

## **S CORPORATIONS**

The new minimum wage law includes some significant changes for S corporations. S corporations now may have a larger number of shareholders and trusts may more easily own shares of an S corporation. The new law has other revisions as well. One or more of these changes may be significant to current or former clients. There are several implications for estate planning. It should now be easier to pass on an S corporation without a heavy tax burden. Most of P.L. 104-188 Title I Subtitle C (8/20/96) went into effect on January 1, 1997.

## **RESIDENTIAL LEAD-BASED PAINT HAZARD REDUCTION ACT OF 1992, 42 U.S.C. Sec.4852d.**

For owners of more than four single-family homes or apartment units built prior to 1978 federal regulations implementing 42 U.S.C. Sec.4852d. went into effect on September 6, 1996. They went into effect on December 6, 1996 for owners of four or fewer of these "residential dwelling units. The regulations apply to real estate agents as well as sellers of residential dwelling units. Key aspects of the regulations are:

- Housing covered is housing constructed prior to 1978.
- The rules apply to lease or sale (with some exemptions).
- The rules include a host of very specific seller disclosure requirements that include providing relevant records and a copy of an EPA pamphlet, "Protect Your Family from Lead in Your Home" or its equivalent. They also contain detailed guidance on what must be included about lead paint hazards in contracts and leases.

Update your residential real estate transactions checklist to make sure disclosure obligations are met and documented. The new regulations are published in the Federal Register at 61 F.R. 9064 and codified at 24 C.F.R. Part 35 and 40 C.F.R. Part 745. An excellent source of information on this subject is the National Lead Information Center at 800-424-LEAD.

## **MEDICAID FRAUD - PUTTING GRANDMA IN JAIL**

The Kennedy-Kassebaum health bill (P. L. 104-191, Title II, 8/21/96) effective January 1, 1997 adds this paragraph to Sec. 217. Criminal Penalty For Fraudulent Disposition Of Assets In Order To Obtain Medicaid Benefits that makes it a crime for any person who:

(6) knowingly and willfully disposes of assets (including by any transfer in trust) in order for an individual to become eligible for medical assistance under a State plan under title

XIX, if disposing of the assets results in the imposition of a period of ineligibility for such assistance under section 1917(c),

This change when read with existing law makes professionals who assist an individual in this crime culpable. The penalty is a \$10,000 fine and one year in prison.

This amendment has been criticized for everything from being pure bad policy to being abysmally drafted. It is unclear how penalties apply and what the clause "if disposing of the assets results in the imposition of a period of ineligibility" means. Is it illegal to apply for Medicaid only during a period of ineligibility, or during the "look-back period, or to ever apply for Medicaid after making a gift that affected Medicaid eligibility? Some lawyers are advising clients that they may be in violation of the new law if they apply for Medicaid during the look-back period. Other lawyers are even more cautious by carefully advising clients of the implications of the law and avoiding assisting in any asset transfers that may trigger criminal penalties.

## **THE FAIR DEBT COLLECTION PRACTICES ACT AND BAD CHECKS**

The Federal Trade Commission ruled that the FDCPA applies to collections for checks returned for insufficient funds under the following circumstances. "To the extent that an NSF check (Nonsufficient Funds Check) was written by a consumer for goods or services intended for household or personal use, the continuing obligation to pay constitutes a debt under the FDCPA, and ... actions to collect such debts are covered by the FDCPA." (Priv. Ltr. Rul. 952-3127, 4/30/96; see Consumer Credit Guide (CCH) 83,707, 6/18/96.)

If you are collecting "bad check" debts, and they fall under this ruling be sure to comply with the FDCPA!

## **BOILERPLATE IN WILLS CONTINUES TO CAUSE PROBLEMS**

Two years ago we alerted you to a malpractice risk concerning boilerplate in wills. The issue centers on the standard residuary clause used in many wills directing that all taxes be paid out of the residue of the estate. This clause surfaced as a problem as more people used non-probate techniques to transfer assets at death. For example if non-probate assets go to one other than a residual beneficiary, but the estate must pay the taxes on those assets, the residual beneficiary could receive substantially less than intended. This boilerplate may also cause problems when the decedent has children by a former marriage. In dividing the estate between a surviving spouse and these children one or the other may end up paying all of the tax, thus receiving considerably less than the decedent intended. The disgruntled beneficiaries can be counted on to blame the lawyer who drafted the will.

**To avoid this malpractice risk be alert to situations when:**

- A will leaves a fractional share to a spouse or a charity.
- A will includes a partial QTIP election.
- Non-probate assets include items such as life insurance, pension benefits, living trusts, powers of appointment over property, and jointly owned property.

**In preparing wills:**

- Always discuss the issue of who pays taxes. Assume at the outset that each asset ought to bear its share of the tax - then get specific instructions from the client.
- Clients will often prefer that taxes on a very large specific bequest or non-probate asset come from that asset - but not always so check it out.
- When non-probate assets such as a pension are to be paid out in installments but all taxes are incurred immediately, consider these assets for favored tax treatment. Again get the client's guidance.
- Ask a lot of questions about non-probate assets to be sure you have the whole picture.
- Be careful of specific bequests of uncertain value which could balloon the tax burden of the residual beneficiary (e.g., antique car to a daughter).
- If the will is to be silent on tax, be sure you inform the client how taxes will be apportioned among assets.
- Document the information obtained from the client about non-probate assets, advice given, and client tax decisions on how the will is to treat taxes.
- Review all wills you have prepared to see if boilerplate creates a problem. Consider whether the client's estate may have substantially changed thereby altering tax consequences.

(Source: Lawyers Weekly USA, Boilerplate In Many Wills Is Causing Tax Problems, 94 LWUSA 1134, 12/5/94; Boilerplate in Wills Causes Tax Problems, 96 LWUSA 100, 1/29/96; Boilerplate in Will Costs an Estate Over \$300,000 in Taxes, 96 LWUSA 505, 6/3/96; 'Boilerplate' in Wills Causes More Problems; 'Hot Issue' for the IRS, 96 LWUSA 1025, 11/18/96.)

**COMPUTER MALPRACTICE**

In his article "10 Ways to Commit Malpractice With Your Computer" Larry Bodine of Lawyers Weekly USA cites the presentation of lawyers David P. Vandagriff and David Bilinsky at the ABA's Techshow 96 for these common errors in managing firm computers:

1. Resolving to change how you manage your computers, but not following through.
2. Not considering long term data storage and recovery.
3. Delegating all computer management to consultants.
4. Not using computer-assisted legal research.
5. Not worrying about security precautions.
6. Letting your kids play on your office computer.
7. Not learning how your secretary uses his or her computer.
8. Not proofreading documents produced from computer forms.
9. Not backing up your data.
10. Installing a new operating system without making a recovery disk and without backing up your hard drive.

*For the analysis that goes with each error see Bodine's article at 96 LWUSA 445, 5/6/96.*