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Georgia Supreme Court Speaks: Married Persons Are Free to Transfer Assets and Proper Title is Critical to Accomplish Intended Transfers (*Gibson v. Gibson*)

On June 5, 2017, the Georgia Supreme Court issued its opinion in the case of *Gibson v. Gibson*, S17F0593 (Ga. 2017). In *Gibson*, the Court considered the scope of a married person's power to freely transfer his or her own assets to a third party. This case appears to have settled a number of disputed issues regarding assets owned by Georgia married persons and the potential effect of Georgia divorce laws on the spouses' ability to make transfers of their assets during their marriage and before any divorce action has been filed. In this issue of *The Passionate Estate Planner*, we look at this important case and the valuable lessons it provides.

Gibson features a husband who created two different irrevocable trusts during his marriage and transferred assets to the trusts. The assets were originally titled in the husband's individual name and were not jointly owned with the wife prior to the transfers to the trusts. The husband created the trusts, and transferred assets to them, long before any divorce action was filed, although the marriage had deteriorated significantly before the trusts were created. It was the wife, not the husband, who eventually filed for the divorce. The husband was neither a beneficiary nor a trustee of either trust. Both of the irrevocable trusts benefitted the husband's wife and descendants, but had provisions that ended the wife's beneficiary interests if she and the husband ever got divorced or legally separated.

The divorce case went to trial. In the trial, the wife's attorney argued that the assets the husband had transferred to the trusts should be considered marital property subject to equitable division in the divorce, instead of separate property that was not subject to division. This was a three-part argument. One part stated that the property should be considered marital property because it likely would have been marital property if the husband had still owned it at the time of the divorce, and that it still retained its status as marital property because the wife neither knew of nor consented to the transfers to the trusts when they were made. A second part of the argument stated that the transfers by the husband to the trusts were fraudulent transfers that should be undone under Georgia law. The third part was that certain assets had not been validly transferred to the trusts in the first place, because the husband had been incorrectly listed as the trustee on the trust accounts in which those assets were placed. The trial court ruled against the wife on all three grounds. On appeal, the Supreme Court upheld the trial court's result on the first two parts of its ruling, finding that a person is not required to get the consent of his or her spouse in order to transfer his or her own property to a third party and that the transfers made to the trusts by the husband were not fraudulent transfers under applicable Georgia law. However, the Supreme Court overturned the trial court's ruling on the third part of the wife's argument, stating that incorrectly naming the trustee on the attempted transfer of brokerage account assets to a trust prevented the attempted transfer from taking place.

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I. Important Lesson One: Ownership rights for married persons' assets are controlled by the asset titles unless and until a divorce action has been filed; Georgia is not a community property state in which each spouse automatically acquires legal rights with regard to assets owned by the other spouse. In *Gibson*, the Court confirmed that the ownership of an asset is controlled by how the asset is titled, and that the concept of "marital" property, in which each spouse has legal rights, does not apply unless and until a divorce action has been filed. This means that each spouse in a Georgia marriage is generally free to transfer or otherwise deal with his or her own assets as he or she sees fit, and that the other spouse does not have to consent to such dealings. This general rule applies except in cases (1) where the assets were transferred by one spouse to a trust for his or her own benefit or under which he or she is a trustee, or (2) where the asset transfers qualify as fraudulent or voidable transfers under applicable Georgia law.

As discussed above, part one of the wife's argument was effectively that a married person could not validly transfer his or her own assets to a third party without the knowledge or consent of the other spouse, if those assets would be considered marital property during a divorce. During the oral arguments at the Supreme Court, one of the Justices asked the wife's attorney if her reasoning meant that one spouse could not make a $25 charitable contribution of his or her own money without the other spouse's approval. The attorney tried to limit her argument so that it would only apply to larger, more material transfers; however, the Court's majority rejected the entire argument. Instead, the Court looked to existing Georgia law and confirmed that, if a spouse wants to have assets transferred by the other spouse to a third party before the divorce brought back into the marital property category for division during the divorce, the spouse trying to bring the assets back in must be able to prove that the transfers were fraudulent or voidable transfers. The Court also reviewed the evidence considered by the trial court, and stated that the trial court appeared to have properly relied on that evidence to determine that the husband's transfers in *Gibson* were not fraudulent or voidable transfers.

II. Important Lesson 2: Understanding Georgia fraudulent or voidable transfer laws is critical for married persons and their advisors. *Gibson* confirms that, if one spouse transfers assets that he or she owns to a third party before any divorce action has been filed, the transfer will be upheld unless it is a fraudulent or voidable transfer. The case also confirms that the other spouse will generally be treated the same as any other party in determining whether the transfer to the third party is fraudulent or voidable. A somewhat higher level of scrutiny may be applied to the transfer, because spouses are generally considered to have a confidential relationship to each other under Georgia law, but a transfer will not be considered fraudulent or voidable simply because one spouse made it without the explicit knowledge or consent of the other spouse. The *Gibson* ruling also confirms that a transfer to an irrevocable trust under which the transferring spouse is neither a trustee nor a beneficiary will generally be considered a transfer to a third party. In practical terms, this means that most such transfers made by one spouse before any divorce action has been filed should be respected unless the other spouse can prove that the

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transfers were fraudulent or voidable under Georgia law. A discussion of the Georgia fraudulent or voidable transfers law is well beyond the scope of this newsletter. However, in general, they mean that transfers need to have some legitimate purpose other than preventing a present or future creditor from having access to the transferred assets. Advisors need to ensure that they understand these laws so that they can help their clients ensure that a proposed transfer will not be considered fraudulent or voidable.

III. Important Lesson 3: A spouse should be considered a creditor under Georgia fraudulent or voidable transfer laws. *Gibson* appears to confirm that a person's spouse should be considered a creditor or potential creditor under Georgia's fraudulent or voidable transfer laws. The status of one spouse as a creditor or potential creditor of the other spouse has potentially significant ramifications beyond the divorce arena. For example, this same rule should apply in the context of a spouse who is acting as the other spouse's agent under a financial Power of Attorney ("POA").

A few years ago, during a presentation Richard Morgan was giving on estate planning, he told the audience that a spouse, as POA agent for the other spouse, could potentially use the POA as a weapon to financially abuse the other spouse, but that the agent spouse's actions would still be illegal and could subject the agent spouse to both criminal punishment and liability for civil damages. However, a family law attorney then told him that this was not the case in Georgia, and that one spouse could financially abuse the other spouse and the courts would do nothing about it, as it was considered a personal matter. We believe that *Gibson*'s confirmation that spouses are potential creditors of each other should, at a minimum, help clarify that a person who commits financial abuse of his or her spouse is subject to the same Georgia civil laws, and possibly criminal laws, that apply to unrelated parties. These laws could include not only the fraudulent or voidable transfer laws, but also the laws on breach of fiduciary duties, conversion, and theft. We also believe that this is absolutely the right result.

IV. Important Lesson 4: Crossing your "t"s and dotting your "i"s when making asset transfers really does matter. The Court disagreed with the trial court's ruling on the issue of whether some of the assets had actually been effectively transferred to one of the trusts, and held that the attempted transfer of those assets by the husband was invalid. This was the only one of the wife's arguments that was successful. As a result of this finding by the Court, approximately $1,300,000 in assets that were supposed to have been held by one of the trusts ended up being marital property that was subject to equitable division as part of the divorce action. In short, an apparently minor error had major implications.

Well before any divorce action had been filed, the husband transferred approximately $1,300,000 in assets he held in two brokerage accounts to two new brokerage accounts, apparently intending to transfer them to one of the irrevocable trusts he had created. However, the new brokerage accounts incorrectly listed the husband as the trustee of the trust, instead of his mother, who at

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the time was the actual trustee. The accounts did include the name of the trust as part of the owner's name, and were each set up using the trust's employer identification number as the owner's taxpayer identification number. Neither account used the husband's Social Security number. The trial court accepted the husband's argument that the transfers were valid. It characterized the incorrect trustee name on the accounts as an administrative error on the part of the brokerage, and found that the attempted transfer of the assets to the trust was effective because the husband had intended to make the transfer and the trustee name error could have been corrected later.

The Supreme Court stated that the trial court was wrong on this issue: the failure to name the correct trustee on the brokerage accounts purportedly belonging to the trust meant that the attempted transfer of the brokerage account assets to the trust was invalid. As support for this conclusion, the Court noted that O.C.G.A. Section 53-12-25(a) states that legal title must be transferred *to the trustee* for an asset to be validly transferred to a trust (emphasis added). The Court found the statute to be clear and unambiguous, and referred to existing Georgia law to hold that a clear and unambiguous statute must be interpreted solely in light of its language. The husband's attempt to introduce outside evidence in support of his argument for a different potential meaning for the statute should therefore have been rejected by the trial court. The Court also noted an earlier Georgia Court of Appeals case that held deeds transferring property to "Morison Outreach, a Trust," without also naming the actual trustee of the trust, to be invalid. *Gibson*, p. 20, citing *Ford v. Reddick*, 319 Ga. App. 482 (735 SE 2d 809) (2012). Finally, the Court pointed to the fact that the so-called "administrative task" of correcting the name of the trustee could not legally have been carried out after the divorce action was filed, contrary to the trial court's apparent assumption.

The Court's ruling on this issue appears correct. It also points out that, when attempting to transfer assets to a trust, it is critical to ensure that the transfer is carried out correctly, and that all "t"s are crossed and "i"s dotted. Language that is close, but not quite correct, likely will not succeed in making a valid transfer. The transfer must name the actual then-serving trustee of the trust as the transferee, in addition to indicating that a trust is intended. Advisors must continue to stress to their clients that compliance with this rule is essential.

In addition to reinforcing existing Georgia law that says assets owned by one spouse are not generally subject to marital rights held by the other spouse unless and until a divorce action has been filed, *Gibson v. Gibson* contains a number of valuable lessons for estate planning advisors and their clients. If you have concerns regarding a proposed transfer to a trust, we are here to help. Contact our office administrator at (678) 720-0750 or info@morgandisalvo.com to schedule an estate planning consultation where you can discuss your questions with one of our attorneys.