

Probate & Trust Law Newsletter

A Publication of the Probate & Trust Law Section of the Minnesota State Bar Association

A Word From the Chair

The fall issue of the *Probate & Trust Law Newsletter* would be incomplete without mention of the Section Conference, which took place on June 19 and 20. Once again, the faculty and planners helped produce a tremendous conference and for that they deserve our thanks.

This newsletter highlights recent developments in state and federal law and the new composition of the Probate & Trust Law Section Council.

The purpose of the newsletter is to serve as a medium through which the Probate & Trust Law Section and the Minnesota estate planning bar can communicate. The newsletter is published semi-annually, and consists of articles on legal developments and legislative updates, announcements of Section activities and events, and information regarding Section contacts. We welcome your comments and the submission of articles or announcements for future newsletters.

Important Numbers for 2006

<u>Federal Estate/GST Tax Exemption</u>	\$2,000,000
<u>Federal Gift Tax Exemption</u>	\$1,000,000
<u>Minnesota Estate Tax Exemption</u>	\$1,000,000
<u>Annual Gift Tax Exclusion</u>	\$12,000
<u>Maximum Federal Gift/Estate Tax Rate</u>	46%
<u>GST Tax Rate</u>	46%
<u>Maximum Minnesota Estate Tax Rate</u>	16%
<u>Maximum Federal Income Tax Rate</u>	35%

State Law Update

(Peter S. Hatinen)

I. Legislative Update

The 2006 legislative session closed with the legislature passing two bills of note, one addressing probate procedures and one conforming state medical assistance law to new federal law. A summary of the principal provisions of each bill follows:

A. Senate File 2519 (approved by the Governor on May 21, 2006)

Senate File 2519 makes two changes to Chapter 524 of the Minnesota Statutes. First, it amends Minn. Stat. § 524.3-301(1)(ii) by removing the requirement that all applications for the informal probate of a will or the informal appointment of a personal representative include the social security number of the decedent. This proposal represents a trend toward protecting the privacy of persons identified in court filings.

Second, Senate File 2519 expands a personal representative's power to sell real property under Minn. Stat. § 524.3-715(23) by explicitly authorizing a personal representative to sell a homestead without the consent of the decedent's children if the personal representative has the surviving spouse's consent. Minn. Stat. § 524.3-715(23), as amended, provides that the personal representative may "sell, mortgage, or lease any real or personal property of the estate or any interest therein, *including the homestead, exempt or otherwise*, for cash, credit, or for part cash and part credit, with or without security for unpaid balances, *and without the consent of any devisee or heir unless the property has been specifically devised to a devisee or heir by decedent's will, except that the homestead of a decedent when the spouse takes any interest therein shall not be sold, mortgaged or leased unless the written consent of the spouse has been obtained.*" (italics indicate new language)

This amendment to Minn. Stat. § 524.3-715(23) applies to every conveyance by a personal representative made before, on, or after the effective date (August 1, 2006), except that it does not affect an action or proceeding that is: (1) pending on the effective date involving the validity of the conveyance; or (2) commenced prior to February 1, 2007, if a notice of the pendency of the action or proceeding is recorded before February 1, 2007, in the office of the county recorder or registrar of titles of the county in which the real property affected by the action or proceeding is located. 2006, ch. 221, sect. 24.

C. House File 4162 (approved by the Governor on June 2, 2006)

House File 4162 amends Minn. Stat. § 256B.0595 to bring Minnesota's medical assistance eligibility rules into conformity with the requirements set forth in the federal Deficit Reduction Act of 2005.

First, and most importantly, House File 4162 amends Minn. Stat. § 256B.0595 to establish a uniform sixty month look-back period to recapture assets transferred for less than fair market value when determining an applicant's eligibility for medical assistance.

Second, Minn. Stat. § 256B.0595 is amended to commence the penalty period for less than fair market value transfers on the later of (i) the first day of the month in which the transfer occurs and (ii) the date an individual has applied for medical assistance, is eligible for assistance without regard to the transfer, and would be receiving institutional care but for the application of the penalty period. Thus, the penalty period will generally commence on the date an individual applies for medical assistance.

Third, House File 4162 adds paragraph (f) to Minn. Stat. § 256B.0595 which requires that the Department of Human Services be named a remainder beneficiary on annuities owned by a medical assistance recipient or the recipient's spouse and that notice will be provided to the state regarding any change in payment. The DHS need not be named a remainder beneficiary

of the entire annuity. Rather, paragraph (f) of Minn. Stat. § 256B.0595 provides that the DHS shall be named the remainder beneficiary "in first position for an amount equal to at least the total amount of medical assistance paid on behalf of the individual or the individual's spouse; or the department is named as the remainder beneficiary in second position for an amount equal to at least the total amount of medical assistance paid on behalf of the individual or the individual's spouse after the individual's community spouse or minor or disabled child and is named as the remainder beneficiary in the first position if the community spouse or a representative of the minor or disabled child disposes of the remainder for less than fair market value."

House File 4162 also adds paragraph (g) to Minn. Stat. § 256B.0595 which provides that any purchase of an annuity during the applicable look-back period which defers the payment stream or provides for a balloon payment will be treated as a transfer of assets for less than fair market value.

For a detailed discussion of the Deficit Reduction Act of 2005 and House File 4162, see Julian J. Zweber's Medical Assistance Update from the 2006 Probate & Trust Law Section Conference.

II. Antone v. Mirviss (Minn. August 17, 2006)

In *Antone v. Mirviss*, the Minnesota Supreme Court issued an opinion that defines when the statute of limitations begins to run on an action for legal malpractice regarding the negligent drafting of an antenuptial agreement.

Antone hired Mirviss to draft an antenuptial agreement that would protect from the claims of his future wife the appreciation in real property he owned. The agreement was executed and the parties were married in 1986. In 1998, the parties were divorced and Antone discovered that the agreement was negligently drafted. He commenced a malpractice action against Mirviss in 2003. The trial court granted a motion to dismiss for failure to state a claim, finding that the 6 year statute of limitations began to run on

the date of the marriage. The Court of Appeals reversed, holding that the statute of limitations began to run only when Antone sustained monetary damages, which were only theoretical until the date of the divorce.

The Supreme Court noted that the statute begins to run when a cause of action accrues, or when a plaintiff can allege sufficient facts to survive a motion to dismiss for failure to state a claim. This standard, the Court determined, is met when “some” damage has occurred as the result of the alleged malpractice.

Because Minn. Stat. § 519.11 requires mutual consent to amend or revoke an antenuptial agreement, the Court reasoned that the value of the appreciation on Antone’s real property was no longer protected, and he thus suffered “some” damage, as of the date of the marriage: “[T]he consequence of Antone marrying Schmidt without having an effective antenuptial agreement in place was that he was left without the nonmarital property protections he sought to obtain through the antenuptial agreement drafted by Mirviss. For Antone, the consequences were both immediate and irremediable as of the date of the marriage.” Therefore, the Court held that because the date of the marriage was more than 6 years before the commencement of the malpractice action, the action was barred by the statute of limitations.

Given the Court’s reasoning and its focus on the irrevocable nature of antenuptial agreements, it appears that the statute of limitations on a malpractice claim involving revocable estate planning documents would not begin to run until the death of the settlor or testator.

Federal Law Update *(Peter S. Hatinen)*

I. Congressional Update

A. Pension Protection Act of 2005

The Pension Protection Act of 2005 (the “Act”) was signed into law on August 17, 2006. The Act contains many provisions that encourage

retirement savings, make permanent many of the most popular aspects of the Economic Growth and Tax Relief Reconciliation Act that were subject to sunset provisions, and strictly regulate the activities of exempt organizations and their donors. The principal provisions of the Act are summarized below:

1. Repeal of Sunset Provisions and other Administrative Provisions

EGTRRA contained numerous pension and IRA-related provisions that were scheduled to expire in 2010 or 2011. The Act makes the following provisions permanent:

- a. The increased contribution limits for IRAs;
- b. The increased contribution limits for 401(k)s;
- c. The increased catch-up contribution limits for those age 50 and older; and
- d. The provisions regarding section 529 plans.

The Act also permits non-spouse beneficiaries to make direct rollovers from a qualified plan, 403(b), or 457 plan to an IRA. The IRA will be treated as an inherited IRA of the non-spouse beneficiary.

2. Charitable Giving Incentives

The Act permits individuals who are older than 70 ½ to distribute up to \$100,000 per year from traditional or Roth IRAs directly to charitable organizations—other than donor advised funds, supporting organizations, private nonoperating foundations, or charitable remainder trusts—without the contribution being included in gross income. These provisions only apply to contributions made in 2006 and 2007.

3. Substantiation of Donations

For all cash contributions, donors will be required to maintain a record, such as a receipt, canceled check, or letter from the donee, in order to claim a charitable contribution deduction.

4. Regulation of Exempt Organizations

Organizations currently not required to file Form 990 because their gross annual receipts do not exceed \$25,000 must now submit an annual electronic return with basic organizational information including the name under which the organization does business, internet and mailing addresses, and the identity of the organization's principal officer. The return will be publicly available. Failure to file the return for three consecutive years will result in the revocation of tax-exempt status.

5. Regulation of Private Foundations

The excise taxes applicable to private foundations (IRC sections 4940-4945) are generally doubled. Thus, the Act increases the tax for self-dealing from 5% to 10% for the self-dealer and from 2.5% to 5% for the foundation managers and increases the maximum tax imposed upon foundation managers from \$10,000 to \$20,000 for each act of self-dealing.

The Act increases the maximum tax imposed on foundation managers for participating in excess benefit transactions from \$10,000 to \$20,000, per transaction.

For failure to distribute income, the Act increases the tax on the foundation from 15% to 30% of the undistributed amount.

For excess business holdings, the Act increases the tax from 5% to 10% of the value of the excess business holdings.

For jeopardizing investments, the Act doubles the tax on the foundation and the foundation managers from 5% to 10% of the amount of the investment, increases the maximum tax imposed on foundation managers from \$5,000 to \$10,000 per investment, and increases the maximum additional tax imposed on foundation managers from \$10,000 to \$20,000.

For taxable expenditures, the Act increases the initial tax on the foundation from 10% to 20% of the amount of the expenditure, the initial tax on

the foundation managers from 2.5% to 5% of the expenditure, the maximum amount of the initial tax imposed upon the foundation managers from \$5,000 to \$10,000, and the maximum amount of any additional tax imposed upon the foundation managers from \$10,000 to \$20,000.

The Act also provides that private nonoperating foundations may not count as qualifying distributions contributions to (i) Type III supporting organizations that are not "functionally integrated" (see discussion below) or (ii) any other supporting organization if a disqualified person with respect to the foundation directly or indirectly controls the supporting organization or any supported organizations.

6. Regulation of Donor Advised Funds

The Act introduces a new excise tax that is applicable to donor advised funds. The Act imposes on the organization that manages a donor advised fund a 20% tax on any "taxable distribution." Managers are also subject to a 5% tax, up to \$10,000 for any taxable distribution. A taxable distribution is defined as a grant to an individual or any entity for a noncharitable purpose. A distribution to a public charity (other than certain supporting organizations) or a private operating foundation is not a taxable distribution. Distributions to certain other types of organizations require the organization that manages the donor advised fund to exercise expenditure responsibility over the distribution for the distribution to avoid being considered a taxable distribution.

The Act extends the excess benefit transaction rules to donor advised funds by defining donors, donor advisors, and persons related to them as disqualified persons. Grants, loans, compensation, and similar payments from donor advised funds to disqualified persons are treated as automatic excess benefit transactions and the entire amount of the transaction will be subject to the excess benefit transaction excise taxes.

The Act provides that if a donor, advisor, family member of a donor or advisor, or any entity controlled by them receives more than an

“incidental benefit” from a grant, a penalty of 125% of the amount may be imposed upon the person who recommended the grant and the benefited party. Managers who approved the grant knowing it would result in the benefit are also subject to a penalty of 10% of the amount in question.

The Act applies the excess business holding rules that apply to private foundations to donor advised funds.

The Act provides that donors may claim deductions for contributions to donor advised funds only if they receive a written acknowledgement from the organization that manages the fund that the organization has exclusive legal control over the contributed assets. The deduction is denied for contributions made to donor advised funds that are managed by certain Type III supporting organizations.

7. Regulation of Supporting Organizations

The Act applies the excess benefit transaction rules to supporting organizations. Any grant, loan, compensation, or similar payment from a supporting organization to a substantial contributor, member of the contributor’s family, or business controlled by such persons is treated as an automatic excess benefit transaction and the entire amount of the transaction is subject to the excess benefit transaction excise taxes.

The Act requires all supporting organizations to file annual Form 990s indicating whether they are Type I, II, or III supporting organizations, identifying the organizations they support, and certifying that they are not controlled by disqualified persons.

The Act requires the Secretary of the Treasury to promulgate new regulations imposing minimum payout requirements for Type III supporting organizations that are not “functionally integrated.” A Type III supporting organization is not functionally integrated if it is not required to make payments to supported organizations because it satisfies the integral part test of the Treasury Regulations by performing activities that, but for the existence of the supporting

organization, would be carried out by the supported organizations.

The Act applies the excess business holding rules to Type III supporting organizations that are not functionally integrated and to certain Type II supporting organizations.

The Act prohibits Type III supporting organizations from supporting foreign charities.

Finally, the Act provides that a supporting organization will fail to qualify as a Type I or Type III supporting organization if it accepts contributions from a person who directly or indirectly controls a supported organization, a family member of such a person, or an entity controlled by such persons.

II. McCord v. Commissioner (5th Cir., August 22, 2006)

In *McCord v. Commissioner*, the Fifth Circuit Court of Appeals overturned a 2003 decision by the Tax Court and addressed the effectiveness of a defined value clause used in connection with an assignment of limited partnership interests.

The McCords created a family limited partnership in 1995. The following year, they assigned their interests in the partnership to certain trusts, their children, and charities. The assignments, however, were not expressed in terms of percentage interests in the partnership, as is customary; rather, they were expressed in terms of interests equal to defined values. In essence, the children, trusts for their benefit, and a charity were assigned interests having set dollar values. Another charity was assigned the balance, if any, of the partnership interests. In consideration for the assignment, the children agreed to pay any transfer taxes occasioned by the assignments, including any estate taxes that would be imposed if one of the McCords died within 3 years.

Two months after the assignments were executed, the assignees entered into a confirmation agreement allocating the interests among themselves in accordance with the defined value clause.

The McCords filed gift tax returns reflecting the 1996 assignments. The reported value of the assigned interests was reduced by the gift taxes the children agreed to pay and by their contingent obligation to pay estate taxes. After the gift tax returns were filed, the IRS issued a notice of deficiency.

In 2003, the Tax Court (120 T.C. 358 (2003)) held that the defined value clause was not effective and concluded that the total value of the transferred interests was halfway between the values testified to by the McCord's expert witness and the Service's expert witness. It then calculated the value of the interests passing to the children, the trusts, and the charities by applying the percentage interests set forth in the confirmation agreement to the total value of the assigned interests.

The Fifth Circuit Court of Appeals reversed the Tax Court after observing that it erred in using the confirmation agreement to determine the value of the assigned interests. It noted that post-gift events should not change the value of transferred property for gift tax purposes. Thus, it held that the value of the gifted interests was the value set forth in the plain language of the defined value clause of the assignment. The Court of Appeals also held that a reduction in the value of the transferred interests reflecting the children's liability for gift taxes and their contingent liability for estate taxes was appropriate, because a willing buyer would have taken such liabilities into account when purchasing the assigned interests.

In the past, courts have been sympathetic to public policy-based attacks on defined value clauses because they can be drafted to discourage the Service from scrutinizing them (*e.g.* drafting an assignment of assets such that any assets in excess of a defined value are poured over to a zeroed out GRAT or a charitable entity, thus denying the Service any increased revenue as the result of a successful audit). In *McCord*, the Service did not brief the public policy arguments, so the Fifth Circuit Court of Appeals did not address them. While the Court's reasoning does not represent an

unqualified acceptance of defined value clauses, it does represent support for using such clauses where appropriate.

Powers of Attorney

Members of the Minnesota estate planning bar have recently voiced concerns about banks and other financial institutions refusing to accept their clients' powers of attorney. The Section Council has learned that the Minnesota Bankers Association recently published a Legal Compliance Bulletin on this topic and has received its permission to make it available. You may link to the Bulletin from the Practice Links on the Probate & Trust Law Section's website at:

<http://www2.mnbar.org/sections/probate-trust/index.htm>

Grassroots Initiative

Be a resource to the bar and the lawmakers who represent you! The MSBA encourages you to register with its grassroots action center. The purpose of the grassroots initiative is to develop a database of lawyers in each legislative district and to notify them of current issues impacting the justice system and the legal profession. The MSBA anticipates that the grassroots initiative will enable members to participate in the development and execution of policies that affect their communities. Read about the grassroots initiative and register at www2.mnbar.org/grassroots/

Greater Minnesota Probate & Trust Law Study Group

In 2005, the Probate & Trust Law Section began a new initiative to identify opportunities for its Greater Minnesota members to participate in study groups. While such study groups have existed in the Twin Cities for a number of years, many of our Greater Minnesota members have indicated that it can be difficult to identify study groups.

Thus, the Greater Minnesota Involvement committee created a study group on a trial basis. The group consists of eight section members from various locations around the state, and it meets for a MSBA facilitated telephone conference from 9:00 to 10:00 AM on the third Wednesday of each month. Discussion topics have included (1) homestead real estate tax credit treatment for people with multiple residences, (2) protecting the family farm or cabin for the next generation, and (3) the use of beneficiary designations in estate planning.

The flagship study group is chaired by Probate & Trust Law Section Chair, Brad Hanson, of the Quinlivan & Hughes P.A. law firm in St. Cloud. If you are interested in joining this study group or would like more information about this initiative, please call Brad Hanson at (320) 251-1414 or email him at bhanson@quinlivan.com. It is anticipated that the section website (www2.mnbar.org/sections/probate-trust/index.htm) will be used as a clearing house for information regarding study groups around the state.

Meet the Referees

On April 21, 2006, the Litigation Committee of the Probate & Trust Law Section sponsored a luncheon during which referees Krueger, Wolfson, and Maus discussed probate litigation and general probate proceedings. This unique opportunity to hear the referees speak attracted a capacity crowd and was enlightening for all who attended.

If you have ideas for or are interested in developing future seminars, call Education Committee Chair, Thomas J. Woessner, at (612) 340-8940, or email him at twoessner@riderlaw.com.

Probate & Trust Law Section Council Meeting Dates

The Council is scheduled to meet on the following days:

October 12, 2006	November 16, 2006
December 21, 2006	January 18, 2007
February 15, 2007	March 15, 2007
April 19, 2007	May 17, 2007

All meetings begin at 3:30 and are held at the Minnesota State Bar Association Offices Boardroom at 600 Nicollet Mall in Minneapolis.

The Gene Daly Award

The Gene Daly Award is periodically conferred upon Section members who have made a strong, positive impact on the practice of estate planning in Minnesota. Faith Ohman was given the award in 2005. If you would like to nominate someone for the award, please contact Andrea Breckner.

Probate & Trust Law Section Committees

Several Committees develop and implement various programs of the Probate & Trust Law Section. Those interested in chairing the Consumer Protection committee should contact Section Council Chair, Bradley W. Hanson. Volunteers interested in becoming involved in a committee are encouraged to contact the chair of the committee on which they wish to serve. The Section committees and their chairs follow:

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