

TAX AND ESTATE PLANNING NEWSLETTER

AUGUST 1, 2003

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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HOW CAN I LEAVE A BEQUEST OF SPECIFIC PROPERTY

Clients often ask how to bequeath specific assets (family heirlooms, jewelry, or silver for example) to their loved ones. The answer is not as simple as you would think. The client can make specific bequests of the items in his or her will. But, if the client changes his or her mind about the gifts, then the will no longer reflects their wishes. The client then has to decide if he or she wants to go through the process of writing a codicil to their will because they have changed their mind about who gets an item or two of personal property.

Clients ask if they can solve this problem, by preparing a list of their specific bequests of personal property separate from their will.

Under Oklahoma law, such a list is effective, but it must meet certain criteria if it is to be binding upon the executor of the estate. These conditions are: (1) the list must be in existence on the day the client signs the will; (2) the list must be reasonably identified in the will; and (3) the will must show an intent to incorporate the list into its

terms. Estate of Sneed, 953 P.2d 1111 (Okla. 1998). So, interpreted strictly, the law regarding such a list requires that if the list is changed the will should be changed as well.

The Supreme Court of the state of Missouri recently held that the provisions of a will effectively referred to such a list even though the disposition of personal property was not made in a "list" but was actually made in a clause in the decedent's revocable trust which had been amended after the day the will was executed. In re Estate of Blodgett, 95 S.W. 3d (Mo. 2003). Although the case involved a specific Missouri statute, the underlying principle behind the decision was as old a probate law itself: What did the decedent intend?

Nevertheless, until an Oklahoma court, like the Missouri Supreme Court, applies a liberal interpretation to our current law, perhaps the least complicated approach is to give up on trying to make the client's list binding on the executor. Instead, the client can be encouraged to leave a list separate from the will and recite in his or her will that

the executor has discretion as to how to distribute the decedent's tangible personal property and that he or she is encouraged to follow the dispositions set out in the list. Obviously, for this to work, it is very important that the client choose his or her executor carefully.

TRUSTEES MUST BEGIN WITHHOLDING FROM OUT OF STATE MEMBERS

Effective July 1, 2003, a trust must withhold income tax at the rate of 5% "of the Oklahoma share of income of the trust distributed to each nonresident beneficiary." HB1356, Sec. 24.

Trustees are to deposit the withheld amounts with the Oklahoma Tax Commission quarterly, and to report the distributions made and the amount withheld to the Tax Commission no later than the last day of the second month after the end of the trust's taxable year.

Also, the trustee must furnish the nonresident beneficiary a similar statement. If the trustee willfully fails to do so, the trustee shall be punished by an administrative fine not exceeding \$1,000.

Under the new law, the trustee has a fiduciary duty to the State of Oklahoma for the funds withheld, and any trustee who fails to pay the Tax Commission the withheld

funds and "appropriates the amount held in trust" to the trustee's "own use" or "to the use of any person not entitled thereto" (without proper authority) is guilty of embezzlement.

The trust which fails to collect the withholding is liable for the penalties and interest on the amount which should have been withheld even if the nonresident pays the income tax due on the distribution.

The trust which fails to file a return reporting the withholding or fails to pay the Tax Commission the amount withheld within the time prescribed is subject to a penalty of 10% of the "amount required to be withheld" or 10% of the "amount of the underpayment of the amount required to be withheld." Interest is also imposed on the unpaid amount at the rate of 1.25% per month during the period the underpayment exists. However, the penalty is abated if the trust remits the amount required to be withheld within 30 days of "the mailing of the proposed assessment" or voluntarily pays upon the filing of an amended return.