran of O'Neil Cannon at 414-276-5000 or grant.killoran@wilaw.com.

TAX AND WEALTH ADVISOR ALERT: A BRIEF OVERVIEW OF WISCONSIN'S MARITAL PROPERTY SYSTEM

In general, states are considered either "common law property" or "community property" states. Wisconsin, along with a few other states, is a community property state (community property is referred to as "marital property" in Wisconsin). It is important to understand the difference between these two systems for purposes of wealth management planning, estate planning, and divorce.

Under the common law property system, assets and debts earned or acquired by one spouse during the marriage belong only to that spouse. With this type of system, only assets and debts that are titled under the name of both spouses are owned by both spouses. Under Wisconsin's marital property system, all assets and debts acquired or earned during a marriage belong to both spouses, regardless of whose name the assets and debts are titled under. It is important to emphasize that this general rule applies only to assets or debts acquired *during* the marriage—assets and debts acquired before the marriage remain the individual property of whichever spouse brought the assets or debts to the marriage. There are, however, some exceptions to this general rule, such as assets acquired as a gift or through inheritance. Also, non-marital property that is comingled with marital property may be unintentionally reclassified as marital property. Income and appreciation incurred on a non-marital asset may also be deemed marital property.

Spouses living in Wisconsin may wish to enter into a marital property agreement to define and clarify ownership of their assets and debts. Because classifying and defining assets and debts may be difficult, as the above-paragraph outlines, some spouses may wish to enter into a marital property agreement "opting into" Wisconsin's marital property system. By doing so, the spouses can be certain that their property will be classified as marital property, which may have certain tax and estate planning advantages. On the other hand, some spouses may want their property to be subject to a common law property system to protect assets for their children from a prior marriage or shield assets in a potential divorce. These spouses should consider entering into an agreement "opting out" of Wisconsin's marital property system.

Overall, understanding the distinction between common law property systems and community property systems is important for wealth management planning, estate planning, and divorce. Whether it makes sense for spouses living in Wisconsin to opt out of or opt into Wisconsin's marital property system depends on a variety of factors that you should discuss with your estate planning attorney.

If you would like to learn more about Wisconsin's marital property laws and how they affect your estate plan, please contact attorney Kelly M. Spott.

EMPLOYMENT LAWSCENE ALERT: THE ELECTION IS ALMOST HERE—VOTING LEAVE IN WISCONSIN

Tuesday, November 3, 2020 is Election Day. Although early voting is underway and many individuals have already returned their absentee ballots, many people will want to vote in-person on Election Day. All Wisconsin employers are required to provide employees who are eligible to vote up to three consecutive hours of unpaid leave to vote while the polls are open (from 7 AM until 8 PM), and employees must request the time off prior to the election. Voting leave cannot be denied on the basis that employees would have time outside of their scheduled work hours to vote while the polls are open, but employers can specify which three hours an employee is permitted to utilize. Employers may not penalize employees for using voting leave. Although voting leave is unpaid, employers should remember that, under the FLSA, they may not deduct from an exempt employee's salary for partial day absences.

Additionally, all Wisconsin employers are also required to grant an employee who is appointed to serve as an election official 24 hours of unpaid leave for the election day in which the employee serves in his or her official capacity. Employers may not penalize employees for using election official leave. Employees must provide their employers with at least seven days' notice of their need for this leave.

Finally, Wisconsin employers are not permitted to make threats that are intended to influence the political opinions or actions of their employees. Specifically, employers cannot distribute printed materials to employees that threaten to shut down the business, in whole or in part, or reduce the salaries or wages of employees if a certain party or candidate is elected or if any referendum is adopted or rejected.

As always, O'Neil, Cannon, Hollman, DeJong and Laing is here for you. We encourage you to reach out with any questions, concerns, or legal issues you may have.