Choate's Notes **Vol. 3, No. 2** **Fall, 2001**
A free newsletter for estate planners///*From Natalie B. Choate*

Dear estate planning professional:

T & E professionals, individually and through their associations, have volunteered thousands of hours to assist the families of those murdered on September 11. Lawyers can call the American Bar Association to help families establish the fact of death, file claims for benefits and arrange custody for orphaned children. Financial planners can check www.fpanet.org for resources and how to help. Volunteers from the Monroe County Bar Association Probate Section (Rochester, NY) worked over a weekend to draft powers of attorney and other estate planning documents for members of a local reserve unit called up for service in the war on terrorism. These professionals are to be commended for their compassion, creativity and service.

I subscribe to **Kleinrock's TaxExpert®**. I get a monthly CD which contains the Internal Revenue Code plus all regs, proposed regs, IRS Notices, IRS Publications, and Revenue Rulings, plus some letter rulings, and a complete explanation of the tax Code written by experts. I can click from the explanation to the law. I can cut and paste text from the IRS sources right into my memos. I can retrieve by section number, or browse, or use a word search. The program remembers my search history for the session so I can instantly go back and forth among several source materials. Plus I can get all this over the web (though in slower more cumbersome fashion) when I'm traveling or want to bring my monthly CD up to the minute. Plus the website has a daily tax bulletin, *and* I receive a monthly eight-page printed and mailed summary of new developments. The writing is crystal clear, plain text—no exclamation points or cute headlines. This fantastic service costs…$460 per year! I know there are more expensive services out there; what I don't know is how they stay in business. You can find out more and order at www.kleinrock.com (online price is $445).

Charles Redd's article in the May 2001 issue of **Trusts & Estates**, "Recent Case Law Developments In Will And Trust Construction," contains many examples of defective documents, in which the drafter didn't go to the trouble of specifying (e.g.) who are the client's "nieces and nephews" (does that term include children of client's spouse's siblings? Or just children of the client's own siblings?), or who is to take a legacy if the named beneficiary does not survive. If you are starting out as a drafter, read this article at www.trustsandestates.com for a sobering education.

First Trust of Denver, CO, (800) 525-8188, is an IRA provider that will accept non-traditional assets. If you can penetrate their voice mail defenses, inquire about their "Spectrum IRA." First Trust allows these accounts to hold limited partnerships, deeds of trust, private equity investments and other non-conventional investments. Special fees and restrictions apply.

For info on 457 plans (a topic not covered in my book), see the "café" at Mpower.com. For a table of state law creditor exemptions applicable to retirement plans, see the article "Protecting Retirement Plans," by Gideon Rothschild, et al., from the Journal of Asset Protection (March 1997), at www.mosessinger.com (Articles/by Topic/Trust and Estates and Wealth Preservation).

The new edition of *Life and Death Planning for Retirement Benefits* is at the printer. This is your last chance to order at the pre-publication price. Read the enclosed flyer for details on this and other offers. The new edition is bigger and better than the old. You can check out the Table of Contents of the new edition (and the gorgeous new cover) at my website, www.ataxplan.com.

Until the next issue, --Natalie B. Choate

Sex, Lies and IRS Publication 590

Here are a few of the myths, misleading statements and urban legends (some of which come from IRS Publication 590) that I've encountered in the field of planning for retirement benefits.

Myth: A person who failed to take his MRD for a year must file an amended return for that year to report the missing distribution. Wrong. He can't report the missed MRD as income for that now-ended year if it wasn't taken in that year. He *is* supposed to file an amended return for that year, attaching Form 5329 (showing the penalty for an "excess accumulation," Part VII). The amended 1040 will show the same income, but a new higher tax (because of the 50% penalty). The distribution is properly reported as income in the later year, when the (late) distribution is actually taken.

Urban legend: An inherited IRA should be registered under the Social Security number of the decedent. Wrong again. The correct Social Security number is the beneficiary's, because the beneficiary is the one who will be receiving distributions from the account and reporting the resulting income. See IRS Instructions for Form 1099-R (2000), p. R-5 ("Beneficiaries" section).

Myth: We need only one actuarial table under the new, simplified, proposed minimum distribution regulations. Nope, sorry. For one thing, the new "Uniform Table" is used only for *lifetime* required distributions. For post-death required distributions over the life expectancy of a designated beneficiary, you still need the IRS's single life expectancy table, Table V. Even for lifetime required distributions, not everyone uses the Uniform Table: a participant whose sole designated beneficiary is his spouse who is more than 10 years younger than he is will use the IRS's joint and survivor life expectancy table, Table VI, to compute required distributions. All the tables are in IRS Publication 590.

Misleading statements: IRS Publication 590 has several incorrect statements in its discussion of exceptions to the 10% "premature distributions" penalty (§ 72(t)). One is that, in order for a series of substantially equal periodic payments ("SOSEPP") to qualify for the exception, "You must use an IRS-approved distribution method" (from IRS Notice 89-25) to compute the payments. P. 20. But Notice 89-25 says only that its three methods qualify for the exception, not that they are the ONLY ways to qualify. In fact several letter rulings (collected at ¶ 9.2.09 of *Life and Death Planning for Retirement Benefits*) have allowed variations on the 89-25 methods, including annual revaluations and COLAs.

Here's another: "You are considered disabled" (for purposes of the disability exception) if you "cannot do *any* substantial gainful activity" (p. 20; emphasis added). This makes it appear that the exception follows the strict "Social Security" definition of disability. However, Reg. § 1.72-17A(f) provides that "The substantial gainful activity to which [the Code] refers is the activity, or a comparable activity, *in which the individual customarily engaged* prior to" the disability, a much more lenient standard. Your "education, training, and work experience" are taken into account.

One more from the SOSEPP discussion: "[I]f you received a lump sum distribution of the balance in your traditional IRA before the end of the [no-modification] period for your [SOSEPP]," the 10% "tax would apply to the lump sum distribution and all previous distributions made under the" SOSEPP. This statement is incorrect. The 10% penalty would apply only to distributions prior to age 59½; it would not apply to the lump sum distribution if that occurred after age 59½, even if it occurred within the no-modification period. § 72(t)(4)(A).

Misleading advertising: The header on this essay is a classic example of misleading advertising. The headline implies that the content has something to do with sex, which it does not.