

The Complete Lawyer's
Quick Answer Book
Volume II



Minnesota Continuing Legal Education

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Immigration & Nationality Law

Chapter 11

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1. How can I obtain work authorization to work in the United States?

Answer

Under the Immigration Reform Control Act of 1986, an employer must confirm the employment eligibility and identity of all employees hired after November 6, 1986 by completing an I-9 Employment Eligibility Verification form. The I-9 form requires all employees hired after November 6, 1986 to provide evidence of identity and employment authorization to an employer within three business days of the start date of employment.

An individual is authorized to work in the U.S. if the individual meets any one of the following conditions:

1. U.S. citizen;
2. U.S. national;
3. Lawful permanent resident of the U.S. ("green card" holder); or
4. The individual is authorized to work in the U.S. by the United States Citizenship and Immigration Services (USCIS) through evidence such as an employment authorization card, incident to their status such as those granted asylum or refugee status in the United States or the individual possesses a nonimmigrant work visa.

There are various nonimmigrant (temporary) visa categories which allow an individual to work in the U.S. Below is a chart which provides a summary of the some of the most popular work visa options.

Visa Category	Employer Sponsorship Required?	Description	Duration of Stay
E-1 Treaty Trader/E-2 Treaty Investor	Yes - Authorized to work only with sponsoring employer	Perform services as investor (E-2) or trader (E-1), executive, supervisor, or essential skills employee of company that is majority owned by citizens of country that has a treaty of commerce and navigation with the U.S. applicant/beneficiaries must also have the same citizenship of qualifying E entity.	No maximum limitation on stay in the U.S. Admitted for two-year increments and can extend in two-year increments.
E-3 (for Australians)	Yes - Authorized to work only with sponsoring employer.	Similar to H-1B (see below), available to citizens of Australia for employment in professional position requiring at least a Bachelor's degree (a specialty occupation) and who possess at least a Bachelor's degree in a field required for the position.	No limit to length of stay. Granted in two-year increments and can be extended in two-year increments.

Visa Category	Employer Sponsorship Required?	Description	Duration of Stay
F-1 Students	No - requires permission from USCIS or University.	Student can be granted employment authorization off campus through Optional Practical Training (OPT) or Curricular Practical Training (CPT).	F-1 can obtain a total of up to 12 months of CPT. F-1 can obtain up to 12 months of OPT if the F-1 has not used 12 months of full-time CPT. OPT can be extended for another 24 months on or before the 12 month expiration if the individual is eligible for STEM OPT and the employer meets all the compliance requirements.
H-1B Specialty Occupation Workers	Yes - Authorized to work only with sponsoring employer.	Employment in a specialty occupation that requires at least a Bachelor's degree or equivalent and the foreign national must possess at least a Bachelor's or equivalent in a related field.	Six-year total stay - three-year initial stay - three-year extension. *H-1B status can be extended beyond the six years under certain circumstances.
H-2A, H-2B	Yes - Authorized to work only with sponsoring employer.	Short-term skilled/unskilled workers for temporary agricultural (H2A) or nonagricultural (H2B) positions.	Varies, must establish temporary need but for no more than 12 months unless it is a one-time occurrence.
H-3	Yes - Authorized to work only with sponsoring employer.	Trainee to enter the U.S. for training unavailable in trainee's home country.	Up to 24 months maximum.
J-1 Trainee/Intern	Must be sponsored by qualifying J program sponsor.	Intern or train with an employer under authorized J program sponsor.	Up to 18 months as a J-1 trainee or intern.
L-1 Intracompany Transferee	Yes - Authorized to work only with sponsoring employer.	Entering the U.S. from qualifying foreign entity (subsidiary, affiliate, branch, or joint venture) to fill L-1A executive or managerial position or L-1B specialized knowledge position and must have worked abroad for at least one year with qualifying legal entity. Canadians can apply at port of entry, pre-flight inspection, or with USCIS. Other foreign nationals can apply at U.S. Consulates if employer has an approved Blanket L petition.	Seven year limit for L-1A managers/executives and five years for L-1B specialized knowledge employees. New office L-1A – one-year initial stay, extensions of two years up to seven-year limit.

Authorities

- Immigration and Nationality Act (INA) § 274A, 274B & 274C.
- 8 U.S.C. §§ 1324a, 1324b & 1324c.
- 8 C.F.R. §§ 274a.1–274a.10.
- INA § 101(a)(15).
- 8 C.F.R. § 214.2.
- <https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/extension-post-completion-optional-practical-training-opt-and-f-1-status-eligible-students-under-h-1b-cap-gap-regulations>.

Further Reading

- IMMIGRATION PRACTICE DESKBOOK, 1st ed. (Minnesota CLE, 2015).
- ANGELO A. PAPARELLI, L. BATYA SCHWARTZ EHRENS, *The Immigration Compliance Book* (Dan Siciliano, ed., 2009).
- *AILA's Guide to Worksite Enforcement & Corporate Compliance* 3 (2008 ed).

Notes

2. How can I obtain lawful permanent residence status (“green card”) in the United States?

Answer

There are four main ways that foreign nationals can obtain lawful permanent resident status (a “green card”) in the United States: family sponsorship, employment sponsorship, the diversity visa lottery, and humanitarian immigration (i.e., refugees and asylum).

Family Sponsorship: United States immigration law provides specific guidelines as to who can file a family-based immigrant petition and for whom the petition can be filed. A family member must be a United States citizen or lawful permanent resident in order to be a petitioner for a family-based immigrant petition. There are exceptions for widows or widowers of deceased U.S. citizens, battered spouses and children of U.S. citizens and lawful permanent residents, and American children. These individuals can self-petition in order to obtain lawful permanent resident status. In order to sponsor a family-based immigrant petition, the sponsor must file an I-130 Petition for Alien Relative for the qualifying family member (beneficiary). If a visa number is immediately available for the beneficiary when the I-130 is filed or approved, the beneficiary can apply for an immigrant visa at a U.S. Consulate, if abroad, or seek adjustment of status, I-485 Application to Adjust Status, if the beneficiary is eligible and in the United States at the time of the I-130 filing.

Not all familial relationships can serve as a basis for an immigrant petition. In order to be a beneficiary of a family-based immigrant petition, the individual must possess a qualifying relationship with the United States citizen or the lawful permanent resident. United States citizens can file family-based petitions for the following categories: immediate relatives, unmarried and married adult sons and daughters, and their brothers and sisters. For the purpose of family-sponsored immigration, immediate relatives include minor unmarried children under the age of 21, spouses, and parents of a United States citizen. In order to petition for a parent, the United States citizen must be at least 21 years old. Widows or widowers of a U.S. citizen can also be classified as an immediate relative if they were married for at least two years and not legally separated at the time of the citizen's death. In addition, the widow or widower must file a petition for immigration status within two years of the U.S. citizen's death. A lawful permanent resident can file family-based petitions for spouses, children, and unmarried sons and daughters.

Employment Sponsorship: The U.S. provides employment-based immigrant petitions in the following employment (EB) preference categories:

- The first preference involves people of extraordinary ability, outstanding professors and researchers, and executives or managers of multinational organizations.
- The second preference is for people with advanced degrees, bachelor's degrees plus five years of progressive work experience, and those of exceptional ability whose work is deemed in the national interest.
- The third preference includes professionals, skilled workers, and other workers.

- The fourth preference is for special immigrants including religious workers.
- The fifth preference permits the immigration of people who makes a large investment (\$500,000 or \$1 million depending on the investment) and the investment will result in job creation in the United States (EB-5).

All of the above employment preference categories will require an offer of employment (sponsorship) by an employer except for individuals of extraordinary ability, individuals whose work is in the national interest, and EB-5 immigrant investors.

Diversity Immigrant Visa Lottery: The diversity immigrant category was created by Congress in order to provide an opportunity for citizens of countries with low immigrant admissions to the U.S. to obtain immigrant visas. The process is conducted by the Department of State online and the winners are randomly selected.

In order to be eligible, the applicant must have at least the equivalent of a high school education, or at least two years of work experience within the five years prior to applying in a field requiring at least two years of training or experience. In addition, spouses and children under the age of 21 can accompany the winner of a diversity visa.

Humanitarian Immigration Relief and Other Special Programs: Foreign nationals can also obtain lawful permanent residence if they are granted humanitarian relief such as refugee or asylum status in the U.S. In addition, foreign nationals may also obtain lawful permanent residence pursuant to certain forms of relief that Congress may establish for nationals of certain countries, victims of certain crimes, and forms of relief from removal proceedings such as cancellation of removal.

Authorities

- Immigration Act of 1990 (IMMACT90), Pub. L. No. 101-649, 104 Stat. 4978.
- INA §§ 101(b), 201-205, 208, 209, & 240A.
- 22 C.F.R. § 42.33.

Further Reading

- IMMIGRATION PRACTICE DESKBOOK, 1st ed. (Minnesota CLE, 2015).
- RICHARD A. BOSWELL, ESSENTIALS OF IMMIGRATION LAW, *Chapter 5, Immigrant Visas: Lawful Permanent Residence* (2009).

Notes

3. Can a child who was born in the U.S. sponsor their parent(s) for lawful permanent resident status (the “green card”)?

Answer

Yes, a child who was born in the U.S. and is a U.S. citizen (USC) can sponsor his or her parent. The USC child must be at least 21 years old to sponsor their parent(s) for lawful permanent resident status (a “green card”).

Authorities

- Immigration & Nationality Act (INA) §§ 101(b)(2) & 201(b)(2)(A)(i).

Comment

Under the current U.S. immigration system, it is impossible for a parent to obtain lawful permanent residence through the immediate birth of a child due to the requirement that the child must be at least 21 years old in order to file an I-130 Petition for Relative Alien for the parent.

Further Reading

- IMMIGRATION PRACTICE DESKBOOK, 1st ed. (Minnesota CLE, 2015).

Notes

4. Can I sponsor my cousin, who was born outside of the United States and whose parents are not United States citizens, to get a “green card” to live and work in the United States?

Answer

No. Under U.S. immigration laws, family-based immigrant visa sponsorship is only available to the following:

1. the children, spouse, and siblings of a United States citizen;
2. siblings who are 21 years or older of United States citizen; and
3. parents and children of lawful permanent residents.

In order to sponsor a family member for a “green card,” the petitioner must file an I-130 Petition for Relative Alien. Children under 21 years old and spouses of a United States citizen can concurrently file an I-485 Application to Adjust Status (“green card” application) with the I-130 Petition if they are in the United States, or an immigrant visa at a U.S. Consulate if they are outside of the U.S. at the time of the I-130 filing. For the other beneficiaries of an I-130 petition, they must wait for a visa number to be available in order to apply for the “green card.”

Authorities

- INA §§ 101(b)(2), 203(a), & 204.

Comment

It is possible for a cousin to sponsor another cousin for lawful permanent resident status if they married and the USC or lawful permanent resident (LPR) cousin is sponsoring the foreign national cousin as a spouse as defined under U.S. immigration law.

Further Reading

- IMMIGRATION PRACTICE DESKBOOK, 1st ed. (Minnesota CLE, 2015).

5. Can a lawful permanent resident (“green card” holder) lose their status in the United States?

Answer

Yes, lawful permanent residents (LPR) of the United States can lose their lawful permanent residence status by abandoning their lawful permanent residence, the decision to grant adjustment of status is rescinded by the USCIS, or if they are placed in removal (deportation) proceedings and cannot seek any forms of relief to retain their LPR status.

The USCIS can rescind the grant of an adjustment of status of a LPR within five years of approval of the I-485 adjustment of status application if it establishes by clear, convincing, and unequivocal evidence that the LPR was ineligible for the benefit at the time it was granted. The LPR has an opportunity to request a hearing before the Executive Office of Immigration Review to challenge the decision to rescind the grant of the adjustment of status to the LPR.

A LPR can also lose lawful permanent residence status if the LPR is determined to be inadmissible or removable on any grounds of inadmissibility or removability. Offenses for which a LPR can be found to be removable or inadmissible include crimes involving moral turpitude, firearm offenses, certain drug offenses, domestic violence offenses, and aggravated felony offenses.

A LPR can be deemed to have intentionally abandoned lawful permanent residence based on any of the following actions:

- move to another country intending to live there permanently;
- remain outside of the United States for more than one year without obtaining a reentry permit or returning resident visa. The immigration service can still make a determination that lawful permanent residence has been abandoned for absences less than one year. Generally, a LPR who is outside of the U.S. for a continuous period of 180 days can be questioned regarding their lawful permanent residence intent;
- remain outside of the United States for more than two years after issuance of a reentry permit without obtaining a returning resident visa;
- fail to file income tax returns while living outside of the United States for any period; or
- make a declaration of a “nonimmigrant” on a tax returns.

7. I know my neighbor is not legally in the United States, am I required under the law to report him to the immigration service?

Answer

Federal immigration laws do not require private citizens to report on individuals who do not possess legal immigration status in the U.S.

Authorities

<<http://www.aclu.org/drug-law-reform-immigrants-rights-racial-justice/know-your-rights-what-do-if-you>>.

Comment

While private citizens are not required to report on immigration offenses, Homeland Security Investigations (HSI) under Immigration & Customs Enforcement (ICE) has established procedures for a tip line.

Under ICE's Secured Communities program, established in 2008, ICE has access to the databases of local law enforcement agencies to identify whether foreign nationals who are arrested may be subject to removal/deportation. As a result of this program, thousands of individuals have been placed in removal proceedings even though many of the arrests did not result in any criminal charges.

Further Reading

- IMMIGRATION PRACTICE DESKBOOK, 1st ed. (Minnesota CLE, 2015).

Notes

8. What are the requirements to becoming a United States citizen?

Answer

U.S. citizenship can be acquired in a variety of ways: (1) by being born in the United States and subject to the jurisdiction of the United States, (2) by birth overseas to one or more U.S. citizen parents, and (3) by naturalization following the lawful acquisition of permanent resident status in the United States. Certain children can also obtain U.S. citizenship as a derivative beneficiary of their parent's naturalization or upon entry as a lawful permanent resident under the Child Citizenship Act 2000

Generally, in order to qualify for naturalization, an applicant must be at least 18 years old, be a lawful permanent resident (LPR) for the requisite five-year time period (three years in cases of a spouse of a U.S. citizen; one year if a person is in the military), be a person of good moral character during the requisite LPR period, meet the requisite physical presence and residence requirements, possess the ability to read, write, and understand English, and understand the fundamental history and principles of the government of the United States.

The application for naturalization is filed on a N-400 Form.

Authorities

- INA §§ 316, 319–322.

Comment

There are special requirements for individuals who serve in the U.S. military.

Further Reading

- IMMIGRATION PRACTICE DESKBOOK, 1st ed. (Minnesota CLE, 2015).

Notes

9. Will I lose my U.S. citizenship if I become a citizen of another country?

Answer

The acquisition of citizenship of another country can result in the loss of U.S. citizenship if the U.S. citizen voluntarily applies for the acquisition of the citizenship of a foreign state after the age of 18 years *and* possessed intent to relinquish U.S. citizenship.

The U.S. does not prohibit a citizen from acquiring or being a citizen of another country; however, it does not encourage it. Under dual nationality a person may have and exercise rights of nationality in two countries and be subject to the responsibilities of both. It is important to check the laws of the applicable country when acquiring the citizenship of an additional country as each country has its own laws regarding whether it will recognize or accept dual citizenship.

Authorities

- INA § 349.
- *Kawakita v. United States*, 343 U.S. 717 (1952).

Comment

Dual citizenship can often occur when an individual acquires citizenship of the birth country, the concept of *jus solis*, and also acquires citizenship of another country through the concept of *jus sanguinis*, right of blood, by birth to a parent or parents who have that nationality.

Further Reading

- INA § 301.
- IMMIGRATION PRACTICE DESKBOOK, 1st ed. (Minnesota CLE, 2015).

Notes

10. I am currently a B-2 visitor (pleasure tourist) in the United States and I believe that if I return to my home country, I will be harmed /persecuted. What can I do to stay in the United States?

Answer

An individual who believes that he or she will be harmed or persecuted can seek protection in the U.S. by seeking asylum or protection under Article III of the Convention Against Torture. In order to be eligible for asylum in the United States, the individual must establish that he or she is unable or unwilling to return to, or is unable or unwilling to avail himself or herself of the protection of that country because he or she was subject to past persecution or possesses a well-founded fear of persecution on account of religion, nationality, membership in a particular social group, or political opinion. An applicant is barred from applying for asylum if he or she does not establish by clear and convincing evidence that he or she applied within one year of arrival in the United States unless he or she demonstrates that there have been changed circumstances which materially affect his or her eligibility for asylum or extraordinary circumstances relating to the delay in filing the application within the one-year period.

Authorities

- INA §§ 101(a)(42) & 208(b).
- Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.
- Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3009-546 to 3009-724.
- Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, §2242(b), 112 Stat. 2681, 2681-822.
- Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044.
- *Matter of Y-C-*, 23 I&N Dec. 286(BIA 2002) (leading case on extraordinary circumstances as it relates to the one year filing deadline).
- <www.uscis.gov/USCIS/Humanitarian/Refugees%20&c%20Asylum/Asylum/AOBTC%20Lesson%20Plans/One-Year-Filing-Deadline-31aug10.pdf>.

Comment

The B-2 visitor can remain in the United States by seeking an extension of the B-2 status for an additional temporary period. It will not allow the visitor to remain permanently in the United States, but can provide the visitor additional time in the U.S. lawfully to decide what forms of relief are available to remain in the United States permanently.

Individuals who are residing in Minnesota and wish to apply for asylum or believe that they are eligible for asylum should contact Advocates for Human Rights' Refugee and Immigration Program. Advocates for Human Rights provide pro bono legal services to eligible asylum seekers. <www.theadvocatesforhumanrights.org>.

Further Reading

- REGINA GERMAIN, *AILA's Asylum Primer* (6th ed. 2009).
- IMMIGRATION PRACTICE DESKBOOK, 1st ed. (Minnesota CLE, 2015).

Notes

11. Can I come to the United States to attend high school as a foreign student (F-1 or J-1 status) and apply for admission into a U.S. college/university?

Answer

Yes, an F-1 and J-1 foreign student who is currently in the U.S. to attend high school can apply for admission into a U.S. college/university.

An individual who enters the United States for the sole purpose of attending high school or college/university can either seek a J-1 exchange student/visitor visa or F-1 student visa to lawfully enter the United States to attend high school. In order to obtain an F-1 visa, the foreign student must first obtain an I-20 form from the appropriate U.S. school by the Student and Exchange Visitor Program (SEVP). For the J-1 visa, the student must first obtain a DS-2019 form from an exchange visitor program that is certified by SEVP.

In order to attend a U.S. college/university, a foreign student must have the appropriate nonimmigrant visa/status which allows him or her to study in the U.S. For example, if the foreign student needs the college/university to sponsor him or her for an F-1 student visa to pursue secondary or post-secondary studies in the U.S., he or she must first obtain an I-20 from the college/university to apply for the F-1 visa to enter the U.S. if he or she is outside of the U.S. If he or she is already in the U.S. as an F-1 student in high school, he or she can seek an I-20 from the college/university to extend his or her F-1 status to pursue post-secondary studies.

Authorities

- INA § 101(a)(15)(F).
- 8 C.F.R. § 214.2(f) & (j).
- 22 C.F.R. § 62.

Comment

The Student and Exchange Visitor Information System (SEVIS) is an Internet-based system that maintains accurate and current information on nonimmigrant students (F and M visa), exchange visitors (J visa), and their dependents (F-2, M-2, and J-2).

There are several limitations on obtaining F-1 status to attend public schools. F-1 students cannot attend public elementary/middle school. F-1 students can attend a secondary/high school for up to 12 months. In addition, the F-1 student must pay the full cost of the education to the public school/district. This is a mandatory requirement for only F-1 students.

12. I was born abroad and my parents brought me to the United States illegally when I was a child. Can I now request lawful status in the United States through Deferred Action for Childhood Arrivals (DACA).

Answer

On June 15, 2012, the Obama Administration announced certain individuals who came to the United States as children could request deferred action for a two-year period. Individuals who are granted deferred action will not be considered to be unlawfully present during the period in which deferred action is in effect and will be able to receive employment authorization. A person granted deferred action does not have lawful status and it does not excuse prior and subsequent periods of unlawful presence. USCIS (United States Citizenship & Immigration Services) started issuing deferred action to DACA applicants in September 2012.

United States Citizenship and Immigration Services announced in May 2014 it will be issuing instructions for the extension of deferred action for DACA beneficiaries.

An individual may request consideration of deferred action for childhood arrivals if he or she:

1. was under the age of 31 as of June 15, 2012;
2. came to the United States before reaching his or her 16th birthday;
3. has continuously resided in the United States since June 15, 2007, up to the present time;
4. was physically present in the United States on June 15, 2012, and at the time of making the request for consideration of deferred action with USCIS;
5. entered without inspection before June 15, 2012, or his or her lawful immigration status expired as of June 15, 2012;
6. is currently in school, has graduated or obtained a certificate of completion from high school, has obtained a general education development (GED) certificate, or other equivalent state-authorized exam in the United States, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
7. has not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and does not otherwise pose a threat to national security or public safety.

Applications are accepted on a rolling basis and there is no deadline to apply. It is estimated that between 900,000 and 1.3 million individuals in the United States may be eligible for DACA.

13. Can I obtain a visa to come to the United States if I want to invest in a business in the United States?

Answer

Citizens/nationals of certain countries may apply for a non-immigrant E-2 (Treaty Investor) visa to come to the United States to live for as long needed to develop and direct the investment, but not permanently. In order to be eligible for the E-2, the following must exist:

- a. a treaty of commerce and navigation between the country of the foreign national's citizenship and the United States;
- b. a majority ownership in an investment by a national or citizen of the treaty country; and
- c. citizenship in the treaty country by the person seeking admission under treaty investor status.

There is no required minimum dollar amount for the investor visa. The investment must be "substantial" and the investor has made a commitment of funds that represent an actual, active investment (i.e., an operating enterprise producing some service or commodity). While USCIS has defined "substantial," the investor must show that the investor's own resources are at risk, and that the investment represents a significant part of the value of the enterprise, sufficient to capitalize an enterprise of the type contemplated. If one is going to start a bank, millions of dollars would be needed; if one is going to buy a small coffee shop, \$100,000 or less might suffice. In addition, the investment cannot be marginal in nature (one which will support only the investor and his or her family), but should create job opportunities for U.S. workers. Also, the person for whom the treaty investor status is sought must fill a key role within the company (i.e., one of the persons who has developed and directed the investment), and have a controlling interest in the company. The E-2 visa also allows a foreign nationals of the same treaty country to enter the U.S. for up to two years at a time, to serve in an executive or managerial capacity or as an essential employee for the company, and can be renewed for an indefinite period of time, provided nonimmigrant intent is maintained as well as the same nationality of the business.

Nonimmigrant investors may be eligible for other types of work visas depending on the facts of their situation. For example, if the investor has an existing business in a foreign country and wants to set up a U.S. joint venture, affiliate, subsidiary, or branch office of the existing foreign business, they may be eligible for the L-1 intra-company visa as an executive, manager, or specialized knowledge employee.

Foreign investors may obtain lawful permanent resident status ("the green card") through the EB-5 investor visa. Under the EB-5 investor visa program, the investor and certain immediate family members can obtain lawful permanent residence if the investment is \$1,000,000 in a new commercial enterprise that employs ten or more U.S. citizens or authorized immigrant workers full-time and engages in the business through day-to-day management or policy formation. The investment amount is \$500,000 if you invest in a targeted employment area (TEA) or rural area (RA).

Authorities

- 8 C.F.R. § 214.2(e).
- Department of State, Foreign Affairs Manual, Volume 9, Visas. 9 FAM 41.51 Note 1 Treaty Traders and Investors.
- <travel.state.gov/content/visas/english/fees/treaty.html> (link to list treaty countries).
- Immigration and Nationality Act 203(b)(5).
- 8 C.F.R. §§ 204.6 & 216.6.

Comment

In 2011, USCIS announced the Entrepreneurs in Residence (EIR) program, which bought it together with private-sector startup expertise to assist immigrant entrepreneurs with visa resources on investing in the U.S. A result of the collaboration was the creation of Entrepreneurs Pathway, a website resource for foreign entrepreneurs interested in investing in the United States. The website link is <www.uscis.gov/eir>.

Further Reading

- IMMIGRATION PRACTICE DESKBOOK, 1st ed. (Minnesota CLE, 2015).

Notes

Intellectual Property Law

Chapter 12

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1. I am starting a new business. Do I have to register a trademark to protect my business name?

Answer

No.

A business name or “trade name” is the name under which an entity conducts its business. A trademark is any sort of designation (e.g., a word, name, symbol, or design) that indicates the source or origin of goods and is capable of distinguishing them from the goods of others. A service mark is like a trademark, except that it identifies the source or origin of the services, instead of goods.

The process of creating an entity to do business and registering that entity’s name (e.g., with the secretary of state) is quite different from the process for registering a trademark or service mark.

The same word or phrase can function both as a trademark and a trade name:

1. “This is a NIKE shoe.” (Here, “NIKE” is a trademark – used as an adjective.)
2. “At Nike, we are proud of our products.” (Here, “Nike” is a trade name – used as a noun.)

While rights in a trade name may be protected by its owner under common law and perhaps certain state statutes, the advantages provided by obtaining federal registration of a trademark or service mark are numerous and powerful:

1. Registration provides a registrant *nationwide protection* from the filing date of the application, and gives the registrant priority against someone else adopting the same or a similar mark after the date of the application.
2. Registration (on the Principal Register of the U.S. Patent and Trademark Office) provides constructive notice to all others, so that no subsequent user can adopt the mark in good faith. 15 U.S.C. § 1072.
3. Registration allows the owner to use the federal registration symbol ®. 15 U.S.C. § 1111.
4. A registered mark is recordable with U.S. Customs to *exclude importation* of goods bearing a mark that would infringe the registered mark. 15 U.S.C. § 1124.
5. Registration on the Principle Register of the Patent and Trademark Office is *prima facie* evidence of the registrant’s exclusive right to use the mark. 15 U.S.C. § 1057(b).
6. A mark becomes “incontestable” once registered on the Principal Register for five years, except if the mark is later abandoned, the registration was obtained by fraud, or the mark becomes generic. 15 U.S.C. § 1065.

7. Registration provides federal jurisdiction without regard to diversity of citizenship or the amount in controversy for infringement actions. 15 U.S.C. § 1121.
8. Remedies for infringement of a registered mark include injunctive relief, damages, recovery of profits, and the destruction of infringing labels, packages, and ads.
9. “Counterfeiting” of a registered mark is a criminal offense. 18 U.S.C. § 2320.
10. Having a federally registered mark helps establish the mark owner’s rights in a domain name dispute resolution proceeding. ICANN Rules for Uniform Domain Name Dispute Resolution Policy 3(b)(xiv) (2013).

Authorities

- Federal Trademark Law: 15 U.S.C. § 1051 *et seq.*
- 18 U.S.C. § 2320.
- ICANN Rules for Uniform Domain Name Dispute Resolution Policy 3(b)(xiv) (2013).

Comment

As noted above, while it is not required that a trademark be registered to protect a new business name, it might be worthwhile to consider it. This is particularly true if the brand/name is distinctive (e.g., XCEL ENERGY for energy services versus GROUP HEALTHCARE for HMO services) and the business has nationwide aspirations for selling its goods or rendering its services. The cost for clearing a trademark for use and possible registration is typically \$1,000 or less. The cost for obtaining a federal registration of a mark, assuming there are no substantive or procedural road blocks encountered, is typically less than \$1,500 (spread out over the course of about a year). While these expenses are not required for a new business venture, it may be quite prudent to incur them, especially when the strength and vitality of the new business is closely associated with its brand (e.g., CARIBOU for retail coffee shop services).

Further Reading

- J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION (4th ed. 2015).

Notes

2. Do I have to register a copyright to protect my creative work?

Answer

No. A creative work is afforded copyright protection from the moment it is fixed in a tangible medium of expression. 17 U.S.C. § 102(a). For example, as soon as words or software code are written, they are protected by copyright; as soon as a photograph is taken (whether on film or via a digital recording medium), it is protected by copyright; or as soon as paint is applied to a canvas, it is protected by copyright.

Regardless of whether the copyright in a creative work is registered with the U.S. Copyright Office, copyright protection is automatically secured for the work upon its creation. 17 U.S.C. § 408(a). Obtaining a copyright registration, however, provides several important advantages:

- Registration is a prerequisite for initiating an action for copyright infringement based upon a work of United States origin. 17 U.S.C. § 411.
- Registration is a prerequisite to recovery of statutory damages and attorney fees in a copyright infringement action. 17 U.S.C. § 412.
- Registration establishes prima facie evidence of ownership and validity of the copyright. 17 U.S.C. § 410(c).

U.S. copyright law protects all works of authorship as soon as they are fixed in a tangible form, be it on paper, film, digitally, or any other human or machine readable format. A work is “fixed” in a tangible medium of expression when it “is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration.” 17 U.S.C. § 101. Thus, the performance of a play is not itself protected by copyright but a video recording of that performance would be.

Authorities

- U.S.C. Title 17.

Comment

While copyright registration is not necessary to protect a creative work, it is quite useful and inexpensive. Typically, copyright registration should be sought when the creative work itself has commercial value (such as when revenue can be generated by selling or licensing the work or reproductions of the work). Registration is not an expensive proposition – the registration fee by paper filing is \$85, and by electronic filing is only \$55 (as of March 1, 2016).

3. What copying is allowed under the fair use doctrine?

Answer

Copyright infringement is excused and a copyrighted work may be used without implicating infringement liability for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research. 17 U.S.C. § 107.

The factors to be considered in determining whether use of a work is a fair use include:

1. the purpose and character of the use, including whether it is a commercial use or a nonprofit use;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for the work or the value of the work.

Most fair use analysis falls in two categories: either “commentary and criticism” or “parody.” Under the commentary and criticism category, the fair use doctrine allows an individual to reproduce some portion of a copyrighted work to comment upon or critique the copyrighted work. The underlying rationale for the commentary and criticism category is that the public reaps benefits from an individual’s review of the copyrighted work, which is often enhanced by including some portion of the copyrighted material. Under the parody category, the fair use doctrine allows an individual to ridicule another copyrighted work by imitating it in a comic way. This rule assumes that, due to its nature, parody necessitates taking some portion of the copyrighted work.

Authorities

- WILLIAM PATRY, 2 PATRY ON FAIR USE §§ 3-6 (2015).
- MELVILLE B. NIMMER & DAVID NIMMER, 4 NIMMER ON COPYRIGHT § 13 (2015).

Comment

Traditionally, in a fair use evaluation, the primary factor considered is whether the allegedly infringing use has an effect on the market for the underlying copyrighted work. The four statutory factors are not to be treated separately or in isolation, but are to be explored in each case and the results weighed together in light of the purposes of the copyright.

A determination of fair use is very fact-dependent. Some examples:

- Recording a television program for later viewing in a home was deemed to be fair use. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

- The disassembly or reverse engineering of a computer program in order to gain access and an understanding of its underlying ideas, processes, and methods of operation is a fair use, as long as the original program being examined is acquired in an appropriate manner. *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832 (Fed. Cir. 1992).
- Displaying a cached website in search engine results is a fair use. *Field v. Google Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006).
- A Harry Potter encyclopedia, which made the Harry Potter terms and lexicons available in one volume and made extensive verbatim use of text from the Harry Potter books, was not afforded a fair use defense. *Warner Bros. Entmt, Inc. v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008).
- A television program that copied one minute and 15 seconds from a 72-minute Charlie Chaplin film and used it in a news report about Chaplin's death was not fair use because the taken portions were substantial and part of the "heart" of the film. *Roy Export Co. Estab. of Vaduz v. Columbia Broad. Sys., Inc.*, 672 F.2d 1095, 1100 (2d Cir. 1982).
- A television station's news broadcast used 30 seconds from a four-minute copyrighted videotape of the 1992 Los Angeles beating of Reginald Denny was not a fair use because the use was commercial, took the "heart" of the work, and affected the copyright owner's ability to market the video. *Los Angeles News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119 (9th Cir. 1997).

Further Reading

- Circulars available at <www.copyright.gov>.
- MELVILLE B. NIMMER & DAVID NIMMER, 4 NIMMER ON COPYRIGHT § 13 (2015).

Notes

4. What is the process for obtaining a patent?

Answer

In the United States, the only way to obtain a patent is to file a patent application with the U.S. Patent and Trademark Office. 35 U.S.C. § 2. Each application must meet certain disclosure requirements and formalities. The disclosure must include:

1. Disclosure: Sufficient details so that a person skilled in the art to which it pertains can practice the invention. 35 U.S.C. § 112;
2. Claims: One or more claims that particularly point out and distinctly claim the subject matter which the inventor regards as his or her invention. 35 U.S.C. § 112.

Once filed (along with the required filing, search and examination fees), an application is eventually examined by a patent examiner of the U.S. Patent and Trademark Office. The examination process is referred to as the “prosecution” of the patent application, and is conducted on an ex parte basis. Because it is an ex parte proceeding, the applicant has an uncompromising duty of candor in dealing with the U.S. Patent and Trademark Office. 35 C.F.R. § 1.56.

In the United States, there are three types of patents that are issued by the U.S. Patent and Trademark Office:

1. “utility” patents for machines, articles of manufacture, composition of matter, and processes. 35 U.S.C. § 101;
2. “design” patents for the ornamental appearance of articles of manufacture or machines. 35 U.S.C. § 171; and
3. “plant” patents for asexually reproduced plants. 35 U.S.C. § 161.

For utility patents, the invention must meet three statutory requirements for patentability:

1. Utility (35 U.S.C. § 101)
 - a. An invention must be useful.
 - b. The invention must be directed to a process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.
2. Novelty (35 U.S.C. § 102)

For example:

- a. An applicant’s invention cannot have been patented or described in a printed publication, or in public use, on sale, or otherwise available to the public before an applicant files a patent application for intervention.

- b. Before an applicant's filing of an application for the invention, the invention must not have been previously patented or described in a published patent application.

3. Non-Obviousness (35 U.S.C. § 103)

"A patent for a claimed invention may not be obtained, notwithstanding that the claimed invention is not identically disclosed as set forth in section 102, if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains. Patentability shall not be negated by the manner in which the invention was made." 35 U.S.C. § 103

For example, even if an invention is "new," a patent will not be granted if the invention is a trivial or obvious modification of the existing state of the art. *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 82 USPQ2d 1385 (2007).

During prosecution of a patent application before the U.S. Patent and Trademark Office, a negotiation is conducted between the applicant and the U.S. Patent Examiner regarding the form and substance of the patent application and invention. From filing to issuance, the average time for utility patent prosecution is about three years. The negotiation is about the scope of the claims of the patent application, where each claim is a written definition of the invention for which the patent is sought. If and when agreement is reached as to the scope of the claim, and the issue fee is paid for that patent, a U.S. patent is granted.

U.S. patents are issued for fixed terms, and cannot be renewed or extended. A design patent is issued for a term of 15 years from the date of the patent grant, with the exception of design patents issuing from applications filed prior to May 13, 2015, which issue for a term of 14 years. 35 U.S.C. § 173. Utility and plant patents are issued for a maximum term of 20 years from the date the patent application was filed. 35 U.S.C. § 154. A utility patent's term can be adjusted or extended as a result of certain applicant or government delays related to the patent application or product. 35 U.S.C. §§ 154 & 156. Once a patent expires (at the end of its term), the invention enters the public domain and the public is free to practice that invention. 35 U.S.C. § 154.

Authorities

- 35 U.S.C. §§ 2, 101, 102, 103, 112, 154, 156, 161, 171 & 173.
- 35 C.F.R. § 1.56.
- *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 82 USPQ2d 1385 (2007).

Comment

The 2011 America Invents Act was signed into law on September 16, 2011 by President Obama, which revised certain portions of the patent statute. One of the most significant revisions was to change U.S. patent law from a "first-to-invent" system to a "first-to-file" system. The "first-to-file" portion of the new law became effective for applications filed on or after March 16, 2013.

5. If I invent something at work, do I own it, or does my company own it?

Answer

It depends.

Under United States law, the rights to an invention initially vest in the inventor upon creation of the invention. For instance, the patent and copyright clause in Section 8 of the United States Constitution states that Congress has the power: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Also for instance, 35 U.S.C. § 101 states that, "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."

Rights to an invention are treated as personal property and may be transferred from the inventor to another legal entity (e.g., another person or a company). 35 U.S.C. § 261 states for example that "[s]ubject to the provisions of this title, patents shall have the attributes of personal property," and that "[a]pplications for patent, patents, or any interest therein, shall be assignable in law by an instrument in writing."

Inventors that work for companies commonly sign an employment agreement contract having an invention assignment clause that obligates the employee inventor to assign any inventions conceived during the course of employment to his or her employer. Additionally, when a company hires a consultant to develop a product (e.g., possibly make an invention), the consultant has an implied obligation to assign any invention to the company if the invention reasonably relates to the scope of the consultation, absent an agreement to the contrary. Accordingly, although rights to an invention generally initially vest in the inventor, the rights are often transferred to the company/employer by means of an explicit or implicit contractual agreement.

Some employment agreements may state that an employee is obligated to assign any invention made at any time during the course of his or her employment to the employer. *See e.g., NeoNetworks, Inc. v. Cree*, No. A07-0729 (Minn. Ct. App. May 20, 2008). In Minnesota, these agreements may be held to be unenforceable as being against public policy by Minnesota Statutes section 181.78. In particular, the statute states that if no equipment, supplies, facilities, or trade secret information of an employer was used and an invention was developed entirely on an employee's own time, an employer cannot force an employee to assign that invention to the employer.

Authorities

- U.S. CONST. art. 1, § 8.
- 35 U.S.C. § 101.
- 35 U.S.C. § 261.
- *NeoNetworks, Inc. v. Cree*, No. A07-0729 (Minn. Ct. App. May 20, 2008).
- MINN. STAT. § 181.78.

Comment

If an employee is hired to invent, and in fact does contribute to the development of new products for his or her employer, the company would own that invention (even without an explicit invention assignment clause or employment agreement). However, if an employee is hired in another capacity (e.g., sales, accounting, or inventory management (e.g., forklift operator)), and that employee contributes to an invention of the employer, the issue becomes more fact-dependent. MINN. STAT § 181.78.

Further Reading

- William P. Hovell, *Patent Ownership: An Employer's Rights to His Employee's Invention*, 58 NOTRE DAME L. REV. 863, 864 (1983).
- *Ingersoll-Rand Co. v. Ciavatta*, 542 A.2d 879 (N.J. 1988).
- *Eaton Corp. v. Giere*, 971 F.2d 136 (8th Cir. 1992).

Notes

6. Are patented inventions protected worldwide or just in the U.S.?

Answer

Patent protection is available worldwide but is jurisdictional in nature, and the form and scope of protection varies from country to country. For a U.S. company, the typical process for obtaining international patent protection involves first filing a U.S. patent application. There are then three options for obtaining protection outside the U.S. based upon that U.S. patent application. These options include:

1. filing direct in other countries, if a patent office in the desired other country is available;
2. filing an application in the European Patent Office (EPO), which can be brought into force in most Western European countries;
3. filing an application under the Patent Cooperation Treaty (PCT), which by itself does not convey any rights, but rather reserves the patent applicant's rights to file corresponding applications in designated other countries. 148 countries are members of the PCT; and
4. filing an International Application for your design under the Hague System for the International Registration of Industrial Designs. The International Application does not require any prior national application or registration, but similarly to PCT applications for utility inventions, the design can be protected at the international level in any or all countries subscribing to the Hague System.

Direct Filing

An application can be filed in other countries if that country is equipped to examine patent applications. Most industrialized countries have such offices and will examine patent applications.

European Patents Office Application

The European Patent Office (EPO) is a single body which examines applications for most European countries. The EPO is an alternative for the applicant even if a desired country has a patent office to examine patent applications. With the EPO, the applicant can have the application examined once, and if allowed, can bring the subsequent patent into force in designated European countries. Generally, filing an EPO application is cost effective if protection is sought in three or more European countries.

Once the patent has been allowed, the applicant is then required to obtain necessary translations (English, German and French are mandatory) in order to bring the patent into force. Each country also requires that grant fees be paid in order to bring the patent into force in each of the countries.

PCT Application

A PCT application conveys no rights to the applicant and therefore is not a substitute for either the direct filing of the application in the selected country or the filing of the application with the EPO. Rather, a PCT application

reserves the applicant's rights to file in other countries. By filing a PCT application, an applicant defers the date upon which filing must be made, hopefully until the amount of coverage available for patent protection and the interest of the invention in the marketplace can be more clearly defined.

It is possible to designate the EPO without individually designating every country belonging to that office. By filing a PCT application, the applicant reserves its right to file applications in the designated country until about 30 months after the original U.S. filing date.

Almost all other countries impose maintenance fees (annuities) during the pendency of the application and maintenance fees during the term of the allowed patent. Currently, these maintenance fees start at a small amount of \$200 to \$350 per year, per country, and escalate quickly to \$1,000 to \$4,500 per year, per country, especially at the end of the patent term

Comment

Seeking international patent protection is an expensive proposition, and takes several years to bear fruit. It can provide a significant advantage, however, for a company attempting to raise capital or trying to elevate the value of the company by showing that steps have been taken to protect the intellectual property of the company in areas outside the U.S. (e.g., markets or sources of competitive manufacturing). Enforcement of international patent protection is quite mature in some countries (e.g., in Europe) but not as fully developed in others (e.g., China and India). It is also an expensive proposition, although not typically as expensive as U.S. patent litigation.

It is important to remember that in all countries, a patent is not an affirmative grant of rights from the government. Rather, a patent provides the owner of the patent with the right to exclude others from engaging in certain activities related to the patented invention for a limited period of time.

Further Reading

- DONALD S. CHISUM, CHISUM ON PATENTS (2016).
- Information regarding international patent protection at <www.uspto.gov>.

Notes

7. How are trade secrets different from patents?

Answer

Both trade secrets and patents protect ideas. However, to obtain a patent, one must allow that idea to be published (in the patent). The opposite is true with respect to trade secret protection—secrecy of the idea is fundamental. Another important distinction between patent protection and trade secret protection is that patent protection is only granted for a limited period of time (20 years from your utility patent application filing date), while trade secret protection can last indefinitely, as long as appropriate measures are taken to protect the trade secret information.

In Minnesota (as in most states),

“Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique or process, that:

- i. derives independent economic value, actual or potential, for not being generally known and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and
- ii. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

MINN. STAT. § 325C.01, SUBD. 5; *see also Electrocraft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890 (Minn. 1983).

This definition of a “trade secret” comes from the Uniform Trade Secrets Act, which Minnesota and 47 other states have adopted (as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands).

Trade secret rights begin upon creation of the trade secret (as opposed to patent rights, which begin upon the issuance of a patent). Trade secret rights can be lost by:

1. unrestricted disclosure of the trade secret by the owner to another;
2. failure to maintain reasonable security for the trade secret information;
3. independent creation and disclosure of the trade secret by another; or
4. “reverse engineering” – figuring out trade secrets of another by examining his or her product obtained lawfully.

Trade secret protection arises under state law. Patent protection arises under federal law. Federal U.S. patent laws do not preempt protection of trade secrets under state law.

8. Will the filing of a UCC-1 financing statement under Article 9 of the Uniform Commercial Code put me, as a lender, in the best position to protect my security interest in someone's intangible assets (which include "intellectual property")?

Answer

It depends.

Under Article 9 of the Uniform Commercial Code, the general procedure for perfecting a security interest involves the filing of a UCC-1 financing statement with a relevant state agency. But, sometimes federal law preempts state law. This is the case for some types of intellectual property, and that is why where to record a security interest depends on what kind of intellectual property is included in the secured asset.

Intangible assets include intellectual property, which may include trademarks (registered or unregistered) and goodwill, inventions, pending patent applications, issued patents, trade secrets, and domain name registrations.

A UCC-1 filing is necessary for the following intellectual property assets:

- trade secrets;
- issued patents, pending patent applications, and inventions;
- unregistered copyrights;
- trademarks; and
- domain names.

For pending patent applications and issued U.S. patents, recording the security interest with the U.S. Patent and Trademark Office is highly recommended.

For registered copyrights, recording the security interest at the U.S. Copyright Office is necessary.

Authorities

- Federal Trademark Law – 15 U.S.C. § 1051 *et seq.*
- Uniform Commercial Code, Article 9.

Comment

Here are some tips that could be useful to improve the situation for the lender.

1. Have the collateral description include everything associated with the secured intellectual property, such as, for example, goodwill; licensing rights; foreign rights, including rights of priority; rights to sue for infringement; distribution rights; etc.
2. In the collateral description, include “all now existing, after-acquired, or created” intellectual property.
3. Require the borrower to:
 - a. promptly register any newly-acquired or created intellectual property, and to notify the lender of any newly-acquired or created intellectual property so the lender can properly perfect its interest in the collateral;
 - b. provide periodic intellectual property updates to the lender;
 - c. timely pay (for patents) all maintenance fees and (for trademarks) all continued use and renewal fees;
 - d. notify the lender about any intellectual property infringement litigation;
 - e. cooperate with the lender in protecting the intellectual property;
 - f. warrant that, as to the intellectual property, the borrower has good title, there are no prior security agreements or assignments, and that the intellectual property is valid and enforceable; and
 - g. cooperate upon default and provide a power of attorney that permits the lender to assign and register its rights to the intellectual property upon foreclosure.

Further Reading

- J. THOMAS MCCARTHY, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* (4th ed. 2015).

Notes

9. I hired and paid a non-employee to design or build something for my company. Do I own the copyright to the “work?”

Answer

No.

A non-employee creator of a “work” generally retains the copyright rights to that work. But, if the creator (i.e., author) agrees in writing that anything created in the course of the project (and the associated copyright rights) is assigned to and owned by the company, then the company owns the copyright rights to the work.

The company might hire such a non-employee to design or build such things as product packaging, software, a logo for use as a trademark, or to build or create content for the company’s website (and these are just examples).

Absent a written agreement that transfers the creator’s copyright rights to the company, however, the company does not own the copyright rights, and consequently, does not have the right to do any of the following:

- make copies of the packaging;
- make copies of the software so it can be put on several computers;
- make copies of the design (logo) so it can freely advertise and use the logo in connection with any product or service the company sells; and
- make copies of the new content on the company’s website.

Without a written agreement, what your company actually owns is the original copy of the “work” it received.

There must be a written agreement, because there is a federal statute that specifically states that copyright rights can only be transferred in writing:

A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner’s duly authorized agent.

17 U.S.C. § 204.

Authorities

- Federal Copyright Law – 17 U.S.C. § 101 *et seq.*
- 17 U.S.C. § 204.
- 17 U.S.C. § 101.

Comment

This is absolutely one of those situations where one “must get it in writing.”

But what if you just call it a “work made for hire?” Can’t the company deem something to be a “work made for hire” in order to deal with copyright ownership issues? “Work made for hire” is also defined by a federal statute (17 U.S.C. § 101), and there are only two situations in which a “work made for hire” can exist. The first is when the work is prepared by an employee within the scope of employment. The second situation relates to a specially ordered or commissioned work for nine very specific types of works. In short, the company cannot make an arrangement a “work made for hire” simply by inserting this phrase in an agreement. Even if the company did, the enforceability of such a written provision is doubtful, unless the work is one of the nine very specific types of works mentioned in the statute.

Further Reading

- MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT (2015).

Notes

Adoption Law

Chapter 13

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1. How do we begin the adoption process?

Answer

Adoption is the legal process through which a legally recognized parent-child relationship is established where one otherwise does not exist. An adoptive parent has the same rights, duties, and responsibilities to a child as does a parent to whom the child is born. Adoption is a creature of statute. Adoptions are controlled by the language contained within the statutes. While adoption is a creature of statute, case law has established that adoption statutes are to be liberally construed to accomplish their purpose. The best interests of the child are paramount in an adoption proceeding.

The primary challenge for most people beginning the adoption process is to find an adoptable child. Over the last several decades, demographics have shifted to a dramatic degree making it very difficult to find newborn or very young and healthy children who are adoptable. With the advent of the Internet, there are now adoption agencies and adoption facilitators who are located all over the country who advertise matching services to help adoptive parents find birth parents wanting to place their children for adoption. Searching on the Internet is one way to find these contacts and to establish and obtain information, but it is critical to approach this process cautiously as there is much misinformation on the Internet as well as persons and entities who seek to take advantage of people in the vulnerable position of desperately seeking to start a family in the face of infertility issues or other barriers to building a family. In addition to Internet resources, there are many very good and reputable local adoption agencies in the state of Minnesota who are happy to provide information about not only their services and programs, many of which include matching services, but also general information on the adoption process.

If a person is interested in finding out about the legal process, there are attorneys who specialize in adoption who will usually meet with potential adoptive parents or potential birth parents and provide an overview of the adoption process. The American Academy of Adoption Attorneys is a national organization of attorneys who specialize in adoption. They have a website at <www.adoptionattorneys.org>. There is another national organization called RESOLVE that also assists people who are experiencing problems with infertility. That group deals with both adoption and assisted reproduction. If the Internet is not something the person is comfortable with in getting started in obtaining information on adoption, the person should make an appointment with an adoption attorney or visit a licensed adoption agency.

Word of mouth is also invaluable when starting out in the adoption process. There often times are birth parents who are related to co-workers, friends at your church or synagogue, people at schools, and people in groups or organizations people belong to. Adoption connections are made in all of these different and often informal venues.

Another option is to contact the local county social services department and explore the possibility of becoming a foster parent and adopting a waiting child in the state guardianship program. These are children whose parents are voluntarily consenting to having their children adopted through the state ward program or they have had their parental rights terminated for neglect or child abuse. Persons can be licensed as foster parents after they have gone through the foster parent training and licensing process; in many circumstances they may be eligible to adopt the foster children who are placed with them. It is important to understand and advise potential clients considering a state ward adoption that these adoptive placements often involve children with significant special needs; potential adoptive parents who enter the foster care system looking to do foster care and possible adoption should be aware of the special needs that the children come with and determine if that is the type of adoption they wish to pursue.

Once a child has been identified for an adoption, in most types of adoptions it will be necessary for the adoptive parents to have an adoption homestudy completed which must be done by a licensed child placing agency. Therefore, in most adoptions it will be necessary to retain the services of an adoption agency early in the process. It would also be appropriate to begin discussing the legal requirements for the specific type of adoption that is being considered as soon as your clients begin considering adoption. The best practice is to have both the birth parents and the adoptive parents represented by separate legal counsel; it is considered unethical conduct for an attorney in Minnesota to represent both the birth parent(s) and the adoptive parent(s) in the same adoption. The agency that will be doing the homestudy will also provide various related services such as birth parent counseling, assistance in drafting post-adoption contact agreements, and also facilitating the criminal and child protection background checks that are a part of the evaluation process to determine suitability. The agency can also help in determining what, if any, birth parent expenses can be paid.

Attorneys can advise on such matters as the legal rights of birth parents, how to properly terminate those parental rights or obtain a valid consent to the adoption, how to negotiate and draft a contact agreement and order, and if the child happens to be of Native American heritage, how to comply with the federal Indian Child Welfare Act and the Minnesota Indian Family Preservation Act, and if the adoption will involve more than one state, how to address the inherent complications that come with the applicability of the Interstate Compact on the Placement of Children. If the matter is going to be an interstate adoption where birth parents live in one state and the adoptive parents live in another, it will be important to have experienced agencies and attorneys involved in both states in order to comply with all of the interstate requirements that come into play when a child is moved across state lines and where two sets of often divergent substantive adoption laws must be reconciled.

In sum, you must first find a child who is adoptable. You must then involve a reputable adoption agency to provide necessary support services, and you will then need to confer with legal experts to determine the legal process.

Authorities

- *Petition of Jordet*, 80 N.W.2d 642 (Minn. 1957).

Comment

I will frequently get calls from persons not knowing where to begin the adoption process or how to find an adoptable child. I am clear with them that as an attorney I cannot help locate or place a child with them, but I can and do walk them through the different types of adoptions, refer them to adoption agencies and other adoption resources, and discuss the various legal requirements and pitfalls. They will then often come back to me after they locate a child to adopt and ask me to represent them in finalizing the adoption.

Further Reading

- Jody DeSmidt, *Adoption and Assisted Reproductive Technology Law*, in MINNESOTA CHILD CUSTODY DESKBOOK, 2d ed., ch. 23 (Minnesota CLE 2011, updated 2015).
- Amy M. Silberberg, MINNESOTA ADOPTION LAW AND PRACTICE (Lexis Law 1999 & updates).

2. One of my co-workers has a teenage daughter who has become pregnant; she wants us to adopt this child. Can we? How do we do it?

Answer

The answer to this question has both a practical component and a legal component. The practical part is that the client must determine whether he or she is in a position financially, emotionally, and physically to adopt a child. Once it is determined the client feels comfortable going ahead with this endeavor, the client will then want to involve him or herself with both a licensed adoption agency as well as reputable legal counsel to guide them through the process. With regard to the adoption agency, the client will want to visit the agency to determine if the agency believes that person is a good candidate to adopt and that the agency will be able to provide a favorable homestudy. This will involve looking into the potential adoptive parent's finances, home safety and sufficiency, mental and physical health, criminal history, any involvement with child protection, and any other factors that may be a concern as to whether the potential adoptive parent is a suitable potential parent. They will also explore issues regarding the potential adoptive parent's age and family circumstances to determine if adoption of this particular child will be appropriate. The potential adoptive parent will need a homestudy from a licensed child-placing agency that supports this adoption before a court will grant the adoption petition. The potential adoptive parent will also need to have a criminal background check, known as an Adam Walsh background check, completed. This reviews the criminal and child protection history of anyone older than 13 living in the potential adoptive parent's home. These search results are generally incorporated into the adoption homestudy.

In addition to meeting with an adoption agency, a potential adoptive parent will also want to meet with an attorney experienced in adoption practice. The attorney will review the circumstances of this particular birth parent with whom the potential adoptive parent had contact and determine what particular issues may arise with getting a consent to the adoption from her, determining what steps need to be taken with a birth father, whether the birth father is known or unknown, and whether he will cooperate and whether the birthmother wants to involve him in the process. There will be a discussion with the attorney about whether the birth father is going to be involved in the pregnancy, will have his name put on the child's birth certificate, and if he going to be involved with the adoption agency. Discussion will be had about how adoption consents are obtained, when they can be signed and when they become irrevocable. The question will also be asked whether the child is of Native American heritage, and if so, the attorney should discuss the additional procedural and notice requirements under the federal Indian Child Welfare Act and the Minnesota Indian Family Preservation Act, federal and state statutes that apply when children are either enrolled members of Indian tribes or eligible for enrollment based on the child's parents' enrollment or tribal affiliation status. If the birth mother lives in another state, discussion will be had about how to comply with the Interstate Compact on the Placement of Children. Issues will also be discussed regarding compensation or payment of the birth parents for any of their financial needs and services and whether the adoption will be a closed adoption or an open adoption, and if open, what the terms of any open adoption agreement and order would be.

Both the adoption agency aspects and the legal aspects of the potential adoption must be considered before a definitive answer can be given as to how the adoption will work and whether the adoption is likely to be successful.

3. Would becoming foster parents assist us in becoming adoptive parents? How does one become a foster parent?

Answer

Becoming a licensed foster parent is one avenue towards becoming an adoptive parent. Under the federal statute known as the Adoption and Safe Families' Act of 1997, there was a federal push to reduce the number of children languishing in foster care. The underlying purpose of the federal statute was to encourage foster parents to adopt the children who are placed with them in foster care and move more quickly to permanent placements for children whose parents are not able to parent them for whatever reason. With the passage of that federal statute, states were given financial and other resources and encouragement to create what became known as the "Fost-Adopt" programs. In these programs, foster parents are trained and prepared to be licensed foster parents to take in foster care children, while at the same time they are encouraged to consider adopting the children placed with them in the event the children are unable to return home.

These children who enter the foster care system and whose parents were unable to have their children returned to them are referred to as "state wards" and these adoptions are often called "state ward" adoptions. They are unique adoptions in the sense that these children enter the system usually through proactive steps taken by the local county child protection office in response to reports of child abuse, neglect, or abandonment. Once the county investigates and determines that the children cannot remain in the care and custody of the biological parents, the children are removed from the parents' home and placed in foster care, all under the supervision of the local juvenile court. Case plans are put into place to address the issues in the family of origin giving rise to the removal of the children and after a period of time, if it is determined that changes cannot be made, the family must move to permanency which usually means that the child is either transferred to the custody of a relative or close friend, a termination of parental rights occurs or the birth parents' consent to an adoption, and an adoption then occurs.

There is a strong preference under Minnesota law for biological siblings to be placed together and for children to be placed with relatives whenever possible. These preferences can often lead to contested litigation regarding the adoptive placements when relatives step forward to adopt a child and foster parents who have had the child in foster care placement also wish to adopt. Competing adoption petitions often get filed in these cases and ultimately a court is asked to determine who will adopt the child. The county child protection office is the agent of the state's Commissioner of Human Services; that county makes a preliminary determination as to who they will consent to adopting the child. The consent is not to be unreasonably withheld from any of the parties and the parties are then free to take this up with the juvenile court if they disagree with the recommendation and support of the county. Many of these cases are uncontested, as there are not relatives who step forward or often relatives who do step forward to adopt may not have the support of the county for a variety of reasons.

Many of these children in the foster care system are older children who have been in the foster care system for a period of time or are removed later in their childhood. They also often enter the child protection system with very serious physical disabilities and emotional challenges. Many of these children have been severely abused, whether emotionally, physically, or sexually, and as a result, have significant mental health and behavioral issues. Attachment issues, chemical dependency issues, and behavioral issues are not uncommon. People considering

becoming foster parents with the hope of adopting children should realize the population from which these children come from and be prepared to accept children with those kinds of backgrounds. There are also many multicultural placements that occur, as unfortunately many of the children in the foster care system are coming from communities of color and there are more caucasian foster parents wanting to adopt than there are potential adoptive parents in the children's own communities. Foster parents seeking to adopt should be open to a multicultural adoption experience.

To become a licensed foster parent, a person must apply through their local county social services department. Background checks similar to those conducted as part of a private adoption study will be conducted by the county and the county will make a determination based on state regulations and statutory provisions as to whether the person qualifies to be a foster care parent. Foster parents are compensated for their time and efforts for caring for foster children. They must meet the requirements regarding housing standards and other relevant considerations including criminal and child protection background checks. There will also be training that the foster parents will be expected to attend and they will be assigned a foster case worker through the county who will guide them through the process. There are no costs involved for the foster parents and there are financial subsidies available even after the adoption is finalized if the children have special needs and meet the requirements for an adoption subsidy.

Authorities

- MINN. STAT. ch. 259 & ch. 260C.

Comment

The numbers of disrupting adoptions seems to be on the rise of late. These are situations where adoptive parents feel they can no longer parent an adopted child and they seek to have their parental rights terminated voluntarily. Unfortunately, the great majority of these disruptions are coming from state ward adoptions and international adoptions involving children with special needs where there may have been inadequate background checks done of the adoptive parents and a failure to fully obtain or provide information about the child being adopted with the adopting parent.

Further Reading

- Jody DeSmidt, *Adoption and Assisted Reproductive Technology Law*, in MINNESOTA CHILD CUSTODY DESKBOOK, 2d ed., ch. 23 (Minnesota CLE 2011, updated 2015).
- Amy M. Silberberg, MINNESOTA ADOPTION LAW AND PRACTICE (Lexis Law 1999 & updates).

Notes

4. What are the different kinds of adoptions? Are some more complicated and/or expensive than others?

Answer

There are many different types of adoptions, including agency, state ward, direct placement or independent, step-parent, relative, co-parent or second parent, adult, and international. There is significant variance between these types of adoptions as to the legal and procedural requirements and the costs.

The simplest types of adoptions are step-parent adoptions. These adoptions do not require an adoption homestudy or post-placement report and they do not require the same formalities that other adoptions require in obtaining a consent to the adoption by the other biological parent who is giving up his or her parental rights in order to allow the child to be adopted by the other parent and his or her spouse or significant other. Complications that can arise in these types of adoptions involve a parent who has disappeared or a parent who is resisting the idea of an adoption, in which case a termination of parental rights proceeding—which is an ancillary proceeding filed in addition to the adoption proceeding—must be commenced. In that situation, there must be a statutory basis to terminate the parental rights. Examples of statutory bases to terminate parental rights include failing to meet court-ordered financial support obligations, abandonment, being palpably unfit to be a parent to the child, or the commission of certain serious criminal offenses, usually involving children. Contested termination of parental rights proceedings can be expensive and lengthy proceedings in which public defenders frequently get appointed to represent the parent whose rights are being terminated.

Another type of adoption is an agency adoption; this can involve either a private agency or a public agency in a state ward adoption. Private agency adoptions are adoptions that are organized and supervised by a private, licensed adoption agency. The agency will very often be involved in matching the adoptive parents with the child; the agency will provide the adoption homestudy, the post-placement report, the necessary criminal and child protection background checks, and will facilitate providing birth parent counseling, counseling services to the adoptive parents, post-adoption services, assistance with working out the possible payment of adoption-related expenses for the birth parents, and helping to negotiate the terms of a post-adoption contact agreement between birth parents and/or birth relatives and the adopted child. In many of these agency adoptions, attorneys will also be engaged to represent the parties and to facilitate the legal aspects of the adoption. Agency adoptions that are done through county social services departments are referred to as state ward adoptions and those adoptions involve the placement and adoption of children in foster care as discussed in other portions of this chapter.

Another common type of adoption is a direct placement or independent adoption. This is an adoption where a birth parent independently locates and selects an adoptive parent(s) to adopt her child or children. An adoption agency is involved, but they are generally retained to provide the limited services of preparing an adoption homestudy and possibly providing birth parent counseling and a post-placement report. These adoptions often have more attorney involvement than other adoptions and are frequently the types of adoptions that involve interstate placements. The adoption process in direct placement adoptions usually begins even before the child is born, with the adoptive parents working with an attorney to obtain a pre-birth, pre-adoptive custody order that will allow the child to leave the hospital with the adoptive parents and remain with the adoptive parents pending finalization of the adoption.

Another category of adoptions are co-parent adoptions, also known as second parent adoptions. These adoptions are similar in many respects to a step-parent adoption, but with added complications because they involve same-sex couples or couples who are unmarried. See the discussion *infra* in section 13 of this chapter about same-sex adoptions and Minnesota's gender-neutral marriage statute. As with direct placement adoptions, these adoptions will usually require an adoption homestudy and a pre-adoptive custody order be obtained. If the parties are related to the child, it may be possible to have a homestudy and post-placement report waived because of that relative status.

In some respects, the most complicated and perhaps most expensive adoption is an international adoption. In Minnesota, these adoptions are largely overseen and carried out by private licensed adoption agencies. These agencies must comply with an international treaty called the Hague Convention which the United States signed onto several years ago. This requires that agencies doing international adoptions receive particular certification and their practices are overseen by the United States Citizenship and Immigration Services (USCIS, formerly the INS). Most of the agencies working in international adoption have cultivated relationships with foreign governments and foreign adoption agencies and programs that they work with. The agencies will do both the homestudy and post-placement report, as well as work on the immigration and citizenship issues that are inherent in these types of adoptions. There will often be substantial agency fees paid to the foreign agency and the local agency that the adoptive parents are working with. There will be significant travel expenses involved, as in most instances the adoptive parents are required to travel abroad at least once, and sometimes twice, in order to spend time in the foreign country both to process the adoption and to retrieve the child. Significant paperwork must be filed with the USCIS in order to address citizenship issues and in order to bring the child into this country legally. A final adoption hearing may occur in the foreign country involving that country's court process and there may be follow-up court proceedings in the United States depending on the particular circumstances of the adoption. The demographics of international adoptions are changing dramatically with numbers being reduced significantly since the United States joined the Hague Convention on international adoption. These types of adoptions must be carefully planned and it is critical to work with a reputable and experienced adoption agency with strong ties with the foreign country where the child to be adopted is located.

While international adoptions are complicated because of the particular requirements imposed by both the foreign country where the child is located and the Hague Convention, as well as the complications of immigration law that must be complied with in order to get citizenship for the child, domestic adoptions can also be complicated. Two categories of complication are especially common in domestic adoptions: birth father issues and compliance with the Indian Child Welfare Act. If a birth father is either not supportive of the adoption or actively taking steps to thwart the adoption, this will require applying the provisions of the Minnesota Father's Adoption Registry and possibly having to commence a separate termination of parental rights proceeding. Other complications can arise if a child is connected in any way with an Indian tribe, which then brings into play the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act. If either of these statutes apply, notice must be given to the affected Indian tribe and heightened burdens of proof and extended timelines may come into play. These complications can arise in any of the various types of domestic adoptions, and can be magnified still further if the matter involves an interstate adoption.

Authorities

- MINN. STAT. ch. 259.

5. What is an adoption homestudy?

Answer

An adoption homestudy conducted by a licensed child placing agency is required to be completed prior to placement of a child for purposes of adoption. MINN. STAT. § 259.41. This report must be filed with the court at the time the adoption petition is filed in an agency adoption. In a direct placement adoption, the report has to be filed along with motion for a pre-adoptive custody order. An agency has a right to charge a fee for conducting a study. At least one in-home visit with the prospective adoptive parents is required. Additionally, the homestudy has to include a criminal and child protection background check referred to as an Adam Walsh background check. If there is any criminal or child protection background, the effect of a conviction or finding of substantiated maltreatment on the ability of the prospective adoptive parent to care for a child must be addressed in the study. The adoption study must also include an assessment of the adoptive parents' current health, and if there are current health issues (the adoption agency typically seeks written verification from the treating physician of the prospective adoptive parents' ability to parent the child in spite of the current health issue), how these issues will be addressed in parenting with the child. The study also contains an assessment of potential parenting skills, the ability to provide adequate financial support for a child and the proposed parents' knowledge, and awareness of adoption issues, including where appropriate, knowledge and awareness relating to interracial, cross-cultural, and special needs if such issues are involved. Adoption agencies frequently require adoption training for the prospective adoptive parents prior to their issuance of an adoption study approving a home for placement.

An adoption study will contain the agency's recommendations regarding the suitability of the proposed adoptive parent(s) to parent a child. Practically, most agencies pre-screen applicants to determine those they know will not be able to get approval based on preliminary information received. An adoption study is valid for one year. If the proposed adoptive parents are waiting for placement of a child longer than 12 months, then an adoption study update must be completed prior to an adoptive placement. MINN. STAT. § 259.41, SUBD. 4. The adoption study update, like the study itself, needs to be completed by an agent of the Commissioner of Human Services for the state of Minnesota (a licensed child-placing agency).

The adoptive parents may request a summary report of their adoption study from the agency upon its completion. Use of the study, however, is limited to what is agreed to by the agency and the prospective adoptive parents. MINN. STAT. § 259.53, SUBD. 3(a).

As part of that homestudy, a background check has to be completed on any individual residing in the prospective adoptive home who is 13 years of age or older. The adoptive family members have to sign an authorization allowing the agency to access private data needed to complete the check and the prospective adoptive parents must identify all addresses where they have resided for the last five years. They also need to disclose any other names previously used. Once the prospective adoptive parents have provided this information to the agency, then the agency initiates the background check to be completed by the Commissioner of Human Services on each person ages 13 or older in the home.

An agency cannot issue an approved adoption study where the child to be adopted is a ward of the state or where Title IV-E funds are to be provided if the background check reveals a felony conviction, child abuse or neglect, spousal abuse, a crime against children, including child pornography, or a crime involving violence, including rape, sexual assault, homicide, physical assault, or battery.

Once an adoption petition has been filed with the court administrator's office, the court administrator is required to send a copy of the petition to the Commissioner of Human Services. In addition, the court administrator's office is required to forward a copy of the petition to the agency that placed the child for adoption or, in a direct placement adoption, the agency that is supervising the placement. If the child to be adopted is relative, then the court administrator's office is supposed to refer the petition to the local social services agency in the county in which the adoptive parents reside. MINN. STAT. § 259.53. The supervising agency is required to conduct its post-placement assessment and file a report to the court within 90 days of receipt of the adoption petition. When the agency files its report to court, it is also required to provide a copy to the Commissioner of Human Services. The post-placement assessment must, at a minimum, address the adaptation of the prospective adoptive parents to the child, the health and well-being of the child in the home, how well the child has been incorporated into the home, community and extended family of the adoptive family, and the level of the inclusion of the child's previous history into the prospective adoptive home, such as cultural and ethnic practices or contact with former foster parents or biological relatives, if relevant. A post-placement report is valid for 12 months following the date of its completion. If the agency recommends that the court not grant the adoption petition, then the agency completing the report is required to file the report with the court and also provide a copy to the local social services agency. Either one may then recommend the court dismiss the adoption petition. If the local social services agency determines that a continued placement in the home endangers the child physically or emotionally, then the agency may seek an order to remove the child from the home.

Of note, the statute provides that if the agency fails to complete its report within 90 days after the petition has been filed, the petitioner may schedule a final adoption hearing without the report being issued upon five days' notice to the agency and the local social services agency if not one and the same.

Authorities

- MINN. STAT. § 259.41.
- MINN. STAT. § 259.53.

Comment

As an attorney practicing in adoption law, you should familiarize yourself with the various adoption agencies in your vicinity, including the quality of their work, their reputation, and their charging practices with regard to homestudies, post-placement reports, and the taking of consents. There is significant variance from agency to agency on all of these items.

Further Reading

- Jody DeSmidt, *Adoption and Assisted Reproductive Technology Law*, in MINNESOTA CHILD CUSTODY DESKBOOK, 2d ed., ch. 23 (Minnesota CLE 2011, updated 2015).
- Amy M. Silberberg, MINNESOTA ADOPTION LAW AND PRACTICE (Lexis Law 1999 & updates).

6. How does a birth parent consent to an adoption? What is involved in the process? How soon after the birth of a child can the consent occur? Can the birth mother change her mind after she signs the consent?

Answer

Generally, there are two ways to free a child for adoption: by consent or by termination of parental rights. Minnesota Statutes section 259.24 provides that no child may be adopted without the consent of the child's parents. However, a consent is not required of a parent who is not entitled to notice of the proceedings, of a parent who has abandoned the child, or of a parent who has lost custody of a child through a divorce decree and upon whom notice has been served as required by Minnesota Statutes section 259.49. Consent is also not required of a parent whose parental rights have been terminated. MINN. STAT. § 259.49, SUBD. 1. If the child to be adopted is over 14 years of age, then the child must also consent to the adoption. In an adult adoption, only the consent of the adoptee is required. A consent is required of any parent whose name appears on the birth certificate of the child, any individual who has substantially supported the child, any individual who is married to the biological mother of the child within 325 days before birth or married to her within 10 days after birth, any individual adjudicated to be the parent of the child, any individual who has brought a paternity action and that action is still pending, and any individual who has properly registered with the Minnesota Fathers' Adoption Registry and followed through with any subsequent notices.

If an unmarried minor birth parent is consenting to an adoption of his or her child, the consent of the minor's parents or guardian is also required. If either or both of the minor parents are disqualified for any reason, then the consent of that parent is waived and only the consent of the guardian is necessary. If neither of the minor birth parents or guardian is qualified to give such a consent, the consent may be given by the Commissioner of Human Services. If the case involves an agency placement of the child, the agency overseeing the adoption has to ensure that the minor parent is offered the opportunity to talk to a lawyer, a clergy member, or a physician before consenting to the adoption. If the minor parent cannot afford the cost, the county is required to pay for it.

A consent to an adoption may not be executed sooner than 72 hours after the birth of a child and not later than 60 days after the child's placement. MINN. STAT. § 259.24, SUBD. 2(a). If an adoption plan has been made by one birth parent when there is another birth parent whose consent is required under the statute, then the birth parent who planned the adoption is required to provide notice to the other parent whose consent is also required within 72 hours after the child has been placed for purposes of an adoption. A birth parent who receives notice has 60 days from the placement of the child to consent or refuse to consent to the adoption. If the birth parent whose consent is required does nothing within that time frame, that parent is deemed to have irrevocably consented to the child's adoption. Notice of this provision is to be accomplished by personal service.

Consents must be in writing, witnessed by two competent witnesses, and acknowledged by a consenting party in front of a notary public. All consents by a parent also have to contain a notice to the parent that the parent has the right to withdraw the consent until it becomes final 10 working days after it was signed (unless the consent was one taken in open court as part of a consent through a child protection/termination of parental rights settlement). The birth parent must also be advised in writing in the consent document that the agency or attorney for the adoptive parents will submit the consent to the court. The consent itself does not terminate the birth parent's parental rights. Parental rights to a child may be terminated only by the completion of an adoption and an entry of a decree by a court or by a court order terminating parental rights. Unless the child is adopted or the birth parents' parental rights are terminated, that birth parent may be asked to support the child in the future.

Of practical note is that a consent if validly executed in accordance with the law of this state or in accordance with the law of the place it was executed is valid. Another state's consents are to be accepted by Minnesota courts for purposes of finalizing an adoption if the consent was validly executed under the laws of the state where the consent was taken.

A Minnesota consent to adoption can be withdrawn within 10 working days after being signed. Once the 10th working day goes by, the consent is deemed final and cannot be revoked except by proof of fraud. Working days are defined by rule and do not include weekends or legally recognized holidays. A timely withdrawal of a consent has to be done in writing, and it does not need to give a reason, but must be provided to the agency that took the consent within the 10-working-day frame to be valid.

The other way to free a child for an adoption is to terminate the parental rights of the parent or parents involved. This can be done by voluntary consents to termination of parental rights under Minnesota Statutes section 260C.301, subdivision 1(a) or by involuntary termination, Minnesota Statutes section 260C.301, subdivision 1(b). An involuntary termination of parental rights proceeding can be extremely complicated and expensive. It is important to note that a consent to an adoption is not a consent to terminate parental rights and care should be taken not to attempt to create a hybrid form. See *In Re the Welfare of A.M.P.*, 507 N.W.2d 616 (Minn. Ct. App. 1993).

Authorities

- MINN. STAT. §§ 259.24, 259.49 & 260C.301.
- *In Re the Welfare of A.M.P.*, 507 N.W.2d 616 (Minn. Ct. App. 1993).

Further Reading

- Jody DeSmidt, *Adoption and Assisted Reproductive Technology Law*, in MINNESOTA CHILD CUSTODY DESKBOOK, 2d ed., ch. 23 (Minnesota CLE 2011, updated 2015).
- Amy M. Silberberg, MINNESOTA ADOPTION LAW AND PRACTICE (Lexis Law 1999 & updates).

7. I would like my new husband to adopt my child from a prior relationship. What do I need the biological father to do in order for the adoption to occur? Can I terminate his parental rights, and if so, how do I do that and how much will it cost?

Answer

What is being attempted to do with this type of adoption is a step-parent adoption. Most of the complicated requirements for a consent to adoption are relaxed in the step-parent context. The consent form used by a parent in a step-parent adoption is simply an affidavit that is witnessed and notarized. The most common and the easiest approach is when you have a biological father who is willing to have the new spouse of the child's mother adopt his child and is willing to sign the consent. Complicating factors may be if there are outstanding child support arrearages not only owed to the biological mother, but to the county for reimbursement of financial support for the child. In those circumstances, the county must be involved in the planned adoption and the birth father must be aware that the adoptive mother and her husband are not able to forgive those arrearages for monies owed to the county. In many instances, the county will be happy to support the adoption and will frequently waive the payment. Often times the birth father wants to continue to have contact with the child or more commonly, paternal grandparents or paternal relatives want to have post-adoption contact. It may still be possible to obtain the consent and to salvage the adoption by working out a post-adoption contact agreement and order with paternal relatives.

These cases are more complicated in circumstances where the biological father either cannot be located or is not cooperative. If he refuses to sign a consent to the adoption, then his parental rights must be terminated through a separate juvenile court proceeding that is both complicated and potentially expensive. It must be proven that one of the statutory grounds can be met that would be a basis to terminate his parental rights. Under the termination of parental rights statute, this must be proven by clear and convincing evidence, and also that the termination is in the child's best interests. A birth parent whose rights are being sought to be terminated is entitled to a public defender and often times cases can involve significant discovery, expert evaluations and testimony, and numerous court proceedings. In the event the child is of Native American ancestry, further procedural protections must be complied with under the federal Indian Child Welfare Act. The costs of these proceedings can easily exceed \$5,000 to \$10,000 if they are complicated proceedings.

Authorities

- MINN. STAT. § 260C.301.
- Minnesota Juvenile Protection Procedure Rules.

8. I want to adopt a Native American child, but understand such adoptions are complicated because of the Indian Child Welfare Act. What does that statute do and require?

Answer

The Indian Child Welfare Act (ICWA), found at 25 U.S.C. §1901 *et seq.*, and the Minnesota Indian Family Preservation Act (MIFPA), found at Minnesota Statutes section 260.751 *et seq.*, must both be considered any time a child who is being considered for an adoption is potentially of Native American heritage. The ICWA specifically provides that a Native American child is someone who is a member of a tribe or is eligible for membership in a Native American tribe and whose parent is a member of a tribe. MIFPA has a broader definition and includes any child who is eligible for membership in a Native American tribe, regardless of the status of the parent. If a child meets the MIFPA definition, then the Indian child's tribe is entitled to notice of the adoption proceeding and the pre-adoptive placement proceedings regarding the child.

Such notice must be provided to the Indian child's tribal social services agency by registered mail with return receipt requested. If the identity of the Indian child's tribe cannot be determined, notice must be given to the United States Secretary of Interior, who has 15 days after receipt of notice to provide notice to the tribe. A tribe has a separate and independent right to intervene in the proceeding and the tribe may request and is entitled to an additional 20 days to prepare for the proceeding, if so requested. The right of the tribe is deemed separate and independent of either of the birth parents and the fact that the father is unidentified does not render the act inapplicable if it is known that the father, or alleged father, may be of Native American heritage. This includes voluntary adoptive placement where the birth parents may have made the adoption plan. *But see Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (United States Supreme Court interpreted ICWA to say that certain portions of the statute did not apply where the Indian birth father had never had legal custody of the child). The issue of whether the child is eligible for membership in the Native American tribe is determined by the tribe itself which is considered a sovereign nation and which has the exclusive right to determine who its citizens are. *See In Re the Welfare of S.N.R.*, 617 N.W.2d 77 (Minn. Ct. App. 2000).

Consents in ICWA cases must be done in court before a judge and cannot be done earlier than 10 days after birth. An ICWA compliant consent is revocable until rights are terminated in a termination of parental rights proceeding or by a final adoption hearing.

Authorities

- 25 U.S.C. § 1901 *et seq.*
- MINN. STAT. § 260.751 *et seq.*

9. I have a birth mother wanting to place her child with me, but I am concerned about the birth father who does not know about the pregnancy or the adoption plan. What are his rights and how does the Minnesota Fathers' Adoption Registry work?

Answer

The Minnesota Fathers' Adoption Registry was enacted with the intent and purpose of determining the identity and location of a putative father interested in a minor child who is, or is expected to be, the subject to an adoption proceeding, so that the putative father could put himself in a position of getting notice of an adoptive placement when he is not otherwise entitled to notice. MINN. STAT. § 259.52, SUBD. 1. The Minnesota Legislature created the comprehensive process, codified at Minnesota Statutes section 259.52, as the Minnesota Fathers' Adoption Registry, to "balance the putative fathers' interest with those of the child, the birth mother, and the adoptive parents." *Heidbreder v. Carton*, 645 N.W.2d 355, 369 (Minn. 2002). The intent and purpose is to establish a "clear cutoff date after which there is little risk that a putative father who has failed to timely register and who is not otherwise entitled to notice can disrupt the adoptive placement." *Id.* The dual purpose of the statute was to create a mechanism to protect the putative father's parental rights while also providing certainty as to when those rights are no longer protected so that an adoption could proceed unhindered.

A "putative father" is defined as a man who may be a child's father, but who is not married to the child's mother on or before the date of the child's birth and has not established paternity of the child according to Minnesota Statutes section 256.57 before the filing of a petition for adoption of the child. MINN. STAT. § 259.21, SUBD. 12. The Minnesota Fathers' Adoption Registry governs children born on or after January 1, 1998.

A putative father, in order to protect his interest in a child, must register with the Minnesota Fathers' Adoption Registry within 30 days after the child's birth. MINN. STAT. § 259.52. The registration form itself is very basic and requires only fundamental information, but it allows the birth father to protect his interest in having notice if the child is placed for purposes of adoption. MINN. STAT. § 259.52, SUBD. 10. If the child is placed for adoption, and the registry search reflects that an individual has registered, then certain notices to the alleged father are required under the statute. Upon receipt of the court required notices, the alleged father has 30 days to file his notice of intent to retain parental rights to the child and to initiate a paternity action. Failure to comply with the Minnesota Fathers' Adoption Registry by a putative father means that the father is barred from bringing or maintaining an action to assert any interest in the child during a pending adoption proceeding and is deemed to have waived and surrendered any right to any notice of any proceeding regarding the adoption of the child and is considered to have abandoned the child. Our Minnesota Supreme Court has upheld the Fathers' Adoption Registry as constitutional. In *Heidbreder*, the Minnesota Supreme Court stated that "adoption registries serve the interests of the child and the adoptive parents by establishing a clear cutoff date after which there is little risk

that a putative father who has failed to timely register and who is not otherwise entitled to notice can disrupt an adoptive placement.” *Heidbreder*, 645 N.W.2d at 369. One day late in filing should be treated as “one week, one month, or one decade late.” *Id.* at 370.

Counsel for an adoptive parent or a birth parent or any agency involved can request a final search of the registry. A registry search and results are required to be filed with the court prior to the finalization of an adoption of any child born in the United States on or after January 1, 1998. This is true regardless of whether there is an identified father who has consented to the adoption of a child. The Fathers’ Adoption Registry search results need to be filed in any adoption case in order for any adoption case to be finalized in Minnesota unless the child was born outside of the United States.

Failure to register is a bar to bringing or maintaining an action to assert an interest in the child during the pendency of an adoption and the father is considered to have abandoned the child. It is considered prima facie evidence of sufficient grounds to terminate a putative fathers’ rights under Minnesota Statutes section 260C.301, subdivision 2. If the father does not timely register and he proves by clear and convincing evidence that it was not possible for him to register within the specified time, that his failure to register was no fault in his own, and that he registered within 10 days after it became possible for him to do so, he is exempted from the registration timelines. However, lack of knowledge of pregnancy or the birth is not an acceptable reason for failure to register.

If a putative father had registered, then he must be served by an interested party by certified mail, return receipt requested or personal service of the following: notice of the location of where the adoption will be filed, intent to claim parental rights form, denial of paternity form, and consent to adoption form. The return receipt is to be filed with the court attached to copies of the original documents sent. Within 30 days of receipt of these notices, the putative father is required to file his completed intent to claim parental rights form with the court administrator in the county where the adoption will be filed and he needs to initiate a paternity action. It is clear that there is no exception for his failure to file the notice of intent to claim parental rights form within 30 days after his receipt of the notices. However, the requirement that he initiate a paternity action within 30 days of receipt is not a bar if he can show there is “good cause” why he was unable to initiate the paternity action within that timeframe. *T.D. v. A.K.*, 677 N.W.2d 110 (Minn. Ct. App. 2004) defined, “good cause” to be a requirement that the putative father show “he lacked the necessary power, authority, or means to do so.” In that case, the putative father argued that he was unaware of the ability to get court appointed counsel, that the form was misleading, and that he was preoccupied with an eye injury. According to the appellate court, none of these reasons were sufficient to overcome the statutory requirement that he initiate his paternity action within 30 days of receipt of registry notices.

Authorities

- MINN. STAT. § 259.52.
- *Heidbreder v. Carton*, 645 N.W.2d 355 (Minn. 2002).

Comment

Clients looking to complete an adoption are usually most fearful of the role of the birth father; they also find the Registry to be quite confusing. Be prepared to spend a good amount of time explaining how the Registry works and what its impact will be in your particular case.

Further Reading

- Jody DeSmidt, *Adoption and Assisted Reproductive Technology Law*, in MINNESOTA CHILD CUSTODY DESKBOOK, 2d ed., ch. 23 (Minnesota CLE 2011, updated 2015).
- Amy M. Silberberg, MINNESOTA ADOPTION LAW AND PRACTICE (Lexis Law 1999 & updates).

Notes

10. We are working with a birth mother who wants to place her child with us, but she is asking us to pay some of her living expenses. Can we legally pay such expenses?

Answer

Minnesota Statutes section 259.55 allows for the payment of certain expenses on behalf of a birth parent in any adoption. These expenses include the following: reasonable counseling, medical and legal fees which are supposed to be paid directly to the provider of the service; reasonable expenses for transportation, meals, and lodging incurred for the placement of the child or in order to receive counseling, legal, or medical services related to the pregnancy, birth, or placement of the child; reasonable expenses for adoption services provided by an agency at the request of a birth parent which are to be paid directly to the agency; and reasonable living expenses of the birth mother needed to maintain an adequate standard of living which the birth mother is unable to do otherwise because of a loss of income or other support resulting from the pregnancy. These expenses are allowable during the course of the pregnancy and for up to six weeks following the delivery of the child. The statute provides that if the birth mother is unable to be employed due to physical limitations relating to the birth of the child for longer than a six week period after birth, a request to extend this period may be made to the court within six weeks after the birth.

Payment of birth parent expenses is not and cannot be made contingent upon the placement of the child for adoption, consent to the adoption, or cooperation in the completion of the adoption. Specific expenses that are not allowed are the following: lost wages, gifts, educational expenses, or other similar expenses of the birth mother. If a certain expense appears to be unusual, one should exercise caution with the payment. If there is doubt, a motion before the court can answer whether a judge finds a certain expense to be reasonable and appropriate under the circumstances. The statute specifically prohibits a contract to require a birth parent to reimburse a prospective adoption parent for payments under any circumstances, including a refusal to consent to an adoption or the withdrawal of the consent to an adoption. Such contracts are deemed void as against public policy.

The statute provides that it is a gross misdemeanor for an individual to give, or a birth parent to accept, money or anything of value or compensation for the placement of a child for adoption, and it is a gross misdemeanor for any person to give money or anything of value to the birth parent of a child if the person has engaged in any placement activity in connection with the adoption of the child. MINN. STAT. § 259.55, SUBD. 3.

Authorities

- MINN. STAT. § 259.55.

11. We are working with a birth mother who says she wants to do an “open adoption” that includes post-adoption contact and visits with the child. Can we agree to such an arrangement? Is it legal in Minnesota and is the agreement enforceable?

Answer

Minnesota statutes provide that a birth parent or foster parent may enter into an agreement regarding communication or contact between an adopted child, adoptive parents, and a birth relative or foster parent that is legally binding and enforceable in the future. MINN. STAT. § 259.58. This agreement can be entered into between the adoptive parents and a birth parent, any other birth relative or foster parent with whom the child has resided prior to an adoption or any other birth relative if the child is adopted by a birth relative upon the death of both birth parents. Birth relatives are specifically defined by this portion of the statute as a parent, step-parent, grandparent, brother, sister, uncle, or aunt of a minor adoptee. The definition is broadened for an Indian child and includes members of the extended family as defined by law or custom of the Indian child's tribe or in the absence of law or customs, nieces, nephews, first or second cousins, in addition to the birth relatives defined otherwise. It is important to know as a practical matter that although not specifically provided for under the statute, situations have been approved by district courts involving contact agreement between adoptive parents, a minor child, and the child's Indian tribe where the child is a member or is eligible for membership in the tribe.

In order for the agreement to be legally enforceable, it must be in writing and contained in a written order that is entered prior to the adoption decree being granted. A court, upon receipt of a proposed contact agreement and order, must review the agreement and proposed order within thirty days of receipt or no later than the granting of an adoption decree, whichever is earlier. The proposed agreement and order must be in writing and signed by the prospective adoptive parents, the birth relative who desires to be a party to the agreement, and, if the child is being placed by an agency or is under the guardianship of an agency, a representative of that agency as well. A birth parent must approve an agreement between an adoptive parent and any other birth relative or foster parent in writing for it to become an order. It is possible to enter into a contact agreement where the parties' identities are not disclosed to each other. In order to grant the request for a contact order, the court must find that the proposed order is in the best interest of the minor child.

Failure to comply with an agreed upon court order regarding communication or contact is not a basis for setting aside an adoption decree or revocation of a written consent to an adoption after that consent has become irrevocable. Enforcement of a contact agreement is done by a petition or motion in family court. A certified copy of the order granting the contact, communication, or visitation must be filed with the motion and such a motion may not be brought until the parties have mediated or attempted mediation unless the parties agree to the proposed modification. If a motion needs to be brought to enforce a contact agreement, the prevailing party

may be awarded reasonable attorneys' fees and costs. The court may not modify the agreed upon order unless it finds modification is necessary to serve the best interests of the minor child and modification is agreed to by the parties to the agreement or that exceptional circumstances have arisen since the agreed upon order was entered that justify modification of the order.

Authorities

- MINN. STAT. § 259.58.

Comment

The fact that Minnesota law provides for an enforceable post-adoption contact agreement is a very valuable tool in negotiating adoptions where a birth father refuses to consent or where an Indian tribe is reluctant to support the adoption. Sometimes if the opposing party can be assured of either ongoing contact or even access to information about the child, that will allow the adoption to go forward without litigation.

Further Reading

- Jody DeSmidt, *Adoption and Assisted Reproductive Technology Law*, in MINNESOTA CHILD CUSTODY DESKBOOK, 2d ed., ch. 23 (Minnesota CLE 2011, updated 2015).
- Amy M. Silberberg, MINNESOTA ADOPTION LAW AND PRACTICE (Lexis Law 1999 & updates).

Notes

12. If we adopt a special needs child through the state foster care system, are there any governmental subsidies available to help us do that?

Answer

Whenever an individual is adopting a ward of the state, particular attention should be paid to whether the child qualifies for adoption assistance—otherwise known as an adoption subsidy. To qualify for an adoption subsidy, the adoptive parents and child must meet the requirements under Minnesota Statutes chapter 256N, known as the Northstar Care for Children Act. This statute sets forth the criteria for adoption subsidies, as well as payments for foster parents and relative custodians. The child must have been a ward of the state and in the foster care system before being eligible for an adoption subsidy, as well as present special needs and circumstances that would justify the payment of an adoption subsidy. The process and the criteria are complicated, the amount of the subsidy is tied to the level of need, and the terms of the subsidy can be negotiated and the decision is subject to appeal. No child on whose behalf federal Title IV-E adoption assistance or subsidy payments are to be made may be placed in any home where there is a disqualifying condition as a result of the criminal/child protection background of a proposed adoptive home. If a child is eligible for adoption assistance, the attorney must ensure that the adoption assistance agreement has been signed by the adoptive parents and the Commissioner of Human Services or its agent prior to the adoption being finalized. If an adoption is finalized prior to the agreement being finalized, then the adoption assistance cannot be granted.

Adoption assistance agreements are not available for direct placements or international adoptions.

Adoption assistance agreements provide a basic monthly cash payment and, in some cases, additional supplemental payments, based on the child's special needs, to the adoptive family. The subsidy package may also include medical assistance backup to the adoptive family's health insurance. Subsidies also provide for reimbursement of nonrecurring adoption expenses up to \$2,000 per child. Under certain circumstances, these agreements can be modified, terminated, or extended.

The adoption subsidies are not based on the financial circumstances of the adoptive parents, but rather on the special needs of the child. If a child received Social Security survivorship payments based on the death of a parent, those payments will continue to be paid on behalf of the child following the child's adoption. Those payments would also be in addition to an adoption subsidy. Adoption subsidies are funded by a combination of state and federal funding. It will be the county that is the agent for the Commissioner of Human Services placing the child who will have the initial responsibility for gathering the information to document the existence of the special needs giving rise to the subsidy and then forwarding that information on to the Minnesota Department of Human Services for their assessment. The Department of Human Services makes the final determination as to whether a subsidy will be granted and they will then lead the discussions with the adoptive parents on negotiating the specific terms of the contract providing for the subsidy.

13. If my partner and I are a same-sex couple, how has the neutral marriage law that went into effect in Minnesota on August 1, 2013, impacted how we would go about adopting a child?

Answer

Adoption for same-sex couples in Minnesota and in other states has always been fraught with complications and challenges. Under a technical reading of Minnesota's adoption code, only single persons or married couples are allowed to file an adoption petition and adopt a child. This has been true whether the petitioners are a same-sex or heterosexual couple or whether involved in a romantic relationship or not. Despite that, there have always been certain judges who have been willing to "bend the law" a bit and allow unmarried couples or unmarried persons to adopt children in this state. With regard to same-sex couples, this has evolved over the years into a specific kind of adoption, which while not specifically provided for in the adoption code, has come to be known as a "second-parent adoption."

A second-parent adoption is really a kind of hybrid adoption that combines some of the waivers of statutory requirements that one finds in step-parent adoptions or relative adoptions and the procedures for a direct placement adoption. In these kinds of adoptions, typically one of the petitioners is either the biological parent of the child or has some other legal claim to the child, perhaps as a result of having adopted the child previously as a single person. Other situations involve a same-sex couple where both parties are legally and genetically unrelated to the child and both want to adopt the child together. The procedures that have evolved over the years have involved the petitioners preparing somewhat detailed affidavits outlining the duration and nature of their relationship and attempting to convince the court of the stability of the relationship. If the couple was married in a jurisdiction that allowed same-sex marriage or have entered into a domestic partnership or been through some kind of commitment ceremony, those events would be described for the court. Many attorneys doing these adoptions would also get corroborating affidavits from friends and relatives further verifying the solidity of the relationship. A request would be made in a motion to allow the petitioners to file their petition and to be relieved of the obligation to obtain an adoption home study and post-placement report—although Adam Walsh background checks would still be required, as they are in all adoptions.

While no appellate court in Minnesota has given its explicit blessing to second-parent adoptions, whether involving heterosexual or same-sex couples, the topic did come before the Minnesota Court of Appeals a few years ago where a mother commenced an action to have the adoption of her child by her former same-sex partner voided for lack of legal authority for the second-parent adoption that had occurred a number of years previously. The appellate court found the motion was brought too late and declined to vacate the adoption—but also declined to comment on whether such an adoption was even valid in the first place. In North Carolina, when a similar motion was brought, that state's appellate court declared not only the adoption before it was void, but

all previously granted same-sex adoptions in that state were declared void. The message from these cases is that while second-parent adoptions have long been done in Minnesota, there has always been a question as to their long-term viability.

When Minnesota enacted its gender neutral marriage law in 2013, this dramatically changed the situation for same-sex couples in Minnesota. That law not only provides that same sex-couples can get married in Minnesota, but they can get divorced in Minnesota if they happen to move to another state that does not recognize same-sex marriage and where they could not get a divorce. More important in its impact on adoption is a provision that says all other laws in the state that are based on the gender of the parties are to be interpreted in a gender neutral fashion. Thus, now a married same-sex couple should be able to adopt a child under the state's adoption code just like any other married couple. Presumably, a child born during the marriage of a same-sex couple will also be presumed to be the legal child of both spouses, just as occurs with a heterosexual couple. Married same-sex couples are now fully able to do step-parent adoptions, direct placement adoptions, agency adoptions, state ward adoptions, and international adoptions that are finalized in Minnesota—all without question or extra procedural requirements.

One remaining question that will continue to arise is whether unmarried same-sex couples will still be able to do second-parent adoptions. While it is still too early to have a definitive answer to this question, it is anticipated that there may be judges who will decline to do a second-adoption for a same sex couple when they now have the option to get married. Time will tell how judges will address these issues. However, given the legal tenuousness of second-parent adoptions, many adoption practitioners will no doubt push their same-sex clients considering adoption to do it as a married couple rather than take a legal chance with a second-parent adoption.

Authorities

- MINN. STAT. §§ 517.01, 517.03 & 517.08.
- MINN. STAT. § 518.07.
- *In re the Adoption of T.A.M. and E.J.M.*, 791 N.W.2d 573 (Minn. Ct. App. 2010).
- *Boseman v. Jarrell*, 704 S.E.2d 494 (N.C. 2010).

Comment

Another related concern is how best to protect same-sex couples who build a family in Minnesota and then move to a state that does not recognize same-sex marriage or second-parent adoption or parentage. The best protection under the Full Faith and Credit Clause of the United States Constitution is a court order or judgment. If parentage is established by a marital presumption or under one of the presumptions in the Parentage Act resulting in simply a birth certificate but not an adoption decree or parentage order, such a decree or order should be sought even if not legally necessary under Minnesota law. At least one state court judge in New York has declined to issue such an order or judgment where it was not necessary under New York law as a result of its law allowing same-sex marriage. *Matter of S.E.B. and C-M*, 40 F.L.R. 1159 (N.Y. Surr. Ct. 2014) Until same-sex marriage, adoption, and parentage is recognized in every state, these issues will remain a significant concern to same-sex couples who may find themselves relocating to another state.

14. My spouse and I are experiencing infertility issues and considering building our family either through adoption or assisted reproduction. What are the different considerations we should ponder as we decide which route to take?

Answer

As medical technology continues to advance making Assisted Reproduction Technology (ARTS) available to more and more people, and as the availability of both domestic and international healthy infants for adoption remains challenging, this question will become increasingly more common.

The starting point is for the couple to do a careful analysis of their values and their primary purpose in building a family. If a primary goal is helping a disadvantaged child find a loving and secure home, adoption may be the way to go. If it is important to have a genetically related child or a healthy infant who looks like the intended parents, and the couple has viable genetic material, ARTS may be the way to go.

Practical considerations also come into play: is there a readily available child who meets the desires of the adoptive couple available in the near future, and is the time it takes to find a match for an adoption an important consideration? Do you meet all of the requirements of an adoption agency or an international adoption program? Is there anything in your background that would raise questions in an adoption homestudy? Unlike ARTS, adoption is heavily regulated and adoption agencies must meet rigorous licensing requirements as they go about supporting and facilitating an adoption.

While both adoption and ARTS can be expensive, as between the two, the costs of ARTS may be higher if you are working with unrelated carriers or surrogates or donors of genetic material who expect to be compensated in some fashion. As the costs for ARTS can be considerable, this may also be a substantial factor. Not all medical insurance policies will cover ARTS procedures and pregnancies and the medical expenses can be significant, especially if there are any complications with the pregnancy or the children born of the process have significant special medical needs. An ARTS process may involve complex contract drafting if there are egg, sperm, or embryo donations; gestational carriers or traditional surrogates may be involved if the intended parent is unable to carry a child—all of which adds to the complications and resulting costs. Finding donors, carriers, or surrogates and then drafting the necessary contracts is just the start of the legal and medical process. The transfer of genetic material must occur, there is usually a medical and mental health screening process involved, and then after pregnancy occurs, planning and drafting must be done for the court proceedings where legal parentage will be established. This could involve a pre-birth or post-birth parentage proceeding, or both, and it might also require an adoption. The particular nature of the ARTS procedure will be largely determined by the status of the intended parents' genetic material and whether one of the intended parents is able to carry and deliver a child.

Both adoption and ARTS can be expensive. Much of the costs, however, depend on whether relatives and close family members are involved. Both processes may involve the work of agencies in matching birth parents and adoptive parents, donors, and intended parents and carriers or surrogates and intended parents. Home studies, background checks, medical and psychological evaluations can all come into play. The actual costs are going to depend on all of these variables and need to be carefully considered by persons seeking to build a family through either adoption or ARTS.

Many private adoption agencies, international programs, and foreign countries have become more selective as to who can participate in their adoption programs and the various requirements to do an adoption have in many instances become more complicated. Finding a reputable adoption agency is critical and meeting with the agency to fully understand its programs and requirements is essential. While ARTS is much less regulated than adoption, for that reason it is even more essential that great care must be taken to make sure that you are working with reputable medical, legal, and matching facilities. It is definitely a “buyer beware” world for couples seeking to build a family through either adoption or ARTS.

Authorities

- *In re Custody of L.M.K.O.*, 607 N.W.2d 151 (Minn. Ct. App. 2000).
- *In re the Paternity and Custody of Baby Boy A*, No. AO-452, 2007 WL 4304448 (Minn. Ct. App. Dec. 11, 2007).
- *A.L.S. by guardian ad litem J.P. v. E.A.G. v. R.W.S.*, No. A-10-443, 2010 WL 4181449 (Minn. Ct. App. Oct. 26, 2010).

Further Reading

- Jody DeSmidt, *Adoption and Assisted Reproductive Technology Law*, in MINNESOTA CHILD CUSTODY DESKBOOK, 2d ed., ch. 23 (Minnesota CLE 2011, updated 2015).

Notes

Consumer Debt Collection

Chapter 14

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1. Can a debt collector call me at work?

Answer

Yes, but not if they know or have reason to know that a consumer cannot or refuses to take collection calls at work.

If a debt collector knows, or has reason to know that a consumer's employer prohibits calls from a debt collector, or personal calls, they cannot contact the consumer at work. 15 U.S.C. § 1692c(a)(3).

In addition, if a consumer tells a debt collector to stop calling them at work, the debt collector must stop calling the consumer at work (*see* 15 U.S.C. § 1692c(a)(1)—prohibiting collection calls at an inconvenient or unusual time or place).

Otherwise, a debt collector may only contact a consumer at work if the consumer gives them consent, or with the express permission of a court of competent jurisdiction (15 U.S.C. § 1692c(a)(3)).

Authorities

- 15 U.S.C. § 1692c(a)(3).
- 15 U.S.C. § 1692c(a)(1).

Comment

In many cases, a collection call to a consumer at work will violate other portions of the Fair Debt Collection Practices Act (FDCPA). For example, collectors reveal a consumer's debt, ask impermissible questions about the consumer, or ask a co-worker to pass on a message to the consumer.

If a consumer does not want to receive collection calls at work, they should tell the debt collector they cannot receive debt collection calls at work. Unlike other sections of the FDCPA, a consumer is not required to put that request in writing in order for a collector to comply with that request.

Further Reading

- DEBTOR-CREDITOR HANDBOOK, 11th ed. (Minnesota CLE 2014, updated 2016).

Notes

2. How can I stop a debt collector from contacting me?

Answer

If they are calling your workplace, tell them you cannot receive calls there. If a debt collector knows, or has reason to know that a consumer's employer prohibits calls from a debt collector, or personal calls, they cannot contact the consumer at work. 15 U.S.C. § 1692c(a)(3).

If they are calling at another inconvenient time, tell them you cannot speak to them. *See* 15 U.S.C. § 1692c(a)(1).

If you are represented by an attorney, inform the collector you have an attorney, and provide the contact information for your attorney. *See* 15 U.S.C. § 1692c(a)(2).

If you want to tell them to cease all communications via telephone, or cease communications all together, send a letter informing the debt collector to cease all contact. *See* 15 U.S.C. § 1692c(c). In the alternative, a consumer can send a letter stating that they refuse to pay the debt. *See* 15 U.S.C. § 1692c(c).

Notably, a debt collector can still contact a consumer after this request, but only to notify the consumer that collection efforts are being terminated, that the collector or creditor may invoke a specific remedy, or that the collector or creditor intends to invoke a specific remedy—usually a lawsuit regarding the debt. *See* 15 U.S.C. § 1692c(c)(1)-(3).

Authorities

- 15 U.S.C. § 1692c(a)(1).
- 15 U.S.C. § 1692c(a)(3).
- 15 U.S.C. § 1692c(c).
- 15 U.S.C. § 1692c(c)(1)-(3).
- *Erickson v. Messerli & Kramer, P.A.*, Civ. No. 09-03044 (D. Minn. May 16, 2011) (holding that a verbal request to cease communication is ineffective; the request must be in writing).

Comment

If a consumer verbally informs a debt collector to cease calling at a certain time or place, the consumer should make notes as to when they did that.

If a consumer informs a debt collector that they are represented by an attorney, the consumer does not need to provide any other information beyond the name and contact information of their attorney. A debt collector is not allowed to ask questions like “when did you retain them,” “what did you retain them for” or “have you paid them yet?”

The most effective way to stop communications, however, is to send a letter requesting a debt collector cease all communications. If a consumer sends a request in writing, they should make a copy of the letter for their records. Debt collectors have been known to claim they never received a written cease request from a consumer.

Further Reading

- DEBTOR-CREDITOR HANDBOOK, 11th ed. (Minnesota CLE 2014, updated 2016).

Notes

3. What should I do if I think a debt collector has violated the law?

Answer

Contact a consumer rights attorney immediately.

In addition, take good notes on what happened—like a diary. Who called, what time, what number, and what did you talk about. Specific wording becomes very important. Preserve any evidence—voicemails, take photos of caller I.D.s or cellphones, and keep any recordings.

Do not, however, decide to try and trick or entrap a debt collector. In addition, do not record any conversations without (1) figuring out what state you are calling and (2) figuring out if it is legal to record in that state. Illegal recordings could not only undercut a case, many states have civil and criminal penalties for illegally recording a phone call.

Authorities

- Any smart consumer rights attorney.
- <<http://www.rcfp.org/reporters-recording-guide>>.

Comment

Sometimes consumers like to outsmart themselves and immediately try and setup a debt collector after receiving a nasty collection call.

In almost every case, this will prevent a consumer rights attorney from agreeing to pursue their case. Debt collectors love to argue that they were set up.

The vast majority of debt collectors record all collection calls – and those recordings should be discoverable during any litigation.

Further Reading

- DEBTOR-CREDITOR HANDBOOK, 11th ed. (Minnesota CLE 2014, updated 2016).

Notes

4. I got a letter from a debt collector, are they going to garnish me?

Answer

In the majority of situations: no, at least not yet.

Garnishment usually occurs after a judgment has been entered. A judgment requires a lawsuit. A collection letter is just that—an attempt to collect a debt—it is not a lawsuit.

Most garnishment happens after a judgment is entered—usually a default judgment because the consumer fails to respond to a summons and complaint.

Garnishment can occur in three scenarios:

1. After a judgment has been entered (MINN. STAT. § 571.71, SUBD. 3).
2. Pre-judgment garnishment—which occurs after a consumer has been served, but before a judgment has been entered. Under this procedure, a creditor can serve a notice of intent to garnish and exemption form if more than 20 days have passed since the date of service of the summons and complaint, with no response from the consumer. Both forms must be compliant with statutory requirements. MINN. STAT. §§ 571.71; 571.72, SUBDS. 10 & 11. Once the consumer receives the notice of intent to garnish, the consumer has 25 days to submit an answer to the lawsuit. During that 25-day period, the debtor cannot obtain a default judgment, they must wait until that time has elapsed.
3. By court order after a civil action has commenced. MINN. STAT. §§ 571.71, SUBD. 1; 571.93.

Authorities

- Generally, *see* MINN. STAT. § 571.
- MINN. STAT. § 571.71—when garnishment is authorized.
- MINN. STAT. § 571.74—garnishment summons and notice to debtor.
- MINN. STAT. § 571.9112—exemption notice and instructions.

Comment

Many outstate law firms that send collection letters are not licensed to practice in Minnesota. Not only are they unable to sue in Minnesota, they are also arguably committing unauthorized practice of law by threatening to sue in a state where they are not licensed.

In addition, if a debt collector threatens to garnish a consumer, that can be a violation of the FDCPA.

5. I have a joint bank account, can the bank take all my money?

Answer

Yes and no.

There is a rebuttable presumption that all funds in a joint bank account belong to the debtor. That means a bank or other financial institution can freeze up to 100 percent of the creditors claim before you have a chance to object.

A consumer, however, can rebut the presumption before the bank releases the funds to the creditor. *See Savig v. First Nat'l Bank of Omaha*, 781 N.W.2d 335 (Minn. 2010). A consumer can rebut the presumption by filling out and sending an exemption form, along with requisite financial statements, to show that some or all of the funds are exempt.

A creditor can object to an exemption(s) and request a hearing to decide the issue. A court would then decide whether the exemption is valid.

How garnishment works:

Garnishment begins when a creditor serves a garnishment summons and disclosure form on a garnishee (usually a bank). MINN. STAT. § 571.72, SUBDS. 2, 4 & 5. The documents are also served on the debtor. *Id.*

If the debtor is a natural person and the funds to be held are in a financial institution (again, usually a bank), then the creditor must also send an exemption notice to the debtor and financial institution. MINN. STAT. § 571.72, SUBDS. 4 & 8. The financial institution must also send an exemption notice to the debtor. MINN. STAT. § 571.913. The bank must also retain up to 110 percent of the amount the creditor claims the debtor owes. MINN. STAT. § 571.911.

Authorities

- MINN. STAT. §§ 571.71–571.932.
- *Savig v. First Nat'l Bank of Omaha*, 781 N.W.2d 335 (Minn. 2010).
- *Billar v. Atlantic Credit, et al.*, Civ. No. 09-00133 (D. Minn. Aug. 4, 2011).
- *Lind v. Midland Funding, LLC, et al.*, Civ. No. 11-01242 (D. Minn. Sept. 8, 2011).

6. Can a debt collector talk to my friends, family, co-workers, etc.?

Answer

Yes, but only to acquire or verify location information.

Location information is defined as a consumer's home address and home phone number or workplace and workplace address. 15 U.S.C. § 1692a(7). A debt collector must identify themselves, but should only reveal their employer if a third-party asks for the information. 15 U.S.C. § 1692b(1).

A debt collector is not allowed to contact a third party more than once unless requested to do so by the third party. 15 U.S.C. § 1692b(3).

If a debt collector contacts a third party, they cannot reveal the consumers debt (15 U.S.C. § 1692b(2)), they cannot ask them to pass on a message, and they cannot harass them.

A third party, who does not owe the debt has standing to bring a claim under the FDCPA if they are harassed or misled by a debt collector. *See* 15 U.S.C. §§ 1692a(3) & 1692k(a).

Authorities

- 15 U.S.C. § 1692a(7).
- 15 U.S.C. § 1692b(1).
- 15 U.S.C. § 1692b(3).
- 15 U.S.C. § 1692b(2).
- 15 U.S.C. § 1692a(3).
- 15 U.S.C. § 1692k(a).

Comment

Debt collector contacts to third parties are a frequent source of FDCPA violations. Although debt collectors are tightly regulated in what they can say, they frequently stray from the script.

Further Reading

- DEBTOR-CREDITOR HANDBOOK, 11th ed. (Minnesota CLE 2014, updated 2016).

Notes

7. Can a debt collector reveal my debt to other people?

Answer

No.

With a few limited exceptions (spouse and co-debtor are the most common), a debt collector cannot reveal the debt to a third party. *See* 15 U.S.C. § 1692b(2).

If a debt collector is contacting a third party, they cannot reveal the debt, they cannot call more than once unless requested to do so, and they can only ask for location information. 15 U.S.C. § 1692b(1)–(6). Location information is defined as a consumer's home address and home phone number or workplace and workplace address. 15 U.S.C. § 1692a(7).

Revealing the debt is a violation of the FDCPA and can also form the basis for a state law tort claim for an invasion of privacy—revelation of private financial information.

Authorities

- 15 U.S.C. § 1692a(7).
- 15 U.S.C. § 1692b(1)–(6).
- 15 U.S.C. § 1692b(2).

Comment

A debt collector can reveal the debt to a spouse, co-debtor, the consumer's attorney, a credit reporting agency, the creditor, the creditor's attorney, and a parent of the debtor if the debtor is a minor.

Most violations on this issue, however, occur when a debt collector calls a relative, neighbor, or co-worker and reveals the debt.

Further Reading

- DEBTOR-CREDITOR HANDBOOK, 11th ed. (Minnesota CLE 2014, updated 2016).

Notes

8. How many times a day can a debt collector call me?

Answer

Probably more than once, but it depends on the circumstances.

It is a violation of the FDCPA to cause a telephone to ring or engaging any person in repeated telephone conversations with the intent to annoy, abuse, or harass the person. 15 U.S.C. § 1692d(5).

For example, repeated phone calls after a consumer disputes the debt may constitute a violation, but repeated phone calls to negotiate a settlement agreement may not constitute a violation.

A debt collector, however, cannot contact a consumer once they know a consumer is represented by an attorney. In addition, a debt collector cannot continue to call a consumer's workplace once they know the consumer cannot receive calls at work. Lastly, a debt collector cannot contact a consumer after receiving written notification from the consumer to cease communication.

Repeated phone calls to a consumer may indicate that a debt collector is using an autodialer or robo-dialer. Debt collectors are strictly governed in their usage of autodialers or robodialers by the Telephone Consumer Protection Act (TCPA).

Key indications of an autodialer are a large volume of calls, automated messages, calls where nobody is on the other end of the phone, or if the consumer answers and there is a pause before a debt collector actually speaks. If an autodialer is being used, and the consumer never provided their cell phone number, the debt collector may be in violation of the TCPA. Damages under the TCPA can add up quickly—statutory damages are \$500 per call and \$1,500 per call if the court determines the calls were willful.

Authorities

- 15 U.S.C. § 1692d(5).
- 15 U.S.C. § 1692c(a)2.
- 15 U.S.C. § 1692c(a)3.
- 15 U.S.C. § 1692c(c).
- 47 U.S.C. § 227 (Telephone Consumer Protection Act).

Comment

This is a fairly fact-specific inquiry.

For example, multiple phone calls from a debt collector in one day to negotiate a payment agreement may not be a violation. On the other hand, multiple phone calls a day after a consumer has disputed a debt would likely be a violation.

9. What happens if I receive a summons and complaint with no court file number? Is it fake?

Answer

No, it's probably real, it just has not been filed with the court.

Minnesota allows pocket service, which means a lawsuit is initiated once the summons is served on the defendant—not once it is filed with the court. MINN. R. CIV. P. 3.01. It is still a real, live, lawsuit, and a defendant must respond within 20 days. MINN. R. CIV. P. 4.01.

This can be very confusing for consumers. In many cases, consumers are pocket served by a debt buyer—a company they have never heard of—regarding an alleged debt. The confusion is compounded when a consumer calls their courthouse and is informed the court has no record of their case.

Failure to respond means the plaintiff can pursue a default judgment—and a consumer soon learns that the “fake” lawsuit has very real implications—like garnishment.

Authorities

- MINN. R. CIV. P. 3.01, 3.02 & 4.01.

Comment

Debt collection lawfirms frequently use pocket service. This frequently leads to default judgments because consumers do not respond, or do not think they need to respond because:

- the consumer has never heard of the company suing them (e.g., Ryder Financial as successor in interest to Citibank);
- the consumer thinks that account or debt was paid in full;
- the company has sued the wrong person and the consumer does not think they have to respond;
- the consumer disagrees with the amount; or
- the consumer thinks the lawsuit is fake.

None of those reasons are justification for failing to answer. Once a default judgment is entered, a creditor can garnish a consumer's bank account and/or wages. Once there is a judgment against a consumer, the only way to litigate the case is to try and have the judgment set aside through a motion to vacate the judgment.

10. Can my wages be garnished and my tax refunds be seized by student loan collectors for not paying my federally backed student loans?

Answer

Yes.

Garnishment, however, will not occur until after the loan has gone into default (defined as 270 consecutive days of non-payment), and the borrower has been provided notice of the proposed tax refund offset or garnishment. In addition, there is typically some collection activity before garnishment is pursued.

In order to capture a tax refund, the Department of Education (DOE) must provide notice of the proposed offset and an opportunity to review the loan/grant records, allow the consumer an opportunity to demonstrate why the debt is either not in default or not enforceable, and to allow the consumer to avoid tax offset by making alternative arrangements.

In order to proceed to administrative wage garnishment, the consumer must also receive notice of the intention to garnish, and be given an opportunity to inspect records and either object to the garnishment or agree to a voluntary repayment plan. If the garnishment is initiated, it cannot exceed 15 percent of the consumer's disposable pay. For more details, please review the sources below.

Even if a borrower sets up a rehabilitation payment plan, administrative wage garnishment will continue for the first five months of the nine-month rehabilitation period.

Authorities

- 34 C.F.R. §§ 30.20–30.33—Tax offset.
- 34 C.F.R. § 34—Administrative wage garnishment.
- 34 C.F.R. §§ 682.405(a) & 685.211(f) – garnishment during rehabilitation.
- Federal Student Aid Collections: <<http://www2.ed.gov/offices/OSFAP/DCS/>>.

Comment

Typically, before either one of these events happen, the consumer will be contacted directly by the DOE and/or a debt collector under contract with the DOE.

In order to cure default on a federal student loan, the consumer can settle the debt, consolidate the loan, or enter a rehabilitation repayment plan. Given the large balance of most student loans, settlement is not an option. Consolidation may not be an option if the loan(s) have previously been consolidated. If administrative wage garnishment has already started, consolidation is not an option.

A consumer can also request a one-time rehabilitation in order to get the loan out of default status. Rehabilitation involves making nine consecutive payments, and the amount of the payments are calculated using the same formula as the Income-Based-Repayment plan (although the borrower is not automatically enrolled in that repayment plan).

The benefits of rehabilitation are that upon completing the rehabilitation, the loan is no longer in default, and the borrower regains all of their repayment rights (including deferment, forbearance, and the various repayment plans). If the loan was being reported as defaulted, the credit reporting agencies are notified to change that status. Some debt collection agencies will also agree to waive the 16-percent collection fees upon successful rehabilitation.

One important thing for borrowers to understand is that upon completion of rehabilitation, any unpaid interest, along with the collection costs, are capitalized and rolled into the loan. Which means the borrower is then paying interest in a significantly higher principal balance.

Further Reading

- DEBTOR-CREDITOR HANDBOOK, 11th ed. (Minnesota CLE 2014, updated 2016).

Notes

11. Can a debt collector collect on debt that is past the statute of limitations?

Answer

Yes, but they have to be very careful.

Debt that is past the statute of limitations is generally called time-barred debt or zombie debt. Debt collectors can collect on the debt, but they cannot threaten or imply litigation, mislead a consumer into believing the debt is not time-barred, or mislead the consumer into believing they will be subjected to legal action to recover the debt.

Authorities

- 15 U.S.C. § 1692e(2).
- 15 U.S.C. § 1692e(5).
- *Buchanan v. Northland Group*, 776 F.3d 393 (6th Cir. 2015).
- *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010 (7th Cir. 2014).
- *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 33 (3d Cir. 2011).
- *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001).

Comment

There are, to put it mildly, mixed opinions on the topic.

The FTC has taken the stance that failure to disclose that the debt is time-barred can deceive a consumer. FED. TRADE COMM'N, *THE STRUCTURE AND PRACTICE OF THE DEBT BUYING INDUSTRY* 47 (2013) (FTC Report 2013).

The Seventh Circuit recently issued an opinion along those same lines, finding that a consumer may have a claim when a debt collector seeks payment of a time barred debt by misleading “an unsophisticated consumer into believing that the debt is legally enforceable, regardless of whether the letter actually threatens litigation.” *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010 (7th Cir. 2014).

The Sixth Circuit has a similar view, holding that a debt collector violated the FDCPA by sending a collection letter that offered to settle a \$4,800 debt for \$1,700. *Buchanan v. Northland Group*, 776 F.3d 393 (6th Cir. 2015). The court took issue with the fact that the debt was time-barred, but the debt collector did not affirmatively disclose that fact, and the collector failed to explain that making a partial payment could revive the statute of limitations. 1195633607 (note: the debt collector has petitioned for a rehearing by the Sixth Circuit).

The Third and Eighth Circuits have found that sending dunning letters for time-barred debts does not violate the FDCPA unless the letter is accompanied by a threat of litigation. See *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 33 (3d Cir. 2011) (plaintiff’s FDCPA claim regarding the attempt to collect a time-barred debt “hinges on whether [the dunning] letter threatened litigation”); *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767,

771 (8th Cir. 2001) (“in the absence of a threat of litigation or actual litigation, no violation of the FDCPA has occurred when a debt collector attempts to collect on a potentially time-barred debt that is otherwise valid.”).

The National Consumer Law Center (NCLC) recently published a report, urging the Consumer Financial Protection Bureau to prohibit debt collectors from collecting on debts that are past the statute of limitations. (See 1195633607 <www.nclc.org/images/pdf/debt_collection/report-zombie-debt-2015.pdf>) A number of debt collectors now include an affirmative disclaimer in their communications to consumers, along the lines of “the law limits how long you can be sued on a debt; because of the age of your debt, we cannot sue you for it; in many circumstances you can renew a debt by making a payment after the statute of limitations has expired....”)

Further Reading

- DEBTOR-CREDITOR HANDBOOK, 11th ed. (Minnesota CLE 2014, updated 2016).

Notes

12. Is it true that there is no statute of limitations for student loan debt?

Answer

Yes and no.

For federally-backed student loans, there is no statute of limitations.

For private student loans, the statute of limitations for an action in Minnesota is six years. However, if the promissory note for the student loan elects another state's governing law, that could shorten or extend the statute of limitations, based on Minnesota's Conflict of Law statute.

Authorities

- 20 U.S.C. § 1091a—Statute of limitations, and State court judgments.
- MINN. STAT. § 541.053—Limitations of Actions Based on Consumer Debt.
- MINN. STAT. § 541.31—Conflict of Law; limitation periods.

Comment

The uniform six year statute of limitations (MINN. STAT. § 541.053) is a new law that went into effect on September 1, 2013. Section 541.053 states that “notwithstanding section 541.31, subdivision 1” actions on a consumer debt shall be commenced within six years.

Given the reference to section 541.31 (conflict of law statute), there is potential carve-out to argue that a contract is governed by the law of a different state (as elected in the contract). That would then open the door for an argument that the other state's statute of limitations would apply under Minnesota's conflict of law statute (MINN. STAT. § 541.31).

The statute, however, is so new, that there is no caselaw on the issue, and it is unclear if that is the intended effect of the statute.

For private student loans, it can be very difficult to determine when the statute of limitations began running and if tolled and/or restarted. For example, many student loans have an acceleration clause that states the entire balance is due when a payment is not made on time. In addition, if a consumer was granted a forbearance or deferment, that could toll the statute of limitations. A consumer should pay very close attention to those issues. In some cases, the loan may have gone into default before a deferment or forbearance was granted, which could start the statute of limitations if the loan has an acceleration clause.

Further Reading

- DEBTOR-CREDITOR HANDBOOK, 11th ed. (Minnesota CLE 2014, updated 2016).

Contracts

Chapter 15

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1. What are the elements of a contract?

Answer

A contract is “a promise or set of promises for the breach of which the law gives a remedy or the performance of which the law recognizes a duty.” *Baehr v. Penn-O-Tex Oil Corp.*, 104 N.W.2d 661, 664–65 (Minn. 1960). “A contract is formed when two or more parties exchange bargained-for promises, manifest mutual assent to the exchange, and support their promises with consideration.” *Med. Staff of Avera Marshall Reg’l Med. Ctr. v. Avera Marshall*, No. A-12-2117, 2014 WL 7448532, at *6 (Minn. Dec. 31, 2014) (citing RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981)). Stated more simply, the elements of a contract are generally recognized as: (1) offer, (2) acceptance, (3) consideration, and (4) a mutual intent to be bound.

Offer. The first element of a contract is an offer. An offer is a manifestation of willingness to enter into a bargain which justifies the other party in understanding that assent will conclude a deal. *Travelers Ins. Co. v. Westridge Mall Co.*, 826 F. Supp. 289, 292 (D. Minn. 1992), *aff’d*, 994 F.2d 460 (8th Cir. 1993). An offer “empowers the offeree to create a contract by his or her acceptance.” *League Gen. Ins. Co. v. Tvedt*, 317 N.W.2d 40, 43 (Minn. 1982). In other words, an expression must invite acceptance in order to constitute an offer. Offers must not be mere invitations to negotiate. Whether an offer exists “depends on the intention of the parties and the surrounding circumstances, but ‘where the offer is clear, definite and explicit, and leaves nothing open for negotiation, it constitutes an offer.’” *Short v. Sun Newspapers*, 300 N.W.2d 781, 786 (citing *Lefkowitz v. Great Minneapolis Surplus Store*, 86 N.W.2d 689, 691 (Minn. 1957)).

Acceptance. The second element of a contract is acceptance. Acceptance is “a manifestation of the assent to the offer, as evaluated under an objective standard.” *Travelers*, 826 F. Supp. 289, 292 (D. Minn. 1992), *aff’d*, 994 F.2d 460 (8th Cir. 1993) (citing *Holman Erection v. Orville E. Madsen & Sons, Inc.*, 330 N.W.2d 693, 695 (Minn. 1983), RESTATEMENT (SECOND) OF CONTRACTS § 19 (1979)). The acceptance must resemble a “mirror image” of the offer, but it need not repeat the terms of the offer. *Knaus Truck Lines v. Donaldson*, 51 N.W.2d 99 (Minn. 1952) (*see also Barry v. Telander*, No. C4-99-452, 1999 WL 619020 (Minn. Ct. App. Aug. 17, 1999)). A purported acceptance that adds to or alters the terms of the offer will not constitute an acceptance and will not operate to form a legally binding contract, but instead constitutes a rejection of the original offer and presentment of a counter-offer. *Markmann v. H.A. Bruntjen, Co.*, 81 N.W.2d 858, 862 (Minn. 1957). It is also worth noting that a response subsequent to the offeree’s rejection of the offer cannot constitute an acceptance. *Powell v. MVE Holdings, Inc.*, 626 N.W.2d 451, 462 (Minn. Ct. App. 2001).

Consideration. The third element of a contract is consideration. An offer, properly accepted by the offeree, is only legally enforceable if it is supported by consideration. *Ruud v. Great Plains Supply, Inc.*, 526 N.W.2d 369, 371 (Minn. 1995) (citing *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 626 (Minn. 1983)). Consideration is a party’s promise to do something, or refrain from doing something, that it does not otherwise have a legal obligation to do. In other words, “consideration requires the voluntary assumption of an obligation by one party on the condition of an act or forbearance by the other.” *Cady v. Coleman*, 315 N.W.2d 593, 596 (Minn. 1982). An example of consideration is Party A’s promise to pay \$1,000 in exchange for Party B’s promise to deliver goods or services to Party A.

While there needs to be an exchange of consideration between the parties, a party’s consideration need not benefit the other contracting party. *Brooksbank v. Anderson*, 586 N.W.2d 789, 794 (Minn. Ct. App. 1998). For example,

a contracting party's promise to pay a third-party constitutes proper consideration because the contracting party is suffering a detriment. *Concordia College Corp. of Moorhead, Minn. V. Salvation Army, Verona, N.J.*, 470 N.W.2d 542, 547 (Minn. Ct. App. 1991). Likewise, the consideration provided by each party need not be objectively equal in value but may be sufficient "if it is something which the law regards of value." *Estrada v. Hanson*, 215 N.W.2d 223, 226 (Minn. 1943).

Intent to Be Bound. The fourth element of a contact is a mutual intent of the parties to be bound to each other. There must be such a definite offer and acceptance that it can be said that there has been a meeting of the minds on the essential terms of the agreement. *Jallen v. Agre*, 119 N.W.2d 739, 743 (Minn. 1963). When determining whether a contract has been formed, the parties' outward manifestations are determinative, rather than either party's subjective intent. See *Cederstrand v. Lutheran Brotherhood*, 117 N.W.2d 213, 221 (Minn. 1962) (expressions of mutual assent must be judged objectively, not subjectively). In fact, no contract is formed by the signing of an instrument when one party knows the other does not intend to be bound by the document. *Hansen v. Phillips Beverage Co.*, 487 N.W.2d 925, 927 (Minn. Ct. App. 1992). The application of this element is clear in some cases, such as a non-binding letter of intent, and less clear in others, such as settlement agreements.

Further Reading

- MINNESOTA CONTRACTS DESKBOOK, 3rd ed. (Minnesota CLE 2016).

Notes

2. When must a contract be in writing?

Answer

As a best practice, wherever possible, contractual agreements should be reduced to writing in order to best ensure the parties understand their respective rights and obligations. *See Winter v. Skoglund*, 404 N.W.2d 786, 791 (Minn. 1987). Nonetheless, many contracts are never formalized in writing and the parties in most instances are under no legal obligation to do so. However, according to the Statute of Frauds certain contracts must be in writing in order to be legally enforceable. It is important to note that the Statute of Frauds does not generally render contracts void or illegal. However, it serves as an affirmative defense to enforcement if a party refuses to fulfill its obligations. *See* MINN. R. CIV. P. 8.03.

Statute of Frauds. In Minnesota, the Statute of Frauds is codified at Minnesota Statutes chapter 513 and identifies certain transactions that must be in writing in order to be legally enforceable. These transactions include:

- An agreement that by its terms is not to be performed within one year from the making thereof. MINN. STAT. § 513.01(1).
- An agreement concerning the transfer of an interest in land. MINN. STAT. § 513.04.
- A special promise to answer for the debt, default, or doings of another. MINN. STAT. § 513.01(2).
- The grant or assignment of a trust. MINN. STAT. § 513.03.
- A cohabitation agreement. MINN. STAT. § 513.075
- A credit agreement. MINN. STAT. § 513.33.

However, the Statute of Frauds does not provide an exhaustive list of contracts that are required to be in writing. For example, the Uniform Commercial Code as adopted in Minnesota requires that contracts for the sale of goods for a price of \$500 or more must be in writing. MINN. STAT. § 336.2-201.

Parol Evidence. The Statute of Frauds is often confused with the Parol Evidence Rule. However, their purposes and scope are different. Under the Parol Evidence Rule, evidence concerning discussions prior to or contemporaneous with the execution of a written instrument is inadmissible when that evidence contradicts or varies the terms of the written agreement. *Housing & Redevelopment Authority v. First Avenue Realty Co., Inc.*, 133 N.W.2d 645, 648–49 (Minn. 1965). Where the terms of the written contract are clear and unambiguous, the terms of the contract will be given their plain and ordinary meaning; *Knudsen v. Transp. Leasing/Contract, Inc.*, 672 N.W.2d 221, 223 (Minn. App. 2003). In giving effect to the parties' intentions, a court will look only to the "four corners" of the written agreement. *Id.* However, evidence of subsequent oral agreements is not excluded by the Parol Evidence Rule. *Duffy v. Park Terrace Supper Club, Inc.*, 206 N.W.2d 24 (Minn. 1973). Likewise, where a written agreement is ambiguous or incomplete, evidence of oral agreements which establish the intent of the parties is admissible. *Weyerhaeuser Co. v. Hyidsten*, 129 N.W.2d 772, 776 (Minn. 1964).

3. What constitutes a breach of contract, and what are the defenses to breach?

Answer

Generally, a party's failure to follow the terms of a contract constitutes breach. A "material" breach occurs when a party substantially fails to perform a "primary purpose" of the contract. *Steller v. Thomas*, 45 N.W.2d 537, 542–43 (Minn. 1950). Whether a breach has occurred is specific to the terms of a contract and must be determined by referring to the agreement itself and the intent of the parties. See *Ylijarvi v. Brockphaler*, 213 Minn. 385 (1942). Breach can come in the form of nonperformance or performance that is defective or otherwise contrary to the terms of the contract. Common examples of breach include failure to pay and delivery of non-conforming goods or services.

Ordinarily, one party's material breach of contract excuses the performance of the other party. *Baker Domes, Div of R.M. Baker Co. v. Wolfe*, 403 N.W.2d 876 (Minn. Ct. App. 1987). However, a party may have a legitimate reason for a breach that could serve as a legal defense. Most defenses to contract breach are "affirmative" defenses, meaning that the party being sued has the burden of proving the defense if the issue is litigated. Common defenses to breach of contract include:

Performance Not Due. Nonperformance under a contract constitutes breach unless the performance is not due. *Fitger Brewing Co. v. Am. Bonding Co.*, 155 Minn. 78, 82 (1911). Performance may not be due because of a required period of time has not passed, because a condition has not occurred, or because the duty has been discharged.

Impossibility. A promisor-party to a contract may raise impossibility as an affirmative defense when it has become impossible for the promisor to fulfill its contractual obligation in any way. Minnesota common law applies the doctrine of Impossibility when an event arises after the contract has been formed making it no longer possible for the promisor to perform under the contract. *Village of Minn. v. Fairbanks, Morse & Co.*, 31 N.W.2d 920 (Minn. 1948). For example, a promise to deliver title to a building becomes impossible to perform when that building is destroyed by natural disaster. Minnesota has extended the doctrine to include instances where a fact or circumstance that the promisor could not reasonably have anticipated would render performance impossible or impracticable due to unreasonably burdensome loss or injury. *Id.* at 926.

The Uniform Commercial Code, covering contracts involving the sale of goods, uses a less stringent standard for impossibility referred to as "commercial impracticability." *Barbarossa & Sons, Inc. v. Item Chevrolet, Inc.*, 265 N.W.2d 655, 658 (Minn. 1978). Minnesota's version of the standard holds that where a seller's performance "has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made..." MINN. STAT. § 336.2-615(a).

Frustration of Purpose. The common law doctrine of Frustration of Purpose is similar to that of Impossibility and holds that a promisor's obligation is excused when the principal purpose of the contract has been substantially frustrated by the occurrence of an event. *J.J. Brooksbank Co. v. Budget Rent-A-Car*, 337 N.W.2d 372, 377 (Minn. 1983). The nonoccurrence of the interfering event must have been a basic assumption of the contract at the time it was entered into and must not have occurred at the party's fault. See *Nat'l Recruiters, Inc. v. Toro Co.*, 343 N.W.2d 704, 707 (Minn. Ct. App. 1984). Unlike the doctrine of Impossibility, Frustration of Purpose may exist even

where performance is not impossible or impracticable. *City of Savage v. Formanek*, 459 N.W.2d 173, 177 (Minn. Ct. App. 1990).

Statute of Frauds. A party seeking to be excused from performance under a contract can raise the Statute of Frauds as an affirmative defense if the contract is subject to the Statute of Frauds but nonetheless was not reduced to writing.

Mistake. The *Restatement (Second) of Contracts* § 152(1) (1981) releases a party from its contractual obligations when a mistake is made by one or both parties as to a basic assumption made in forming the contract. The mistake must have a material effect on the exchanged considerations. *Id.* Minnesota adopted this framework in *Winter v. Skoglund*, 404 N.W.2d 786, 793 (Minn. 1987).

Misrepresentation. A contract entered into based upon fraudulent misrepresentation is voidable by the aggrieved party. *Carpenter v. Vreeman*, 409 N.W.2d 258, 260–61 (Minn. Ct. App. 1987). The elements of fraudulent misrepresentation in Minnesota are: (1) a false representation of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made without knowing whether it was true or false; (3) with the intention to induce the other party to act in reliance thereon; (4) that the representation caused such reliance thereon; and (5) that the relying party suffered pecuniary damages as a result of the reliance. *Valspar Refinish, Inc. v. Gaylord's Inc.*, 764 N.W.2d 359, 368 (Minn. 2009).

Illegality. A contract that violates federal or state law, municipal ordinances, or which cannot be performed without violating such statutes or ordinances, is void and illegal. *AMCO Ins. Co. v. Lang*, 420 N.W.2d 895 (Minn. 1988). Similarly, a contract involving the commission of a crime is unenforceable. *Pettit Grain & Potato Co. v. N. Pac. Ry. Co.*, 35 N.W.2d 127, 131–32 (Minn. 1948).

Contracts Against Public Policy. Certain contracts deemed against public policy are void or voidable by a party seeking relief. For example, contracts that prohibit a party from marrying are void. *In re Appleby's Estate*, 111 N.W. 305 (Minn. 1907). Whether a contract violates public policy depends on the jurisdictions enumerated public policies, determined by the legislature. See *United Steelworkers of America, Local 6115 v. Quadra Mountain Corp.*, 435 N.W.2d 120 (Minn. Ct. App. 1989).

Further Reading

- MINNESOTA CONTRACTS DESKBOOK, 3rd ed. (Minnesota CLE 2016).

Notes

4. What are the remedies to breach of contract and how are damages calculated?

Answer

When a party breaches a contract, the other party may either affirm the contract and seek a related remedy or demand avoidance of the transaction and seek a remedy consistent with disaffirmance. The distinction between the two types of remedies is important. A remedy in conjunction with the affirming of the contract (damages) excludes a remedy based on disaffirmance, or rescission, of a contract. *Vesta State Bank v. Indep. State Bank*, 518 N.W.2d 850, 855 (Minn. 1994). This means an aggrieved party must make an election of remedies in order to prevent double recovery. *Id.* at 855. Of course, practitioners should be aware of whether remedies and damages were addressed in any extent by the contract itself.

Remedies. A party seeking relief from the other party's breach of contract has a few options for remedies. Most commonly, an aggrieved party receives some form of monetary damages, discussed in more detail below. However, courts allow for other, equitable relief for a breach when monetary damages are unavailable or inadequate. RESTATEMENT (SECOND) OF CONTRACTS § 359 (1981). Equitable relief comes in two forms: specific performance and injunctive relief. An award of specific performance orders that the contract be carried out as originally intended by the parties. *Fred O. Watson v. U.S. Life Ins. Co.*, 258 N.W.2d 776 (Minn. 1977). While it is usually awarded when monetary damages are unavailable or inadequate, a combination of specific performance and money damages may be available when neither alone would provide an adequate remedy. *Id.* at 778. Specific performance asks for the breaching party to deliver what was promise under the contract (for example, transferring title to land as per a contract's terms). An injunction intends to prevent a party in breach from acting contrary to the contract's terms. For example, a breaching party might be ordered to refrain from selling a product covered by the underlying licensing agreement.

Damages. Most aggrieved parties will receive the remedy of monetary damages in a contract dispute that reaches litigation. Damages intend to compensate for loss caused by the party in breach. *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F.2d 580 (8th Cir. 1945). An aggrieved party's loss is usually measured by computing "expectation interest" under the contract. *Faust v. Parrott*, 270 N.W.2d 117, 120 (Minn. 1978). This measure, adopted from the *Restatement (Second) of Contracts* § 344, aims to put the aggrieved party in the same position as if the contract had been fully performed. *Peters v. Mut. Benefit Life Ins. Co.*, 420 N.W.2d 908 (Minn. Ct. App. 1988). For example, an aggrieved party might be awarded damages in an amount equal to the compensation the breaching party would have paid under the agreement.

Another, less common form of damage calculation is "reliance interest." Reliance damages reimburse losses arising from a party's change in its position in reliance on a contract. *Logan v. Norwest Bank Minn., N.A.*, 603 N.W.2d 659 (Minn. Ct. App. 1999). Reliance damages are less favorable to the aggrieved party because they merely place the party back in the position she had before the contract was formed. Thus, the aggrieved party realizes none of the gain bargained for under the contract. Reliance damages, while less ideal, are sometimes the only form of damages available when expectation damages cannot be calculated due to uncertainty.

Depending on the circumstances of the dispute, an aggrieved party might also be awarded restitution or, in rare cases, punitive damages. Restitution requires that a breaching party return any gain obtained by her own breach of the agreement. Restitution is similar to reliance damages in that both calculations aim to return the injured

party to her original position before the contract. Punitive damages are not available in the absence of a specific statutory provision or a situation where the breach is accompanied by an independent tort. *Barr/Nelson, Inc. v. Tonto's, Inc.*, 336 N.W.2d 46, 52 (Minn. 1983).

Liquidated Damages. In some instances, the written agreement may include a “liquidated damages” clause. For example, the contract may specify damages of \$1,000 per day in the event of a breach (such as delay in performance). These clauses are highly scrutinized but are enforced when they are merely compensatory in nature, calling for a reasonable prediction of damages applied against a party in breach.

To be enforceable, a liquidated damages clause must be a reasonable forecast of the damages suffered and the damages must be difficult to estimate in advance. *Gorco Construction Co. v. Stein*, 256 Minn. 476, 482 (1959). “An injured party is entitled to receive a fair equivalent for the actual damages necessarily resulting from failure to perform the contract and no more.” *Id.* A provision that is punitive in nature, rather than compensatory, is deemed a penalty and is unenforceable. See *Meuwissen v. Westerman Lumber Co.*, 218 Minn. 477, 483 (1944) (courts must ascertain whether payment stipulated is in truth liquidated damages. There must be a reasonable basis in fact for such damages. Fair compensation for actual damages sustained is the test).

Promissory Estoppel. A final source of remedy is promissory estoppel, which can grant relief to a party even when no binding contract was formed. If one of the basic elements of a contract (i.e., offer, acceptance, or consideration) is missing, or there is some other defect with a purported contract, a party seeking to enforce a promise should consider the doctrine of promissory estoppel. Promissory estoppel serves to grant relief to a party who relied on a promise that was not supported by consideration (thus voiding any contractual remedy). Promissory estoppel requires (1) a promise, (2) the promisee’s right to rely on the promise and the promisor’s duty to prevent reliance, and (3) harm suffered in reliance on the promise. *Olson v. Synergistic Tech. Bus. Sys., Inc.*, 628 N.W.2d 142, 151 (Minn. 2001). Minnesota has recognized that “the doctrine of promissory estoppel [has] evolved, and courts [now] focus on the promisee’s right to rely rather than the promisor’s duty to prevent reliance.” *Id.* Promissory estoppel is properly applied when a promisee relies on a promise to his or her own detriment, and all other elements above are satisfied. In Minnesota, any relief is limited to the “extent necessary to prevent injustice.” *Id.* For example, Party B might receive moving expenses when Party B relied on Party A’s promise to provide employment in a new location. But Party B would not receive wages that she would have earned during the course of employment (absent unusual circumstances).

Further Reading

- MINNESOTA CONTRACTS DESKBOOK, 3rd ed. (Minnesota CLE 2016).

Notes

5. What are the common rules of contract interpretation?

Answer

When interpreting a contract, Minnesota courts follow a linear analysis developed over years of litigation. This process begins with a determination of whether the contract's language is clear and unambiguous. When contract language is clear and unambiguous, a court will enforce its plain meaning in accordance with the plainly expressed intent of the parties. *Carl Bolander & Sons, Inc. v. United Stockyards Corp.*, 215 N.W.2d 473, 476 (Minn. 1976). However, where the terms of an agreement are ambiguous or incomplete, the court must determine the parties' intent.

Minnesota courts have identified a number of guidelines and rules to use in determining intent. It is important to note that these rules, while helpful, are "mere aids in ascertaining the meaning of writings...they are neither ironclad nor inflexible and yield to manifestation of contrary intention." *Romanchuk v. Plotkin*, 9 N.W.2d 421, 426 (Minn. 1943). When determining party intent related to an ambiguous contract, Minnesota courts consider, among other principles, the following:

Purpose of Contract. A court will ascertain the parties' intent by considering the agreement as a whole and the circumstances surrounding the creation and execution of the agreement. *Cherne Industries, Inc. v. Grounds & Associates, Inc.*, 278 N.W.2d 81 (Minn. 1979). The court will attempt to read each provision of the contract in a way that does not contradict other provisions.

Avoidance of Absurd or Unjust Results. Minnesota courts presume that the parties intended their contract language to have effect, and will avoid any interpretation that would render a provision meaningless, absurd, or unjust to either party. See *Lakeland Tool and Eng'g v. Thermo-Serv, Inc.*, 916 F.2d 476 (8th Cir. 1990); *Employers Mut. Liab. Ins. Co. v. Eagles Lodge*, 282 Minn. 477 (1969); *Donnay v. Boulware*, 275 Minn. 37, 144 N.W.2d 711 (1966).

Ambiguity Resolved Against Drafter. Minnesota courts interpret ambiguous language in a contract against the party who drafted the contract. *Cherne*, 278 N.W.2d at 81. When the drafting party has greater bargaining power, the language will be strictly construed so as to prevent one party from controlling all terms under the agreement. *Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co.*, 366 N.W.2d 271 (Minn. 1985).

Course of Dealing. Minnesota courts will often consider the parties' prior course of dealing (between themselves) to interpret ambiguous language in a contract for the sale of goods. Course of dealing, a Uniform Commercial Code concept, was adopted in Minnesota by Minnesota Statutes section 336.2-208. Course of dealing cannot be used to contradict terms, only to interpret them. *Wabasso State Bank v. Caldwell Packing Co.*, 308 Minn. 349 (1976). Course of dealing focuses on prior interactions of the parties.

Course of Performance. Often the most probative form of evidence, a court can consider the actions of the parties in performing under the contract at hand to determine intent. *Fredrich v. Indep. Sch. Dist. No. 720*, 465 N.W.2d 692 (Minn. Ct. App. 1991). Observing the parties' behavior throughout the performance of the contract allows a court to supplement its interpretation of the contract based on how the parties have chosen to act.

Specific Language. Specific language is typically construed as governing over general language in a contract. *Burgi v. Eckes*, 354 N.W.2d 514 (Minn. Ct. App. 1984).

6. What is the difference between an express and an implied contract?

Answer

An express contract is a contract created by parties that expressed their intent to contract with each other in words (written or oral). An express contract might have formed orally between the parties and could be later memorialized in a written document. Both versions of the contract are express.

Implied contracts arise in two contexts. An implied-in-fact contract is an actual contract involving one or both parties expressing their willingness to contract by (in)action rather than by words. *See Mjolsness v. Mjolsness*, 363 N.W.2d 839 (Minn. Ct. App. 1985). Implied-in-law contracts are not actually contracts at all, but the phrase is applied in situations where the court treats a situation as if a contract existed in order to grant relief to a harmed party. Such contracts are often called “quasi-contracts” or “constructive contracts.” This concept is used to provide a remedy, and cannot be used unless there is no actual contract (which itself would serve to provide a remedy). *Southtown Plumbing, Inc. v. Har-Ned Lumber Co., Inc.*, 493 N.W.2d 137 (Minn. Ct. App. 1992).

Quasi contracts are most commonly used to provide relief on grounds of promissory estoppel. If a party changes her position (incurs costs, expends time and effort, etc.) under reliance of a promise made by another, Minnesota courts might require the promisor to fulfill the promise even if the promise does not constitute an enforceable contract. *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344 (8th Cir. 1980). Under the rules of promissory estoppel, a court must first determine that the injured party’s reliance was justified and that it would be inequitable not to enforce the promise. *Id.*

It is important to be aware of the differences between express and implied contracts. Express contracts create obligations on the parties and are legally enforceable whether written or oral (subject to the Statute of Frauds). Implied contracts arise when there is no contract at all. Parties to an implied contract might not realize a right or obligation exists in the first place.

Further Reading

- MINNESOTA CONTRACTS DESKBOOK, 3rd ed. (Minnesota CLE 2016).

Notes

7. What “boilerplate” provisions should most written contracts include?

Answer

Every written contract should contain at least the basic provisions to establish the elements of a contract: offer, acceptance, consideration, and a mutual assent by both parties to enter into the exact agreement with each other. In addition to these provisions, there are several clauses that parties should always consider adding to their written agreement.

Governing Law and Venue. A governing law or “choice of law” provision specifies that an agreed upon jurisdiction will govern the enforcement of the contract and the interpretation of its terms. In general, these clauses are enforced. Such a clause is more important in some relationships and for some parties than others. For example, a business incorporated in Delaware and seeking the application favorable corporate laws will want to contract for a governing law provision. A venue clause or “forum selection clause” determines the actual place of litigation in the event that a dispute arises under the contract. For example, a Delaware business should contract for a Delaware court to hear any disputes. This is achieved by a forum selection clause, while the application of Delaware law is achieved by a choice of law provision. It is important to note, the choice of venue does not have to be the same as the choice of jurisdiction.

Attorneys' Fees. The general rule in Minnesota is that each party to a dispute must pay his or her own costs and attorneys' fees. *Barr/Nelson, Inc. v. Tonto's, Inc.*, 336 N.W.2d 46, 53 (Minn. 1983). However, parties can contract to hold the losing party in a dispute accountable for the prevailing party's attorney fees and costs. Fees and costs recoverable under such a provision are usually limited to those costs that are reasonable and necessary. *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC*, 813 N.W.2d 49, 55 (Minn. 2012) (citing *Griswold v. Taylor*, 8 Minn. 342 (1863)). Parties should be wary of cost provisions that are one-sided. Courts often hold such provisions unenforceable, especially when the favored party has more bargaining power.

Entire Agreement. Written contracts usually contain a clause indicating that the written document represents the complete and final agreement between the parties. These provisions are frequently referred to as “merger,” “integration,” or “entire agreement” clauses. Such a provision reinforces the Parol Evidence Rule and establishes that any prior negotiations and terms are superseded by the written contract.

Severability. A severability clause states that should a court deem any provision of the contract unenforceable, the parties agree that all remaining provisions remain operative and enforceable. Without such a provision, an entire agreement could fall apart if a court determines that a small provision, whether important to the bargain or not, is unenforceable. In some cases, the parties go one step further and empower the court to ascertain the intent of the parties and revise the operative provision to the minimum extent necessary to comport with applicable law. This is known as the “blue pencil” doctrine.

Default. Parties should draft and agree upon an “events of default” clause. Such a clause identifies events that will constitute default. Identifying in advance events that will constitute default adds certainty to the agreement and encourages parties to focus on adhering to the terms of the agreement. Without such a clause, parties will surely disagree on which acts by either side will constitute default, leading to unnecessary conflict and increased chances of litigation.

Indemnity. An indemnity clause states that one party agrees to indemnify the other party for enumerated losses arising under the contract. To indemnify means to absorb the losses (pay for damages, citations, etc.) of the other party rather than seeking reimbursement from the party. Indemnifying can also mean to compensate the other party for something the indemnifying party does (or fails to do) that causes the other party to experience loss or a lawsuit from a third party. If the parties desire this concept to help balance the relationship, this provision must be included and written clearly. All losses and damages must be clearly enumerated.

Alternative Dispute Resolution. An alternative dispute resolution clause allows the parties to specify a methodology for resolution of disputes short of litigation such as good-faith negotiation, mediation, arbitration, or a combination thereof. While there is a common perception that mediation and arbitration allow for faster and less expensive resolution of disputes, this is not always the case and, because arbitration rulings typically offer very limited appeal rights, is not without risk.

Interpretation. An interpretation clause allows the parties to clarify how the provisions of a contract should be read and interpreted. Among other issues, parties can specify that a court is not to apply the general rule of contract construction that ambiguities be resolved in favor of the non-drafting party. This is particularly appropriate when the parties have negotiated the agreement at arms-length and engaged in a joint drafting process.

Further Reading

- MINNESOTA CONTRACTS DESKBOOK, 3rd ed. (Minnesota CLE 2016).

Notes

Tax Controversy Issues

Chapter 16

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1. Can I challenge the Internal Revenue Service's (IRS) decision to pursue me for unpaid taxes?

Answer

Yes. You have many options for challenging an IRS assessment. Two common procedures are the Collection Due Process (CDP) hearing and the Collections Appeal Program (CAP) hearing, depending on the circumstances.

The CDP program gives you the right to appeal the filing of a notice of federal tax lien (I.R.C. § 6320) or the right to request a hearing in response to a notice of intent to levy (I.R.C. § 6330). Two exceptions to the IRS notice requirement are when the collection of the tax is in jeopardy under I.R.C. § 6331(a) and the levy is made on the state for a state tax refund.

The request for the hearing must be in writing; be made within 30 days of the date of the notice of intent to levy and notice of your right to a hearing or within the 30 days beginning with the day after the five-business-day period of the filing of the notice of federal tax lien; and, be signed by you or your representative. IRS Form 12153, request for collection due process hearing, is available for this procedure, but it is not required.

If your request is timely, levy action must be suspended during the appeal period and while any further appeals to the tax court or district court are pending, except in the case of state refund levies, jeopardy levies, or if the IRS receives leave from the court to continue the levies. Review IRM § 5.1.9.

If the request for a CDP hearing is made after the 30-day notice period, but within one year of the notice date, you will still be given an independent review of the collection action by an appeals officer. This is known as an equivalent hearing. However, your rights are different. The appeals officer's decision will be final. The decision will not be appealable to the tax court, except as the issues relate to spousal defenses under I.R.C. § 6015. The levy action need not be suspended during an equivalent hearing. As a general rule, it should be suspended, but if the revenue officer determines that collection is at risk, like where you are dissipating assets, levy action can continue.

During the hearing, you may raise any relevant issue including: appropriate spousal defenses, challenges to the appropriateness of the collection action, and, offers of collection alternatives which may include the posting of a bond, the substitution of other assets, an installment agreement, or an offer in compromise. You may also offer evidence of hardship and challenge the underlying tax if you did not receive a statutory notice of deficiency for the tax liability or did not otherwise have the opportunity to dispute the liability.

You may not raise an issue that was previously considered at an earlier I.R.C. § 6320 hearing or any previous administrative or judicial hearing and the person seeking to raise the issue meaningfully participated in the hearing.

The CAP program gives you the right to appeal the IRS's actions in a wider variety of areas. To receive a CAP hearing, you must first discuss the case with the revenue officer's manager. If the issue is not resolved, you can then file a written request to have the matter reviewed by an appeals officer. You can use Form 9423, collection appeal request. The goal of the appeals office is to resolve CAP cases within five business days. The appeals officer will attempt to have a conference with you within two days of receipt of the case. If appeals sustains the

collection actions, enforcement action may resume when you receive verbal notice of the decision, unless otherwise prohibited.

Through the CAP program, you may appeal the following issues:

1. *Rejected installment agreement.* You have 30 days after the request for an installment agreement is denied to request an appeal. During this time, plus 15 days to allow for mailing and receipt of request, levy action is prohibited.
2. *Defaulted/roproposed termination of installment agreement.* You have 30 days to request an appeal after termination of an installment agreement is proposed. During this time, plus 15 days to allow for mailing and receipt of request, levy action is prohibited.
3. *Terminated installment agreements.* You have 30 days to request an appeal after an installment agreement is terminated. During this time, plus 15 days to allow for mailing and receipt of request, levy action is prohibited.
4. *Lien issues.* You can also use this procedure to appeal the filing or proposed filing of a notice of federal tax lien (NFTL), the denied requests to withdraw the NFTL and denied discharges, subordinations, and non-attachments of a lien.
5. *Third-party issues.* Third-party claims to property and alter ego and nominee liens are also appealable under CAP.
6. *Seizure actions.* You can appeal a seizure action within 10 business days of date the notice of seizure is provided to you or left at your usual place of abode or place of business.

Authorities

- Internal Revenue Manual (IRM) §§ 5.1.9.3 & 5.1.9.4.

Comment

These remedies are for after the assessment. If you have not been assessed, you may have the right to appeal before the assessment of a tax.

Further Reading

- IRS Publication 1660, Collection Appeals Rights

Notes

2. Can I get the IRS or the Minnesota Department of Revenue (MDR) to change the assessment against me after they have started a collection action like levies and liens?

Answer

Yes. For the IRS, the procedure is known as an Audit Reconsideration Request (AR). The IRS has the discretionary authority to abate an assessment of any tax if it is in excess of your liability. Reasons for an AR include: you did not appear for the audit; you moved and did not receive the correspondence from the IRS; or, you have new documentation to present.

To be eligible for an AR you must have filed a tax return, the assessment must be unpaid or the IRS has reversed tax credits that you are disputing, you must know which adjustments you are disputing, and you must provide additional information not considered during the original examination.

The state of Minnesota has similar authority to abate taxes after an assessment. The state program is called a Courtesy Review (CR). A CR is a request for review of an assessment after the appeal period has expired. The state will consider only new information that has not been previously reviewed. The CR is effective when the taxpayer never took advantage of the audit or appeal to present information and the state's assessment is clearly wrong. When the taxpayer requests the review, the state sends the taxpayer an application for a courtesy review. The taxpayer should follow the instructions from the state and present the best case possible as there is no appeal from a denial of the CR.

Authorities

- IRS Publication 3598

Comment

For information on the Minnesota Courtesy Review, ask the Minnesota Department of Revenue (MDR) representative who contacts you and explain that you have additional information that was never considered by the MDR. He or she will send you the application for courtesy review.

Further Reading

- IRM §§ 4.13 & 5.1.15

3. Can I discharge income taxes in bankruptcy?

Answer

Yes, under the right circumstances. Income taxes (not trust-fund or withholding taxes) are dischargeable in a Chapter 7 Bankruptcy if certain conditions are met.

Has it been more than three years since the original due date, including extensions, for the return? If not, the taxes are not dischargeable. (*Three-Year Rule*).

If the tax return was filed after the original due date, has it been more than two years since the late return was filed? If not, the taxes are not dischargeable. (*Two-Year Rule*). Some added caution is necessary for state tax obligations. The Fifth Circuit Court of Appeals, *In re McCoy*, 666 F.3d 924 (5th Cir. 2012), *petition for cert. filed*, 80 U.S.L.W. 3680 (U.S. Apr. 2, 2012) (No. 11-1469), recently held that the obligations from a late filed state return are not dischargeable in bankruptcy as the late filed return was not a "return" for bankruptcy purposes.

Has it been more than 240 days since the taxes were assessed? If not, the taxes are not dischargeable. (*240-Day Rule*)

There are other conditions that can prevent a discharge. Are the tax obligations due to the taxpayer's fraud or misrepresentation? If so, that may render the taxes not dischargeable in a Chapter 7. Interestingly, the fraud penalty itself may still be dischargeable. Is the tax obligation the result of the IRS filing returns for the taxpayer because the taxpayer failed to file? If so, the taxes may not be dischargeable as the returns should be filed by the taxpayer, not the IRS.

The discharge does not automatically eliminate a lien for the taxes. While liens don't affect the dischargeability of the tax, the lien may survive the bankruptcy thereby making the discharge practically ineffective. If you file the bankruptcy prior to the IRS filing its Notice of Federal Tax Lien (NFTL), then you may have the opportunity to completely avoid the tax claims. However, if the IRS filed a NFTL against you prior to you filing bankruptcy, the bankruptcy may discharge the debt, but the liens may continue to encumber your property. For example, if the IRS lien encumbered your homestead which had \$20,000 of equity, the IRS's underlying tax may be discharged, but the IRS would still have a lien against the home for the equity in your property. If you have no equity in any assets, then the lien loses its importance, but must still be removed from the county and state records after the bankruptcy. This can be accomplished with an application for release of federal tax lien.

A Chapter 13 bankruptcy is not designed to discharge all debts completely. Instead, it is a way to force your creditors into a long-term installment arrangement (for example, five years). A Chapter 13 bankruptcy may be appropriate if you do not want to file a Chapter 7 bankruptcy, or if your taxes would not be entirely discharged in a Chapter 7 bankruptcy.

4. Can I negotiate payment plans with the IRS and the MDR?

Answer

Yes. The IRS can accept payments through an installment agreement for the full amount or, if your financial situation shows you cannot pay the full amount, it can accept monthly payments for the time left on the statute of limitations on collections, even if these payments will not total the full amount owed.

If your individual income tax liabilities are \$10,000 or less (exclusive of penalties and interest), you may be guaranteed an installment agreement (IA.) If your aggregate unpaid balance of assessment (SUMRY) is equal to \$50,000 or less, you may qualify for a streamlined installment agreement. The unpaid balance of assessment includes tax and assessed interest and penalties. It does not include accrued interest and penalty. The benefit of qualifying for a streamlined installment agreement is that you need not provide detailed financial information and you will be allowed to pay the obligation in 72 monthly payments, assuming that much time is left on the statute of limitations on collections.

If an IA is not an option, the IRS can classify your account as currently not collectible or consider an offer in compromise.

The MDR also allows payment plans, but it does not have specific payment plan guidelines. It determines the appropriateness of an installment plan for each case based on the certain factors. See the MDR Fact Sheet, Installment Payment Plans, for these factors.

Authorities

- IRM § 5.14.5
- MDR Collection Fact Sheet 2, Installment Payment Plans

Comment

Don't let the IRS or the MDR force you into an IA if it is not workable. Work with the agency to arrive at a plan that has a real chance of success.

Further Reading

- 2011 TAX INSTITUTE MANUAL (Minnesota CLE 2011)

Notes

5. Can I settle my debt to the IRS or MDR for an amount less than the balance owing?

Answer

Yes. The IRS and the MDR have the authority to settle tax liabilities by accepting less than full payment under certain circumstances.

The IRS can compromise for a variety of reasons. A Doubt as to Collectibility (DATC) offer (IRM § 5.8.1.) is based on what the IRS believes it can collect from you during a five-year period, even when it has 10 years remaining on the statute of limitations to collect. To qualify for this type of offer, the IRS must be convinced that you cannot pay the obligation within the period remaining on the statute of limitations for collection.

You should submit a Doubt as to Liability (DATL) offer (IRM § 5.8.1.3) if there is a legitimate doubt as to whether you owe part or all of the assessed tax liability. These offers are handled more like an audit reconsideration and will involve a review by the exam division. These offers usually involve a mistake by the IRS in including an item in income, disallowing a deduction, or miscalculating the liability. This is not a second “bite at the apple.” If the IRS has already addressed the issue in appeals, and you still object to the liability, you will most likely have to pursue the matter in court.

When you do not qualify for a DATC or DATL offer, you should determine whether you qualify for an Effective Tax Administration (ETA) (IRM § 5.8.11.2) offer. Under this type of offer, you owe the taxes and have sufficient assets to pay the full amount of the tax obligation, but due to exceptional circumstances, full payment would cause economic hardship or would be unfair and inequitable.

If the IRS accepts your offer for consideration, but rejects it, you have the right to appeal and continue negotiations on that offer. The original representative investigating the offer may have made a mistake valuing your assets, determining the amount of your expenses, or calculating the values of the available assets or income. The appeals officer can correct these errors.

The MDR also has a program for accepting an amount less than the full balance as payment in full. The starting point for a compromise with the MDR is similar to the IRS. Determine the net quick sale value of your assets and your excess monthly income. The MDR will evaluate this information in light of the additional factors listed below. Some of these factors are also used by the IRS, but the MDR is often more subjective in its evaluation, considering your past bad conduct and evaluating your ability to make payments over a longer period of time.

1. Age of the liability and whether the statute of limitations on collections will soon expire;
2. Employment potential of the taxpayer;
3. Age and health of the taxpayer;
4. Realistic potential for collecting the liability in full;
5. Other liable parties (spouse, partner, corporate officers);

6. Credit bureau report;
7. The make-up of the balance due (how much of the total is tax, penalty, and interest?);
8. Whether the liability is comprised of "trust taxes" (such as Minnesota income tax withheld by an employer or sales tax collected by a retailer);
9. Whether the taxpayer is current with filing all tax returns;
10. Previous collection action taken, past or current bankruptcy of the taxpayer, and the amount paid against the liability to date including any refunds that may have been applied;
11. Whether any doubt exists to the correctness of the liability;
12. Whether all or a portion of the liability would be discharged if the taxpayer declared bankruptcy;
13. In the case of a business liability, whether the business is open or closed;
14. Whether the offer is the first offer to compromise or a reconsideration of a previous offer; and
15. Whether there are factors that would justify an abatement of penalty.

If the offer is accepted, you will receive an agreement to compromise setting out the terms and conditions of the offer. If the offer is denied, you may request a reconsideration of the denial by the Minnesota Department of Revenue Taxpayer Rights Advocate's office. However, if the offer is not accepted by the MDR or the Attorney General, there are no formal appeal rights.

Authorities

- Doubt as to Collectibility (DATC) IRM § 5.8.1
- Doubt as to Liability Offer (DATL) IRM § 5.8.1.3
- Effective Tax Administration Offer (ETA) IRM § 5.8.11.2
- MDR Collection Fact Sheet 4, Compromise Procedures

Comment

If you submit an offer, submit one you believe has a realistic chance of success. The IRS asks for a 20-percent non-refundable down payment which will be applied to your tax if your offer is not accepted. For the IRS, the offer also extends the statute of limitations on collections.

Further Reading

- 2011 TAX INSTITUTE MANUAL (Minnesota CLE 2011)

6. Can I be relieved of an income tax obligation from a return I filed Married Filing Joint with my spouse, even when my spouse has to pay the obligation?

Answer

Yes. If you filed a joint tax return with your spouse, but the tax liability on the return is the result of the conduct of your spouse, and not you, you may be entitled to relief as an innocent spouse. With the IRS, there are three types of relief available for a spouse.

1. Innocent Spouse Relief.

- a. *Understatement.* There is an understatement of tax attributable to erroneous items of one spouse filing the return. Erroneous items include unreported income, incorrect deductions, incorrect credits or incorrect basis.
 - i. *Lack of knowledge.* You establish that in signing the return, you did not know (and had no reason to know) that there was such an understatement.
 - ii. *Fairness.* It would be unfair to hold you liable for the deficiency, taking into account all the facts and circumstances. In determining if it is unfair to hold you responsible for an understatement, the IRS considers many factors including:
 - (1) Whether you received any significant benefit from the understatement of tax. Examples of significant benefits are expensive vacations, jewelry or clothing that exceed your normal lifestyle;
 - (2) Whether you were later divorced from or deserted by your spouse.

If these conditions are satisfied, you may be relieved of the liability.

2. Separation of Liability. This type of relief allocates the understatement of tax based on the amount for which each spouse is responsible. To qualify for this option, you must be either divorced, legally separated or not a member of the same household at any time during the 12-month period before you request the separation of liability. Even if you meet the above-mentioned requirements, the IRS can reject your request in the following situations:
 - a. *Fraud.* The IRS proves that assets were transferred between you and your spouse as part of a fraudulent scheme.

- b. *Knowledge.* The IRS proves you had actual knowledge of any item giving rise to a deficiency not allocable to you (unless you signed the return under duress).
 - c. *Avoidance.* The IRS proves you transferred property to your spouse (or former spouse) just to avoid tax or the payment of tax.
3. **Equitable Relief.** If you are not eligible for innocent spouse relief or separation of liability, you may be relieved of the tax through equitable relief. This is the case when the liability is the result of an underpayment instead of an understatement. Simply stated, taking into account all the facts and circumstances, it would be unfair to hold you liable for the understatement or underpayment of tax. The IRS will look for indicators of fairness like whether you received any significant benefit from the understatement, whether you were later divorced from or deserted by your spouse, knowledge, economic hardship, abuse, tax compliance, lack of control over finances, and, if you know taxes are due, that you have a reasonable expectation that your spouse will pay the tax within a reasonably prompt time after the filing of the return.

Authorities

- I.R.C. § 6015
- IRS Publication 971
- IRS Notice 2012-6; IRB 2011-32
- MDR Innocent Spouse Allocation Program, available at <www.revenue.state.mn.us>

Comment

It is often difficult for a tax preparer, who has prepared married filing joint returns for his or her clients for many years, to see that one of the spouses is entitled to relief from a joint liability as an innocent spouse. If you feel at all uncomfortable with an assessment against you, like you never knew about the obligation or you were confident it was going to be paid and it was not, contact an experienced attorney to review your situation. Your current advisor may have a conflict of interest and cannot give you good advice.

Further Reading

- IRS Notice 2012-8. This Notice also sets out the IRS's "streamlined" equitable relief for requesting spouses who can prove they meet the marriage, knowledge, and economic hardship factors as defined in Notice 2012-8.

Notes

7. Can the IRS, the MDR, and the Minnesota Department of Employment and Economic Development (MDEED) pursue me, individually, for employment taxes a company failed to pay?

Answer

Yes. If you had control over the finances in the company, even if you do not own the company, the IRS, the MDR, and the MDEED may hold you personally responsible for some of the employment taxes that were not paid while you had control. The IRS expects you to hold and protect the income, social security and medicare tax the company withheld from employees (the trust fund taxes) for the IRS; the MDR expects you to protect the income taxes the company withheld from employees and the sales taxes the company collected from customers; and, even though you are not withholding any taxes for the MDEED, it expects you to make sure your company pays the proper amount of unemployment insurance. If these obligations remain unpaid, the IRS, the MDR, and MDEED may pursue you for all or a portion of the unpaid tax liability.

The IRS puts this obligation on you through the trust fund recovery penalty (I.R.C. § 6672). If the IRS deems you to be one of the people in the company responsible for the company's finances and you willfully failed to pay the trust fund taxes, you can be personally obligated to pay these taxes. To determine if you had the requisite responsibility and willfulness, the IRS will interview you and others in and outside of the company with knowledge of the company's operations. The IRS revenue officer will ask questions contained in its Form 4180. The IRS will also collect corporate and banking records which it will use to determine who in the company had authority to and actually did handle the financial matters for the company.

The MDR has a similar process to assess what it calls personal liability, but it does not need to demonstrate you were willful or had any knowledge that the taxes were unpaid. It bases its decision on many factors, but primarily whether you had authority to sign checks or make other financial decisions for the company; you had authority to make decisions regarding the operation of the company; you were an owner, partner or officer; or, you prepared or submitted tax forms or payments for the company. In addition, the MDR can hold you responsible for not only the income tax, but also the penalties and interest it charges the company. The IRS does not do this.

The MDEED also has a similar process, but like the IRS, it must be able to demonstrate that you had sufficient control over the company's finances and wilfully failed to pay the unemployment insurance. Unlike the obligations to the IRS or the MDR, the personal obligation can be discharged in bankruptcy under the right circumstances.

If you receive a notice from the IRS assessing you the trust fund recovery penalty, an order assessing personal liability from the MDR, or a personal liability determination from the MDEED, make sure you file an appeal within the time allowed. You may not be responsible for these taxes. The fact that you received a notice of the assessment usually only means that you possess some of the common characteristics of the individual who can be held responsible for a company's unpaid employment or sales taxes. You may be an officer, a bookkeeper, a check signer, or a shareholder. While each of these positions is relevant to determining whether you are responsible, they

do not, standing alone, support an assessment against you. The key is whether you had real control over the company's finances and the payment of creditors and, in the case of the IRS and MDEED, whether you knew the taxes were not being paid.

You should also ask to see all of the information the IRS, the MDR, or the MDEED used to make its determination that you are liable. For the IRS, you should submit a Freedom of Information Act (FOIA) request to obtain this information. For the MDR and MDEED, you can request these documents under the Government Data Practices Act (GDPA). You want this information so you can determine if the agency is using incorrect or misleading information to make its assessment. Mistakes are not uncommon.

Authorities

- I.R.C. § 6672(IRS)
- MINN. STAT. §§ 270C.56 (MDR) & 268.063(MDEED)
- MINN. STAT. § 13 (Gov. Data Practices Act)
- 5 U.S.C. § 552 (Freedom of Information Act)

Comment

You may contest the IRS assessment at various times: during the initial investigation; in the appeal process allowed after you receive the notice that you have been assessed; as part of a collection due process hearing if your claims had not previously been considered by an appeals officer; in a claim for refund after you paid the tax for one employee for one quarter; in a suit for refund; or, in a bankruptcy proceeding. You also have multiple times for consideration with the MDR and MDEED, but each agency's procedures are unique. Try resolve the issue at the earliest possible stage.

Further Reading

- Internal Revenue Manual (IRM) § 5.7.3

Notes

8. Are settlement or litigation awards taxable?

Answer

Yes, in most circumstances, subject to some exclusions. A better question is to what extent are the proceeds taxable? The general rule is that the proceeds from a settlement or verdict are part of your gross income, unless you can prove that the Internal Revenue Code provides for the exclusion of your receipts from gross income.

The first step to determine the taxability of settlement or verdict proceeds is to determine the nature of the claims that were resolved or compromised. This is commonly referred to as the “origin of the claim test.” The critical question is: “In lieu of what were the damages awarded?”

If you were given compensatory damages as a replacement for income that would otherwise be fully taxable, then the damages you were paid are also fully taxable. For example, if you received an award in lieu of payments under an employment contract, they will usually be taxable as ordinary income. However, if the payments are to compensate you for a personal physical injury, they can be excluded from income under I.R.C. § 104(a)(2). There will be more on that in another section. The focus here is determining the character of the payment.

- *Capital asset.* If you receive payments to replace a capital asset, the payment will be taxable to the extent that it exceeds the basis of the replaced property, and then only as a capital gain. For example, recovery from a suit against a stock brokerage firm for losses in the value of stock.
- *Lost profits.* Payments for lost profits are ordinary income. For example, damage to business reputation; breach of contract; patent infringement; conspiracy to destroy a business; inverse condemnation; and, losses from negligent acts. Proceeds from an insurance policy that insures against lost profits, will also be taxable as ordinary income.
- *Goodwill.* Where the underlying lawsuit is for injury to the goodwill of a business (a capital asset), the recovery represents a return of capital.
- *Loss of value or loss of income.* If the payment is to compensate you for the loss in the value of the physical asset, it is capital in nature. If the payment is to compensate you for the loss of income from the physical asset, the payment may be taxable as the recovery of lost profits, that being ordinary income.
- *Disability insurance.* Proceeds from a disability policy which pays for overhead expenses for a prolonged absence from the business are taxable as ordinary income.
- *Punitive damages.* Punitive damages are taxable as ordinary income, regardless of the character of the underlying claim.
- *Community property.* If the award is community property, only a portion may be included in your gross income.
- *Attorney’s fees.* The portion of the award that is for attorney’s fees is generally considered taxable to the plaintiff if the underlying claim is taxable.

Authorities

- I.R.C. §§ 61 & 104(a)(2)

Comment

To protect the character of the award, make sure the settlement agreement or court order allocates the payment among items taxable as ordinary income, items taxable as a capital recovery and items excluded from taxation. If you do not allocate, the IRS or the Tax Court will be free to allocate the award in a manner it believes is more accurate. The IRS and the courts will look to more than the settlement agreement or order including: the trial court judgment; trial exhibits; drafts of the settlement agreement; correspondence between counsel, including demand letters, and settlement negotiations; communications with third parties including accountants; witness affidavits/statements; deposition transcripts; original and amended complaints; discovery; medical reports; and medical expense payments.

Further Reading

- Robert W. Wood, TAXATION OF DAMAGE AWARDS AND SETTLEMENT PAYMENTS (2012)

Notes

9. Can I exclude from taxable income the amounts I receive for a personal physical injury?

Answer

Yes. I.R.C. § 104(a)(2) excludes from gross income any amounts (other than punitive damages) you received as damages for personal physical injuries, regardless of whether the payment resulted from judgment or settlement. Punitive damages generally are not excludable under I.R.C. § 104(a)(2). However, punitive damages received under a state wrongful death law, under which punitive damages are the only damages available, are excludable under I.R.C. § 104(a)(2).

Damages must be received on account of physical personal injuries or sickness to be excluded from your gross income. If a claim has its origin in a physical personal injury or sickness, then all compensatory damages that flow from that injury or sickness are payments received on account of physical personal injury or sickness.

I.R.C. § 104(a) specifically excludes emotional distress from the definition of physical injury or physical sickness, except where damages are paid for medical care attributable to such distress. This effectively eliminates the exclusion of payments arising out of claims for discrimination, breach of a fiduciary duty, malicious prosecution, defamation, wrongful discharge, and intentional or negligent infliction of emotional distress.

Damages for physical illnesses arising out of emotional distress (e.g., insomnia, headaches, stomach disorders) are generally not excludable because they are considered mere symptoms of the underlying distress. The emotional distress itself is not treated as a physical personal injury or sickness. To the contrary, damages for emotional distress resulting from a physical injury are excluded from gross income.

Authorities

- I.R.C. § 104(a)(2)
- TREAS. REG. § 1.104-1

Comment

Be sure to understand the tax treatment of a settlement award before you accept the settlement, as the taxes can greatly reduce the amount you get to keep. Don't assume the award is not taxable because of something you read or heard.

Further Reading

- Letter Ruling 200041022 distinguishing damages relating to physical injury from damages without physical injury
- Robert W. Wood, *TAXATION OF DAMAGE AWARDS AND SETTLEMENT PAYMENTS* (2012)

10. Is the money I am awarded for attorneys' fees included in my income?

Answer

Yes, in most circumstances. The Internal Revenue Code defines "gross income" broadly to include all economic gains not otherwise exempted. Under the anticipatory assignment of income doctrine, you cannot exclude an economic gain from gross income by assigning the gain in advance to another party because gains should be taxed "to those who earn them." The doctrine is meant to prevent taxpayers from avoiding taxation through arrangements and contracts devised to prevent income from vesting in the one who earned it.

The U.S. Supreme Court and U.S. Tax Court view a contingent-fee agreement as an anticipatory assignment to the attorney of a portion of your income from any litigation recovery. In an ordinary case, attribution of income is resolved by asking whether a taxpayer exercises complete dominion over the income in question. However, in the context of anticipatory assignments, where the assignor may not have dominion over the income at the moment of receipt, the question is whether the assignor retained dominion over the income-generating asset. In the case of a litigation recovery, the income-generating asset is the cause of action derived from the plaintiff's legal injury.

The attorney-client relationship is a principal-agent relationship. You retain ultimate dominion and control over the underlying claim. The attorney can make tactical decisions without consulting you, but you still must determine whether to settle or proceed to judgment and make other critical decisions. The attorney is your agent who is duty bound to act in your interests, and so it is appropriate to treat the full recovery amount as income to you. This rule applies regardless of whether the attorney-client contract or state law confers any special rights or protections on the attorney, so long as such protections do not alter the relationship's fundamental principal-agent character.

Authorities

- *Commissioner v. Banks*, 125 S. Ct. 826 (2005)
- *Lucas v. Earl*, 281 U.S. 111 (1930)
- *Sinyard v. Commissioner*, 268 F.3d 756 (9th Cir. 2001), *affg.*, T.C. Memo. 1998-364
- *Sanford v. Commissioner*, T.C. Memo 2008-158
- *Green v. Commissioner*, T.C. Memo. 2007-39
- *Vincent v. Commissioner*, T.C. Memo, 2005-95

Comment

Always start with the assumption that any money you receive is included in income. Then, look for a basis to exclude it from income.

11. Can I deduct attorney's fees I paid to recover damages?

Answer

Yes, in the right circumstances. When only a portion of the award is taxable, then only a portion of the attorney's fees are deductible. Legal fees and court costs that are related to the taxable portion of the award are allowed as a miscellaneous itemized deduction subject to the two-percent AGI limitation on Schedule A. For example, assume you received an award of \$100,000, of which 80 percent was taxable, and your attorney's fees and costs were \$52,000. Only 80 percent (\$41,600) of the attorney's fees and costs would be deductible and even that would be subject to the two percent AGI limit.

Attorney's fees paid in an action covered by I.R.C. § 62(a)(20) may be deducted "above the line." For cases not covered by I.R.C. § 62(a)(20), the United States Supreme Court determined, in *Commissioner v. Banks*, 125 S. Ct. 826 (2005), that when a litigant's recovery constitutes income, the litigant's income includes the portion of the recovery paid to the attorney as a contingent fee. Therefore, the deduction for attorney's fees must be made "below the line" as an itemized deduction, subject to the two percent AGI limitation and the AMT rules.

If your income is high enough, you may be exposed to the alternative minimum tax (AMT) and thereby receive no deduction for the attorney's fees. The AMT operates by adding back to your income certain, but not all, deductions that, at a lower income level, would otherwise be available. You are then taxed on this larger amount of income. The AMT operates on both the federal and state levels. Below the line legal fees are one of the deductions that is added back to calculate tax. This can have a devastating effect on your award. For example, after federal taxes, state taxes and effectively nondeductible attorney fees, you could be left with less than 33 percent of the damage award. If the attorney charges 40 percent plus costs, your share could easily be less than 25 percent of the total award.

Authorities

- I.R.C. § 62(a)(20)
- *Commissioner v. Banks*, 125 S. Ct. 826 (2005)
- *Alexander v. Commissioner* 72 F.3d 938 (1st Cir. 1995) (the tax liability was greater than the taxpayer's recovery)

Comment

When you are analyzing a settlement offer, remember to calculate the tax impact of the settlement amount. To be safe, assume that the award is taxable and the attorney's fees are only deductible below the line. Then, talk with your attorney and accountant about whether the amounts can be excluded or deducted above the line.

Further Reading

- IRS Publication 525, Taxable and Nontaxable Income

12. Can the IRS or the MDR disallow my business deductions on the basis that I do not have a profit motive for my business?

Answer

Yes. You may be fortunate enough to have turned a hobby or an activity you are passionate about into a business, but, the IRS and the MDR may determine that your business is not entitled to deductions in excess of its income if you lack a real profit motive. This can result in a significant loss of deductions and an increased tax liability.

I.R.C. § 183, the “hobby loss rule,” states that the IRS will presume that an activity is for profit when the gross receipts for that activity exceed the deductions for three years out of any five-year period. If, however, losses have continued for multiple years, the IRS will assume that your activity is not engaged in for profit. This puts the burden on you to prove your profit motive.

Common sense suggests that if you are continually losing money, you should close the business to avoid future losses. If you continue to operate the business, the IRS will most likely conclude that it must be for a non-business reason, like deducting the expenses of your hobby. Some common targets of IRS audits include: dog, horse, and other animal breeders; race car drivers; artists; and “direct” or “multi-level” marketing businesses.

When auditing a business for profit motive, the IRS considers a number of factors to determine whether a taxpayer had a reasonable expectation of making a profit. These factors are listed in Treasury Regulations section 1.183-2.

1. Manner in which the taxpayer carries on the activity;
2. Expertise of the taxpayer;
3. Time and effort expended by the taxpayer;
4. Expectation of future profitability or that assets used in the activity may appreciate in value;
5. Past success of the taxpayer;
6. Taxpayer’s history with respect to the activity;
7. Amount of occasional profits;
8. Financial status of the taxpayer; and/or
9. Elements of personal pleasure or recreation.

These factors are not exclusive nor are they applicable or appropriate for every case. A determination is not made on the basis that the number of factors indicating a lack of profit motive exceeds the number of factors indicating a

profit objective or vice versa. Therefore, a court cannot merely “add up the score.”

Even taxpayers who report many years of business losses can prove they engage in their activity for profit. For example, in *Allen v. Commissioner*, 72 T.C. 28 (1979), the U.S. Tax Court held that the taxpayer, who operated a skiing lodge and reported losses on the Schedule C to his Form 1040 tax return for 11 consecutive years, was engaged in an activity for profit because he operated the company in a business-like manner. He kept meticulous books and records, advertised, and reasonably expected the lodge to appreciate in value.

Authorities

- I.R.C. § 183
- TREAS. REG. § 1.183-2
- *Siegel v. Commissioner*, 78 T.C. 659, 700 (1982), acq. 1984-2 C.B. 2. (Court will not simply add up the score)

Comment

Remember, in a profit-motive case, the issue is not whether you have the records to substantiate your deductions. The issue is whether you are entitled to take deductions you can substantiate.

Further Reading

- *Activities Not Engaged in For Profit* - IRS Audit Technique Guide (2009)

Notes

13. How do I determine if my income or losses from a business are passive or non-passive and why does it matter?

Answer

I.R.C. § 469 was enacted as part of the Reform Act of 1986 to limit the abuse of high-income taxpayers using shelters generating losses to shelter their other income, including their salaries. The impact on you is that you may not be able to deduct passive losses from your non-passive income like your wages, unless you can prove that you had a substantial and bona fide involvement in the loss generating activity.

An activity is passive if it involves the conduct of any trade or business in which the taxpayer does not materially participate. Rental activities are specifically included in the definition of passive activity, regardless of material participation unless you meet the IRS requirements of being a real estate professional. Some activities are specifically not passive. Those include a working interest in an oil or gas property where the investor's liability is not limited to investment, the rental of a dwelling unit that is used by you for sufficient days as a residence, trading personal property for the account of owners, and performance of personal services by an individual.

You materially participate when you are involved with the operations of an activity on a regular, continuous and substantial basis, regardless of whether you own an interest in the business activity either directly or indirectly.

Participation in an activity means any work done in connection with an activity by an owner of an interest in the activity, without regard to the capacity in which the individual does the work. The participation of your spouse in an activity that is attributable to you for purposes of determining your participation. This is regardless of whether you own an interest or there is a joint return filed.

Certain work by the owner is not treated as participation. Work done that is not customarily done by an owner of such an activity is not treated as participation if one of the principal purposes is to avoid disallowance of the loss. Work done by an investor in his capacity as an investor is not treated as participation unless the investor is involved in the day to day management or operations of the activity. Work done in the capacity of an investor includes: studying and reviewing financial statements, studying and reviewing reports on operation of the activity, preparing or compiling summaries or analyses of the finances or operations of the activity for the individual's own use, and, monitoring the finances or operations of the activity in a non-managerial capacity.

The extent of your participation may be established by any reasonable means. Reasonable means include but are not limited to the identification of services performed over a period of time and the approximate number of hours spent performing the services during that period based on appointment books, calendars or narrative summaries. Contemporaneous daily time reports, logs, similar documents are not required if the extent of the taxpayer's participation may be established by other reasonable means.

Treasury Regulations section 1.469-5T(a)(2), specifically sets out the tests for sufficient participation to make an activity non-passive.

Authorities

- I.R.C. §§ 280A, 469(c)(1), 469(h)(1), & 469(h)(5).
- TREAS. REG. §§ 1.469-5(f)(1), 1.469-5T(f)(3), 1.469-5T(f)(2)(I), 1.469-5T(f)(2)(ii)(A), & 1.469-5T(f)(2)(ii)(B)

Comment

Evaluate the character of your activity, passive or active, before you take any deductions on your tax returns.

Further Reading

- IRS Publication 925 (2011)
- Passive Activity and At Risk Rules; Passive Activity Loss - Audit Technique Guide (ATG) (2005)

Notes

14. Can I get information from the IRS and the Minnesota Department of Revenue about my case without having to go through litigation?

Answer

Yes. Much of the information the IRS and the MDR have collected from or about you in an audit or collection situation is available to you without having to go to court. This includes the revenue agent's or revenue officer's notes and many of the documents they have collected about you.

The IRS can release this information through a Freedom of Information Act (FOIA) request. Detailed information about what is available through the FOIA request is available at the IRS website, <www.irs.gov>. This information can be very valuable when you are trying to determine the IRS's basis for pursuing you and how it may have misinterpreted the situation or may simply have bad information. It can also be valuable when you are trying to find the details of your spouse's or ex-spouse's interactions with the IRS on a joint tax obligation. When the obligation is not joint, for example, a trust fund recovery penalty assessment against only your spouse, then only they will normally have access to this information through the FOIA process.

You can also learn a lot about your account through transcripts available from the IRS. The IRS will provide you a copy of your return or a print-out of the line items of your return (return transcript); information about the financial status of your account (account transcript); a combination of these transcripts (record of account); proof that you did not file a return (Verification of Non-Filing); data from the information returns submitted by third parties, like the W-2 and the 1099 (wage and income transcript). You can obtain these transcripts by filing a Form 4506-T and requesting the specific transcripts for all relevant years. The transcript will allow you to track many things, including every assessment of tax, penalty and interest, the accruing portions of interest and penalties, all payments and other adjustments made to your account.

The state of Minnesota also has a process available to taxpayers to request information the state has collected. This process is explained in the Government Data Practices Act, Minnesota Statutes chapter 13.

Authorities

- 5 U.S.C. § 552 Freedom of Information Act (FOIA)
- MINN. STAT. ch. 13 Government Data Practices Act (GDPA)

Comment

If you have any questions about what the IRS or MDR is doing, seeing the information they have collected is a good starting point.

Real Estate Law

Chapter 17

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1. What is title insurance and do I need it?

Answer

Historically in Minnesota, a purchaser or mortgagee relied either on an attorney's title opinion or title insurance policy to ensure proper title to the property. In the past several years, the overwhelming majority of transactions utilize title insurance rather than an attorney's opinion. This is because a purchaser or mortgagee may not have any recourse under an attorney's title opinion for many possible title defects such as fraud, forgery or duress in the execution of documents, equitable mortgages, execution by an incompetent person, deeds executed but not actually delivered until after death, abstractor error, or matters affecting title between the date of the opinion and recording of the new deed or mortgage.

It is important to understand that title insurance is an indemnity contract where the title company promises to pay the cost of a resulting loss from an adverse interest to the insured, which adverse interest is not provided for in the title insurance policy. *Stewart Title Guar. Co. v. West*, 110 Md. App. 114, 676 A.2d 960 (1996). The insurer promises to defend the title against adverse claims subject to the provisions of the policy. In short, the title company promises to pay the insured the actual loss or damage sustained, limited to the face amount of the policy.

The purchaser or mortgagee will first receive a title commitment that details the status of title and the terms on which the insurer will issue the final policy. The commitment is divided into different schedules, with schedule A setting forth information such as the amount of the policy, the party to be insured, and the current owner. Schedule B-I lists the requirements to be completed to obligate the insurer to issue the final policy. Schedule B-II lists the exceptions to title, including so called "standard exceptions." Each of the schedules must be carefully reviewed, as well as the documents referenced within the schedules, so that an appropriate final policy can be obtained.

It is also important to determine when the insured needs to obtain a survey. This will be necessary to delete the exception in schedule B-II relating to matters that would be disclosed by an accurate survey of the property. Other standard exceptions can be deleted by affidavits or negotiation with the title company.

Authorities

- *Stewart Title Guar. Co. v. West*, 110 Md. App. 114, 676 A.2d 960 (1996)

Comment

As a practical matter, lenders require title insurance and because the purchaser is responsible for that cost, it simply makes sense to purchase the owner's policy because it can be obtained for a modest additional cost.

Further Reading

- MINNESOTA REAL ESTATE PURCHASE AND SALE DESKBOOK, 2nd ed. (Minnesota CLE 2015)

2. I bought a house and now the basement is leaking. What can I do about it?

Answer

The answer to the water in the basement issue first depends upon who sold the house to you. If the house is new construction purchased from a general contractor, the potential claim will most likely be based on one or more of these theories:

- breach of contract (*Carlone v. Int'l Ass'n of Heat and Frost Insulators & Allied Workers Local Union No. 34*, 2010 WL 2195463 (D. Minn. May 28, 2010) (citing *Indus. Rubber Applicators, Inc. v. Eaton Metal Prods. Co.*, 171 N.W.2d 728 (Minn. 1969)))
- negligence (*Rediske v. Minn. Valley Breeder's Ass'n*, 374 N.W.2d 745 (Minn. Ct. App. 1985))
- misrepresentation or fraud (*Davis v. Re-Trac Mfg. Corp.*, 149 N.W.2d 37 (Minn. 1967))
- statutory warranties for new homes (MINN. STAT. CH. 327A)

The most common claim will be based on the chapter 327A Housing and Home Improvement Statutory Warranties Act. The statute provides warranties to the initial purchaser and subsequent purchasers. Priority of contract with the developer is not required. MINN. STAT. §§ 327A.01, SUBD. 6, & 327A.02, SUBD. 2. The basis for the liability is found on the following warranties in the statute:

1. That the dwelling will be free from defects caused by faulty workmanship and defective materials due to non-compliance with building standards for a period of one year from and after the warranty date.
2. That the dwelling will be free from defects caused by faulty installation of plumbing, electrical, or heating and cooling systems for a period of two years from and after the warranty date.
3. That the dwelling will be free from major construction defects for a period of ten years from and after the warranty date. MINN. STAT. § 327A.02.

Claims under chapter 327A can be extremely complex and issues can arise with respect to statutes of limitation, inspection requirements, offers to repair, the definition of "major construction defects," and a myriad of other issues. It is essential to review all aspects of this act as soon as possible after hearing of a potential claim.

Claims for leaking basements in used housing may, in some instances, be made under chapter 327A because a claim for breach of warranty does not require privity of contract with the contractor. A claim against the seller will also typically be based on breach of contract, misrepresentation or fraud, or violation of the disclosure requirements of Minnesota Statutes sections 513.52 through 60. It is important to note that a claim for water in the basement in used housing must be maintained under one of the following theories because the doctrine of implied warranty does not apply in sales of houses by non-builders in Minnesota. *Fretschel v. Burbank*, 351 N.W.2d 403 (Minn. Ct. App. 1984).

Authorities

- *Carlone v. Int'l Ass'n of Heat and Frost Insulators & Allied Workers Local Union No. 34*, 2010 WL 2195463 (D. Minn. May 28, 2010) (citing *Indus. Rubber Applicators, Inc. v. Eaton Metal Prods. Co.*, 171 N.W.2d 728 (Minn. 1969))
- *Rediske v. Minn. Valley Breeder's Ass'n*, 374 N.W.2d 745 (Minn. Ct. App. 1985)
- *Davis v. Re-Trac Mfg. Corp.*, 149 N.W.2d 37 (Minn. 1967)
- MINN. STAT. CH. 327A
- MINN. STAT. §§ 327A.01, SUBD. 6, & 327A.02, SUBD. 2
- MINN. STAT. § 327A.02
- *Fretschel v. Burbank*, 351 N.W.2d 403 (Minn. Ct. App. 1984)

Comment

Attorneys' fees and costs in any leaking basement case can be significant. It is wise to explore settlement in these cases as early as possible. Because the "fix" is often not excessive, a settlement is usually warranted and wise.

Further Reading

- *Vlahos v. R&I Constr. of Bloomington Inc.*, 676 N.W.2d 672 (Minn. 2004)
- *Ittel v. Pietig*, 705 N.W.2d 203 (Minn. Ct. App. 2005), *review denied* (Jan. 17, 2006)

Notes

3. I can't afford to pay my mortgage. Should I try to do a short sale, or let the house go into foreclosure?

Answer

Simply stated, a short sale is the sale of a house for less than the amount the owner still owes on the mortgage. A seller deciding to lower the price and take less profit is not a short sale. In the typical short sale situation, the homeowner is in arrears on mortgage payments and the market value of the house is less than the balance on the loan.

From a credit standpoint, a foreclosure on the homeowner's record is probably worse than a situation where payments are in arrears and there is eventually a short sale. Both situations are bad, but there are also degrees of bad. The one distinct benefit of a short sale is that a homeowner may be able to pay off some existing judgments or liens through a short sale process. A short sale requires that marketable title be provided to the new buyer, and in order to do so, judgments or liens recorded against the property will need to be removed. If the judgments or liens are for amounts that will still make the short sale numbers work, this can be a distinct advantage to the homeowner. A foreclosure will remove these judgments or liens from the title but the obligation by the homeowner will still remain.

The Mortgage Forgiveness Debt Relief Act offers relief to homeowners who would otherwise owe taxes or forgiven mortgage debt after facing foreclosure. Pub. L. No. 110-343, § 303(a), 122 Stat. 3765, 3807 (codified as amended in scattered sections of U.S.C. titles 5, 12, 15, and 31). The act applies to debt discharged in calendar years 2007 through 2012. The act is limited to primary residences and applies to both short sales and foreclosures.

Authorities

- Pub. L. No. 110-343, § 303(a), 122 Stat. 3765, 3807 (codified as amended in scattered sections of U.S.C. titles 5, 12, 15, and 31)

Comment

The homeowner will remain in possession of the property during the redemption period following foreclosure. This will not be the case in a short sale.

Further Reading

- MINNESOTA REAL ESTATE PURCHASE AND SALE DESKBOOK, 2nd ed. (Minnesota CLE 2015)

4. If my house is foreclosed on, how can I get it back?

Answer

The applicable mortgage foreclosure statute allows a homeowner to reinstate the mortgage at any time prior to the sale and applies both to foreclosures by advertisement and action. MINN. STAT. § 580.30. To reinstate, the mortgagor must pay (1) the amount due at the time of tender; (2) attorneys' fees and costs authorized by statute, as well as "other lawful disbursements necessarily incurred;" and (3) payment may be made to the holder of the mortgage, foreclosing attorney or sheriff.

Subsequent to the actual sheriff's sale, the owner has the right to redeem the property by paying (1) the amount for which the property was sold at the foreclosure sale; (2) interest on the debt as stated in the certificate of sale; and (3) the additional advances made by the purchase at sale, including such items as real estate taxes, hazard insurance, reasonable attorneys' fees pursuant to statute, and costs incurred to protect the property. MINN. STAT. §§ 580.23, 582.03 & 582.031. The redemption period will be either 12 months, six months, two months, or five weeks depending on the circumstances involved with each particular property. MINN. STAT. § 580.23 (12 months or six months); MINN. STAT. § 582.032 (five weeks for abandoned property); MINN. STAT. § 582.32 (two months for voluntary foreclosure agreement).

The time period to buy back a house may also be affected by the homeowner filing bankruptcy. Where a filing occurs prior to the sale, there is no effect on the redemption period but the lender must seek relief from the automatic stay. Where the filing occurs after the sheriff's sale, the right of the owner to redeem is extended for 60 days. 11 U.S.C. § 108.

It is also important to note that during a redemption period, the owner has the ability to not only buy back the house but may also redeem by selling the house to a third party and use the proceeds for redemption purposes. Due to declining property values in the past few years, this has not been a common practice.

Authorities

- MINN. STAT. § 580.30
- MINN. STAT. §§ 580.23, 582.03 & 582.031
- MINN. STAT. § 580.23 (12 months or six months); MINN. STAT. § 582.032 (five weeks for abandoned property); MINN. STAT. § 582.32 (two months for voluntary foreclosure agreement)
- 11 U.S.C. § 108

Comment

The rights of a mortgagor can also be affected by the Home Affordable Modification Program (HAMP), which requires loans owned by Fannie Mae and Freddie Mac to be reviewed for modification prior to foreclosing if the borrower requests and meets certain eligibility criteria.

5. Is there anything different about buying lake property?

Answer

Lake properties certainly have several unique issues and potential problem areas. A purchaser must carefully review all disclosures and thoroughly inspect the property personally and with professionals.

Septic systems or subsurface sewage treatment systems (SSTSs) are regulated by the Minnesota Pollution Control Agency. MINN. STAT. §§ 115.55 & 115.56; MINN. R. 7080 & 7081. The local government agency (county, municipality or township) regulating the property should be contacted to determine whether the system has been properly permitted and inspected. If the system does not comply with current requirements, it will need to be replaced and the new one will have to comply with existing land use requirements. A purchase agreement should contain contingencies for inspection and the ability to replace if not sufficient.

A seller must disclose the existence of any wells on the property before signing a purchase agreement. A licensed contractor will need to be retained to determine the size of the well, its condition and capacities. A water test will need to be completed to detect the presence of harmful chemicals. Contingencies should be included in the purchase agreement for those issues. Contingencies in the purchase agreement should also be included for structural integrity, mold and mildew, and methamphetamine use.

In purchasing lake property, attention should also be paid to such issues as:

- legal descriptions—a survey is almost always recommended for these types of properties;
- access to a public road; and
- riparian issues such as the ability to put in a dock, the property's extension to the water, fishing, boating, hunting and other rights, changes in the shoreline, and the state's jurisdiction through the Department of Natural Resources. MINN. STAT. CH. 103G; *State v. Kuluvar*, 266 Minn. 408, 123 N.W.2d 699 (1963).

The development of lake property entails a review and compliance with many federal, state, and local statutes and regulations ranging from the Federal Clean Water Act, Federal Wild and Scenic Rivers Act, the Minnesota Wild and Scenic Rivers Act (MINN. STAT. CH. 103A-103G), the Floodplain Management Act (MINN. STAT. CH. 103F), Wetland Conservation Act (MINN. STAT. § 103G.221 *et seq.*), Shoreland Development Act (MINN. STAT. § 103F.201 *et seq.*), and many county and municipal laws mandated by these state laws.

Authorities

- MINN. STAT. §§ 115.55 & 115.56; MINN. R. 7080 & 7081
- MINN. STAT. CH. 103G; *State v. Kulwoar*, 266 Minn. 408, 123 N.W.2d 699 (1963)
- MINN. STAT. CH. 103A-103G
- MINN. STAT. CH. 103F
- MINN. STAT. § 103G.221 *et seq.*
- MINN. STAT. § 103F.201 *et seq.*

Comment

Strongly encourage the buyer to retain an attorney accustomed to the issues involved with lake properties.

Further Reading

- ISSUES UNIQUE TO RECREATIONAL AND LAKE SHORE PROPERTY (Minnesota CLE June 2010)
- WATER PROJECT AND DRAINAGE LAW DESKBOOK, 2d ed. (Minnesota CLE 2010)

Notes

6. Should I sign the arbitration addendum in the realtor's purchase agreement form?

Answer

The Minnesota Association of Realtors' purchase agreement contains an optional arbitration disclosure and residential real property arbitration agreement that becomes part of the purchase agreement if executed by the sellers, purchasers, and the licensees involved in the transaction.

There is no right or wrong answer regarding the question posed. The proper advice is to explain the pros and cons of arbitration versus a court action. Some of the pros and cons of arbitration as agreed to in the Minnesota Association of Realtors' (MAR) form versus a court action can be summarized as follows:

- the initial cost of filing an arbitration claim can be higher than filing a lawsuit;
- the time within which a claim can be filed is more limited in arbitration (the MAR agreement provides that a request for arbitration must be filed within 24 months of the date of the closing of the property. It also provides that in some cases of fraud, a court or arbitration may extend the 24-month limitation period);
- as a result of the relevant arbitration rules, the length of time from filing a claim to resolution will be much shorter in arbitration;
- the arbitration hearing is typically held at the home and not in a courtroom;
- the arbitration is heard by one arbitrator while a court proceeding will involve a judge or jury;
- arbitration will generally not allow any discovery, as opposed to a court action;
- litigation will involve a record of the proceedings with findings of fact and conclusions of law (the arbitration proceeding will typically have only a short decision); and
- absent special or unique circumstances, an arbitration proceeding is final while a court action allows for appeals. See Minnesota Statutes section 572.19 for statutory provisions allowing a court to set aside an arbitration award.

It is important to remember that if the parties sign the MAR arbitration agreement, they forego the possibility of using conciliation court, as well as district court. A viable option may be for the parties to modify the MAR form to provide for arbitration instead of a court action if the claim is less than a specific dollar amount.

Authorities

- See Minnesota Statutes section 572.19 for statutory provisions allowing a court to set aside an arbitration award

7. I don't like the person who made a full-price offer on my house, or I changed my mind. Do I have to sell?

Answer

There are three considerations that must be addressed in answering this question. The first is the relationship between the seller and the broker. If the seller does not like the buyer or changes his or her mind and rejects the full price offer, the seller may very well be obligated to pay a commission. In Minnesota, a broker who procures a ready, willing and able buyer on the seller's terms is entitled to a commission even if the sale is not consummated, as long as the failure to close is not due to fault on the part of the broker. *Mayberry v. Davis*, 288 Minn. 73, 178 N.W.2d 911 (1970); *Olson v. Penkert*, 252 Minn. 334, 90 N.W.2d 193 (1958).

The second consideration is the relationship between the seller and buyer. If the seller changes his or her mind, the potential buyer will not have a claim against the seller for specific performance or damages because there is no contractual relationship between them.

The third consideration relates to the motivation or reason for the seller's decision not to sell. In Minnesota, it is an unfair discriminatory practice for an owner to refuse to sell because of race, color, creed, religion, natural origin, sex, marital status, status with regard to public assistance, disability, sexual orientation, or familial status. MINN. STAT. § 363A.09, SUBD. 1. Violation of the statute may result in relief for the discriminated party involving damages, attorneys' fees, costs, or an order requiring the seller to sell to such party. See MINN. STAT. §§ 363A.28-363A.33.

Authorities

- *Mayberry v. Davis*, 288 Minn. 73, 178 N.W.2d 911 (1970); *Olson v. Penkert*, 252 Minn. 334, 90 N.W.2d 193 (1958)
- MINN. STAT. § 363A.09, SUBD. 1
- MINN. STAT. §§ 363A.28-363A.33

Comment

A seller should clearly think through a decision to place the home for sale and, obviously, not discriminate in the sale process. If a legitimate change of mind occurs, liability for a commission will result if the broker decides to proceed with such remedy.

Further Reading

- MINNESOTA REAL ESTATE PURCHASE AND SALE DESKBOOK, 2nd ed. (Minnesota CLE 2015)

8. What should I know before I sign a listing agreement?

Answer

It is important to realize that the relationship between the seller and broker is governed by agency principles. *Klawitter v. Billick*, 308 Minn. 325, 242 N.W.2d 588 (1976). In this relationship, the agent is bound to exercise reasonable care, skill and diligence, and is responsible for any loss to the principal that results because of the agent's failure to do so. *Witt v. John Blomquist, Inc.*, 249 Minn. 32, 81 N.W.2d 265 (1957). The broker/agent must act solely for the benefit of the principal in all matters connected with the agency, and owes the utmost good faith and loyalty to the principal. *Olson v. Penkert*, 252 Minn. 334, 90 N.W.2d 194 (1958). A broker/agent is bound to communicate to the principal all facts of which the agent has knowledge that might affect the principal's rights or interests. *Boulevard Plaza Corp. v. Campbell*, 254 Minn. 123, 94 N.W.2d 273 (1959). The broker owes the principal several fiduciary duties such as loyalty, obedience, disclosure and confidentiality.

The relationship between the seller and listing agent, as well as the relationship between buyer and buyer's agent must be in writing and contain the contents set forth in the statute. MINN. STAT. § 82.66, SUBDS. 1 & 2.

The "exclusive right to sell" listing agreement is the most common type of listing agreement and provides that the listing broker is entitled to receive a commission even if the owner sells the property without the listing broker being involved. In this situation, a broker who procures a ready, willing, and able buyer on the seller's terms is entitled to a commission even if the sale is not consummated, as long as the failure to close is not the fault of the broker. *Mayberry v. Davis*, 288 Minn. 73, 178 N.W.2d 911 (1970). Net listing agreements, whereby the broker receives a percentage of the amount obtained above a specified amount, can also be utilized in the right situation. A buyer's broker agreement usually provides that the buyer's broker will receive a share of the commission paid by the seller.

It is important for the seller to understand that the listing agreement is a legally binding contract that creates significant rights between the parties. A seller can be responsible for a commission after the listing agreement has expired if the listing agreement contains an override clause and the broker provides a timely protective list. MINN. STAT. § 82.66, SUBD. 1.

Authorities

- *Klawitter v. Billick*, 308 Minn. 325, 242 N.W.2d 588 (1976)
- *Witt v. John Blomquist, Inc.*, 249 Minn. 32, 81 N.W.2d 265 (1957)
- *Olson v. Penkert*, 252 Minn. 334, 90 N.W.2d 194 (1958)
- *Boulevard Plaza Corp. v. Campbell*, 254 Minn. 123, 94 N.W.2d 273 (1959)
- MINN. STAT. § 82.66, SUBDS. 1 & 2
- *Mayberry v. Davis*, 288 Minn. 73, 178 N.W.2d 911 (1970)
- MINN. STAT. § 82.66, SUBD. 1

Landlord- Tenant Law

Chapter 18

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1. What are unlawful detainers and what can a landlord expect of the legal process?

Answer

An unlawful detainer (commonly called a “UD”) is an eviction action. It is a lawsuit that a landlord commences with filing and service of a summons and complaint in court for purposes of evicting a tenant. The complaint must include name and date of birth of tenant, address of property, and basis for relief. The bases are non-payment of rent (MINN. STAT. § 504B.291), breach of lease, or “holding over” after the lease has terminated.

Unless the lease provides otherwise (and many leases for subsidized properties do), the landlord does not need to give the tenant notice or an opportunity to cure before filing an eviction action in court.

First, the complaint is filed with the court, and then the court issues the summons to be personally served or “mailed and nailed.” Most counties accept electronic filing. Consider working with a process server to serve the summons and complaint, as very specific service requirements apply under MINN. STAT. § 504B.331.

For breach of lease eviction actions, the lease must be attached to the complaint. For “holding over” eviction actions, landlords should also attach the document that shows the lease has ended (notice to vacate or mutual lease termination agreement, for example). For breach of lease cases, the landlord should specify the breaches in the complaint.

Landlords should be aware that tenants can raise retaliation as a defense to an eviction action if the termination was intended in whole or in part (1) as a penalty for the defendant’s good faith attempt to secure or enforce rights under a lease or contract, oral or written, under the laws of the state or any of its governmental subdivisions, or of the United States; or (2) as a penalty for the defendant’s good faith report to a governmental authority of the plaintiff’s violation of a health, safety, housing, or building code or ordinance. See MINN. STAT. § 504B.285, subd. 2 for more details.

Authorities

- Procedure for evictions is contained at MINN. STAT. § 504B.321.
- Procedure for service of summons and complaint is contained at MINN. STAT. § 504B.331.

Comment

Don’t expect to get possession right away, even if expedited. Takes up to three days to serve, seven days for an initial hearing, seven days for trial, and even longer for an order. Depending on the county, it can take up to two weeks after that for sheriff to execute a writ of recovery. (For sheriff’s execution of writ requirements, see MINN. STAT. § 504B.365)

Court trial is before housing court referee in Hennepin County and Ramsey County, which have their own procedural rules. Can seek judge review of referee orders. Also, either side may request a jury trial (MINN. STAT. § 504B.335). Appeals are addressed at MINN. STAT. § 504B.371.

2. If the tenant is really bad, can the landlord evict without a court order?

Answer

No. In Minnesota, an eviction must be done through the court. Tenants cannot be evicted without a court order, regardless of what they have done or whether or not they have paid rent. Evicting someone without a court order is a lock-out, which carries stiff penalties for the landlord. See MINN. STAT. § 504B.375 for lockout standard and procedure.

But what if I have a tenant who is causing major problems and needs to leave immediately? If the conduct justifies calling the police, then do so. Also consider calling Adult Protection.

Also consider filing an expedited eviction action under MINN. STAT. § 504B.321, subd. 2, but make sure the facts satisfy the higher standard. Must file affidavit with facts showing that tenant is either violating the covenant not to allow illegal activities on the premises under MINN. STAT. § 504B.171, or the tenant is “causing a nuisance or other illegal behavior that seriously endangers the safety of other residents, their property, or the landlord’s property.” If affidavit is approved, landlord will receive a hearing in 5-7 days, but resident must be personally served with summons and complaint. If landlord chooses to file an expedited eviction action, must make sure there are facts to support it and that the tenant can be personally served. Otherwise, landlord could face penalty of \$500 for filing an expedited eviction without a sufficient basis under MINN. STAT. § 504B.321, subd. 2(d).

Notes

3. What will happen in court after an eviction action has been filed, and how can a landlord prepare?

Answer

In most counties, the eviction action hearing stated on the summons is the “first appearance” and not a trial. There will likely be many other cases called at the hearing and there may be some waiting time. Typically, cases that have settled will be called first. Make sure to meet with the tenant to see if the case can be settled. Most courts have their own settlement forms.

If it’s a non-payment of rent case, the tenant has the right to “pay [in full] and stay.” If the tenant pays the full amount owed plus filing and service fees, the landlord must accept that amount and the eviction action will be dismissed. Inability to pay rent or hardships (including eviction in cold weather) are not defenses to a non-payment of rent action.

If the tenant does not have the money to pay the full amount, consider agreeing to a date when the tenant will pay and entering into a settlement agreement to that effect. The settlement agreement should state that if the tenant does not pay in full by the date agreed upon, the landlord may notify the court (typically by filing a short affidavit stating that the tenant has not paid) and the writ will be issued. Keep in mind that if the tenant does not have the money to pay, most judges will give the tenant up to seven days to pay and stay, or will issue the writ and “stay” it for seven days based on a hardship (children in the home or disability). If the landlord has reasons why the tenant should not be entitled to the seven days, be prepared to explain that to the judge at the first appearance hearing.

If the eviction action is for “holding over,” the landlord should be able to receive a writ of recovery at the first appearance, except if there is a dispute about the validity or enforceability of the agreement to vacate, in which case the court may set the matter on for trial. The trial will be held in seven days of the first appearance hearing, unless the landlord waives that right and agrees to a later date. At trial, be prepared to enter evidence and call witnesses.

If the eviction action is for breach of lease and a settlement cannot be reached, the court will likely set the matter on for trial in seven days (unless the landlord agrees to a later trial). Be prepared with exhibits and witnesses to prove up the breaches of lease. The same rules of evidence apply as apply to civil actions.

If the tenant is claiming a retaliation defense, the landlord should be prepared to ask the court at the first appearance to have the tenant deposit money into court for rent.

Authorities

- Procedure for evictions is contained at MINN. STAT. § 504B.321.

4. What type of notice is required to end a tenancy?

Answer

It depends on the lease and if applicable, any subsidy (HUD Handbook or tax credit).

If not in written lease, then lease may be terminated by either party in writing. In that case, the time of the notice must be at least as long as the interval between when rent is due (usually, one month) or three months, whichever is less.

If there is not a lease at all, the landlord may terminate the tenancy by giving the tenant 14 days' notice to quit in writing.

Victims of domestic violence, who fear imminent domestic abuse against them or their minor children if they remain on the premises, have the right to terminate a lease without penalty or liability. In that case, they must send written notice to the landlord. The statute contains detailed requirements, so be sure to compare the notice to the statute. MINN. STAT. § 504B.206.

Death of tenant- Either the landlord or the personal representative of the tenant's estate may terminate the lease upon at least two months' written notice, to be effective on the last day of a calendar month. (MINN. STAT. § 504B.265)

Authorities

- MINN. STAT. § 504B.135 (terminating tenancy at will)
- MINN. STAT. § 504B.265 (terminating lease upon death of tenant)
- MINN. STAT. § 504B.206 (rights of victims of domestic violence)

Further Reading

- For HUD Handbook properties, the HUD Handbook is a must read.

Notes

6. What can be done about a tenant who sells or does drugs on the property?

Answer

Call the police. See if the police will test the substance. (They likely will not offer to test.)

In every lease or license of residential premises, whether in writing or parol, the landlord or licensor and the tenant or licensee covenant that:

(1) neither will:

(i) unlawfully allow controlled substances in those premises or in the common area and curtilage of the premises;

(ii) allow prostitution or prostitution-related activity as defined in section 617.80, subdivision 4, to occur on the premises or in the common area and curtilage of the premises;

(iii) allow the unlawful use or possession of a firearm in violation of section 609.66, subdivision 1a, 609.67, or 624.713, on the premises or in the common area and curtilage of the premises; or

(iv) allow stolen property or property obtained by robbery in those premises or in the common area and curtilage of the premises; and

(2) the common area and curtilage of the premises will not be used by either the landlord or licensor or the tenant or licensee or others acting under the control of either to manufacture, sell, give away, barter, deliver, exchange, distribute, purchase, or possess a controlled substance in violation of any criminal provision of chapter 152. The covenant is not violated when a person other than the landlord or licensor or the tenant or licensee possesses or allows controlled substances in the premises, common area, or curtilage, unless the landlord or licensor or the tenant or licensee knew or had reason to know of that activity.

Authorities

- M.S.A. § 504B.171

Comment

Just because the police don't charge or the prosecutor doesn't prosecute doesn't mean that the landlord can't evict! The evidentiary standard is by a preponderance of the evidence, not beyond a reasonable doubt.

Further Reading

- For subsidized housing, Drug-Free/Crime-Free Addendum.

7. What sorts of background checks can be done on a prospective tenant?

Answer

Criminal background check – BCA

Credit check

Rental history

Be advised of MINN. STAT. § 504B.173 regarding tenant screening. Under that statute, a **landlord may not:**

- (1) charge an applicant a screening fee when the landlord knows or should have known that no rental unit is available at that time or will be available within a reasonable future time;
- (2) collect or hold an applicant screening fee without giving the applicant a written receipt for the fee, which may be incorporated into the application form, upon request of the applicant; or
- (3) use, cash, or deposit an applicant screening fee until all prior applicants have either been screened and rejected, or offered the unit and declined to enter into a rental agreement.

Also, **the landlord must return the applicant screening fee if:**

- (1) the applicant is rejected for any reason not listed in the disclosure required under subdivision 3; or
- (2) a prior applicant is offered the unit and agrees to enter into a rental agreement.
 - (b) If the landlord does not perform a personal reference check or does not obtain a consumer credit report or tenant screening report, the landlord must return any amount of the applicant screening fee that is not used for those purposes.
 - (c) The applicant screening fee may be returned by mail, may be destroyed upon the applicant's request if paid by check, or may be made available for the applicant to retrieve.

If a landlord accepts an applicant screening fee from a prospective tenant, the landlord must:

- (1) disclose in writing prior to accepting the applicant screening fee:
 - (i) the name, address, and telephone number of the tenant screening service the landlord will use, unless the landlord does not use a tenant screening service; and
 - (ii) the criteria on which the decision to rent to the prospective tenant will be based; and
- (2) notify the applicant within 14 days of rejecting a rental application, identifying the criteria the applicant failed to meet.

Penalty of \$100 fine, filing costs and attorneys' fees for landlords who violate these laws.

M.S.A. § 504B.173

8. What should be included in a lease?

Answer

For the most part, whatever the parties want. It is, after all, a contract.

Most important point is to have a lease in the first place. In Minnesota, landlords with over 12 residential units must have a written lease and provide the tenants with a copy, or it is a misdemeanor (MINN. STAT. § 504B.111)

Lease terms for the landlord to consider:

- When and where rent is due (including during eviction and holding over)
- Late fees which cannot exceed 8% of the overdue rent under MINN. STAT. § 504B.177
- Strong non-waiver language
- Animal policy with animal addendum
- Landlord's right to enter (does not need to say 24 hours' notice, just reasonable notice)
- Security deposit may be used for unpaid rent or other amounts
- Charges for lost keys or other charges
- Details about what tenant is responsible for and what landlord is responsible for
- Beware of attorneys' fees clauses even if sided in favor of the landlord, as courts will interpret clause as being in favor of residents as well. See MINN. STAT. § 504B.172
- Eviction may be filed immediately and without prior notice (unless subsidized, in which case follow the subsidy notice requirements)
- Responsible for conduct of guests
- Drugs and illegal activities
- Notice under MINN. STAT. § 504B.181 (name of the landlord of the premises or an agent authorized by the landlord to accept service of process and receive and give receipt for notices and demands).
- Tenant must cooperate in all inspections, repairs, and pest control.

Notes

9. What are the rules for security deposits?

Answer

The landlord must return the full amount of the security deposit, plus 1% annual interest, within 21 days after the tenant moves out. If the building was condemned, then the landlord must return it within five days. The landlord may withhold the cost of any damage to property beyond normal wear and tear or to offset unpaid rent or other amounts due under the lease. Damages for not returning the security deposit are double the amount plus \$500. Keep in mind that claims for security deposit returns are very popular conciliation court claims.

Authorities

- MINN. STAT. § 504.B.178

Comment

Consider a pet deposit, but not for reasonable accommodation assistance animals.

Notes

10. Can tenants be evicted in winter, and can they move in the winter?

Answer

Yes and yes.

In this instance, the protection goes to the landlord. It is a misdemeanor for a tenant to terminate the tenancy or otherwise abandon or vacate the property between November 15 and April 15, without first giving the landlord three days' notice of intention so that the landlord may address issues with the utilities. (MINN. STAT. § 504B.155)

Authorities

- MINN. STAT. § 504B.155

Notes

11. Do tenants have a right to privacy?

Answer

Yes, but it's not as broad as landlords might expect.

MINN. STAT. § 504B.211 provides, "a landlord may enter the premises rented by a residential tenant only for a reasonable business purpose and after making a good faith effort to give the residential tenant reasonable notice under the circumstances of the intent to enter. A residential tenant may not waive and the landlord may not require the residential tenant to waive the residential tenant's right to prior notice of entry under this section as a condition of entering into or maintaining the lease."

A reasonable purpose can be: (1) showing the unit to prospective residential tenants during the notice period, (2) showing the unit to a prospective buyer or to an insurance representative, (3) performing maintenance work, (4) allowing inspections by state, county, or city officials charged in the enforcement of health, housing, building, fire prevention, or housing maintenance codes, (5) the residential tenant is causing a disturbance within the unit, (6) the landlord has a reasonable belief that the residential tenant is violating the lease within the residential tenant's unit, (7) prearranged housekeeping work in senior housing where 80 percent or more of the residential tenants are age 55 or older, (8) the landlord has a reasonable belief that the unit is being occupied by an individual without a legal right to occupy it; or (9) the residential tenant has vacated the unit.

Also, a landlord may enter without prior notice if it reasonably suspects that: (1) immediate entry is necessary to prevent injury to persons or property because of conditions relating to maintenance, building security, or law enforcement; (2) immediate entry is necessary to determine a residential tenant's safety; or (3) immediate entry is necessary in order to comply with local ordinances regarding unlawful activity occurring within the residential tenant's premises.

Authorities

- MINN. STAT. § 504B.211

Notes

The Ethics of Answering Questions at Cocktail Parties

Chapter 19

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1. Can an attorney-client relationship be formed at a cocktail party?

Answer

Yes. Under tort theory, an attorney-client relationship is created when a person seeks and receives legal advice from an attorney in circumstances in which a reasonable person would rely on the advice. See *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693 n.4 (Minn. 1980); *Admiral Merchs. Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261, 265-66 (Minn. 1992).

Authorities

- RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14, 15 (2000).
- *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693 n. 4 (Minn. 1980).
- *Admiral Merchs. Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261, 265-66 (Minn. 1992).

Comment

In a casual setting, a lawyer must balance the risk of creating duties to a client against the perception that the lawyer is unhelpful, callous, or worse. Prudent lawyers will typically engage someone in conversation without going so far as to give specific legal advice or, if the lawyer gives advice, discourage the prospective client from relying on the advice.

Further Reading

- CLIENT RELATIONS FORMBOOK, 2nd ed. (Minnesota CLE 2014).

Notes

2. Does a lawyer owe any duty to someone who gives the lawyer confidential information before the lawyer agrees to represent that person?

Answer

Generally, the lawyer's duties are limited as long as the lawyer has not given legal advice. However, once the lawyer engages someone in conversation about their legal issue, the person likely becomes a prospective client, which creates a duty to protect the confidential information received. *See* MINN. R. PROF'L CONDUCT 1.18(c).

Authorities

- MINN. R. PROF'L CONDUCT 1.18(c).

Comment

Disclosures of confidential information that have not been solicited or encouraged by the lawyer do not generally create a duty on the part of the lawyer to protect that information. For example, unsolicited emails and phone messages, by themselves, do not create an attorney-client relationship. *See* San Diego County Bar Ass'n Legal Ethics Comm. Op. 2006-01, *reported in* 22 LAW. MAN. 434 (Sept. 6, 2006). *Accord* Arizona Ethics Op. 2002-04 (2002); New York City Ethics Op. 2001-1 (2001); *See Pro-Hand Services Trust v. Monthei*, 49 P.3d 56 (Mont. 2002) (finding it not reasonable for a prospective client to believe a lawyer-client relationship arose from preliminary phone calls to lawyer's secretary).

In contrast, a longer conversation with someone, in which a lawyer asks questions of the person or otherwise encourages the person to provide information, will take on the characteristics of a meeting with a prospective client, which may trigger duties under Minnesota Rule of Professional Conduct, Rule 1.18 (c).

Further Reading

- CLIENT RELATIONS FORMBOOK, 2nd ed. (Minnesota CLE 2014).

Notes

3. What are the risks of giving someone legal advice at a cocktail party?

Answer

There are three areas of possible risks:

1. **Conflict of Interest.** In a casual setting, a lawyer is unable to run a conflicts check and thus is unable to determine whether the lawyer's firm is handling matters adverse to the prospective client or whether that person might be a witness in a matter being handled by the lawyer's firm.
2. **Confidentiality.** The setting of a cocktail party or similar casual gathering is ill-suited to a detailed conversation about someone's divorce, DUI, home foreclosure, etc. Because there is rarely such a creature as a "quick legal question," most lawyers need to ask follow-up questions to determine what advice, if any, they should give or whether the legal issue merits a subsequent meeting with the lawyer. The person asking the question may draw others into the conversation, further complicating the ability to keep the issues confidential.
3. **Malpractice.** This is likely a small risk if the advice is qualified, such as by stating "I haven't researched this issue," or "I haven't looked at the statute recently," so "don't rely on my advice. Call me at my office or contact another lawyer."

Authorities

- MINN. R. PROF'L CONDUCT 1.6 (confidentiality), 1.7 (concurrent conflicts of interest), & 1.10 (imputed conflicts).

Comment

Of the three areas of risk, the conflict-of-interest risk is greatest. Imagine a relative asks you an employment question about their job at Huge Corp. and you did not know that someone in your firm has been representing Huge Corp. The conversation with the relative has the potential to conflict the firm out of its representation of Huge Corp. This risk is lower for solo practitioners or for questions clearly outside the practice area of a small firm (i.e. you work at a family law firm and someone asks you a DUI question).

Further Reading

- CLIENT RELATIONS FORMBOOK, 2nd ed. (Minnesota CLE 2014).

4. May a lawyer represent family or friends?

Answer

There is no prohibition against representing family and friends. Practical considerations abound.

Comment

Many lawyers have horror stories about representing family and friends. The “horror” part usually focuses on either the volume of free work the lawyer was drawn into, unrealistic expectations on the part of the client, and the lack of a graceful way to withdraw that preserves the underlying relationship. Some of these problems can be avoided by treating representation of a family member or friend in the same as other client relationships. Draft a representation agreement. Consider offering some portion of the representation for free, such as two to four hours of time, followed by an hourly rate (the client can hardly complain about having to pay after the lawyer has given them a significant amount of time for free). Limit the scope of the representation to provide the lawyer with an exit strategy when the agreed-upon service ends.

Further Reading

- Eric Cooperstein, *A Family and Friends Plan for Your Law Firm*, LAWYERIST, available at <www.lawyerist.com> (first posted Nov. 17, 2009).

Notes
