

Legal NEWSLETTER

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VACATION RENTALS AND RESTRICTIVE COVENANTS

By Attorney Amy A. Jahnke

The vacation rental market has exploded in recent years due to the popularity of online sites such as Airbnb, VRBO, and HomeAway. While these sites have created a booming marketplace for homeowners and renters alike, they have also created a myriad of legal and governmental quagmires. One of these complex issues is restrictive covenants and land use.

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This publication is not intended to provide legal advice, but rather insight and awareness into legal issues that we feel could be useful to our clients and friends. Actual resolution of legal issues depends upon many factors, including variations of facts and state and federal laws.

ANDERSON O'BRIEN

MASTERPIECE CAKESHOP: A COLLISION COURSE OF CIVIL LIBERTIES AND RELIGIOUS RIGHTS

By Attorney Brian G. Formella

The civil liberties of gay couples and the religious rights of a Colorado business owner were recently on a collision course. Then, on June 4, 2018, the U.S. Supreme Court found a detour to avoid the collision...at least for now.

The Court held that, in some instances, a balance must be struck between protecting gay persons in the exercise of their civil rights and the rights of a business owner to express his religious-based objection to gay marriage. The majority of the Supreme Court held that the Colorado commission's treatment of the baker violated Colorado's duty under the First Amendment not to have laws or regulations that express an overt hostility to a religion or a religious viewpoint. This case is known as the Masterpiece Cakeshop case.

This case is of special interest to human resources professionals and business owners because the same policy intersection could easily arise in an employment context in Wisconsin. Wisconsin has a law similar to the Colorado law that makes it unlawful to give preferential treatment to some classes of persons in providing services or facilities in any public place of accommodation or amusement because of sex, race, color, creed, sexual orientation, national origin or ancestry. In Wisconsin Statutes § 106.52(3), a person who feels that he or she has been a victim of unlawful treatment under the law may file a claim with the Equal Rights Division of the Wisconsin Department of Workforce Development, the same entity that considers violations under the Wisconsin Fair Employment Act.



In addition, certain Wisconsin employers may have the constitutional protection of the Free Exercise Clause of the First Amendment to the U.S. Constitution. That clause states that “Congress shall make no law . . . prohibiting the free exercise” of religion.

The rights and remedies available to everyone under state and federal law — whether state fair employment or public accommodation laws, or Title VII, the Americans with Disabilities Act, or similar federal laws — often create policy conflicts for employees, employers and businesses in general. The wise HR professional will stay alert to the intersection and potential conflicts that will necessarily arise in the workplace and in the marketplace. For now, the resolution to the underlying policy conflict in Masterpiece Cakeshop between public accommodation rights for gay couples and the religious expression rights of small businesses will need to be addressed another day.

Lawyers Where You Live!

LONG-TERM CARE AND INSURANCE CONSIDERATIONS

By Attorney Amy J. Eddy

Clients often seek the advice of an elder law attorney regarding the best protection for their assets in the event they need long-term care in a nursing home or assisted living facility. Since Medicare does not pay for long-term custodial care, having enough to pay for several months to several years of care in a facility is a serious concern for many seniors.

If you have minimal assets, you may qualify for Wisconsin's Medicaid program to pay for care. But what if your assets exceed the limits for Medicaid qualification? Should you purchase long-term care insurance, or a combination of life insurance and long-term care insurance (called "hybrid" policies)? Factors to consider when choosing between the two include your current health status, available financial resources and your risk tolerance.

With traditional long-term care insurance, you will pay a monthly (or sometimes annual) premium. If you end up needing long-term care, the policy pays out a daily or monthly benefit, up to a lifetime maximum. If you never need long-term care, you end up with no return on the premiums you have paid. While this is the nature of many types of insurance (auto, home, term life), some find the "use-it-or-lose-it" strategy difficult to swallow.

As an alternative, some individuals will purchase so-called hybrid policies. These are policies that combine long-term care insurance with permanent life insurance policies that include a savings/investment component that builds over time. If you end up needing long-term care, you withdraw funds from the policy as they are needed, and the insurance company continues to pay for your care when those funds run out. If you never



need long-term care, the funds are still available during your lifetime, and if you die without having expended the funds, your heirs receive the funds upon your death.

Typically, it is easier to qualify for hybrid type coverage because traditional long-term care insurance has stricter underwriting requirements and, therefore, the status of your health will be a consideration in which type of product to invest. Affordability may also be a factor. Hybrid policies are paid over a much shorter period of time, so you will not be able to stretch payments out as long as you would with traditional long-term care insurance, which means you will need to consider available resources. Individuals with more substantial resources may wish to look at alternative investments.

You should also inquire as to whether the payments you will be making are tax deductible. Payments for some hybrid products may not be deductible. Finally, be sure to consult with your attorney, accountant, and financial advisor as to the legal, financial, and tax consequences of your purchase before you make your final decision.

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A restrictive covenant is a type of agreement that limits permissible use of land. Generally, a restrictive covenant agreement is recorded so that potential purchasers of real estate are aware that there are restrictions on what they, as landowners, can or cannot do with the real estate.

In a recent Wisconsin Supreme Court decision, *Forshee v. Neuschwander*, 2018 WI 62, restrictive covenants that prohibited “commercial activity” were held to be ambiguous and unenforceable.

In the Forshee case, the issue was that the landowners were renting their property to vacationers. The question that the Wisconsin Supreme Court analyzed here was whether the prohibition against “commercial activity” included short-term and long-term rentals. Wisconsin law requires that restrictive covenants must be expressed in clear, unambiguous, and peremptory terms in order to be enforceable. The Court held that the phrase “commercial activity” was susceptible to more than one reasonable interpretation and, therefore, ambiguous. The Court ultimately decided that prohibition against commercial activity did not preclude either short-term or long-term rentals and the landowners could continue engaging in such activities.

The Forshee case could be setting a larger stage for landowners to have the ability to void any restrictive covenant that is ambiguous. If you own land that has restrictive covenants, you might want to closely examine those covenants as not all of them may be enforceable against you.

For developers, it is in your best interest to review those restrictive covenants again and make sure they are clear and convey exactly what you intend. At minimum, you should review those restrictive covenants that are most important to the development. Having restrictive covenants drafted right the first time is crucial because subsequent landowners will be bound to the covenants as originally drafted. If the language in the covenants does not clearly convey what the restriction is, that restriction will likely be determined by a court to be unenforceable.



Firm News

NEW ATTORNEY - STEVEN H. THOMPSON



Steven Thompson recently joined our firm as an associate. He was raised in Eagle River, Wisconsin, and attended the University of Wisconsin – Oshkosh for his bachelor’s degree and the University of Wisconsin Law School for his law degree. In law school Steven became interested in business and estate planning law, and served as the law school’s representative with the Real Property Probate and Trust Section of the State Bar, as well as completing his concentration in Estate Planning, with honors. Steven will be practicing in the areas of estate planning, real estate, and business law.

ENHANCED ELECTRONIC SECURITY

We take the privacy and security of our clients’ files at Anderson O’Brien very seriously. As such, we recently enhanced our electronic security measures for sending and receiving online communications. This new software is called ShareFile and it allows us to securely send and receive documents and information with our clients through email and an online portal. In addition, we can now send documents for electronic signatures using a service called RightSignature. We are very excited to add these additional layers of security to our current system, and to be able to provide you with the ability to sign and return documents electronically. Be on the lookout for these important new features coming to your email inbox soon.



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