Ohnstad Twichell attorneys

Number 55
June 22, 2015

Newsline

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Ohnstad Twichell, P.C., is a full service law firm having a general and trial practice in North Dakota, Minnesota, and federal courts and offering services in the fields of probate, real estate, estate planning, corporate, labor/employment law, family law, elder law, municipal finance and bonding, taxation, personal injury, criminal, negligence, commercial, insurance defense, water rights, oil, gas and wind law, and automobile law.

OHNSTAD TWICHELL ATTORNEYS LEAD EFFORT TO AMEND NORTH DAKOTA TRUST LAW

Marshall W. McCullough *works in the West Fargo and Page offices and devotes his practice to corporate/business, estate planning, probate, and taxation.*

Jacob L. Geiermann *works in the West Fargo office and devotes his practice to estate planning, trusts, probate and business law.*

During the North Dakota spring legislative session, Ohnstad Twichell President Marshall W. McCullough, and associate attorney Jacob L. Geiermann, spearheaded an effort of trust and estate attorneys and trust departments from across the state to address a problem with North Dakota law relating to mineral-related receipts received by a trust.

McCullough and Geiermann worked closely with Rep. George Keiser, a legislator from Bismarck, to draft House Bill 1221, which was recently enacted into law. Rep. Keiser served as the Bill's primary sponsor, while Rep. Sukut, a legislator from Williston, served as co-sponsor. McCullough and Geiermann actively lobbied in support of the Bill, testifying before the House and Senate Energy and Natural Resources Committees.

House Bill 1221 relates to a trustee's duty to allocate mineral-related receipts (such as royalties, bonuses, and working interest income) between income and principal, which can have a significant effect on the amount that is ultimately distributed to the beneficiaries.

It is common for trusts to contain language requiring the trustee to distribute "all income" to the beneficiaries. Occasionally, trustees are given discretion to distribute "any amount of income." Under either type of trust provision, the trustee is required to determine the meaning of the word "income."

Receipts that are not income are considered principal. Trusts may contain provisions allowing for discretionary distributions of trust principal to the beneficiaries. However, many trusts do not include any type of principal distribution provision, allowing only for distribution of trust income.

Ohnstad Twichell attorneys have long recognized the need to discuss this issue of income and principal allocation with our clients, and we regularly include express provisions within trust agreements to address this. Unfortunately, many attorneys often fail to include express provisions, and trustees are then left to administer under the provisions of the default allocation rules.

In short, the previous allocation rule under North Dakota law relating to mineral receipts is very different than what most people would expect. Under the previous provision, 90% of most mineral-related receipts by a trust are considered principal, while only 10% are considered income.

The change within House Bill 1221 was meant to make the default allocation rule more closely reflect what people would likely expect when creating a trust. The new law will now allocate 85% of most mineral-related receipts to income, and the remaining 15% to principal. These allocation percentages are consistent with the approaches taken by a number of

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Ohnstad Twichell attorneys

A legal newsletter from Ohnstad Twichell, P.C., with offices in West Fargo, Hillsboro, Casselton, and Page, North Dakota, and Barnesville, Minnesota.

other states with substantial oil and gas industries, such as Montana, Texas, and Oklahoma.

The new allocation rule applies only to trusts that have not received mineral-related receipts before August 1, 2015, the effective date of the Bill. While a strong argument can be made that changes are appropriate for older trusts that have already received receipts, this approach was taken to ensure that a drastic and immediate change doesn't occur, which could create unintended consequences. Fortunately, a provision within House Bill 1221 now allows a trustee to petition a court to adjust the allocation rule in certain circumstances.

Ohnstad Twichell is proud to have been part of helping to make this improvement to North Dakota law. We very much appreciate the leadership of Rep. Keiser, along with the support of attorneys and trust departments from across the state. We believe that the changes within House Bill 1221 will make a meaningful difference to many beneficiaries of North Dakota trusts. In addition, we look forward to utilizing the new provisions of law that now allows a trustee to petition the court to change the allocation provision in certain circumstances.

If you would like to further discuss the recent changes to North Dakota law explained above, or if you are a trustee desiring to change a trust's allocation provision, do not hesitate to contact your Ohnstad Twichell attorney.

The new law will now allocate 85% of most mineral-related receipts by a trust to income.

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PROFILE OF ATTORNEY KEVEN J. KERCHER

Keven J. Kercher *works in the West Fargo office and devotes his practice to estate planning, trusts, probate, and business law.*

In December 2014, Keven Kercher, a native of North Dakota and a military veteran, joined the Ohnstad Twichell Law Firm as an associate attorney. Enjoying helping people plan for their future, Keven focuses his practice on estate planning (Wills, Trusts, Powers of Attorney, Health Care Directives, Medicaid, etc), probate, business law, elder law, and veteran issues. He is licensed to practice law in North Dakota and Minnesota and looks forward to handling your legal needs.

Keven and his family have strong connections to the area with relatives in Jamestown, Mapleton, West Fargo, and Fargo. His two daughters are active in local school activities, and his wife Sara and he enjoy weekend trips to the Minnesota lake country.

Keven graduated from West Fargo High School in 1990. He then went on to earn a Bachelor's degree in Environmental Science from the United States Military Academy, West Point, New York, and a Masters of Science degree in Project Management from the University of Missouri-Rolla, Rolla, Missouri. In 2002, he received his law degree from the University of North Dakota School of Law.

Prior to joining Ohnstad Twichell, Keven spent over ten years as a Judge Advocate General (military lawyer) advising government officials, Soldiers, and their families on a wide range of legal issues and topics. Having served overseas and in various locations throughout the United States, Keven and his family were ready to put down firm roots back in their hometown area.

Keven practices in the West Fargo office. He is a member of the Cass County Bar Association, the Red River Valley Estate Planning Council, the State Bar Associations of North Dakota and Minnesota, and the West Fargo Veterans of Foreign Wars.

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GREATEST MISCONCEPTIONS ABOUT ESTATE PLANNING

Keven J. Kercher *works in the West Fargo office and devotes his practice to estate planning, trusts, probate, and business law.*

1. My net worth is too small for an estate plan.

Regardless of your net worth, a comprehensive estate plan ensures that your finances are managed in the event the you become incapacitated or incompetent and that your financial goals are met after you die. If you die without a Will, the state decides who gets your property. The state may not have the same plan as you do in distributing your property at your death. If you have minor children, you can name a guardian in your Will to care for your children; otherwise, the state will decide who will serve as the guardian of your minor children. Also, you can name a Trustee in your Will to manage the

property that your minor children may inherit from you. Trustees and guardians named in your Will typically take effect if both parents are deceased.

2. An estate plan is nothing more than a Will.

Every estate plan should include a Will to direct exactly where your assets are to be distributed after you die, but it also should include lifetime management of your property and health. Every adult should have a general Power of Attorney and a Health Care Directive. A Power of Attorney will allow the individual that you appoint as your agent to handle your financial and legal affairs in the event that you are unable to make those decisions for yourself. A Health Care Directive will allow the individual that you appoint as your agent to make medical care decisions for you if you were unable to make them yourself. An estate plan also includes a review of title to assets and beneficiary designations for life insurance, financial accounts, and retirement plans.

3. My Attorney only needs to know my total net worth, and not the individual assets that makeup my net worth.

An inventory of your assets will aid in preparing an estate plan that will accomplish transferring your property in accordance with your wishes while attempting to minimize the tax consequences on your estate. The inventory should include your retirement savings, investments, life insurance, real estate, personal property, and business interests. An inventory will assist your attorney in determining what assets have beneficiary designations to make sure they are up to date and the beneficiary designations are in accordance with other elements of your estate plan.

4. Trusts are only for wealthy individuals.

Trusts are a powerful estate planning tool for all individuals regardless of income, and many can be set up for relatively low costs. They are a legal mechanism that allows you to put conditions on how and when your assets will be distributed. One of the most common trusts that individuals elect to include in their estate plan is a trust for their children. In most cases, if you die with minor children and without a Will, your children will receive property that they inherit from you when they are 18 years of age. Prior to your children turning 18, the court will have the discretion to appoint an individual to manage the property that your children inherit from you. A trust for your children will allow you to designate a Trustee to manage the trust property and you can dictate the terms and conditions of the distributions of the trust property to your children. For example, in the trust provisions, you could withhold distributions from your children until they reach an age at which you feel they are mature enough to make their own financial decisions. Other trusts that may be included in your estate plan may include a trust to avoid probate proceedings or a trust to reduce your exposure to estate tax.

5. I already have a Will, and it will last my entire life.

Your estate planning needs and laws involving estate planning will change over time, and your current Will and/or trust agreements may no longer achieve your intent for your estate. If the size of your estate has increased since your estate plan was created, your estate plan may be out of date. If your marital status has changed or you have become a parent, a step-parent, or grandparent, you may have different wishes for your assets than your current estate plan dictates. If you have changed your state of residence, the new state's tax rules may have estate tax consequences for your estate. Therefore, your estate plan should be reviewed periodically to ensure that it meets your present wishes for the distribution of your property following your death, and minimizes any estate tax consequences.

Contact Marshall, Dave, Bob, Keven or Jacob to prepare an estate plan or to review your existing estate plan.

BUSINESS CORNER!

NEW FMLA RULE DEFINING "SPOUSE"

Susan L. Ellison *works in the West Fargo office and devotes her practice to labor law, family law, and elder law.*

The Family Medical Leave Act (FMLA) now requires employers governed by the FMLA to recognize valid same-sex and common-law marriages when determining spousal coverage. The definition of "spouse" under the FMLA was revised under a Department of Labor rule that became effective March 27, 2015.

A 2013 U.S. Supreme Court decision that declared a portion of the Defense of Marriage Act (DOMA) unconstitutional triggered revisions to federal laws, including the FMLA, that defined "marriage" and "spouse" as opposite-sex marriages and spouses.

Under the former FMLA, a spousal coverage is now determined based upon "place of celebration"

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FMLA requires employers governed by FMLA to recognize same-sex and common-law marriages when determining spousal coverage.

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and not "place of residence." Employers must follow the law of the state where the marriage took place, not where the employee resides. The new rule allows legally married couples, whether opposite-sex or same-sex, or married under common law, to have federal family leave rights no matter where they live.

Under the new rule, an eligible employee may take spousal FMLA leave to care for a same-sex spouse with a serious health condition, or leave for qualifying exigencies arising from the same-sex spouse's covered military service, or leave to care for a stepchild of the employee's same-sex spouse.

Only spouses who have entered into a valid marriage are covered under the new FMLA rule.

As a result of this change, employers should revise their FMLA policies and forms to conform to the new definition of the term spouse, publish the revisions to employees and educate supervisors and HR employees of the change.

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EMPLOYEES FIRED OVER FACEBOOK POSTINGS

This interesting set of events comes to us from New Hampshire and involved a center providing after-school programs for high school students.

After a center employee was demoted, she and another employee posted comments about the center on Facebook--about how they would create problems at work by doing such things as allowing students to draw graffiti on the walls and making work difficult for other staff members. Their employer learned of the postings and fired both employees.

The judge hearing this case ruled that the Facebook comments were serious enough to justify termination. In essence, it was found that the employee's activity was not protected because it had a negative impact on student safety and the center's ability to raise money for programing.

The employee's challenged the firing as an unfair labor practice under the National Labor Relations Act.

Not every Facebook posting will justify a firing; so, employers beware when considering such disciplinary action.

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