

CHANGES TO MINNESOTA ESTATE TAX: Non-Residents Now Subject to Minnesota Estate Tax

by Susie A. King

Common estate planning techniques and recommendations for non-residents to maintain control of real and tangible property located in Minnesota now may provide little protection from Minnesota estate tax.



REAL ESTATE IN MINNESOTA: Issues to Consider

by Caroline A. Bussey

For those selling, buying, or financing real estate in Minnesota, residents and non-residents alike, here are nine issues for consideration.



CHANGES TO MINNESOTA ESTATE TAX: Non-Residents Now Subject to Minnesota Estate Tax

By Susie A. King | 612.877.5362 | Susie.King@lawmoss.com

Recent changes in Minnesota estate and gift tax law may have far-reaching implications for non-residents. Common estate planning techniques and recommendations for non-residents to maintain control of real and tangible property located in Minnesota now may provide little protection from Minnesota estate tax.

Prior to 2014, a non-resident of Minnesota who owned an interest in a pass-through entity that owned real property, tangible personal property, or equipment in Minnesota was not subject to Minnesota estate tax upon the death of the non-resident. The new law now subjects such property to possible Minnesota estate tax despite the non-resident having no connection – aside

from an ownership interest in the entity – to the State of Minnesota. Moreover, a non-resident having an interest in a pass-through entity that owns real property, tangible personal property, or equipment in Minnesota may be subject to Minnesota estate tax even if the business entity is incorporated or organized and operated in another state.

Minnesota Estate Tax and Residency

Minnesota is one of only 19 states, along with the District of Columbia, that imposes a state death tax. In 2015, Minnesota increased an individual's exemption – meaning the amount one can leave at death without having a tax assessed – to \$1.4 million. This exemption will increase to \$1.6 million in

2016, \$1.8 million in 2017, and eventually cap out at \$2 million in 2018. The likelihood of tax at death, along with less than habitable winters, has many Minnesota residents permanently relocating elsewhere.

To be considered a non-resident of Minnesota, an individual must not be present for more than 183 days in Minnesota and the individual must intend to reside permanently outside of Minnesota. To establish such intent, the Minnesota Department of Revenue has an objective test in which 26 factors – including the location of financial institution, advisors, and place of worship – are evaluated to determine an individual's domicile. Establishing the lack of physical presence in Minnesota is a far

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Did You Know?

Susan Rhode Elected to Mitchell | Hamline School of Law Board of Trustees

Susan C. Rhode, chair of our family law team, has been elected to the Mitchell | Hamline School of Law Board of Trustees. Susan is one of 11 leaders from the legal, higher education, and business communities elected by Hamline University School of Law on June 2, 2015, to combine with William Mitchell College of Law's existing board members to form the Mitchell | Hamline Board of Trustees. The Board will begin serving once the Mitchell and Hamline combination receives final approval from the American Bar Association.



Susan Rhode

Moss & Barnett is Pleased to Recognize the Following Team Members:

Joshua A. Bobich, an attorney with our business law; mergers, acquisitions, and corporate finance; and technology teams; has been selected to participate in the Minnesota Chamber of Commerce's inaugural Leaders Lab program for 2015-2016. Leaders Lab is a one of-a-kind opportunity to engage Minnesota's developing business leaders. As a participant, Josh will be exposed to a wide range of businesses that drive Minnesota's economy. Josh will have the opportunity to explore with key business leaders the public policy issues that affect Minnesota's competitiveness in a global environment. To learn more about the Minnesota Chamber of Commerce's Leaders Lab program, visit mnchamber.com/connect/leaders-lab.



Josh Bobich

Committee since 2013. ALAMN provides continuing support, educational opportunities, and information designed to assist members in the legal profession. Each member of ALAMN and ALA has made a personal commitment to increasing the professionalism of law office administration. To learn more about ALAMN, visit ala-mn.org.

Deborah J. Weinstock, our Marketing Coordinator, was awarded the Legal Marketing Association-Minnesota Chapter's "President's Scholarship" to attend the Legal Marketing Association's 2015 Annual Conference held this past April in San Diego. Debbie has been a member of LMA since 2006, currently serves on the Minnesota Chapter's Programming Committee, and will assume the role of Programming Chair for the Minnesota Chapter in 2016. LMA is a nonprofit professional association dedicated to serving the needs and maintaining the professional standards of those involved in marketing for the legal profession. To learn more about LMA-MN, visit lmamn.org.



Debbie Weinstock

Philip T. Rush, Moss & Barnett's Finance Director, has been elected to the board of directors of the Association of Legal Administrators -Minnesota Chapter (ALAMN) for 2015-2016. Phil will serve as the Minnesota Chapter's Communications Director. Phil joined ALAMN in 1999, served as chair of the Finance SIG in 2006, served on the Region 3 Conference Committee in 2012, and has served on the Communications



Phil Rush

Moss & Barnett is proud of the initiative on the part of our team members to engage with Minnesota's legal and business communities. Congratulations Josh Bobich, Phil Rush, and Debbie Weinstock!

Moss & Barnett's New Certified Paralegals

Shelly A. Doerr and **Stacie L. Iverson**, paralegals with our wealth preservation and estate planning team, and **Mara L. Gollin-Garrett**, a paralegal with our family law team, were each recently certified as a Minnesota Certified Paralegal (MnCP). In June 2014, the Minnesota Paralegal Association announced its voluntary certification program to establish a standard of competency for paralegals in Minnesota. The program is an opportunity for Minnesota paralegals to validate their qualifications and offers the credential to paralegals that meet certain education and experience requirements. Paralegals are key members of the firm's practice teams, assisting the firm's attorneys in providing efficient, cost-effective solutions to our clients.



Stacie Iverson, Shelly Doerr, and Mara Gollin-Garrett

Three New Attorneys Have Joined the Team

Eric J. Beecher has joined the firm's business law team focusing his practice on corporate and commercial transactions including mergers and acquisitions and business succession planning. Eric received his J.D., *summa cum laude*, from the University of St. Thomas School of Law, his M.S. from the University of Florida, his M.A. from the University of Melbourne, and his B.A., *cum laude* and with distinction, from Duke University.

Patrick D. Newman has joined the firm's creditors' remedies and bankruptcy team, focusing on all facets of creditors' rights, including defense of debt buyers and collection agencies, debt collection, secured transactions, bankruptcy litigation, and judgment enforcement. Patrick received his J.D. from William Mitchell College of Law and his B.A. from the University of Wisconsin-Madison.

John M. Schmid has joined the firm's real estate team. John works primarily in the multifamily housing department, which closes and delivers loans secured by multifamily projects to secondary market investors such as Freddie Mac and Fannie Mae. He received his J.D. from William Mitchell College of Law and his B.A. from the University of Minnesota-Twin Cities.



Eric Beecher



Patrick Newman



John Schmid

REAL ESTATE IN MINNESOTA: Issues to Consider

By Caroline A. Bussey | 612-877-5383 | Caroline.Bussey@lawmoss.com

Real estate as an investment is no longer a local matter. Sellers, buyers, and lenders may be from other states, or even other countries. Investment real estate is now a global industry. For those selling, buying, or financing real estate in Minnesota, residents and non-residents alike, here are nine issues for consideration:

1. Cancellation of Purchase Agreements:

In Minnesota, purchase agreements do not automatically terminate when a party fails to perform as agreed. In almost all cases, the purchase agreement remains in effect after a default, until it is cancelled. There are three ways to cancel a purchase agreement. First, a buyer and seller may voluntarily cancel the purchase agreement by written agreement. Second, a relatively expeditious statutory cancellation process is available, in which the buyer generally has 30 days to cure after service of a notice of cancellation. If the statutory procedure is strictly followed, this is an effective and relatively inexpensive process. Third, a party wishing to cancel a purchase agreement may seek judicial cancellation, but that is time-consuming and expensive.

2. Deed Tax: Minnesota imposes a tax on deeds and some other instruments that convey title to Minnesota real estate. Deed tax is an obligation of the grantor and must be paid as a condition to recording. The tax rate where the consideration exceeds \$500 is .0033 of the purchase price (.0034 in Hennepin and Ramsey Counties). Some deeds (e.g., deeds making a qualifying designated transfer under Minn. Stat. § 287.20, deeds transferring real property to

complete a merger/consolidation, and deeds gifting real property) qualify for the minimum deed tax.

3. Dual Recording Systems: Minnesota has two real estate recording systems. The first is the “abstract” system in which documents are recorded with the County Recorder’s office. The second is the registered land system, commonly referred to as the Torrens system. Documents affecting Torrens property are recorded with the office of the Registrar of Titles. If the property is part abstract and part Torrens, documents must be recorded in both offices. Recording in one office is ineffective to serve as notice if the recording should have occurred in the other office.

4. Marketable Title State: Minnesota is a marketable title state as compared to an insurable title state. Marketable title is title that is free from reasonable doubt or title that a prudent person, with full knowledge of the facts, would be willing to accept. Insurable title is merely title that a reasonably prudent title insurance company would be willing to insure. Most purchase agreements in Minnesota will require the seller to provide marketable title to the buyer at the time of closing. A buyer may be able to cancel a purchase agreement if there is an alleged or apparent defect in title that is not resolved or cured prior to closing, even if a title insurance company is willing to “insure over” the defect.

5. Skyways: Minnesota winters can be long and cold. Many buildings in downtown Minneapolis and St. Paul, and some in other cities, are connected

by climate-controlled skyways. In Minneapolis, skyways are privately owned and are governed by agreements between the respective building owners. In St. Paul, the City owns and regulates the skyways. Skyways add value to a building, but there may be governmental and contractual obligations that come with owning a building that has a skyway connection.

6. Mortgage Registry Tax: Minnesota imposes a tax on the recording of a mortgage (“MRT”). MRT must be paid (typically by the borrower) before the mortgage may be recorded, and payment of MRT is required to enforce a mortgage. The tax rate is .0023 (.0024 in Hennepin and Ramsey Counties) of a debt or portion of the debt that is secured by the mortgage on Minnesota real property. If the mortgage secures a revolving line of credit, MRT is payable on the maximum amount of the line of credit, even though the full amount may never be advanced. No MRT is payable for a mere mortgage amendment or extension that alters a mortgage without securing a new debt, or increasing the amount of the existing debt. If the amount of the existing debt is increased, additional MRT is payable only on the amount that exceeds the existing principal balance. Purchasing and then amending and restating existing mortgage loan documents may result in a substantial reduction in MRT.

7. Key Mortgage Terms: A mortgage should state the maturity date of the debt it secures. If the mortgage does not specify the maturity date, the 15-year statute of limitations for enforcement of the mortgage will run from the date

of the mortgage, rather than from the maturity date. If a mortgage secures a revolving line of credit, that fact, and the maximum principal amount that may be secured at any one time, should be stated in the mortgage.

8. **Assignment of Rents/Receivership:**

Minnesota is a lien theory state, meaning the lender is considered the holder of only a security interest, and the mortgagor is the owner of the land and is entitled to possession, unless and until foreclosure of the mortgage is completed. An assignment of leases and rents is generally enforceable in Minnesota when recorded and after default by the mortgagor. However, a well-drafted assignment of leases and rents will provide for enforcement of the assignment either by the lender or through appointment of a receiver. The assignment remains effective

during foreclosure of the mortgage and throughout the redemption period from a foreclosure sale.

9. **Foreclosure:** Minnesota allows both foreclosure by advertisement and foreclosure by action. To foreclose by advertisement: (i) the mortgage must contain a power of sale; (ii) a default must have occurred under the mortgage by which the power of sale has become operative; (iii) no other action or proceeding to collect the debt may be pending; and (iv) the mortgage and all assignments must have been recorded. Under either foreclosure procedure, the borrower has the absolute right to "reinstate" the mortgage (and thereby undo any acceleration of the debt) prior to foreclosure sale by curing the existing curable defaults and paying certain expenses. After a foreclosure sale, the

borrower has the statutory right to redeem the mortgaged property, and if the borrower fails to redeem, junior lien creditors also may redeem, in the order of priority of their liens. Usually the mortgagor's redemption period is six months after the foreclosure sale.

For further information about selling, buying, or financing real estate in Minnesota – or for any other real estate questions – contact your attorney at Moss & Barnett.



Caroline A. Bussey is a member of our real estate team. She represents landlords, tenants, and lenders on a wide range of leasing and financing transactions.

Visit: LawMoss.com/caroline-a-bussey

Call: **612.877.5383**

Email: Caroline.Bussey@lawmoss.com

Moss & Barnett Awarded Environmental Accomplishment Award

We are very proud to announce that Moss & Barnett has been awarded the Shred-it "Environmental Accomplishment Award" for our green efforts in 2014! The firm participated in the Shred-it shredding and recycling program and, based on the volume of paper Shred-it recycled for us, saved 1,250 trees from destruction. Shred-it chose 15 of their largest recyclers in its Minneapolis district to receive this recognition.

Pictured from left to right: Cindy Frisco, Records Center Coordinator; Phil Meinert, Shred-it Account Manager; Jan Magnuson, Records Center Coordinator; Teresa Burshek, Office Services Assistant; and Lori O'Donnell, Facilities Director



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easier task than satisfying the Department of Revenue's residency intent factors. Not one of the 26 factors is determinative over the other factors; however, some of the factors provide stronger evidence in establishing an individual's intent to make some other place – outside of Minnesota – his or her home.

Prior to the changes in 2013 and 2014, one of the main concerns in estate planning for a non-resident was ensuring that the individual satisfied the Minnesota Department of Revenue's residency test, thereby putting his or her, most likely, outside the reach of the Minnesota Department of Revenue and Minnesota estate tax. Unfortunately for some non-residents, this first step does not provide absolute protection.

Changes in Definitions Broaden Scope of Tax

The possible imposition of Minnesota estate tax on a non-resident who owns seasonal real property in Minnesota – such as a cabin or lake home – is not a farfetched concept. Similarly, exposure to Minnesota estate tax if a non-resident maintained significant tangible personal property in the state is not a shocking revelation. What may come as a shock to many non-residents is the possibility of Minnesota death tax if the non-resident has an ownership interest in a pass-through entity with assets that include real or tangible personal property in Minnesota, or if such ownership interest was gifted within three years of death.

The 2013 and 2014 amendments to the Minnesota estate tax law focuses on broadening definitions of "Minnesota adjustable taxable estate" and "situs of intangible personal property" to expand to individuals both within and outside state lines. For instance, an individual's adjusted

taxable estate now includes taxable gifts within three years of the decedent's death. This provision does not apply to annual exclusion gifts – currently \$14,000 – made to individuals. Any gifts made over and above this amount, and occurring within three years of death, are brought back into the estate for calculation of Minnesota estate tax.

In addition to the claw back of gifts made within three years of death, the other significant change came to the definition of "situs of intangible personal property." The definition includes ownership interests by residents and, now, non-residents in pass-through entities that owned real or tangible personal property located in Minnesota at the time of death.

A pass-through entity can include:

- a corporation electing to be treated as an S-corporation for tax purposes;
- a single-member limited liability company;
- a multi-member LLC or other entity taxed as a partnership; or
- a trust, to the extent the property is includable in the decedent's federal gross estate.

The new law, in effect, removes the pass-through entity from the equation and treats the property – either real or personal – as being personally owned by the decedent. If the decedent shared ownership of the pass-through entity with other individuals, then the decedent's ownership of the property is proportional to the decedent's capital ownership share of the pass-through entity.

The impact of these changes is likely to be far-reaching given traditional estate planning vehicles for non-residents of Minnesota, including establishing a family limited

partnership or limited liability company to hold and manage a family cabin, farm, or lake home. For example, Minnesota residents would until now establish a pass-through entity to allow mom or dad to maintain control and determine if and when interests in the entity could be transferred or gifted, while at the same time reducing their overall gross estate. Under the new law, such traditional estate planning is no longer effective.

Next Steps

Whenever there is a significant change affecting an estate plan or the transfer of wealth, it is always advisable to review one's current estate plan to ensure it remains effective. There are still some, though not as many, options available to non-residents. Specifically, the law does not apply to Minnesota-situated property owned by a C-corporation. It may be possible to convert the pass-through entity currently holding property into a C-corporation, although one should carefully consider the tax implications before any such conversion. Also, non-residents may decide to gift interests in a pass-through entity earlier than at death – although hopefully living at least three years following the gift.



Susie A. King is a member of our wealth preservation and estate planning team focusing her practice in the areas of estate planning, probate, trust, guardianship/conservatorship, and elder law. Her experience covers a broad range of services from the simple estate plan to administration of complicated estate or trust matters.

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Bold. Decisive. Results.

Moss & Barnett Congratulates its Attorneys Listed in 2015 *Super Lawyers* and *Rising Stars*

Moss & Barnett is pleased to congratulate its attorneys who are listed in 2015 *Super Lawyers* and *Rising Stars*.

Minnesota Super Lawyers 2015

- **Cindy J. Ackerman** – Estate & Probate
- **Kevin M. Busch** – Banking
- **Mitchell H. Cox** – Business/Corporate
- **Jana Aune Deach** – Family Law
- **Aaron A. Dean** – Construction Litigation
- **Peter A. Koller** – Business Litigation
- **Susan C. Rhode*** – Family Law
- **James A. Rubenstein** – Bankruptcy: Business
- **Dave F. Senger** – Business/Corporate
- **Thomas J. Shroyer** – Business Litigation
- **James J. Vedder*** – Family Law

Minnesota Rising Stars 2015

- **Sarah E. Doerr** – Business Litigation
- **Taylor D. Tarvestad-Sztainer** – Business Litigation

In 1998, *Super Lawyers* launched *Rising Stars* in Minnesota to recognize the top up-and-coming attorneys in the state – those who are 40 years old or younger, or who have been practicing for ten years or less. No more than 2.5% of attorneys in Minnesota are selected to the *Rising Stars* list annually.

* *Moss & Barnett is especially pleased to congratulate Susan C. Rhode, who, once again, ranked in the Minnesota Top 10, Top 50 Women, and Top 100 Super Lawyers lists for 2015, and to James J. Vedder, who ranked in the Top 100 Super Lawyers list for 2015.*



Cindy J. Ackerman



Kevin M. Busch



Mitchell H. Cox



Jana Aune Deach



Aaron A. Dean



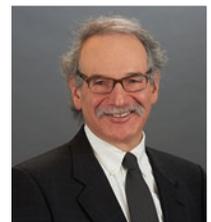
Sarah E. Doerr



Peter A. Koller



Susan C. Rhode



James A. Rubenstein



Dave F. Senger



Thomas J. Shroyer



**Taylor D.
Tarvestad-Sztainer**



James J. Vedder

To learn more about Moss & Barnett, our attorneys, and our various practice areas, please visit our website at LawMoss.com.

IMPORTANT NOTICE

This publication is provided only as a general discussion of legal principles and ideas. Every situation is unique and must be reviewed by a licensed attorney to determine the appropriate application of the law to any particular fact scenario. If you have a legal question, consult with an attorney. The reader of this publication will not rely upon anything herein as legal advice and will not substitute anything contained herein for obtaining legal advice from an attorney. No attorney-client relationship is formed by the publication or reading of this document. Moss & Barnett, A Professional Association, assumes no liability for typographical or other errors contained herein or for changes in the law affecting anything discussed herein.

Did You Know?

Shelly A. Doerr, a paralegal with our wealth preservation and estate planning team, is celebrating her “Sweet 16” as a cancer survivor. Shelly has been a participant in the Susan G. Komen Twin Cities Race for the Cure since her diagnosis in 1999 at the age of 36. She also participated in the Susan G. Komen 3-Day in 2008 and 2010.

In 2006, Shelly started volunteering her time on Saturday mornings during Race weekend. Now, she volunteers on Saturday morning and takes a couple of shifts on Friday, too. “Friday is my day alone to volunteer in whatever capacity I’m needed, but the Saturday morning shift has always been a friends and family affair.” Shelly and her group of volunteers are usually found in the Team Challenge Packet Pick Up area on Race weekend.

Shelly has been a member of the Pink Honor Roll since 2012, a program that was created to encourage and recognize the efforts of Komen Minnesota’s top individual fundraisers. She has raised over \$47,000 to support innovative programs in the area of breast health and breast cancer screening, treatment, treatment support, survivorship, health care delivery, and research. According to Shelly, “I could never have reached this level of fundraising without the ongoing generosity, love, care and support of my family and friends.” To learn more, visit komenminnesota.org.



Shelly Doerr



“Shelly’s Sole Mates” Team: (Left to right): Krista Turgeon, Kathy Lindahl, Lori Turgeon, Becca Wolfe, Hailey Doerr, Shelly Doerr