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estate planning briefs®

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Another scam aimed at tax professionals

The IRS and state tax agencies issued an urgent warning on February 11 to tax professionals around the country. A new phishing scam was discovered involving the impersonation of the IRS. Tax professionals may have received an email purporting to be from the IRS, demanding that they verify their e-file numbers before submitting any new tax returns this year.

Although that sounds like something that the IRS might request, in fact they did not. This was a brazen attempt to steal credentials that will allow the thieves to file false tax returns, a serious problem that shows no signs of going away.

The Service provided the text of the bogus email, and warned that none of its directives should be followed. Anyone who receives such an email should save a digital copy and forward it as an attachment to phishing@irs.gov, and they should also report the impersonation to TIGTA. The IRS is looking for a criminal prosecution for this scam.

—IR-2021-34

Warren joins Senate Finance

Estate planning professionals should note that Senator Elizabeth Warren has joined the Senate Finance Committee. She gave up her seat on the Health, Education, Labor, and Pensions Committee and remains a member of the Senate Banking, Housing, and Urban Affairs Committee. Warren has promised to work toward implementation of a national wealth tax, and she also supports lifting the estate tax rate back up to 55%, with a lower exemption threshold.

During the campaign Warren advocated an annual 2% wealth tax on holdings in excess of $50 million, and a 6% annual tax on those with over $1 billion. The defect in the estate tax, apparently, is that the IRS has to wait for the rich to die before collecting it. An annual wealth tax promises to be a bonanza for appraisers and tax attorneys, given the administrative difficulties inherent in accurately measuring an individual’s total wealth at a moment in time, including real estate and fine art.

COMMENT: There is considerable support among wealthy Democrats for higher taxes on "the rich," and Warren has proved to have significant political clout. A robust debate on the merits of a wealth tax should be expected this year.

Pro se estate representation

Arthur Tunnell died in 2016, leaving a will that named his sister, Margaret, as the executor of his estate. She was not a lawyer. Arthur's landlord, Ralph Wilbur, brought an action against the estate for damage to rental property and missed rent payments. Margaret appeared in court *pro se*, asking that the lawsuit be dismissed. The court denied her request and ordered Margaret to get a lawyer to represent the estate.

She got the lawyer, who filed a motion for reconsideration of the prior orders, including a request that Margaret be allowed to continue to represent the estate herself. When that was denied, her lawyer filed an appeal.

Nonlawyers are permitted to represent themselves when there are no third parties involved. Usually this means that they are not allowed to represent trusts or estates in court. However, in this case Margaret was the sole beneficiary of the estate, and no third-party interests were at stake. In these limited circumstances, the appellate court rules, Margaret can fire her attorney and once again appear in court *pro se* to defend the interests of the estate.

—Wilbur v. Tunnell, 151 N.E.3d 908 (Mass. App. Ct. 2020)

Closing fees

The IRS proposed a new fee for estate tax closing letters. One side effect of the creation of the portable estate tax exemption for married couples (the Deceased Spouse's Unused Exemption, or DSUE) was an explosion in the number of estate tax returns being filed. The portable exemption must be claimed on an estate tax return. In a recent Brookings study of estate tax returns, each year there are as many or more nontaxable estate tax returns as taxable ones. Usually an estate escapes federal estate tax through the charitable or marital deduction, but now many smaller estates are filing what amounts to protective returns for the surviving spouse.

These returns generate no money for the IRS, which in 2015 responded to the flood of nontaxable returns by ending the routine provision of an estate tax closing letter to the executor of an estate. Such letters then had to be specifically requested, and practitioners reported that the process was clumsy and protracted.

On December 29 the IRS issued proposed regulations suggesting that there will be a better process for closing letters, and that now there will be a fee of $67 for such letters.

—REG-114615-16

COMMENT: The immediate reaction of many practitioners was a sigh of relief.

Surviving spouse regains IRA rights

Terry Carmack opened his IRA in 2002, naming his wife, Marilyn, as its beneficiary. That status continued until 2016, when Marilyn's health deteriorated and she began to develop dementia. In August 2016 Marilyn was relocated to a long-term care facility. In September, Terry named his siblings as the beneficiaries of his IRA. He then asked Marilyn's daughter to file an application for Medicaid for Marilyn to help with the nursing home expenses. The decision does not reveal what became of that application, but Marilyn returned home to live with Terry.

Terry died in 2018, and Marilyn survived him. His estate then consisted of $94,450 worth of housing, vehicles, and bank accounts, and $386,031 in the IRA. Marilyn filed suit, alleging that the change of IRA beneficiary was a gift in fraud of her marital rights, which reduced her intestate share of Terry's estate. The trial court agreed, and the intermediate court of appeals now confirms that judgment.

Although the state law appears to apply to lifetime transfers, not changes of beneficiary designations, the court held that the fact that the transfer did not happen until death, and that the IRA is a nonprobate asset not part of the estate,

is immaterial. Had there been no beneficiary designation at all the IRA would have been part of Terry's estate, subject to Marilyn's marital rights.

The trial court held Terry's "intent was to render [Wife] destitute in an ill-conceived effort to make the state and federal governments pay for his wife's care instead of him or his children." The appellate court agreed and cited this as further evidence that Terry's change of beneficiary was intended to defeat her marital rights.

— Carmack v. Carmack, 603 S.W.3d 900 (Mo. Ct. App. 2020)

COMMENT: Under ERISA, spouses acquire rights in their partner's employer-sponsored retirement plans. Nonspouse beneficiaries may not be named without the written consent of the spouse. If an individual joins a retirement plan when single and later marries, the spouse gains those rights regardless of what the old beneficiary designation says. This rule does not generally apply to IRAs, however, making this case an exception.

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