

TAX AND ESTATE PLANNING NEWSLETTER

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The following tax and estate planning news may be of interest to you in your business or personal pursuits. If you have questions about any of these items, please call or e-mail one of the Tax and Estate Planning Attorneys listed below by clicking on the attorney's e-mail address or calling the telephone number.

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AN ATTEMPT TO DISINHERIT A CHILD BY TRUST AMENDMENT IS HELD INVALID

Have you amended your trust to disinherit a child or are you advising someone who has? If so, you need to be aware of an Oklahoma Court of Civil Appeals decision which could effect whether the trust amendment works. In In the Matter of The Estate of Richardson, 2002 OK CIV APP 69, the Court held that a trust amendment which disinherited a son was not effective under Oklahoma's pretermitted heir statute. The statute in question gives an omitted child their intestate share of a decedent's estate unless it is clear from the face of the decedent's will that the omission is intentional. In Richardson the decedent disinherited his son in a trust amendment executed approximately one year later than his "pour-over will." Despite the fact that the will left the residue of the decedent's estate to the trust "as (it) may be amended, to be administered and distributed in accordance with the provisions of the trust which is incorporated by reference in this will," the Court held that, for purposes of the

pretermitted heir statute, the trust amendment was not incorporated by reference unless the trust was executed with the same formalities as a will. Instead, the court found that only the terms of the trust at the time the will was executed were incorporated by reference.

In Richardson, the trust was not executed like a will and the terms of the trust on the day the will was executed not only did not disinherit the child they did not even mention the child, so the court found that the child was unintentionally overlooked. This case will clearly effect an estate plan where: (i) the settlor wishes to amend an existing trust to disinherit a child or (ii) where the settlor has disinherited a child in a trust instrument, has not fully funded his or her trust, and has not also disinherited the child in a will signed with the trust. However, the court's opinion uses very broad language in rendering its opinion: "No effect can be given to the subsequent modification of the trust instrument if it is not executed in accordance with the act which regulates the execution of a will." It is conceivable that the language from the opinion could be

construed to apply to all situations where there is an amendment made to a trust instrument which is referred to in a pour-over will.

In Richardson, the court also held that a no-contest clause would not invalidate the omitted child's claim because such a claim is decided at the time the estate is distributed, not when the will is admitted to probate.

TRUST AMENDMENT MUST BE DELIVERED TO THE TRUSTEE TO BE EFFECTIVE

In another case of importance to Oklahoma estate planners, the Court of Civil Appeals found against a trust beneficiary who argued that a trust amendment was effective regardless of the date of the delivery of the amendment to the trustee. The trust instrument provided that the settlor reserved the right to amend the trust by notice, in writing, delivered to the trustee and that "such amendment ... shall be effective immediately upon delivery to the Trustee." The amendment in question left everything to the trust settlor's daughter, eliminating a gift to the settlor's granddaughter. The amendment was delivered by the daughter to the trustee for the decedent's trust four days after the decedent's death. The court held that where a settlor conditioned the effect of a trust amendment on delivery of notice to of the amendment to the trustee, an undelivered trust amendment is ineffective to alter the terms of a trust. The court held the amendment was invalid saying that to hold otherwise would permit modification of a trust after the trust, by its own terms, had become irrevocable upon the settlor's death. In re Living Trust of Reid, 2002 OK CIV APP 49.

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NO CHANGE IN OKLAHOMA'S ESTATE TAX LINEAL EXEMPTION FOR 2003

The exemption from Oklahoma estate tax for property passing to lineal heirs (*i.e.*, father, mother, child, child of husband or wife, adopted child, or grandchild) remains at \$700,000 through 2003. It will increase to \$850,000 in 2004, \$950,000 in 2005, and \$1,000,000 in 2006. There is still no exemption from Oklahoma estate tax for property passing to heirs which are not lineal heirs (*i.e.*, collateral heirs). Oklahoma's deduction for property passing to the surviving spouse (the marital deduction) remains at 100% of the value of such property. Oklahoma's lineal exemption was not effected by the Economic Growth and Tax Relief Reconciliation Act of 2001 which made changes in the federal estate tax.

CHANGES IN THE FEDERAL ESTATE AND GIFT TAX FOR 2003

The maximum federal estate and gift tax rate (and the fixed rate for generation-skipping transfers) is 49% for individuals dying in 2003 and for gifts made in 2003. In 2002, the maximum rate was 50%. The federal estate tax credit for state estate taxes paid in 2003 is reduced to 50% of the credit calculated under IRC §2011(b)(1). In 2002 the credit was only reduced by 25%. For calendar year 2003, the value of present interest gifts which can be made without incurring federal gift tax remains at \$11,000 per donee.