



LAMSON, DUGAN AND MURRAY, LLP
ATTORNEYS AT LAW

BUSINESS COUNSELING

UPDATE

FALL 2004

MATTHEW J. BOCK, EDITOR

STATE DEATH
TAXES REQUIRE
RECONSIDERATION OF
STATE OF DOMICILE

Nebraska has decoupled its estate tax from the federal estate tax. Consequently, Nebraska's estate tax exemption will not keep up with the increase in the federal estate tax exemption. This means that estates that are not subject to federal estate tax may be subject to Nebraska estate tax. Other states have eliminated state death taxes.

Nebraska's estate tax exemption will not keep up with the increase in the federal estate tax exemption.

Because state death tax laws now vary, every client with property located in more than one state should review the effect of the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") and state death tax laws to determine how they affect their tax planning. If you own property in more than one state, it may be possible to change the form of ownership or change your domicile to take advantage of favorable state death tax laws.

Angie M. Pelan

AN EVOLUTION FROM
"BUYER BEWARE" TO
"SELLER TELLS ALL"

Residential real estate disclosure law has changed greatly in the past half-century. Until the 1960's, home sellers had no legal obligation to disclose property defects to purchasers as long as they did not conceal latent defects or lie about the condition of the property. In those days, sellers' lawyers could reasonably have copied a page from the *Miranda* decision and counseled their seller-clients that they had the right to remain silent and anything they may say could be used against them during the contract negotiations.

Times have certainly changed. Beginning in the 1960's consumer protection reforms reached the residential real estate industry, first in the courts, and later in the legislatures of various states. Today, in all but a few states (Alabama, Montana, Massachusetts and Utah) home sellers are expected to provide buyers with a detailed account of known material defects. This is a statutory requirement in roughly two-thirds of the states and is an accepted practice in the industry nation-wide. Silence is no longer acceptable in those states, and, in fact,

silence can become extremely costly to sellers and their brokers.

The Nebraska Unicameral formally adopted such residential real estate disclosure requirements in 1994 and

INSIDE THIS ISSUE

BANKRUPTCY

Debtors Did Not Read
Before They Signed

EMPLOYMENT

Workplace-Related
Tax Issues Update

ESTATE PLANNING

Tax Court Disregards
Buy-Sell Agreement
for Estate Tax
Valuation Purposes

State Death
Taxes Require
Reconsideration of
State of Domicile

GENERAL BUSINESS

Changes to Notary Public
Practices and Procedures
Under Nebraska Law

REAL ESTATE

An Evolution from
"Buyer Beware" to
"Seller Tells All"

TAX

Tax Relief for
Working Families

codified the requirements in Neb. Rev. Stat. § 76-2,120. This statute generally requires a “seller” of “residential real property” to complete a statutorily-mandated disclosure statement and to deliver it to a proposed purchaser prior to or upon the date of execution of a purchase agreement. The disclosure statement comprehensively details the condition of the real property and the improvements on the real property.

Neb. Rev. Stat. § 76-2,120 the definition of “seller” includes an owner of real property, attempting to sell or lease with option to purchase, residential real property. “Residential real property” is defined to include real property used primarily for residential purposes on which no fewer than one (1) or more than four (4) dwelling units are located. It is important to be aware that a duplex or apartment building with four (4) or less dwelling units is considered residential real property for purposes of the statute, and transfers of such property generally require the seller to prepare and deliver the disclosure statement.

Sellers should be aware that the disclosure form is not required when real property is transferred under certain circumstances. Several different types of transfers are excluded from the requirements of Neb. Rev. Stat. § 76-2,120, including foreclosure sales, trustee’s sales pursuant to a power of sale under a deed of trust, transfers by a trustee in bankruptcy, deeds in lieu of foreclosure, fiduciary transfers, transfers from one co-owner to another, transfers between related individuals or spouses and transfers of newly constructed real estate never occupied.

It is also important to understand what the disclosure is not. It is not a

warranty of any kind by the seller. The disclosure statement is a representation of the seller of the condition of the property to the best of his/her belief and knowledge as of the date the disclosure statement is completed that may be relied upon by the purchaser.

If a seller fails to comply with the provisions of Neb. Rev. Stat. § 76-2,120, the purchaser has a cause of action against the seller and may recover actual damages, court costs and reasonable attorney’s fees. However, noncompliance with the provisions of the statute itself, taken alone, is not a ground to invalidate the conveyance of the property. Regardless, the action must be commenced within one (1) year after the date the purchaser takes possession or the conveyance of the real property occurs, whichever occurs first.

Ryan N. Boe



TAX COURT DISREGARDS BUY-SELL AGREEMENT FOR ESTATE TAX VALUATION PURPOSES

Buy-sell agreements for shareholders of closely-held corporations can and often do serve valuable business purposes by: providing a market for corporate stock; assuring continuity of management; providing estate liquidity; establishing a prearranged means of resolving otherwise potentially contentious valuation and succession issues; and fixing value for estate tax purposes.

If a given buy-sell agreement is to be respected by the Internal Revenue Service and the Courts, it must meet the requirements of both Treas. Reg. § 20.2031-1(b) and § 2703 of the Internal Revenue Code (“Code”). The recent opinion of *George C. Blount v. Commissioner*, T.C. Memo 2004 – 116, which was filed on May 12, 2004, represents a classic case study of how not to do buy-sell agreement planning.

If a buy-sell agreement is to be respected by the Internal Revenue Service and the Courts under Treas. Reg. § 20.2031 – 1(b) and Code § 2703, the offering price must be fixed and determinable under the agreement. The agreement must be binding on the parties, both during life and after death, and the restrictive agreement must have been entered into for a bona fide business reason and must not be a substitute for a testamentary disposition. Furthermore, under Code § 2703, the terms of the buy-sell agreement must be comparable to those of other similar arrangements negotiated at arms-length.

If the foregoing requirements are met in a given situation, the price-per-share negotiated under the terms of the buy-

sell agreement will be regarded as cogent evidence by the Internal Revenue Service and the Courts that the buy-sell arrangement is a bona fide business arrangement which should be respected for all purposes, including valuation of a decedent's stock for Federal estate tax purposes.

The terms of the buy-sell agreement must be comparable to those of other similar arrangements negotiated at arms-length.

In the *Blount* case, two equal shareholders owned all of the stock in a closely-held construction company located in Atlanta, Georgia. In 1981, they negotiated a buy-sell agreement (the "1981 Agreement") which restricted transfers of the corporation's stock and provided that in the event of death of either shareholder, the proportionate book value of the corporation would serve as the value of the stock for post-mortem valuation purposes under which the decedent's estate would be required to sell and the corporation would be required to redeem the stock of the decedent's estate.

As an aside, in 1992, Blount Construction Company formed an ESOP which originally owned approximately 30% of the issued and outstanding stock of the construction company. On January 13, 1996, Mr. Blount's brother-in-law, Mr. Jennings (the other 50% shareholder) died and his stock was redeemed for a price of approximately \$2,900,000. That price was consistent with the independent appraisal performed for the ESOP which concluded that the corporation had a book value of approximately

\$8,000,000 as of January 31, 1996, and approximately \$8,500,000 as of January 31, 1997.

In October of 1996, Mr. Blount was diagnosed with terminal cancer. In mid-November of 1996, Mr. Blount coordinated with the chief financial officer of the construction company to amend the 1981 Agreement and established a value for his shares of approximately \$4,000,000, notwithstanding the appraisal of approximately \$8,000,000 previously completed that year by the independent appraiser for the ESOP. The 1996 amendment was prepared without the benefit of legal counsel. Mr. Blount subsequently passed away on September 21, 1997. The personal representative of his estate utilized the buy-sell value as set forth in the 1996 amendment to the 1981 Agreement and reported a value for Mr. Blount's share on his Federal estate tax return (Form 706) of approximately \$4,000,000.

The Tax Court disregarded the estate tax value as fixed by the 1996 amendment to the buy-sell agreement. In disregarding the 1996 buy-sell value, the Tax Court made it clear that the 1996 amendment failed to meet the requirements of both Treas. Reg. § 20.2031-1(b) and Code § 2703.

The facts of the *Blount* case were terrible for the taxpayer. In making the 1996 amendment to the 1981 Agreement, Mr. Blount failed to obtain the consent of the ESOP in order to modify the agreement. The modified price was substantially below that which would have been payable under the book value provisions of the 1981 Agreement and the 1996 amendment was unilaterally made by Mr. Blount without the benefit of counsel.

In disregarding the buy-sell agreement as amended, the Court emphasized that the decedent had controlling interest of the corporation and, therefore, had the ability to unilaterally modify the value if you ignore for the moment his fiduciary duty to the members of the ESOP.

The Tax Court concluded that the price per share for Blount Construction Company as modified by the 1996 agreement was substantially below the price that would have been payable under the original 1981 Agreement and was substantially below fair market value as of the date of Mr. Blount's death. The Court then went on to determine the fair market value of the shares and it sustained the Commissioner's determination of value after concluding that the shares were worth more than the value as determined by the Internal Revenue Service.

Notwithstanding the analysis and conclusion of the Tax Court in the *Blount* case, buy-sell agreements can and most often do serve useful practical purposes for both business and tax planning purposes. As stated above, a properly planned buy-sell agreement can provide a market for the stock of the corporation. It can also assure continuity of management. It can provide estate liquidity (usually through the purchase of insurance) and establish a prearranged means of resolving potentially contentious valuation and succession issues. With proper planning, those positive reasons for buy-sell planning are clearly achievable. As indicated above, the *Blount* case simply serves as a horrendous example of how not to do buy-sell planning.

Robert J. Murray

DEBTORS DID NOT READ BEFORE THEY SIGNED

The United States Bankruptcy Appellate Panel for the Eighth Circuit, whose territory includes Iowa and Nebraska, recently imposed a severe sanction on individuals who had filed a Chapter 7 liquidation bankruptcy. In *In re Bren*, 303 B.R. 610 (8th Cir. BAP 2004), a creditor had brought a lawsuit within the bankruptcy court seeking to deny the debtors' Chapter 7 discharge based on numerous omissions and misstatements in their bankruptcy schedules and statement of financial affairs pursuant to Bankruptcy Code section 727(a)(4), which provides that the court may not grant a discharge of indebtedness to any debtor who "knowingly and fraudulently, in or in connection with the case, (A) made a false oath or account;...."

The trial court had found that the debtors failed to disclose the existence of certain assets and transfers of assets in the supporting documentation for their bankruptcy petition, and that the debtors failed to read their bankruptcy documents before signing them, which rendered false their declaration under penalty of perjury that the information contained in the documents was true and correct. Nevertheless, the trial court determined that the debtors' inaccuracies and admissions lacked the essential element of actual intent to defraud.

The appeals court, in reversing the trial court, observed that the bankruptcy code is designed to ensure that deserving debtors receive a "fresh start" by requiring them to provide complete, accurate and reliable information as of the commencement of the case, "so that all parties may

adequately evaluate the case and the estate's property may be appropriately administered," concluding that "neither the trustee nor a creditor should be required to engage in a laborious tug-of-war to drag the simple truth into the glare of daylight."

The bankruptcy code is designed to ensure that deserving debtors receive a "fresh start"

The reviewing court concluded that for the debtors to declare under penalty of perjury that the bankruptcy papers had been read and were accurate, when the truth was that the schedules and statement of affairs were not read and were not accurate, was such a significantly detrimental act in terms of the bankruptcy process that the declaration, when considered with the number and extent of omissions and inaccuracies, was "made with reckless disregard for the truth and with fraudulent intent." The debtors had testified at trial that neither of them had read the schedules in detail before signing them, instead relying on their attorney to have prepared the document accurately. The court decided that to allow debtors to ignore the seriousness of their oath, submit documents to the court which contained numerous material inaccuracies, and excuse their behavior because they claimed they failed to read the documents before signing them under oath, would undermine the whole structure of the bankruptcy system.

If faced with a bankruptcy filing by a customer, creditors should consider whether there may be significant inaccuracies in the filed bankruptcy papers, and if so, contact legal counsel.

Frank M. Schepers

WORKPLACE-RELATED TAX ISSUES UPDATE

Two Tax-Favored Ways to Burn Off Excess Leave Win IRS Approval

The Internal Revenue Service recently addressed two ways in which an employer can treat excess vacation and other leave time. In a recent IRS ruling, an employer decided to terminate its separate accounting for vacation and sick time. Instead, the employer gave workers a set number of paid days off for any use. In December, employees with unused accumulated leave could elect irrevocably to take cash payments in lieu of a portion of the upcoming year's leave. The money would be spread evenly over the following year's paychecks. In a private ruling, the IRS said payments for the days "sold" back are taxed when received. The workers did not constructively receive the money in the previous tax year because they had no access to it at that time.

The other treatment addressed by the IRS (other than to simply pay out the entire amount of accumulated, unused leave all at once) is to put cash for unused leave in a pension plan. In another private ruling, the IRS approved a state government's proposal to contribute the cash value of leave remaining when an employee retires to that worker's account in the state's plan. The pay-in is tax free, the IRS said, if the employee cannot otherwise get cash for leftover days.

Health Savings Accounts ("HSA") are tax-favored accounts available only to people covered by a medical insurance policy with a very high deductible. Payers (employee and/or employer) get a tax deduction for HSA

pay-ins, up to the amount of the policy deductible. Distributions from HSAs are tax free only if used for medical expenses. The IRS says, however, that only the account holder can decide how to use HSA money; employers cannot restrict workers' withdrawals.

Consequently, employers that fund HSAs for their workers are not allowed to monitor whether the funds are actually used on health care expenses.

For employers that are reluctant to contribute to HSAs, health reimbursement arrangements are another option for employers. Pay-ins to these plans are deductible, and withdrawals used to pay medical expenses are tax free. Unlike HSAs, employers can restrict how the funds are used but employee contributions are barred, so employers must foot the whole bill.

The IRS is retreating from an original proposal imposing withholding obligations for independent contractors. The original proposal would have required anyone who hired a contractor and paid \$600 or more to withhold up to 5% of the payment and issue the contractor a 1099 form. The plan got mixed reviews in Congress, and businesses were opposed. The IRS is drafting a scaled-back version urging firms in certain industries where noncompliance is high to withhold voluntarily. The IRS also envisions giving tax breaks to businesses that cooperate in an attempt to encourage voluntarily withholding. We expect the new plan to face tough going, much like the prior proposal. We will keep you updated on this and other important issues relating to your business.

Brian J. McGrath

TAX RELIEF FOR WORKING FAMILIES

On October 4, 2004, President Bush signed into law the Working Families Tax Relief Act of 2004 ("Act"). The Act provides approximately \$146 billion dollars in tax breaks aimed principally at middle-income taxpayers and businesses.

Some of the major highlights of the Act include: extension of the \$1,000-per-child tax credit; enhanced marriage penalty relief; expansion of the 10% income tax bracket; a one year extension of the individual alternative minimum tax (AMT) relief; the uniform definition of a "child" for tax purposes; a provision for treating non-taxable combat pay as earned income for determining the earned income credit (EIC) and refundable child tax credit; extension of the educator expense deduction; a provision for the availability of Archer Medical Savings Accounts (MSA's); an extension of twenty-three business related tax provisions; and technical corrections to recently enacted tax laws.

The \$1,000 per child tax credit is extended through 2010 after which the credit reverts to \$500 in taxable years beginning after December 31, 2010. The Act provides for full marriage penalty relief for tax years 2005 to 2010 by increasing the basic standard deduction amount for joint returns to twice the basic standard deduction amount for single returns. The Act also provides for additional marriage penalty relief for taxable years 2005 to 2010 by increasing the size of the 15% rate bracket for joint returns to twice the corresponding rate bracket for single returns. The Act increases the size of the 10% rate bracket for individuals for taxable years 2005 to

2010 by setting the rate bracket for these years at 2003 levels, i.e. \$7,000 for single, \$10,000 for head of household and \$14,000 for married filing jointly, with indexing.

Businesses, both small and large, will receive \$14 billion in tax breaks through 2005. The research and development tax credit is extended for amounts paid or incurred after June 30, 2004 and before 2006. The welfare-to-work and work opportunity tax credits extended for wages paid are incurred for qualified individuals starting work after 2003 and before 2006. The



enhanced deduction for charitable contributions of qualified computers is extended for contributions made in tax years beginning after 2003 and before 2006. Expensing of environmental remediation costs is extended for expenses paid or incurred after 2003 and before 2006. The renewable-source energy credit is extended for facilities placed in service after 2003 and before 2006. Suspension of the marginal-well net-income limitation is extended for tax years beginning after 2003 and before 2006. Indian employment tax credit is extended to tax years beginning before January 1, 2006. Accelerated depreciation for business property on Native-American reservations is extended to property placed in service before January 1, 2006.

The teacher classroom expense

deduction is extended for 2004 and 2005. The credit phase out for qualified electric and clean fuel vehicles is repealed for property acquired in 2004 and 2005. Contributions to Archer Medical Savings Accounts (MSA's) are extended through 2004 and 2005.

While this article merely summarizes the major aspects of Working Families Tax Relief Act of 2004, a more detailed summary of the Act can be found at http://www.bnatax.com/tm/family_tm_summary.htm.

Matthew J. Bock

BUSINESS DEPARTMENT

Frank J. Barrett
Matthew J. Bock
Ryan N. Boe
Thomas R. Burke
Andrew T. Chapeau
Donald L. Erftmier, Jr.
Lawrence F. Harr
C.E. Heaney, Jr.
Brian J. McGrath
Robert J. Murray
Angie M. Pelan
Jon S. Reid
Frank M. Schepers
R.A. Skochdopole

Julie J. Feldhacker, LA
Anna C. Knobbe, LA
Carol J. White, CLA

**CHANGES TO NOTARY
PUBLIC PRACTICES AND
PROCEDURES UNDER
NEBRASKA LAW**

The Nebraska laws concerning Notaries and attestation of documents changed effective July 16, 2004. While the majority of the laws remain the same, there are some very important changes which must be observed to guarantee compliance under the new laws. Some of the more significant changes are discussed below.

The new laws expressly provide that the document must be signed "in the presence of" the Notary. No matter how familiar the Notary is with the signor, or their signature, the Notary may not notarize a previously signed document. This includes a document that was signed "just a few minutes ago in the office next door."

Additionally, the new laws change how the Notary verifies the identity of the signor. The Notary may notarize a signature if the signor is personally known to the Notary. If the signor is not personally known to the Notary, the Notary must verify the signor's identity through "satisfactory evidence."

Satisfactory evidence means identification of an individual based on: (1) A single document issued by a government agency that is current and

that bears a picture of the individual's face, the individual's signature, and a physical description of the individual (e.g. driver's license); although a properly stamped passport without a physical description may be used in lieu of a document meeting the above requirements; (2) the oath or affirmation of one credible witness unaffected by the document or transaction to be notarized who is personally known to the Notary and who personally knows the individual; or (3) the oaths or affirmations of two credible witnesses unaffected by the document or transaction to be notarized, each of whom personally knows the individual and shows the Notary documentary identification as described in part 1, above.

Finally, a Notary may not notarize the signature of a spouse, ancestor, descendant, or sibling, including in-laws, step or half relatives. Being mindful of the new changes in the law concerning Notaries and the attestation of documents will ensure that notarized documents have the full force and effect of the law. For more information on the changes visit <http://www.sos.state.ne.us> and go to the "Notary Division" section under the "Business and Licensing" drop down menu.

Andrew T. Chapeau



LAMSON, DUGAN AND MURRAY, LLP
ATTORNEYS AT LAW

LAMSON, DUGAN AND MURRAY BUILDING
10306 REGENCY PARKWAY DRIVE
OMAHA, NEBRASKA, USA 68114-3743

402-397-7300 FAX 402-397-7824 WWW.LDMLAW.COM