CAROLINA LEGAL COUNSEL
J. WESLEY CASTEEN, ESQ., CPA
Attorney and Certified Public Accountant

Report From Counsel

Insights and Developments in the Law **Winter 2004/2005**

Take the Time to Update Your Will

By some accounts, 70% of adult Americans do not have a will. If you at least have gone to the trouble of getting a will, consider yourself ahead of the curve and pat yourself on the back. Then come back to earth and understand that your work is not completely done. A will is not a static instrument. To serve its purposes, it must keep current with life changes, including an individual's financial circumstances, and with some external factors, such as tax laws. With the help of a professional, you should periodically review your will, staying alert to new or different circumstances that might call for updates.

To serve its purposes, a will must keep current with your life changes.

Marriage, Divorce, and Remarriage

Obviously, a marriage usually brings a new beneficiary into the picture, and a divorce may remove one. Some of the changes in a will prompted by a change in marital status may not be so apparent. For example, when a widow or widower remarries, the will may need to be updated to show how children from the previous marriage and the new spouse are to be provided for.

Additions and Subtractions

A new child is a new beneficiary, but a will can and should cover more than just the distribution of property to heirs. Parents can name a guardian, and even an alternate guardian, to care for their children in the event that something happens to both parents. Absent such a provision in a will, a court will appoint a guardian.

The death of an executor, guardian, beneficiary, or trustee creates a gap in how the will is supposed to operate. Fill in the gaps by making necessary changes, such as naming a new individual or, in the case of a deceased beneficiary, simply removing the lost beneficiary from the will.

Continued on page four.

Telecommuters and the Home Office Tax Deduction

The benefits of working from your home for an employer make telecommuting appealing to many people. In most cases, however, the plus side may be confined to subjective, hard-to-measure factors. What is it worth to you to avoid rush-hour traffic jams or to wear whatever you want while working?

If you are counting on an income tax benefit in the form of a home office deduction, you should understand that most telecommuters do not meet the demanding requirements for the deduction. Still, you will not know how you stand unless you first know the rules. If you do qualify, worthwhile tax breaks are available, consisting of deductions for such items as property taxes, mortgage interest, and utilities.

To qualify for the home office deduction, a taxpayer must meet several requirements relating to the business use of a dwelling. For example, as to the portion of a dwelling in question, it must be used exclusively and regularly for the purpose of carrying on a trade or business. When part of the dwelling is used for business by someone who is an employee, there is an additional requirement that has proved to be a stumbling block for many individuals seeking to claim a deduction. It sounds simple enough, but, as interpreted by the courts, it is a formidable legal hur-

Continued on page four.

CAROLINA LEGAL COUNSEL
1213 Culbreth Drive • Landfall Business Center • Wilmington, North Carolina 28405
Telephone: (910) 509-7209 • Fax: (910) 509-7210 • E-Mail: attorneycpa@carolinalegalcounsel.com

E-Mail Privacy in the Workplace

Richard was an independent insurance agent who sold policies for a major insurer on an exclusive basis. After a period in which there was some dissatisfaction and acrimony on both sides of the relationship, the company terminated its agreement with Richard. In subsequent litigation brought by Richard, the parties disagreed as to the reason for the termination. The company's position was that it had fired Richard for disloyalty. How the company came by its evidence of disloyalty led to a separate element of the ensuing lawsuit.

An attorney for the company and a systems expert searched the company's main file server for any e-mail to or from Richard that caught their attention.

When other events raised suspicions about Richard, an attorney for the company and a systems expert searched the company's main file server for any e-mail to or from Richard that caught their attention because of the e-mail headers. There, they claimed to find two messages from Richard to a competing insurance company that essentially asked if the competitor might be interested in acquiring some clients who supposedly were unhappy with Richard's company.

Richard argued to no avail that his former company violated his rights under the federal Electronic Communications Privacy Act (ECPA). First, he asserted that there was a violation of that part of the law that prohibits "intercepts" of electronic communications such as e-mails. However, courts, including the one hearing his case, have reasoned that an intercept can only occur contemporaneously with the electronic transmission. The company did not access Richard's e-mails *as he was sending them*, but read them later, so it did not "intercept" them.

The second claim was brought under a different part of the ECPA, which creates liability for intentionally accessing without authorization a facility through which an electronic communication service is provided, and thereby obtaining access to a communication while it is in electronic storage. "Storage" in this context means temporary, intermediate storage, or backup storage. A related part of the law makes an exception from liability for the person or entity providing the communications service. Since Richard's e-mails were stored on a system controlled and administered by his company, the company could not be liable for accessing the e-mails.

Oscar Wilde and Copyright Law

Nineteenth-century writer Oscar Wilde had not yet produced the works for which he is best known when he came to the United States in 1882 for a lecture tour to promote a touring opera. He clearly was a celebrity in the making, however, and that is what brought him to the attention of Napolean Sarony. Sarony was making a name for himself, and lots of money, in the still emerging field of photography. He took photographs of the rich and famous, to whom he paid large sums in return for the exclusive right to distribute the photographs.

Wilde posed for 27 pictures taken by Sarony. When the most famous of these was used in an advertisement without Sarony's permission, he sued. The defendant was a lithographer who was said to have reproduced many thousands of copies of the image. Sarony alleged a violation of his copyright in the photograph. The defense was that Congress had the power to protect authors' writings, but not authors' photographs, which were described as mere reproductions of nature created by the operator of a machine.

The case went all the way to the United States Supreme Court (which itself was later the subject of a formal photographic portrait by Sarony). In a decision that has been valuable to photographers and copyright seekers ever since, the Court ruled that Sarony's photograph did indeed have copyright protection. The photograph was deemed a work of art and the product of the photographer's "intellectual invention," no different in nature from a novel. Rebutting the argument that taking a photograph has nothing to do with imagination, the Court described Sarony, as an art critic might have done, as having set up his subject "so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression."

The essential holding in Sarony's case is no less valid today, but more than a century later there are added layers of legal analysis to consider in our copyright jurisprudence. For example, in a recent case, a photographer took pictures of a blue vodka bottle for use in the vodka producer's marketing. The company then had other photographers take similar photos of the bottle

Continued on page three.

New Banking Rules Affect Checking Accounts

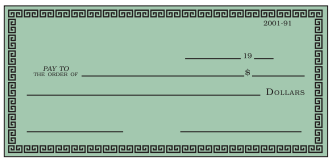
We Americans write about 40 billion paper checks each year. In addition, for the first time that number recently was eclipsed by the annual number of automated transactions involving checking accounts. Checking account transactions are such a widespread part of our lives that consumers of banking services are well advised to become acquainted with major changes affecting banking laws. Federal legislation called the Check Clearing for the 21st Century Act, or "Check 21" for short, went into effect on October 28, 2004.

The Dangers of "Floating"

Check 21 will allow financial institutions to process "substitute" checks—high-quality paper reproductions created from electronic images of both sides of an original check. In time, check processing will be faster, and this is where there will be ramifications for check writers and depositors.

While it has always been prudent to have enough money in your account to cover a check the moment you write it, who has not used the lag time in check processing to make a necessary deposit? That will soon become a riskier strategy as electronic check processing becomes more prevalent. It will also be more important than ever to keep checkbooks up to date, especially bearing in mind deductions for ATM withdrawals, bank fees, and debit-card purchases. (Another downside to faster check processing is that you may have less time to place a "stop payment" on a check that you have written.)

As a last resort, there are overdraft services, including overdraft lines of credit. They have their place, but remember that each use of an overdraft service is essentially a loan, usually with interest charges or other fees.



Electronic Substitute Checks

Today, most banks do not return customers' actual checks with their monthly statements. Under Check 21, even your bank may not receive your original check but, rather, an electronic substitute check created by the bank where the check was deposited. As long as the substitute check meets standards established under Check 21, it should be just as effective as the original for a customer who needs to prove a disputed payment. Of course, long before the enactment of Check 21, images of checks, rather than the real thing, have enjoyed widespread acceptance as proof of payment. Even if the substitute check falls short in some way, Check 21 provides warranties and remedies to protect the parties to a transaction.

Expedited Recrediting

Erroneous or fraudulent payments are largely the domain of state laws, which can vary greatly. Usually, a bank can be held liable to its customer if it charges the customer's account for a check that is not "properly payable." Check 21 has provisions for "expedited recrediting" in the event of improper payment.

A bank customer can make a claim for expedited recrediting from the bank holding the customer's account if the customer asserts in good faith that the bank improperly charged the account for a substitute check. The customer must show that producing the original check, or a better copy of it, is necessary to determine the validity of the charge to the account. A claim for expedited recredit must be made within 40 days of delivery of the relevant bank statement to the customer, or the date when the substitute check is made available to the customer, whichever is later.

Copyright Law

Continued from page two.

and ended up using them in its advertising campaign. The first photographer sued for copyright infringement in his photographs. He reached back into the 19th century to cite the *Sarony* case, but lost.

The problem was not that the photographs were unworthy of copyright protection. Everyone agreed they were. However, under a doctrine that is now well established in copyright law, courts will not protect a copyrighted work if the idea underlying it can be expressed only in one way, such that the idea and the expression of it "merge." The basic question in the case was, "How many ways are there to create a 'product shot' of a blue vodka bottle?" The court's answer was "not very many."

Update Your Will

Continued from page one.

Changing Fortunes

If you enjoy an unexpected windfall, you may still want the larger pie divided up as before. But it is likely that some changes in your will are called for. If the increase in the potential estate is large enough, it might trigger the need for planning to avoid or minimize estate taxes. A reversal of fortune also could suggest some changes. For example, you may have to revise downward that fixed sum you were planning to leave to a favorite charity.

Moving Out of State

You will not have to start from scratch if you move to another state, because all of the states recognize a will that was properly created in another state. Nonetheless, legal advice should be sought in the new state because changes in the law from state to state could require some tinkering with the will. There may be more than tinkering involved if you move to or from a community property state.

Changes in Tax Laws

The Government's intentions can change even if your intentions have not. Some of the changes benefit individuals with wills, but you can take full advantage of them only if you are aware of them. The big item here is the schedule of changes to the federal estate tax exemption, which is the amount an estate can reach before it is subject to a (hefty) estate tax. The good news is that the exemption is headed up. It goes from the current $1.5 million to $2 million in 2006.

You Change Your Mind

If you decide you want to change beneficiaries, a guardian, an executor, or anything else in a will, you can do so. For example, you want to make sure that the beneficiaries in your will are the same as the beneficiaries you have named in your insurance policies and retirement accounts. Otherwise, the beneficiaries actually named in those documents will get the money from them, *not* the beneficiaries under the will. Bear in mind that no amount of talking about your new intentions will make them happen. The changes must be indicated in a properly executed will.

You should keep the finished (at least until the next update) product in a safe place. When "they" say "keep this with your important papers," think of your will. Your family should know where to find the executed will. An unsigned copy of your will in its latest form is a good starting point for the next periodic review.

Telecommuters

Continued from page one.

dle. For an employee at home, the business use of the dwelling must be for the "convenience" of the employer.

Employer Convenience

There is no cut-and-dried formula for determining if office work at home is for the convenience of an employer. The answer depends on the facts and circumstances of each case. However, there are three alternative situations in which the employer convenience requirement may be met: (1) where maintaining the home office is a condition of employment—that is, the employer requires, not merely allows, the employee to maintain the office and to work there; (2) where the home office is necessary for the functioning of the employer's business; or (3) where the home office is necessary to allow the employee to perform his or her duties properly. Unfortunately for taxpayers hoping for the deduction, it is not enough that working at home for an employer is appropriate or even helpful to everyone involved.

If an employer does not make work space available to an employee at some fixed location, the practical effect is that the employee is required to work at home, even if the employer has no written policy stating such a requirement. In this situation, which is still relatively unusual today, the employee should get it in writing from the employer that the employee has no choice but to work at home.

A Tale of Two Telecommuters

If working at home is not actually required, an alternative basis for qualifying for the deduction is to show that working at home is necessary if the employee is to perform properly for the employer. This, too, can be difficult for the taxpayer to prove. Consider the cases of two college professors, one who got the deduction, and one who did not.

The first professor, who got the deduction, kept an office at his home for some of the scholarly research and writing activities that were a part of his job. He actually had office space provided by his employer, albeit space he had to share with other professors. He also could use the college library. The problems with these work spaces were that there was a lack of privacy and no safe place to leave the professor's materials. All in all, according to a federal court, there was no place like home, even for working.

In the other case, the professor was denied the deduction under similar circumstances. There, too, the professor complained that his on-campus office had deplorable security and was small, crowded, and noisy to boot. All of that only prompted the Tax Court to rule that the home office was for the professor's convenience, not that of his employer.