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WHEN A GIFT MAY NOT BE A GIFT: CAREFUL ESTATE PLANNING AND BUSINESS PLANNING MAY HELP AVOID LATER LITIGATION

by

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When is a gift not a gift? Is a father's transfer of a substantial amount of money to his son's start-up business a gift or an investment in the business? If the father intended the transfer to be a gift, how should he properly memorialize the gift so that it cannot be viewed as something different following his death? A recent New Jersey Appellate Division decision, In the Matter of the Estate of Byung-Tae Oh, Deceased, A-4562-13T1 (App. Div. May 13, 2016), explored the issue of donative intent and demonstrates: (1) how smart estate planning can potentially avoid a later dispute among heirs; and (2) how smart business planning can potentially avoid a later dispute among owners. And the case also had an interesting jurisdictional component.

The Estate of Oh involved an alleged *inter vivos* gift from a non-resident alien to his son, a New Jersey resident. The decedent, Byung-Tae Oh, was a citizen of the Republic of Korea, and died without a will on February 6, 2012. *Id.* at 2. He was survived by his wife, Hyesung Lee, and his three children, a daughter and two sons, Won Ki Oh, Hyung Kee Oh, and Hyunjoo Oh. *Ibid.*

In 2001, the father transferred $900,000 from his Korean bank account directly into business account of an LLC formed by his younger son and that son's wife. *Ibid.* The son was the "general partner" of the LLC. *Id.* at 3. The older son, however, filed an action in the Superior Court of New Jersey, Chancery Division, Probate Part, asking for the appointment of an administrator to marshal their father's New Jersey-located assets, specifically the $900,000 transferred from their father.

The elder son, on behalf of the intestate estate, claimed that the $900,000 transfer was an investment, which gave the Estate a 40.8% interest in the LLC. The younger son asserted that the $900,000 transfer was a gift to him so that he could start a business, and that at no point had the father treated it as anything other than a gift. Ultimately, the parties cross-moved for summary judgment in the trial court, with the older son prevailing. *Id.* at 3.

On appeal, the younger son first asserted (despite not having made the argument in the trial court) that New Jersey did not have jurisdiction over the matter. *Id.* at 4. Essentially, as the Appellate Division noted, the jurisdiction issue "present[ed] a classic chicken-and-egg problem." *Ibid.* New Jersey courts have ancillary jurisdiction over the property of a non-resident decedent, but in order to determine whether it has jurisdiction over that property, it first has to make a finding as to whether the decedent actually possessed that New Jersey property. *Id.* at 3-4.

In this case, because there was no factual dispute as to the residency of the deceased father, that he had no will and that the LLC was a New Jersey LLC, the only issue was whether decedent owned the property when he died. *Id.* at 5. Thus, in order to resolve the jurisdictional issue, the trial court had to resolve the substantive claim as to the alleged gift. *See id.* at 5-6.

Substantively, the Appellate Division upheld the grant of summary judgment to Plaintiff, finding that the father's transfer to the LLC was an investment in the LLC, not a gift to his younger son. *Id.* at 10. A party claiming that a gift was made typically has the burden of proving the gift by clear and convincing evidence that the gift was in fact a gift. *Id.* at 9. However, if a transfer is from a parent to a child, the child has a presumption that the transfer was a gift. *Id.* at 9-10. Unfortunately for the younger son, he was not entitled to the presumption because the $900,000 transfer was not made to him directly but was made to the LLC. *Id.* a 10. Because he had no clear and convincing evidence to support his claim, the Appellate Division upheld the finding that the transfer was an investment in the LLC. Further, there was evidence from Decedent that he had made the investment and held a 40.8% interest in the LLC. *Id.* at 10-11.

While not addressed in the Court's opinion, this case presents an interesting juxtaposition of estate planning and business planning. Disputes in estate and business planning frequently arise when the parties have not fully memorialized their intentions, whether in a revised will or trust agreement, or in an LLC's operating agreement.

For example, if Mr. Oh had sent a gift letter to his son along with the $900,000 transfer, or even an informal letter or email wishing him luck with the business venture, his son may have been able to point to that as evidence that the transfer was actually a gift. Or, if the LLC's operating agreement had a provision recognizing the transfer as a gift from the father, that memorialization might have swayed the Court to remand for a trial. While the decision noted that the father had claimed a 40.8 percent interest in the LLC in documents provided to his bank in Korea, and the estate had claimed that interest in estate tax returns, the decision did not mention whether the LLC had an operating agreement or, if it did, whether that operating agreement memorialized any contributions by its members.

As the results in Estate of Oh strongly suggest, whether you are planning a gift or starting a business, you should be very careful to memorialize the gift and have the proper foundational business documents. Gifts you choose to make during your lifetime may have significant tax implications, and as shown in this case, can be litigated if there is any confusion as to your intent. Similarly, if you organize a business, your business should have proper organizational documents, whether it is an operating agreement or corporate by-laws. Otherwise, your investment could end up being misconstrued as a gift, or vice-versa, and litigation could ensue.

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