TAX AND WEALTH ADVISOR ALERT: CHOOSING A TRUSTEE: IT IS ALL ABOUT TRUST PART 1—DISCRETION VS. DIRECTION

Virtually all of my clients leave property to the next generation through trusts. Generally, these trusts last for the lifetimes of their children and oftentimes for further generations, as well. We setup trusts this way to protect those children from creditors, predators, and divorcing spouses, and previous blog posts have fully described how and why this works. This blog post covers a different issue—the amount of specific direction the trustee should receive regarding management of trust property.

At one extreme, the client can give the trustee very little guidance and allow the trustee to make all of the decisions over the trust. For example, the trust document can allow the trustee to decide what to invest in, who to retain for advice and counsel to the trust, and when (and for what reasons) to make distributions to the beneficiaries. At the other extreme, the trust document can give very specific direction. For example, the trust document can require that the trustee invest only in ETFs or dividend paying stock, maintain a 60/40 equity to debt allocation, and name specific advisers. The trust document can limit distributions of principal except in times of hardship, require the trustee to distribute an amount equal to five percent of the trust property each year or an amount equal to the beneficiary's W-2 income, or limit distributions for education unless the beneficiary maintains a 3.0 GPA. But, which method is better—discretion or direction?

Clients ask me this question often. I respond by reminding them that their estate plan needs to implement their own strategy to take care of the people they care about. Their strategy needs to be an extension of their parenting beliefs and values; at its best, it should mimic what they would do if they were alive and had no personal economic need for the trust property. With that context in mind, we begin to consider certain scenarios that test those beliefs. The answers to those "what if" questions provide guidance as to the right framework.

An example might be helpful. One of the fears of leaving large sums of money to children is a fear of laziness. To avoid their children becoming "trust fund babies," parents might put a provision in the trust that the trust shall make a distribution to the child each year equal to the child's W-2 income. On one hand, that is a perfect solution; the child is incentivized to be very productive and double his or her income. But, then we start scenario testing. What if your child was a doctor making $500,000 per year and wanted for nothing? If you were alive and had the money available, would you transfer another $500,000 to the child? The answer is consistently, no. What if your child was a teacher making $30,000 and, based on child care needs and the like, needed $50,000 to "make ends meet"? If you had it, would you give $50,000 to that child? Often the answer is, yes. What about a stay-at-home parent without

W-2 income? Would you give that child nothing if you had plenty to give?

These discussions often lead to the client envisioning ever more complicated structures. For example, we could solve the doctor problem with a maximum distribution, the teacher problem with a “teacher (or other respected but underpaid profession) multiple,” and the stay-at-home problem by creating a “stay-at-home-parent compensation equivalent.” But, of course, for every solution, there is another question—what if the teacher is married to a well-paid CEO?

The point of this exercise is to point out the value of being able to solve each of these problems given their unique facts. I might still decide to provide money to the hard-charging doctor who is investing everything into her practice and her retirement to give her family some “fun money” to take a well-deserved vacation. I might decide not to give the teacher anything because he blows his paycheck at the bars and the casino. Simply put, if the test is what the parent would do if he or she were alive, the answer almost always is “we would make each decision as it comes and not constrain ourselves in any way.” So, with that in mind, isn’t the best trust design to provide the trustee the same full discretion to consider all of the circumstances and make a real-time decision?

The answer is yes, with one huge caveat. Is there a trustee the parents trust? And “trust” is not simply a matter of having a true-north moral compass; trust means the parents have to choose a person who can execute on the parents’ values and beliefs. In other words, in the same situation, a trustee that would do what Mom and Dad would have done if they were alive. Perhaps surprisingly, in a vast majority of situations that I deal with, that person exists, and we have the perfect structure: A parental stand on whom we place no restriction. But what if that person does not exist? While some practitioners and clients then want to shift back to specific rules, in my opinion, there is a better way. We should still provide strong discretion to the trustee, but incorporate specific values and beliefs rather than hard or fast inflexible rules. For example, instead of matching the W-2 income, incorporate the parents’ value of hard work, disdain for sloth, and respect for a stay-at-home parent. Instead of a hard and fast 3.0 GPA cut off for education expenses, we can provide a values statement that education expenses are an investment in a productive future wherein the child’s coordinating investment needs to be hard work and academic rigor. The trustee can then determine whether a 2.5 GPA is the result of a hard-working child overstretching his abilities or a kid on the “Malt Monday, Tequila Tuesday, Wine Wednesday” education plan.

So, my advice: make the trust flexible enough to deal with every changing circumstance and ever-evolving people. Do not restrict the trustee, but rather choose a parenting clone, and if that perfect parent clone does not exist, pick a trustworthy, smart, thoughtful decision maker and have the parents put their values and beliefs in the trust document as a decision-making GPS for the trustee. This is the structure that will best take care of the people the client cares about.

UPCOMING EVENTS—LUNCH AND LEARN: NEW DOL OVERTIME RULES

Please RSVP to Julie Dietz at julie.dietz@wilaw.com or 414-291-4667.

U.S. DOL ANNOUNCES THAT IT WILL PUBLISH FINAL RULE TO UPDATE OVERTIME REGULATIONS

Today, the U.S. Department of Labor announced that it will publish on May 23, 2016 its Final Rule to update the federal regulations defining the overtime exemption for executive, administrative, and professional employees or otherwise known as ”white-collar” employees. The pre-publication version of the Final Rule is, however, available now. The final rule will become effective December 1, 2016.

The Final Rule focuses primarily on updating the salary level requirement for white-collar employees, increasing the salary level requirement from $455 per week ($23,660 annually) to $913 per week or $47,476 annually for a full-year employee. The Final Rule amends the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level. The Final Rule also sets the total annual compensation requirement for highly compensated employees (HCE) subject to minimal duties test to $134,004 up from the current $100,000 salary threshold.

The initial increases to the standard salary level from $455 to $913 per week and HCE total annual compensation requirement (from $100,000 to $134,004 per year) will be effective on December 1, 2016. Future automatic updates to those salary level thresholds will be automatically updated every three years beginning on January 1, 2020.

Currently, for an employee to be exempt from the minimum wage and overtime requirements under the Fair Labor Standards Act (FLSA), an employee must be paid on a salary basis meaning that the employee must receive a predetermined amount of at least $455 per week which cannot be subject to a reduction because of variations in the quality or quantity of the work performed. In addition, the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations ("duties test").

The Final Rule is not changing any of the existing job duty requirements for employees to qualify for the white collar overtime exemption. The Final Rule is also not changing the HCE duties test. The DOL expects that the standard salary level set in the Final Rule and automatic updating will work effectively with the duties test to distinguish between overtime-eligible workers and those who may be exempt.

The effect of the increase in the salary level test from $455 per week to $913 per week will result in certain employees who are now considered exempt under the current regulations to lose their overtime exemption effective December 1, 2016 unless their employers increase their salary level to the new salary level requirement. The DOL estimates that the change in the salary level requirement will permit approximately 4.2 million more employees who are not currently eligible for overtime under the FLSA to be entitled to overtime once the Final Rule becomes effective on December 1, 2016.

O'Neil Cannon will be hosting a seminar on June 8, 2016 at the Country Springs Hotel in Pewaukee, Wisconsin providing important information and insight for employers on the new overtime rules. Please visit our firm website for more information.

ATTORNEY GUMINA AUTHORS IICLE CHAPTER ON GUIDELINES FOR DRAFTING EMPLOYMENT AGREEMENTS

Joseph E. Gumina is a contributing author for the 2016 Edition of the Illinois Institute for Continuing Legal Education's treatise titled "Illinois Contract Law." Attorney Gumina has authored Chapter 8 entitled *Guidelines for Drafting Specific Contract Clauses in Employment Agreements*. This chapter provides a detailed analysis of the anatomy of an effective employment agreement under Illinois law. Attorney Gumina provides practical insight and examples on how to properly draft specific contract clauses in employment agreements. Attorney Gumina also provides an extensive analysis of the developing law with regard to the enforceability of arbitration provisions in employment agreements both under the Federal Arbitration Act and the Illinois Uniform Arbitration Act.

Attorney Gumina leads O'Neil Cannon's labor and employment practice. Attorney Gumina has extensive experience representing management in a vast array of employment and labor matters. Attorney Gumina has authored articles on various employment law topics in InsideCounsel Magazine, Illinois Bar Journal and the Wisconsin Law Journal. He is also a frequent speaker on the latest topics facing employers. Attorney Gumina is licensed to practice in Illinois and Wisconsin and has represented clients in litigation matters in both state and federal courts in Illinois and Wisconsin.

EMPLOYMENT LAWSCENE ALERT: DEFEND TRADE SECRETS ACT OF 2016: EMPLOYERS MUST INCLUDE NEW WHISTLEBLOWER IMMUNITY NOTICE IN CONFIDENTIALITY OR NON-DISCLOSURE AGREEMENTS

On May 11, 2016, President Obama signed into law the Defend Trade Secrets Act of 2016 (“DTSA”) which amends the Economic Espionage Act (18 U.S.C. § 1831, *et seq.*).

The DTSA creates a private cause of action for trade secret misappropriation under federal law and opens a direct avenue for trade secret cases to proceed in federal court. While making it easier for employers to bring suits for trade secret misappropriation in federal court, the DTSA does not replace or preempt state trade secrets laws such as the Wisconsin Uniform Trade Secrets Act (“WUTSA”) (Wis. Stat. § 134.90 *et seq.*). This means that an employer who believes that one of its trade secrets may have been misappropriated may proceed under either the DTSA or the WUTSA, or both, to enjoin the misappropriation of a trade secret and remedy the harm.

The DTSA has a similar definition of “trade secrets” that is found in the WUTSA. Like the WUTSA, the DTSA defines the term “trade secret” to include all forms and types of financial, business, scientific, technical, economic, or engineering information where reasonable measures are taken to keep such information secret and the information derives independent economic value, actual or potential, from not being generally known to the public. The DTSA also defines the term “misappropriation” relative to the theft of a trade secret identically to the way it is defined by the WUTSA.

While appearing similar, the DTSA, however, differs significantly from the WUTSA on two fronts. First, the DTSA, unlike the WUTSA, permits an owner of a trade secret to obtain an *ex parte* seizure order providing for the seizure of property necessary to prevent the further dissemination or use of a misappropriated trade secret. Similar seizure remedies are found in the Copyright Act and the Lanham Act. Such an order could include, for example, an order seizing an employee's computers or smartphone or even an order seizing an employee's new employer's computers if evidence exists that the misappropriated trade secret was transferred and disseminated by a former employee to his/her new employer. This *ex parte* seizure remedy is only available under extraordinary circumstances. Realizing that such a powerful remedy could be subject to abuse, Congress included a provision within the DTSA that permits a person who is subject to a wrongful or excessive seizure to recover civil damages.

Second, the DTSA has a whistleblower protection provision that is not found in the various Uniform Trade Secrets Acts enacted by various states, like in Wisconsin under the WUTSA. Specifically, the DTSA amends 18 U.S.C. § 1833(b) to provide criminal and civil immunity under any federal or state trade secret law for the disclosure of a trade secret that either is made: (i) in confidence to a federal, state, or local government official or to an attorney solely for the purpose of reporting or investigating a suspected violation of law; or (ii) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.

Overlaying this immunity protection under the DTSA is also a notice requirement. Specifically, starting May 12, 2016 employers must give employees, contractors, and consultants notice of this potential immunity in any contract or agreement that governs or protects the use of a trade secret or other confidential information entered into or amended after this date. The DSTA requires that this whistleblower immunity notice be expressly provided in a contract protecting trade secrets or should at least contain a notice provision that cross-references a policy that contains the employer's whistleblower reporting policy for a suspected violation of law. Failure to provide this notice, however, does not invalidate the enforceability of the agreement or preclude an employer from bringing a claim under the DTSA. Rather, failure to provide the required whistleblower immunity notice simply precludes an employer from recovering exemplary damages or attorneys' fees under the DTSA.

To comply with the new whistleblower immunity notice requirement under the DTSA, all employers must include this notice in any contract protecting the use of trade secrets or confidential information entered into or modified on or after the effective date of the DTSA (May 12, 2016) involving any employee or any non-employee individual performing work as a contractor or consultant for the employer. Employers are not required to amend existing contracts. Employers should take immediate action to incorporate the DTSA's new required whistleblower immunity notice in all new or modified confidentiality or non-disclosure agreements entered into on or after May 12, 2016.

EMPLOYMENT LAWSCENE ALERT: NEW OSHA ANTI-RETALIATION PROVISION REQUIRES EMPLOYERS TO RETHINK THEIR SAFETY-RELATED POLICIES

Last week, the Occupational Safety and Health Administration (OSHA) finalized new record-keeping and reporting rules that require certain employers to electronically submit information about workplace injuries and illnesses to OSHA. The electronic reporting requirements of the rule apply only to employers with 250 or more employees and to employers with between 20 and 249 employees in certain "high-risk" industries, such as construction and manufacturing. A full list of the affected industries can be found here . The full rule (which can be found here) goes into effect January 1, 2017, while certain provisions, like the anti-retaliation provision, go into effect August 10, 2016. Non-personal injury and illness information reported under the rule will be posted on a publicly accessible OSHA website. The new rule does not change the requirement that employers with 10 or more workers in most industries prepare injury reports, compile a log of these incidents, and complete an annual summary of work-related illness and injuries, which OSHA can access during an investigation.

The new rule further requires employers to inform workers of their right to report work-related injuries and illnesses without fear of retaliation and provides additional information on employees' rights to access workplace injury data. Moreover, OSHA's new rule prohibits any workplace policy or practice that could discourage employees from reporting workplace injuries or illnesses. Such policies subject to greater scrutiny under OSHA's new anti-retaliation rule could include post-accident drug testing policies. Employers will have to review their safety-related policies to determine if their policies or practices run afoul of OSHA's new anti-retaliation rule or otherwise discourage employees from reporting workplace safety incidents. The anti-retaliation provisions apply to all employers.

OSHA's stated purpose for the additional reporting and public access are to increase workplace transparency and to encourage employers to increase their efforts to prevent work-related injuries and illnesses. However, employers should be cautioned that such information will make it easier for OSHA to target companies with multiple injuries or illnesses for compliance and enforcement actions, despite any precautions that are being taken, as well as open up companies with high rates of illness or injury to increased union organization.

Employers of all sizes and in all industries should continue to strive to achieve workplace safety. They should also immediately review their workplace safety policies to make sure that appropriate anti-retaliation provisions are included.

TAX AND WEALTH ADVISOR ALERT: CREDITORS, PREDATORS AND DIVORCING SPOUSES ARE WHY HAVING A TRUST MAY BE BETTER THAN A WILL

As I have stated before, when people find out what I do, the most common “cocktail party” question I get is “do I need a will?” Over time, my answer to that question has evolved. I used to respond by asking a couple of questions: Do you have minor children? Who do you want to get your property when you die? Now, my answer is “you don’t need a will or an estate plan, but let me tell you why you want one: to protect your loved ones from creditors, predators, and divorcing spouses.”

As I have mentioned in previous blog articles, virtually all of the plans I have created in the last three years, leave Mom and Dad’s assets not to the children, but to lifetime trusts for their children’s benefit. As I tell my clients, the reason I recommend this structure is simple—if you could control your property and still keep it protected from creditors, you would. Unfortunately, under the laws of most states, the clients cannot do that. In general, they have a choice; own the property and expose it, or give away the property—along with control and enjoyment of the property—and protect it. Generally, clients are appropriately reluctant to give away the property they worked hard for and are left accepting creditor risk.

But, those same rules do not apply if Mom and Dad leave property in trust for the children. In that case, those children can control the property as trustees and enjoy the property as beneficiaries. However, because those children did not create the trust (Mom and Dad did), if the children engage in dumb behavior and get sued, unlike property left to children under a will which would be exposed to creditors, the property left in trust is not exposed. Or, if the children make poor investments in a business and sign personal guarantees, the property in trust cannot be seized by the bank, whereas property left outright to those children can be seized. And, perhaps most important, given the statistical likelihood that a child’s marriage will end in divorce, property left to the child in trust, will stay with that child, and not go to the person that broke the heart of Mom and Dad’s baby.

So, do you need a will? Maybe not. Do you want an estate plan that protects your family from creditors, predators, and divorcing spouses? Absolutely.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN TO IMPLEMENT DRUG TESTING RULES FOR UNEMPLOYMENT RECIPIENTS

On Wednesday, May 4, 2016, Wisconsin Governor Scott Walker approved an emergency rule submitted by the Wisconsin Department of Workforce Development. Under this emergency rule, certain individuals receiving unemployment benefits will be required to be drug free in order to continue receiving unemployment benefits.

Specifically, the new rule will require individuals who are receiving unemployment benefits to pass a pre-employment drug screen for new employment where such drug screens are a condition of employment if they want to remain eligible to receive unemployment benefits. Those who fail the drug screen must comply with substance abuse treatment and a job skills assessment to remain eligible for unemployment benefits. Also, individuals who refuse to take a pre-employment drug screen as part of an offer of new employment may be denied unemployment benefits. The new rule will take effect upon official publication later this week.

THE WILAW CONNECTION QUARTERLY NEWSLETTER

Newsletter Article Highlights:

- Firm Obtains Big Win in Koss Litigation
- “The judgment is affirmed by an equally divided Court”
- Undue Influence in Wisconsin Part 1: Inheritance Disputes and Claims of Undue Influence
- Whether Website Presence Exposes Publisher to Lawsuits in Wisconsin Analyzed in Recent Case
- How Wisconsin’s Knife Law Reform Impact Employers
- Building a Great Plan: It All Starts With Vision
- Proud to Be a Member of Meritas, A Multi-National Network of Business Law Firms

Pleased to Announce:

- Attorney Joe D. Newbold Elected as Shareholder
- Attorney Trevor C. Lippman Selected for Leadership Development Summit

Upcoming Events:

- Run for Justice MJC 5K

LEGISLATIVE ALERT: NEW RULES AND PROCEDURES REGARDING MORTGAGE FORECLOSURES

Wisconsin recently enacted Act 376 modifying certain aspects of mortgage foreclosure proceedings, most notably a reduction to the period of time that owner-occupied, non-commercial property may be redeemed and the process of declaring a property abandoned.

Under current law, a judgment of foreclosure must specify a length of time, called a redemption period, during which a mortgagor may redeem the mortgaged property by paying the entire amount of the mortgage debt. Upon redemption, the judgment of foreclosure and the underlying mortgage are discharged, and the mortgagor retains the property. Act 376 reduces the foreclosure redemption periods applicable to mortgages upon owner-occupied, non-commercial property that are executed on or after April 26, 2016:

- The period of redemption is reduced from 12 months to 6 months after entry of judgment. This new 6-month redemption period may be extended to 8 months if, upon motion of a mortgagor, a court finds that the mortgagor is attempting in good faith to sell the mortgaged premises and has entered into a listing agreement with a licensed broker.
- If a mortgagee, however, waives its right to a judgment for any deficiency that may remain following sale, the newly enacted 6-month redemption period is cut in half to 3 months. Similarly, the redemption period in such a case may be extended to 5 months if, upon motion of a mortgagor, a court finds that the mortgagor is attempting in good faith to sell the mortgaged premises and has entered into a listing agreement with a licensed broker.

Act 376 also provides that only a foreclosing plaintiff or the city, town, village or county where the mortgaged property is located may petition the presiding court for a finding that the mortgaged property has been abandoned by the mortgagor and its assigns.

If the court makes a finding of abandonment, Act 376 requires immediate entry of a foreclosure judgment and requires the foreclosing plaintiff, within 12 months of such entry of judgment, to hold a sale of the mortgaged premises and have the sale confirmed or release or satisfy its mortgage lien and vacate the judgment of foreclosure with prejudice. If a foreclosing plaintiff fails to complete either of the above requirements within 12 months of entry of judgment, any party to the foreclosure action or the city, town, village, or county where the mortgaged property is located may petition the court for an order compelling a sale of the property.

If you have any questions, please contact attorney John R. Schreiber at john.schreiber@wilaw.com or 414-276-5000.