EMPLOYMENT LAWSCENE ALERT: DANE COUNTY JUDGE FINDS RIGHT-TO-WORK LAW UNCONSTITUTIONAL

On March 9, 2015, Governor Scott Walker signed Act 1 (Wisconsin's Right-to-Work legislation) into law, which allows workers covered by a collective bargaining agreement to not pay union dues if they choose not to do so (our previous blog on the law can be found here). Opponents of the law immediately went to work trying to defeat the new law. In late March, the Dane County Circuit Court denied the Wisconsin State AFL-CIO and two labor unions' bid for a preliminary injunction that would have halted implementation of the law. However, this past Friday, the same Court ruled that Wisconsin's Right-to-Work law is unconstitutional (full opinion here).

The unions argued that Act 1 effects an unconstitutional taking of their property without just compensation in violation of Article I, § 13 of the Wisconsin Constitution by "prohibiting the unions from charging nonmembers who refuse to pay for representative service which unions continue to be obligated to provide" by law. Article I, § 13 of the Wisconsin Constitution provides "[t]he property of no person shall be taken for public use without just compensation therefor." The unions successfully argued that their service of providing collective bargaining representation to all employees constitutes "property" subject to a protectable interest under Wisconsin's Constitution. The unions then successfully convinced the circuit court that Act 1 effectuates a taking of their property by requiring the unions to provide services to non-paying nonmembers, because the exclusivity principle of Section 9 of the National Labor Relations Act requires that a union elected by a majority of workers in a bargaining unit must represent all employees, whether or not such employees support the union. The circuit court then opined that Act 1 creates a "free-rider" problem whereby non-union members could refuse to pay for services that the unions are required, by law, to provide to them under the duty of fair representation.

Right-to-Work laws have been enacted in twenty-four other states, and none have been struck down. The Seventh Circuit, which Wisconsin is a part of, in *Sweeney v. Pence*, 767 F.3d 654 (7th Cir. 2014), rejected similar arguments brought by unions challenging Indiana's recently enacted right-to-work law. The circuit court, however, was not persuaded by the decisions in other jurisdictions and expressly held that it was not obligated to reconcile its decision with the Seventh Circuit's decision in *Sweeney*. In justifying its decision, the circuit court found that one important difference between the Indiana and Wisconsin laws is what qualifies as "just compensation." Applying Indiana law, the Seventh Circuit ruled that the ability to exclusively bargain on behalf of employees was a special privilege that qualified as "just compensation;" whereas, under Wisconsin law, the circuit court rejected such a theory and found that Wisconsin has a long history of equating "just compensation" with the

payment of money.

Wisconsin's Attorney General and the Department of Justice have already stated that the State will appeal the ruling, which is likely to be overturned on appeal. In the meantime, the Department of Justice is likely to file a motion to stay the ruling until a higher court can decide the issue. We will keep you posted as matters develop.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN ENACTS LAW ON FRANCHISOR JOINT EMPLOYER LIABILITY

Although federal administrative agencies such as the National Labor Relations Board, the Occupational Safety and Health Administration, and the Department of Labor have recently pushed to expand the definition of "joint employer" under their respective laws, employers in Wisconsin can take some solace in recent legislation. Under Wisconsin Senate Bill 422, which became effective March 2, 2016, there is now a presumption that a franchisor is not an employer of a franchisee's employees for the purposes of Wisconsin unemployment insurance, Wisconsin workers' compensation, Wisconsin wage and hours laws, and Wisconsin fair employment laws. A franchisor can only be subject to liability for its franchisee's employees under those laws if 1) it agrees in writing to assume liability or 2) it exercises a type or degree of control over the franchisee or the franchisee's employees that is not customarily exercised for the purpose of protecting the franchisor's trademarks and brand.

The law is meant to prevent franchisors who use a traditional franchisor-franchisee model from being held legally responsible for matters over which they did not exert control. Wisconsin franchisors should make sure that they are not taking any control over day-to-day operations of their franchisees, as that could expose them to liability under Wisconsin laws. Additionally, this does not impact how such franchisors would be treated under federal law, as mentioned above.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN SUPREME COURT ISSUES DONNING AND

DOFFING DECISION

On March 1, 2016, the Wisconsin Supreme Court issued a decision in *United Food and Commercial Workers Union, Local 1473 et al. v. Hormel Foods Corporation*. The majority determined that the time employees spent putting on and taking off clothes and equipment for their jobs was "work" under the Wisconsin statutes and that employees should, therefore, be compensated for that time.

The Court took into consideration the fact that the employer's work rules required that such clothing and equipment be worn so that the company met food and work safety regulations. Because the Court's majority determined that the employees' "principal activity" was producing food products and that the clothing and equipment was necessary for that production, the Court's majority held that the putting on and taking off of these items was "integral and indispensable" to the work and should, therefore, be compensated. The dissent disagreed, based, in part, on the U.S. Supreme Court's decision in *Integrity Staffing v. Busk*, stating that putting on and taking off the clothing was not a part of safely cleaning and canning food and, therefore, did not need to be compensated.

The Court also rejected the employer's arguments that such time was "*de minimis*" because the case involved more than $500 in unpaid wages per year for each employee. Additionally, the majority noted that, although the "*de minimis*" defense is frequently used under the federal Fair Labor Standards Act, no Wisconsin court has ever applied to it Wisconsin wage and hour laws.

Employers must carefully consider what pre- and post-shift activities must be compensated. Although this decision helps clarify requirements related to donning and doffing for Wisconsin employers, our advice to employers remains the same—time spent performing activities related to an employee's duties, which includes donning and doffing protective gear that is necessary for performing an employee's job duties, should generally be compensated.

"THE JUDGMENT IS AFFIRMED BY AN EQUALLY DIVIDED COURT"

With a one sentence opinion, the United States Supreme Court issued its first deadlocked ruling following the death of Justice Antonin Scalia. The ruling came in a creditors' rights case that languished before the Court for some time, hinting of a divided Court on the issue prior to Scalia's death.

In *Hawkins v. Community Bank of Raymore*, the United States Court of Appeals for the Eighth Circuit addressed a dispute between a bank and a developer that defaulted on its loans from the bank. The two members of the developer and their spouses guarantied the loans. The spouses of the guarantors of the loan sued the bank, alleging they were required to guaranty the loan only because of their spousal status and, therefore, were discriminated against pursuant to the Equal Credit Opportunity Act ("ECOA"). The district court granted summary judgment to the bank, holding that the spouses were not "applicants" who gained protections of the ECOA. The Eighth Circuit affirmed, reasoning the plain language of the ECOA provides that a person is an "applicant" only if he or she requests credit, but a guarantor does not, simply by executing a guaranty, request credit, and, therefore, the marital status protections of the ECOA did not apply. Conflicting authority exists in the Sixth Circuit.

The Supreme Court granted the petition for writ of certiorari in March of 2015, and oral argument was held in October of 2015. The Court had not issued a decision as of Scalia's death on February 13, 2016, indicating a potentially close decision.

The one sentence decision indicating the deadlock was issued on March 22, 2016. When the Supreme Court is deadlocked at 4–4, the decision of the lower court stands, but it does not have precedential value. Therefore, the bank remained victorious over the spouses, and the circuit split remains unresolved.

Although certainly short and sweet, the Court's first deadlocked decision following the death of Justice Scalia speaks volumes on what future United States Supreme Court decisions hold.

UNDUE INFLUENCE IN WISCONSIN PART 3: ALTERNATIVE METHOD OF PROOF

This is the third and final article in a series on undue influence in Wisconsin.

The second method of challenging a will or gift made during a lifetime on grounds of undue influence, a so-called *inter vivos* conveyance requires that the party establish only two elements. Doing so raises a rebuttable presumption of undue influence.

Moving forward with such evidence shifts the burden from the person raising the issue of undue influence to the proponent of the will or the recipient of the conveyance.[1] If rebutting testimony is introduced, the trier of fact does not need to accept the presumption and may reject it and accept the rebutting evidence.[2]

Existence of Confidential or Fiduciary Relationship

The first element of the second method requires a finding that a confidential or fiduciary relationship exists between the testator/grantor and the favored beneficiary. The basis for the presumption is not merely the existence of a personal relationship between the testator or grantor and the beneficiary. Instead, it's the ease with which a confidant can dictate the contents or influence the drafting of a will or particular conveyance, or it's the ease with which such an individual can control or influence the draftsman of such a document.[3]

If the person charged with undue influence is not the actual draftsman or the procurer of the draftsman, evidence must be presented which shows that the testator or the grantor depends upon the advice of the confidant in relation to the subject of the will or conveyance. Establishment of this element requires more than showing that a confidential relationship exists between the parties. It requires proof.

The proof offered will be circumstantial because "if a beneficiary has either instructed the draftsman as to the contents of the will or has unduly influenced the testator as to the disposition of his property, he would not testify that he had done so."[4]

Suspicious Circumstances

The final element of the second method requires that suspicious circumstances surround the execution of the will or conveyance. This element requires a detailed review of factual circumstances.

To prove this element, the Supreme Court has found it sufficient to provide:

- Evidence that proves the conveyance was hastily drafted by a layman or drafted with the active participation of the influencer either in the actual drafting of the document or in the procurement of an individual to draft the document.
- Evidence of a weakened condition, be it physical or mental, of the testator or grantor, all of which culminate in sudden and unexplained changes in the attitude of the testator towards the disposition of his or her property.[5]

As was discussed in our prior article in relation to the fourth element of the classic undue influence case, proof of this element requires more than simply suspicious results. The suspiciousness must be judged in light of the totality of the circumstances.

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[1] *In Re Estate of Kamesar*, 81 Wis. 2d 151, 164, 259 N.W.2d 733 (1977).
[2] *Cooper*, 28 Wis. 2d at 399.
[3] *Estate of Fetcher*, 88 Wis. 2d 199, 219, 277 N.W.2d 143 (1979).
[4] *Estate of Velk*, 53 Wis. 2d 500, 507, 192 N.W.2d 844 (1972).

[5] *Estate of Komarr*, 46 Wis. 2d 230, 240, 175 N.W.2d 473 (1970).

UNDUE INFLUENCE IN WISCONSIN PART 2: ELEMENTS OF CLASSIC UNDUE INFLUENCE

This is the second in a series of three articles on undue influence in Wisconsin.

In Wisconsin, the four elements of classic undue influence cases are susceptibility, opportunity, disposition and a coveted result. In addition to classic undue influence in Wisconsin, there is a second method of challenging a will or gift made during lifetime, a so-called *inter vivos* conveyance, which will be discussed in the third and final article in this series.

Susceptibility

The first element of classic undue influence is a finding that the person charged with exercising undue influence unduly influenced a susceptible testator or grantor.

The Wisconsin Supreme Court, in numerous cases, has stated that the key factors regarding the issue of a testator or grantor's susceptibility to undue influence are:

- Age
- Personality
- Physical and mental health
- Ability to handle business affairs[1]

Opinions about the general state of mind of the testator or grantor from third parties with whom he or she may have had contact are given much credence by the court.

For example, the court will consider whether or not a person is considered to be strong-willed, independent, self-reliant, dominant, stubborn, dependent, capable of making decisions, and taking care of ordinary day-to-day management of their affairs.

Age, in and of itself, is of little significance unless it is coupled with a deteriorating physical or mental condition.[2]

If consideration of the factors set forth above demonstrates that the testator or grantor was unusually receptive to the suggestions of others and consistently deferred to others on matters of utmost personal importance, then the element is established.[3]

Opportunity to Influence

This element requires a showing that the person charged with exercising such influence on the susceptible person had the opportunity to procure the improver favor.

As a general rule, this is the easiest of the four elements to prove. To justify a finding of the opportunity to influence, the court must find repeated close contact with the testator.[4] Close personal relationships whether because of familial ties, living conditions, working conditions, or other social conditions have been found sufficient.

However, opportunity to influence does not mean mere physical propinquity or personal contact. It requires that interviews or personal transactions between the parties exist and that they were followed by the accomplishment of a desired end.[5] It is not necessary, nor is it often the case, that opportunities to influence are accomplished in secret or that they culminate in one particular act that represents the attempt to unduly influence. However, the opportunities to influence must exist at or about the time the will or conveyance is effected.[6]

Disposition to Influence

The third element requires proof of more than a desire on the part of the person charged with undue influence to obtain a share of the estate. It necessitates a showing of a willingness to do something wrong or unfair to obtain a share. It requires proof of grasping or overreaching affirmative steps on the part of the person charged.[7]

Evidence must be submitted of conduct designed to take an unfair advantage. Proof of this element requires evidence of the personality traits of the person charged with committing the act of undue influence.

For example, evidence shows a willingness to take advantage of the kindness and generosity of the testator or grantor. Alternatively, evidence shows that the influencer misled or kept a secret from natural beneficiaries.[8] The court has specifically indicated that there is nothing wrong with aiding and comforting a failing testator and that such activity should be encouraged.[9]

Coveted Result

The last element required in order to present a case of classic undue influence is the showing of a result caused by, or the effect of, such undue influence. Two compounds of this element exist.

First, the result must be an “unnatural,” raising “a red flag of warning.”[10] The essential question is whether the person was favored to be excluded from the natural or expected

recipients of the testator's bounty. However, more than a result favorable to the alleged person is required.

The second component is whether the result obtained was caused by or was the effect of undue influence. What is under scrutiny is that a particular recipient benefits for no apparent reason and that the disposition is, in fact, unnatural and, therefore, the bequest or conveyance is unjust[11]

The mere provision in a will that benefits the influencer does not, by that fact alone, prove the element. Evidence may make what appears unnatural natural given the circumstances of the individual case. The mere fact that the testator makes bequests to his close friends rather than to relatives does not necessarily render the disposition unnatural. Whether a will or conveyance is unnatural or not must be determined from a consideration of all the surrounding circumstances.[12]

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[1] *Dejmal*, 95 Wis. 2d at 156.
[2] *Id.* at 159.
[3] *Id*. at 157.
[4] *In Matter of Estate of Becker*, 76 Wis. 2d 336, 348, 251 N.W.2d 431 (1977).
[5] *Ward vs. Ward*, 62 Wis. 2d 543, 554, 215 N.W.2d 3 (1974).
[6] *Elvers*, 48 Wis. 2d at 21.
[7] *Estate of Brehmer*, 41 Wis. 2d 349, 356, 164 N.W.2d 318 (1969).
[8] *In Matter of Estate of Vorel*, 105 Wis. 2d 112, 312 N.W.2d 850 (1981).
[9] *Estate of McGonigal*, 46 Wis. 2d 205, 214, 174 N.W.2d 256 (1970).
[10] *Estate of Culver*, 22 Wis. 2d 665, 673, 126 N.W.2d 536 (1964).
[11] *Will of Cooper*, 28 Wis. 2d 391, 399, 137 N.W.2d 93 (1965).
[12] *Becker*, 76 Wis. 2d at 349.

FIRM OBTAINS BIG WIN FOR CLIENT

From 1997 to 2009 Sujata Sachdeva embezzled over $36 million from her employer, Koss Corporation, in one of the Top 10 Largest Embezzlements in U.S. history. The embezzlement was reported all over the world, including on the cover of *The National Enquirer*.

Ms. Sachdeva was criminally convicted of embezzlement and is currently serving a prison term. In an attempt to recoup its loses, Koss sued its auditor, credit card company, and banks. Its auditor, Grant Thornton, settled the claim for $8.5 million, and its credit card company American Express, settled the claim for $3 million. Those lawsuits were filed in Illinois and Arizona, respectively.

Koss also sued its local bank, Park Bank, in Milwaukee, arguing that Park Bank acted in bad faith under the Uniform Fiduciaries Act by failing to discover and report the embezzlement. In the lawsuit, Koss sought damages of $43,749,400 from Park Bank. After five years of litigation, on March 11, 2016, the trial court dismissed the case in a 24–page written decision, finding that "Park Bank did not act in bad faith." The court held that, under the Uniform Fiduciaries Act, bad faith "requires a showing of some indicia of dishonest conduct or a showing of facts and circumstances so cogent and obvious that to remain passive would amount to a deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a defect in the transaction," and "there must be some factual basis—whether an allegation of monetary self-interest or compelling evidence of wrongdoing—to suggest the bank acted intentionally to avoid knowledge of the fiduciary's wrongdoing." Here, the court held, "Koss has not provided any evidence that Park Bank intentionally ignored Sachdeva's embezzlement," and it "declines to require banks to act as detectives, whether they be Sherlock Holmes, Columbo, or Andy Sipowicz."

Dean Laing of our firm was Park Bank's lead attorney. Also working on the case were Greg Lyons and Joe Newbold.

EMPLOYMENT LAWSCENE ALERT: HOW WISCONSIN'S KNIFE LAW REFORM IMPACTS EMPLOYERS

On February 7, 2016, 2015 Assembly Bill 142 became law, amending the Wisconsin Statutes related to how knives are, among other things, regulated by concealed carry permits. The law no longer requires an individual to have a concealed carry permit in order to lawfully carry a concealed knife, including a switchblade or automatic knife. There is, however, an exception where the individual is not allowed to possess a firearm under state law (i.e., a felon), then that individual is also not allowed to carry a concealed knife that is a "dangerous weapon." Local ordinances are not permitted to impose stricter laws than the state law, other than in buildings or parts of a building that are owned, operated, or controlled by a political subdivision of the state.

Although the State of Wisconsin will no longer require that knives, including switchblades, be subject to conceal carry permits, employers still have a duty to make sure that their workplaces are safe for their employees, customers, and visitors. If appropriate, employers should review their handbooks and policies to see if they have a Weapon-Free Policy that prohibits employees from carrying weapons, including knives, inside company buildings and

other areas where the employer conducts business.

UNDUE INFLUENCE IN WISCONSIN PART 1: INHERITANCE DISPUTES AND CLAIMS OF UNDUE INFLUENCE

This is the first of a series of three articles on undue influence in Wisconsin.

Unscrupulous people sometimes use undue influence to change wills and obtain gifts from the elderly, sick, or weak. Increasingly, the public has come to realize this is a form of elder abuse.

Undue influence cases involve predominantly factual determinations and require a lawyer to engage in extensive pretrial fact development and investigation. Since appellate courts have shown great deference to the findings of the trial court in these cases, the importance of adequate trial preparation and courtroom experience cannot be overstated.

Elements of a Successful Case

By its very nature, proof of the necessary elements will rest almost entirely on **circumstantial evidence**, or evidence that relies on an inference to connect it to a conclusion, like a fingerprint at the scene of a crime. Even with adequate preparation, it is difficult to predict with any success the outcome of undue influence cases. Why is this? The outcome is based on disputes in the inferences drawn from facts, not the facts themselves.

Success will depend in large measure upon the **skill and labor of your trial attorney**.

Undue Influence in Wisconsin

Wisconsin has long recognized the doctrine of undue influence, or influence that "commands or compels the exercise of volition on the part of the person subject to such influence so that the result is the accomplishment of the will or purpose of the one using influence rather than, in fact, the will or purpose of the donor."[1] In other words, in Wisconsin a person can be prosecuted if he or she compels a person to act other than by his or her own freewill or without adequate attention to the consequences.

The doctrine of undue influence has been utilized to challenge wills as well as to void *inter vivos* conveyances, or a transfer that was made during a person's lifetime as opposed to one

made after his or her death. The same legal principles and theories apply to both situations.[2]

Two distinct methods of proof exist to establish undue influence in Wisconsin. The first, often referred to as **classic undue influence,** is composed of four elements:

1. **Susceptibility** – A person who is susceptible of being duly influenced by the person charged with exercising undue influence.
2. **Opportunity** – The opportunity of the person charged to exercise such influence on the susceptible person to procure the improper favor.
3. **Disposition** – A disposition on the part of the party charged, to influence unduly such susceptible person for the purpose of procuring an improper favor either for himself or another.
4. **Coveted Result** – A result caused by, or the effect of, such undue influence.[3]

The second method of challenging a will or voiding an *inter vivos* conveyance requires establishment of a confidential or fiduciary relationship between the testator or grantor and the favored beneficiary or grantee. It also requires proof of suspicious circumstances surrounding the execution of the will or conveyance.[4]

Proving Undue Influence in Wisconsin

The elements of either method must be proved "by clear, satisfactory and convincing evidence."[5] This high civil burden of proof must usually be met with **circumstantial evidence**. Undue influence exercised in secret, undercover, and with little opportunity for the presence of disinterested parties usually rests "wholly upon circumstantial evidence,"[6] which, the Supreme Court has noted, "is as convincing as direct testimony."[7]

Lower Standard of Proof

Although the burden is on the objector to prove each of the necessary elements, a lower standard of proof applies because of the secrecy that usually accompanies such affairs. When three of the four elements are established by the necessary clear, satisfactory and convincing evidence, only "slight additional evidence" need be presented as to the fourth element."[8] This lower standard of proof has been variously described as requiring only "slight additional evidence"[9] or "very little evidence."[10]

Application of this lesser quantum of proof has generally not caused problems because the finder of fact in the vast majority of reported cases is the trial court. A jury trial is not available as a matter of right in will contests. Suits relating to *inter vivos* transfers, on the other hand, need not be venued in the probate court, and trial by jury is available.[11]

The manner in which a jury is to be instructed with respect to the lower standard of proof is

not the subject of a reported case. Whether a jury should be instructed in the black letter case law language (“slight additional evidence” or “very little evidence”) or should be instructed with the usual civil burden of proof (preponderance of the evidence) is an unresolved issue.

However, instructions to the jury in such a case must indicate that the jury need find only **three of the four elements** by clear, satisfactory and convincing evidence. The lesser quantum of proof is all that is needed for the fourth element, whichever element that may be in the mind of the trier of fact.

Scope of Appellate Review in Wisconsin

The law governing the scope of appellate review is also well established in Wisconsin. Undue influence must be proved by **clear, satisfactory and convincing evidence**. Findings by the trial court will not be upset on appeal unless they are against the great weight and clear preponderance of the evidence presented at trial.[12]

The appellate court will examine the trial court record not for facts to support a finding the trial court did not make or could have made, but for facts to support the finding the trial court *did* make.

As a result, the practitioner must make every effort to present a successful case at the trial court level. A review of undue influence cases decided by the Wisconsin Supreme Court between 1945 and 1968 encompassing 54 decisions revealed that only four trial court decisions were reversed.[13]

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[1] *Kuehn vs. Kuehn,* 11 Wis. 2d 15, 24, 104 N.W.2d 138 (1960).
[2] *Estate of Fillar*, 10 Wis. 2d 141, 102 N.W.2d 210 (1960).
[3] *Will of Freitag*, 9 Wis. 2d 315, 317, 101 N.W.2d 108 (1960).
[4] *Will of Faulks*, 246 Wis. 319, 360, 17 N.W.2d 423 (1945).
[5] *In Matter of Estate of Dejmal*, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980).
[6] *Will of Ehlke*, 244 Wis. 115, 121, 11 N.W.2d 497 (1943).
[7] *Estate of Elvers*, 48 Wis. 2d 17, 20, 179 N.W.2d 881 (1970).
[8] *Freitag*, 9 Wis. 2d at 318.
[9] *Id.*
[10] *In Re Stanley’s Will*, 226 Wis. 354, 360, 276 N.W. 353 (1937).
[11] *Casper vs. McDowell*, 58 Wis. 2d 82, 205 N.W.2d 753 (1973).
[12] *Dejmal*, 95 Wis. 2d at 154.
[13] *Undue Influence – Judicial Implementation of Social Policy*, 1968 Wis. L. Rev. 569.

TAX AND WEALTH ADVISOR ALERT: BUILDING A GREAT PLAN…STEP THREE: BRIDGING THE GAP

The last two posts to this blog have focused on how to build a great plan. First, you need to create a compelling vision; one that describes, in detail, where you are going and why. Then, you need to define where you currently are with empathetic honesty. The third step, and the focus of this post, is bridging the gap between the two. In other words, how do you get from where you are to where you want to go?

The first step to building a strong plan is to do the math. For example, if we are building a financial plan, and for my client to achieve his vision he needs $1,000,000 at age 65, and he is currently 45 and with a savings of $200,000, the math tells us we need to obtain an additional $800,000 over the next 20 years. If we are building a succession plan under which the company needs to fill three key vacancies to meet its five year vision, the math tells us we need to find three more bodies with the required skill sets. If we are building an estate plan and the client's vision is to leave her $20,000,000 illiquid assets (maybe a closely held business) to her children, the math tells us we need about $4,000,000 in cash to pay the estate tax when she dies to successfully achieve that vision.

The problem I see in a lot of plans and with some of the planners I work with is that this is where the plan ends: with the math. For example, the plan might be "you need $800,000 in the next twenty years, so based on an x% rate of return, you need to save $_____ every year." My response to those plans are twofold: the immature teenager living inside me wants to say "duh.," and my more thoughtful response is, if that is all planning is, simply replace the planner with a computer: it can do the math faster and better.

The math is critical. It is where we need to start. But the math is only the surface. Great planners never stay on the surface; they get deep. So, the next step in a great plan is to go one layer down and analyze why we are where we are and what needs to change to get where we want to go. For example, go back to our succession plan that requires hiring three key people over the next five years. Digging one layer deeper from the math, we might want to know why those people are not already part of the organization. There could be any number of answers to that question. Maybe three people will be leaving the organization over the next five years. Perhaps the company's growth strategy requires new talent. Maybe the company burns and churns its talent. Or, let's take our financial plan. It is critical to know we need to save a certain amount of money every year, but it is just as important to know why our client has $200,000 saved right now. Is our client on track or off track?

All of this leads up to the critical issue we have to help our client work through in creating the plan: change. A great quote by Albert Einstein tells us that insanity is doing the same thing over and over again and expecting different results. The problem with change is that science

has proved that human beings are neurologically wired to resist change. Our brains are actually screaming at us to continue to do things in the same comfortable old way we always have. We have to override that voice in our heads to build a successful change plan. It requires choice and discipline.

When working with clients, if the plan requires a change in behavior– and it almost always does– I always start with the tried and true consulting change tool: a start, stop and continue analysis.

I ask, if I want to achieve my vision:

What do I need to start doing that I am not currently doing?
Examples:

- I need to save more.
- I need to create a budget and stick to it diligently.
- I need to have savings removed from my paycheck.
- I need to implement a mentorship program in my company.
- Our company needs to train people for their next job as they are doing their current one.
- I need to invest less money back in my business and invest those funds in life insurance to pay the estate tax.
- I need to delegate more decision making responsibility to future leadership.

What do I need to stop doing?
Examples:

- I need to stop impulse shopping.
- I need to stop going to the mall for entertainment.
- I need to stop going to Starbucks every day.
- I need to stop requiring my people to work so many hours at their job so they have time in their day to focus on professional development.
- I need to stop investing every dollar my business makes back in my business and growing the value of an illiquid asset without first building up my liquid assets (even if the reinvestment is getting a better rate of return).
- I need to stop doing all of the duties of my business and delegate responsibility to others so they can grow.

What do I need to continue doing?
Examples:

- I am saving enough every month to meet my retirement goals. I need to continue doing so.
- We are doing a great job in attracting talented people. We need to keep recruiting the way we have.

This stop, start, and continue analysis– combined with a compelling vision and an empathetically honest assessment of the current state of things– should result in a strong execution plan. We will know how we have to change in order to get where we want to go. We will have a handle on the new behaviors we need to develop and the old habits we need to break. But will we actually change? That question is the focus of my next blog article.