

SOUTH DAKOTA

LEGAL NOTES

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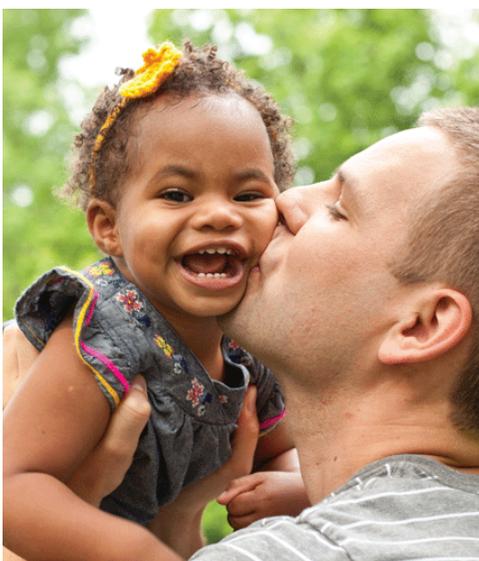
Bill Blewett Joins Swier Law Firm

Swier Law Firm, Prof. LLC is pleased to announce the expansion of its nationally recognized legal practice with the addition of Bill Blewett.

Bill will be a key member of the law firm's Business & Corporate Law Practice Group. Bill focuses his practice on assisting clients in contract negotiations for the sale of their businesses and acquiring new businesses. He also assists clients in setting up corporations, limited liability companies and partnerships. Bill is also involved in contract preparation and review, as well as business planning, for the law firm's clients.

Bill grew up in Rapid City and graduated from Black Hills State University with a Bachelor of Science degree. He received his law degree from the University of South Dakota School of Law. Following law school, Bill joined a Sioux Falls law firm where he practiced for several years.

"Bill Blewett brings experience and strength to our law firm's Business & Corporate Law Practice Group," said Scott Swier. "His joining our law firm is a reflection of our commitment to broadening our strong business presence throughout South Dakota. He is a great fit for our team."



Q: What are the different types of adoptions in South Dakota?

A: In South Dakota, there are several types of adoptions, including:

- (1) adoptions facilitated by social service agencies;
- (2) private adoptions facilitated by adoption attorneys;
- (3) adoptions facilitated by the South Dakota Department of Social Services;
- (4) interstate adoptions;
- (5) international adoptions;
- (6) adult adoptions; and
- (7) stepparent adoptions

South Dakota Supreme Court Decides Indian Law Jurisdiction Case

On March 11, 2015 the South Dakota Supreme Court declined subject matter jurisdiction over a challenge to transfer trust land in Estate of Ducheneaux.

Wayne Ducheneaux was an enrolled member of the Rosebud Sioux Tribe and a lifelong resident of Tripp County, South Dakota. During the end of his life, he suffered from various adverse medical conditions. A guardian was appointed to assist in medical decisions due to miscommunication amongst the three daughters who held power of attorney for their father. After the appointment of the guardian, Ducheneaux's daughter Dawn Daughters (power of attorney) and his son Douglas Ducheneaux (guardian) made all the decisions regarding his medical conditions. CPA Gary Fenenga was appointed as Ducheneaux's conservator. Ducheneaux passed away on November 18, 2011.

Before his passing, Ducheneaux transferred three quarters of land located in Tripp County, which lies in the diminished portion of the original Rosebud Indian Reservation. One quarter was transferred to Douglas Ducheneaux before Douglas' appointment as guardian. The other two parcels are held in trust by the United States for the benefit of Ducheneaux. In November 2011, the conservator filed an action against Douglas Ducheneaux and Dawn Daughters seeking, among other things, to recover the transferred parcels. The Estate introduced testimony that Ducheneaux was not competent to make important decisions at the time he transferred land. The Estate moved for partial summary judgment and requested that the circuit court find that Douglas Ducheneaux did not have, and never had, an interest in the transferred parcels. The Circuit Court denied the Estate's request, determined that it lacked subject matter jurisdiction over the parcels held in trust by the United States, and dismissed the action.

The Estate appealed the Circuit Court's decision and argued, "because the circuit court had personal jurisdiction over [Douglas] Ducheneaux, the circuit court could have compelled [him] to 'make application to the Bureau of Indian Affairs to return the two quarters of trust land to the estate.'" The issue before the Supreme Court was "whether the circuit court possessed the equitable power to compel Douglas

Ducheneaux to make application to the Secretary of the Interior for the transfer of Indian trust property to the Estate."

In the end, the Supreme Court agreed with the Circuit Court and affirmed that there was a lack of subject matter jurisdiction for two main reasons. First, as a matter of state law, South Dakota's Constitution "expressly acknowledges the supremacy of the



federal government in matters pertaining to Indian lands." Second, as a matter of federal law, federal legislation has preempted state courts from exercising equitable power over Indian trust land with a clear barrier to state jurisdiction. In addition, the United States Supreme Court has held "a decree as to the right of possession would . . . interfere with the title or trust interest of the United States." Therefore, the Supreme Court affirmed the denial of lack of subject matter jurisdiction because a trial would adjudicate the right to possession of land held in trust by the United States.



South Dakota Business Law - Wyoming Court Addresses Liability of LLC

The Supreme Court of Wyoming recently addressed whether a limited liability company (“LLC”) controlled by GreenHunter Energy, Inc. (“GreenHunter”) could be held liable for debts owed to Western Ecosystems Technology, Inc. (“Western”).

The court in GreenHunter acknowledged that limited liability is the general rule, and piercing is the rare exception to be applied only in exceptional circumstances. However, this case presented exceptional circumstances in the form of undercapitalization, intermingling of businesses and finances, and fraud.

The court found that the LLC was undercapitalized because of manipulation by its members (a publicly traded corporation) and that GreenHunter used its position to control the amount of money that was transferred to the LLC and to decide which bills of the LLC would be paid. In other words, the LLC was consistently undercapitalized by strategic choice, not by external forces.

The court found that the businesses and finances of GreenHunter, Inc. were intermingled because (1) the same accountants managed the finances of both the LLC and GreenHunter; (2) the two entities

had the same business address; (3) creditors of the LLC mailed their invoices to GreenHunter for processing; (4) the LLC did not have any employees independent of GreenHunter; (5) the LLC had no revenue separate from GreenHunter and all funds were commingled because GreenHunter paid the LLC’s bills; and (6) the LLC’s tax returns were consolidated with the tax returns of GreenHunter. And although tax consolidation is allowed under federal tax law for a single-member limited liability company, the court found it was still proper to use it as one of many factors in the analysis. In sum, the court focused on the fact that GreenHunter manipulated assets and debts in a way that reaped all the LLC’s benefits while burdening it with all of the LLC’s losses and liabilities.

Accordingly, the court found that the LLC had ceased to be a separate entity due to GreenHunter’s misuse of it, and adherence to the fiction of the LLC’s separate existence would lead to injustice so that the LLC’s veil can be pierced to impose liability on GreenHunter’s debt to Western.



South Dakota Estate Planning - Congress Considers Repeal of Federal Estate and Generation-Skipping Taxes

On April 16, 2015, the U.S. House passed H.R. 1105 by a 240-179 vote. The bill, titled the “Death Tax Repeal Act of 2015,” repeals the federal estate tax (FET) and the generation-skipping transfer tax (GSTT) for estates of decedents dying and generation-skipping transfers made after the date of enactment.

The bill retains the gift tax and also retains the “stepped-up” basis rule which allows the heirs to

avoid capital gain taxes on the sale of inherited assets that are attributable to the built-in gain during the decedent’s period of ownership. Other significant provisions are included, making the bill of significant importance to individual taxpayers, business owners and practitioners.

Read more at <https://www.calt.iastate.edu/newsletter/2015-april>.



Scott Swier



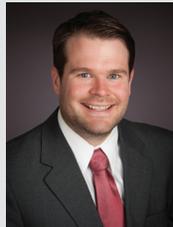
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