



NOTES & TRENDS

CRIMINAL LAW

JUDICIAL LAW

■ **MIRANDA: PUBLIC SAFETY EXCEPTION: FIREARM.** Police received a call that a victim had just been assaulted and threatened with a gun. Within minutes of the call, police responded, where they saw various individuals matching the description of the assailant. Police officers handcuffed and frisked the men, which included the appellant. Officers did not find a gun on the appellant, but a police officer asked the appellant if he'd had a gun, to which he responded that he had three guns inside the residence and described them to the officers. Based on that response, the officer obtained a warrant, executed the warrant, and found three guns. The appellant was subsequently charged with a felony possession of a firearm.

Held, this case falls within the public safety exception to the *Miranda* requirement. Although the appellant was in custody when he gave the statement, the concerns of *Miranda* are outweighed by the need to protect the public and these exigent circumstances. The court holds that the application of the public safety exception pronounced in *New York v. Quarles*, 467 U.S. 649, 104 S. Ct. 2626 (1984) must be decided on a case-by-case basis. Although police did not find a weapon on the appellant, they were faced with the immediate necessity of locating a gun which could threaten their safety and the public's safety ("the fact that appellant's response dispelled any immediate concern for public safety does not affect justification for the question"). *State v. Clyde Caldwell*, Ct. App. 1/29/02, Minnesota Lawyer 2/4/02, p. A-19.

■ **TERRORISTIC THREATS: TRANSITORY ANGER: FAILURE TO INSTRUCT.** Although the charge of terroristic threats is not meant to encompass verbal threats expressing transitory anger without intent to terrorize, there is no authority for the appellant's contention that failure to include such language in a jury instruction is reversible error. See *State v. Jones*, 451 N.W.2d 55, 63 (Minn. App. 1990) review denied (Minn. February 21, 1990). *State v. John Sheldon Dick*, Ct. App. 2/5/02, Minnesota Lawyer 2/11/02, p. A-26.

■ **JOINDER: RELATED OFFENSES: SPREIGL ANALYSIS.** Defendant was charged in a single complaint with two counts of burglary, among other charges. The first charge was Second Degree Burglary of an unoccupied cabin, and the other burglary charge, First Degree Burglary, concerned an occupied home approximately 15 minutes later. Although a *Spreigl* analysis is required to determine whether joinder of unrelated offenses is prejudicial, *State v. Profit*, 591 N.W.2d 451, 460 (Minn. 1999), "it would be absurd to conclude that joinder of related offenses is erroneous as a matter of law if a defendant is acquitted on one of the charged offenses." *State v. John Sheldon Dick*, Ct. App. 2/5/02, Minnesota Lawyer 2/11/02, p. A-26.

■ **PROBATION VIOLATION: WAIVER OF HEARING: CONSTRUCTIVE STIPULATION.** At a probation violation hearing, the appellant admitted that he had not reported to his probation officer, and admitted that he had used drugs. These admissions came after the appellant, with advice of counsel, waived the evidentiary hearing. Such a waiver operates as a constructive stipulation to the facts alleged to support the probation violation, and removes from the prosecution the burden of proving a case by clear and convincing evidence. Once such a waiver of the hearing takes place, the only issue left for the court to determine is mitigation or other reasons why the violation, once proved, should not result in revocation. *State v. John Xiong*, Ct. App. 2/5/02, Minnesota Lawyer 2/11/02, p. A-27.

■ **SENTENCE: IMMIGRATION STATUS: IMPROPER CONSIDERATION.** Possible deportation because of immigration status is not a proper consideration in criminal sentencing. The appellants, both Mexican nationals, were each sentenced for conspiracy to commit a first degree controlled substance violation. Pursuant to a plea agreement, they were allowed to argue for a downward departure. Both acknowledged on the record that their convictions could affect their immigration status. At the sentencing hearing, the appellants moved for a probationary disposition. The judge stated that the INS situation would "make the otherwise possible option of some kind of a local disposition really impossible and impractical" and imposed 81-month prison terms. Held, possible deportation because of immigration status is not a proper consideration in criminal sentencing. The immigration concerns are collateral consequences concerning issues which are beyond the control of district court. The prison terms sentences are remanded, with directions to the trial court to consider legitimate reasons for a downward departure. *State v. Josefina Sanchez Mendoza et al.*, Ct. App. 1/31/02, Minnesota Lawyer 2/11/02, p. A-28.

■ **MULTIPLE COUNTS: PROCEDURE UPON CONVICTION: STAY OF ADJUDICATION.** At trial, the appellant was convicted of the gross misdemeanor interference with a 911 call as well as first degree burglary. The trial court felt that the state should not have prosecuted the appellant under the burglary charge, although after the trial, the court stated that the appellant "stands convicted" of the burglary charge, and stated that the state had satisfied the technical requirements of the law. However, the judge questioned whether the appellant should be sentenced as a felon. Instead, the court stayed imposition of sentence on the gross misdemeanor charge, and refused to take any action on the burglary "conviction." The Court of Appeals reversed the trial court, finding that the court's refusal to take action on the burglary conviction amounted to a stay of adjudication, and that special circumstances were not present for such a disposition.

Held, the Court of Appeals is reversed. The court's failure to take action on the burglary conviction is not the equivalent of a stay of adjudication. The Supreme Court characterizes the trial court's inaction on the burglary charge as an unfulfilled duty, for which a writ of mandamus normally would lie. The Supreme Court, therefore, treats the state's "improper appeal" as a petition for an extraordinary writ.



NOTES & TRENDS

Where there is a conviction, a file disposition must be entered concerning what action the court will perform on the conviction. For accepted pleas, verdicts or findings of guilt to become convictions under Minnesota law, the conviction must be recorded. Minn. Stat. §609.02 subd. 5 (2000). The Supreme Court then lists several options available to the court at the end of the criminal trial and also, in a footnote, raises the issue of multiple punishment under 609.035. Hence, the case is remanded to district court for an appropriate disposition on the unaddressed burglary conviction. *State v. Richard Alan Hoelzel*, S. Ct. 2/14/02, Minnesota Lawyer 2/18/02, p. A-3.

■ **DRIVE BY SHOOTING: TIME OF SHOOTING: EXIT FROM MOTOR VEHICLE.** Minn. Stat. §609.66, subd. 1(e) defines a drive by shooting as “while in or having just exited from a motor vehicle, recklessly discharges a firearm . . .”. In this case, the appellant pulled up to a basketball court in a mini-van, exited, ran up to the players and began shooting within one to two minutes from the time he exited the mini-van. He then retreated back to the van. This conduct is sufficient to come within the definition of “just exited from a motor vehicle.” The dictionary defines the word “just” as “only a moment ago.” The court rejects the appellant’s argument that the shooting must be in the act of exiting the motor vehicle. *State v. Antione Lewis*, Ct. App. 2/12/02, Minnesota Lawyer 2/18/02, p. A-18.

— FREDERIC BRUNO
FREDERIC BRUNO & ASSOCIATES

FAMILY LAW

JUDICIAL LAW

■ **CHILD SUPPORT — MINNESOTA PARENTAGE ACT.** The parties married in 1984 and respondent gave birth to a child in 1986, the same year she filed for divorce. In the dissolution papers, respondent stated that appellant was not the child’s father and the parties stipulated to that fact. The dissolution decree stated that “there has been no issue of the parties nor is petitioner pregnant with a child or children fathered by [appellant].” In 1995, respondent brought a paternity action in California against another man, the child’s alleged biological father, but that action was dismissed. In September 2000, Lincoln County served appellant with a complaint for child support. Appellant moved to dismiss the complaint based on a *res judicata* analysis and requested attorney fees. In January 2001, the trial court ruled that the divorce decree was not a final judgment, paternity was not closely examined, and thus collateral estoppel did not apply. In June 2001, the child support magistrate ordered appellant to pay child and medical support.

Following its *de novo* review of the Minnesota Parentage Act, the Court of Appeals reversed and remanded, with instructions to award appellant his attorney fees. Citing *Reynolds v. Reynolds*, 458 N.W.2d 103, 105 (Minn. 1990), the Court of Appeals noted that the three-year statute of limitations under Minn. Stat. §257.57, subd. 1(b) does not bar a presumed father from denying paternity as a defense to a child support action. Moreover, the Court of Appeals held that the county’s arguments that (1) appellant is the father under the statutory presumption; (2) appellant has not rebutted the presumption by clear and convincing evidence; and (3) the presumption is conclusive because appellant did not bring an action to declare the nonexistence of paternity within three years were contrary to established law. In remanding for a paternity hearing, the Court of Appeals noted that all parties agreed that appellant was not the child’s father and that there was strength to appellant’s *res judicata* argument. Finally, the Court of Appeals held that appellant was entitled to an award of attorney fees under both Minn. Stat. §518.14, subd. 1 and Minn. Stat. §549.211, subd. 3. The Court of Appeals criticized the county for assuming that it could disregard the biological facts in this case, despite respondent’s prior assertions that appellant is not the father of her child. Significantly, the county has also forgone an appeal of a decision preventing further proceedings that were based on evidence as to the identity of the biological father. As a result, the county taxed appellant to respond to a matter that rests solely on a legal presumption. Most importantly, the county’s assertion was made with insistence, erroneous as a matter of law, that appellant was not entitled to a hearing to assert the biological facts. Reversed and remanded. *State of Minnesota Re: Ford v. Mostaghimi*, No. C3-01-1044 (Minn. Ct. App. 1/15/02).

■ **CHILD SUPPORT — JURISDICTION, ATTORNEY FEES.** Respondent mother and father had a child for which appellant, Hennepin County, provided public assistance. While father agreed to reimburse appellant for the public assistance, his prospective support obligation was reserved. On January 10, 2001, respondent, *pro se*, moved for prospective support from father. The district court ordered the county to serve father with respondent’s papers, which it did on February 9. After a hearing, a child support magistrate set father’s prospective monthly support obligation at \$300. The magistrate also directed that appellant pay respondent \$300 for the support she did not receive between January 10, 2001 and February 8, 2001. Appellant sought review of this part of the magistrate’s order but did not provide the district court with a transcript of the hearing before the magistrate. The district court denied the request to alter the magistrate’s order and the county appealed.

The Court of Appeals reversed, concluding that the district court erred in ordering appellant to pay respondent child support and noting that neither the magistrate nor the district court cited any authority requiring or allowing appellant to be ordered to pay respondent. The Court



NOTES & TRENDS

of Appeals went on to hold that under chapter 518, "child support" is an award "for . . . any child of the marriage or of the parties to the proceeding" or "a contribution by parents ordered under section 256.87." Minn. Stat. §518.54, subd. 4 (2000). Appellant was neither married to respondent nor is appellant a "parent" of the child. Therefore, even if the question of whether appellant could be ordered to pay respondent could be addressed within the narrow confines of the expedited child support process, the payment ordered by the district court cannot be child support. Additionally, the court held there was no support for the proposition that the district court's order was for attorney fees, noting, in particular, that respondent was proceeding *pro se*. Finally, the court held that the district court made no findings which would authorize the award as an exercise of its equitable powers. Significantly, the Court of Appeals stated that, while it was reversing on the record of this case, it was not ruling that there could never be such egregious conduct by a governmental unit that attorney fees or other monetary sanctions might be in order in favor of a litigant. Reversed. *County of Hennepin v. Goeman*, No. C7-01-1189 (Minn. Ct. App. 2/19/02).

STEPHEN R. ARNOTT
CHAIR, FAMILY LAW SECTION, MSBA

FEDERAL PRACTICE

JUDICIAL LAW

■ **DIVERSITY JURISDICTION; AMOUNT IN CONTROVERSY; LEGAL CERTAINTY.** Plaintiff sued her ex-husband in federal court on claims arising out of an assault. After federal claims were dismissed, the trial court also dismissed the plaintiff's state law claims, despite the fact that the parties were diverse, after it concluded that the plaintiff could not satisfy the \$75,000 amount in controversy requirement. Rather than pursuing her claims in state court, plaintiff appealed. On appeal, the plaintiff conceded that her medical bills were well below the jurisdictional threshold, but argued that she might well be entitled to recover both punitive damages and emotional distress damages.

The 8th Circuit began its analysis by noting that a complaint should be dismissed only when it appears to a "legal certainty" that the claim is for less than the jurisdictional amount, and that if the defendant challenges a plaintiff's allegations relating to the amount in controversy, the plaintiff must establish jurisdiction by a preponderance of the evidence. Noting that "the jurisdictional fact in this case is not whether the damages are greater than the requisite amount, but whether a fact finder might legally conclude that they are," the 8th Circuit held that the federal courts had jurisdiction over the plaintiff's claims "unless, as a matter of law, [plaintiff] could not recover punitive damages or damages for emotional distress." Because both categories of damages were available to the plaintiff under Missouri law, the 8th Circuit found it "clear" that the plaintiff had "demonstrated that her case falls within the diversity jurisdiction of the federal courts," and remanded the matter to the district court.

This decision provides an instructed analysis of how one can make a threshold determination of the amount in controversy in diversity cases. *Kopp v. Kopp*, 280 F.3d 883 (8th Cir. 2002).

■ **EXCLUSION OF EVIDENCE AT TRIAL; FAILURE TO MAKE REQUIRED DISCLOSURES.** Plaintiffs filed against their chiropractic school alleging breach of contract, fraud, and negligent misrepresentation. Prior to trial, the parties filed lists of anticipated trial exhibits and witnesses. Plaintiffs subsequently prevailed on their motion in limine to preclude the defendant from calling witnesses not listed in its Rule 26 disclosures or from offering exhibits which had not been disclosed during discovery. After the plaintiffs prevailed on negligent misrepresentation claim, defendant appealed, arguing that the district court had abused its discretion in granting plaintiffs' motion in limine.

The 8th Circuit found no abuse of discretion in the district court's decision to exclude the witnesses and exhibits in an attempt to achieve "substantial justice" and avoid "unfair surprise," finding that the district court could have "reasonably concluded that defendant's use of the undisclosed witnesses and exhibits would have unfairly prejudiced the plaintiffs during trial. *Troknya v. Cleveland Chiropractic Clinic*, 2002 WL 243436 (March 18, 2002).

■ **OTHER NOTEWORTHY DECISIONS.** In a pair of recent decisions, Judge Frank held that 28 U.S.C. §1391(a)'s venue provisions are not hierarchical, and that venue may be properly found under 28 U.S.C. §391(a)(2), even if all defendants reside in the same state, meaning the venue can also be properly found under 28 U.S.C. § 39(a)(1). *Guidant Sales Corp. v. Niebur*, 2002 WL 205575 (D. Minn. Feb. 7, 2002); *Grow Biz Int'l, Inc. v. MNO, Inc.*, 2002 WL 113849 (D. Minn. Jan. 25, 2002).

Magistrate Judge Mason granted defendants' motion to extend plaintiffs' depositions beyond the presumptive seven-hour limit of Fed. R. Civ. P. 30(d)(2), while taking under advisement a request for sanctions against plaintiffs' counsel for his conduct during the depositions. *Miller v. Waseca Medical Center*, ___ F. Supp. 2d ___ (D. Minn. 2002).

Judge Tunheim affirmed an Order by Magistrate Judge Noel directing the parties to proceed with limited discovery while a motion to compel arbitration was pending. *Bailey v. Ameriquest Mortgage Co.*, 2002 WL 100388 (D. Minn. Jan. 23, 2002).

At the conclusion of the *pro se* plaintiff's fifth attempt to assert claims against the IRS in federal court, Judge Alsop issued a permanent injunction barring the plaintiff from filing further similar cases without prior leave of court. (Such orders are sometimes referred to as



NOTES & TRENDS

“*Martin-Trigona* orders.” See e.g. *Martin-Trigona v. Shaw*, 986 F.2d 1384 (11th Cir. 1993); *Martin-Trigona v. United States*, 779 F.2d 72 (D.C. Cir. 1985); *In Re Martin-Trigona*, 763 F.2d 140 (2nd Cir. 1985), cert. denied, 474 U.S. 1061, 106 S. Ct. 807 (1986) (all involving the same vexatious litigant). *TONN V. UNITED STATES*, 2001 WL 1664163 (D. Minn. Nov. 16, 2001).

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INTELLECTUAL PROPERTY

JUDICIAL LAW

■ In *Luigino’s, Inc. v. Peterson et al.*, 00-CV-1246 (D. Minn. 01/29/02), Judge Frank granted defendants’ motion for summary judgment dismissing all Luigino’s claims, including a misappropriation of trade secret claim, because it could not refute evidence of independent development. Luigino’s produces frozen food entrees. It entered into negotiations with defendant I.B.P. and its CEO, Peterson. To appease investors, Luigino’s invited Peterson to serve on Luigino’s board of directors. A line of Mexican frozen foods was discussed at Luigino’s board meetings while Peterson was a member. Subsequently, an I.B.P. subsidiary launched a Mexican frozen food line that competed with Luigino’s.

Luigino’s sued I.B.P. and Peterson for, among other things, misappropriation of trade secrets. The court held that the following were not trade secrets: Luigino’s research and development information; Luigino’s financial information; and income statements reflecting volume and sales margins. However, the court held that genuine issues of fact remained as to whether the following items were trade secrets: Luigino’s top-ten customers by volume; EBIDTA projections; details of Luigino’s Mexican product line launch; and Offering Circulars.

Nevertheless, the court found that Luigino’s failed to provide any evidence to prove misappropriation and no evidence to refute defendants’ defense of independent development. The court said: “Plaintiff fails to identify which information was used, how it was used, and what circumstantial evidence within the [Luigino’s Mexican] product line serves to indicate either”

■ In *Timm Medical Tech., Inc. v. SOMA Blue, Inc., et al.*, 99-CV-2011 (D. Minn. 02/15/02), Judge Doty held that a former trademark owner who sold the rights to marks using, in whole and in part, his last name was not precluded from using his name to advertise that he is now affiliated with one of plaintiff’s competitors. Timm Medical purchased the rights to the “Osborn” trademarks that were used by Julian Osborn and his father in their business that was also sold to Timm Medical. After a period of non-competition, Julian Osborn started SOMA Blue which competes against Timm Medical. SOMA Blue used Julian Osborn’s name to advertise his affiliation with the new company.

Plaintiff sued defendants alleging, among other things, that use of Julian Osborn’s name traded on the Osborn trademarks. The court disagreed. Although the court held that defendants cannot trade off the goodwill of the Osborn trademarks by publicizing Julian Osborn’s prior connection with his former company or using the “Osborn” name to sell products, defendants are entitled to use Julian Osborn’s personal name to advertise the fact that he is now affiliated with defendants’ companies. “Such a use of [Osborn’s] personal name does not diminish the goodwill associated with plaintiff’s trademark and trade name,” said the court.

■ In *Symbol Tech., Inc. et al. v. Lemelson Med., Educ. & Research Found.*, 00-CV-1583 (Fed. Cir. 01/24/02), the Court of Appeals for the Federal Circuit recognized a prosecution laches defense to patent infringement. Prosecution laches occurs when unreasonable and unexpected delay in prosecuting a patent application renders it invalid and unenforceable. Relying on two 75-year-old Supreme Court cases, the Court of Appeals held that the defense of prosecution laches was available to Symbol. The Court rejected all three of Lemelson’s arguments as to why the defense should not be available, including rejecting adoption of the holding in *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), that unpublished decisions are binding upon future appellate panels. Prior panels of the court rejected the defense of prosecution laches in two unpublished decisions.

— TONY ZEULI
MERCHANT & GOULD

JUVENILE LAW

RECENT DEVELOPMENTS

■ **GUARDIAN AD LITEMS — MAKING THE TRANSITION TO A STATEWIDE PROGRAM.** More than 25 years ago, Minnesota began implementing a federal mandate requiring the appointment of a guardian ad litem in every case involving allegations of child abuse or neglect. Unfortunately, despite being statutorily mandated on both the federal and state levels, currently 40 percent of children involved in the state child protection process are unrepresented by guardians. This is a problem now being aggressively addressed in accordance with one of the Minnesota judiciary’s strategic priorities for the coming years — justice for children.



NOTES & TRENDS

Currently, individual counties bear the brunt of the burden to provide guardian services. Accordingly, there are more than 50 separate, independent guardian ad litem programs throughout the state that provide services. While guardians play an extensive role throughout the process, their ultimate responsibility is to represent and advocate for the best interest of the children they represent. Such representation has been affected by the inconsistencies between the programs and the history of disparate staffing and funding. Practitioners can widely attest to the vast differences between counties. These differences include varying degrees of understanding about the guardian's role, confusion over process and appointment, and differing levels of commitment and training.

Thus, the judiciary sought significant funding from the Legislature last year to address the problem. During the last legislative session, the Legislature provided over \$10.5 million in funding for statutorily mandated services, with \$7.1 million earmarked for guardian ad litem. On July 1, 2001, the state took over the funding for the guardian ad litem system, and began the process of melding the individual programs into one central, state-run system. A statewide program will better ensure comprehensive, efficient, and consistent service, as well as provide for equitable services across the state. However, the number one goal is to bridge the gap between the children who should be receiving guardian services, and those that actually are receiving guardian services.

The state has hired a guardian ad litem program manager who plans to set up a management and administrative support structure that will best support guardians in their work with children. A "visioning session" was held by key players from around the state on what type of structure to adopt. From that session, the "guardian ad litem system design group" was born. This group will formulate a plan to present to the Conference of Chief Judges this spring, and hopefully will act on it by July of this year. Obviously, merging such a disparate system into one cohesive whole will be a challenging endeavor, but the efforts being made represent a major step in improving the lives of children involved in the child protection system.

— KIMBERLY A. WEINACHT
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TAX LAW

JUDICIAL LAW

■ **SALES TAX — FAILURE TO TIMELY FILE APPEAL TO TAX COURT.** The Minnesota Tax Court dismissed as untimely the sales tax appeal of a sales and use tax matter. The business received a Commissioner's Order for sales and use tax in November of 2000 for the years 1995 through 1999 but did not file a notice of appeal with the Tax Court until September, 2001, eight months after the 60-day deadline for a timely filing in January, 2001. Compliance with the 60-day time limitation for an appeal is an indispensable prerequisite to the Tax Court's acquiring jurisdiction. *Linda R. Kunkel v. Commissioner of Revenue*, Docket No. 7391-R, 2001 WL 1673715 (Minn. T. Ct. December 26, 2001).

■ **FUEL QUALIFIES FOR INDUSTRIAL PRODUCTION SALES TAX EXEMPTION.** The Minnesota Supreme Court affirmed the Tax Court that gas consumed by compressors along a natural gas pipeline was used and purchased by the pipeline operator for use tax, but the gas was exempt as material consumed in industrial production of goods to be sold ultimately at retail. The gas was consumed in a step of the natural gas production process. Pressure regulation and removal of the impurities — a refining process — were part of a series of processes that had to be performed on the gas to make it "customer ready." The Commissioner's argument that the primary purpose of the fuel consumption was to transport the gas was also rejected. *Great Lakes Gas Transmission L.P. v. Commissioner of Revenue*, 638 N.W.2d 435 (Minn. 2002).

■ **MISAPPLICATION OF CLASS RATE ONLY SUBJECT TO CHALLENGE UNDER CHAPTER 278.** The Minnesota Supreme Court, with three judges dissenting, overruled the Minnesota Court of Appeals and held that the assessor's application of the wrong class rate was part of the assessment process and therefore, taxpayers' claims were time-barred under the provisions of Minn. Stat. §278.01, Subd. 1. The Court found that since the taxpayers failed to avail themselves of adequate statutory remedies, there was no constitutional defect based on due process or equal protection. *Programmed Land, Inc., et al. v. Patrick O'Connor*, 633 N.W.2d 517 (Minn. 2001). A petition for certiorari was filed with the United States Supreme Court. U.S. Supreme Court No. 01-1061 (January 16, 2002).

■ **PROPERTY TAX — TAX COURT LACKS JURISDICTION ON "SPECIAL ASSESSMENTS" CHALLENGES.** The Minnesota Tax Court dismissed an appeal by a taxpayer for "special assessments" for late utility charges, rubbish, and weed removal since the court was without subject matter jurisdiction to hear the claim. Minn. Stat. §278.01, Subd. 3 specifically provides that the Tax Court does not have jurisdiction for special assessments made by cities and counties. *Destiny Starr Development, Inc. v. County of Hennepin*, Docket No. 28815-R, 2001 WL 1666718 (Minn. T.Ct. December 21, 2001).

■ **PROPERTY TAX — CHALLENGE TO SALES/ASSESSMENT RATIO.** The Minnesota Tax Court rejected the school district's challenge to the



NOTES & TRENDS

correctness of the Commissioner's determination of the assessment/sales ratio and adjusted net tax capacity of the real property located within the school district in assessment year 2000, taxes payable in 2001. Rather than involving questions of the propriety of including specific real property sales in the Commissioner's assessment/sales ratio study, this case involved a challenge to the methodology employed by the Commissioner in conducting the study. The school district contended that the study was flawed and discriminatory because it took into consideration sales beginning prior to the assessment year in issue and continuing throughout that year (a 21-month study), rather than considering only sales taking place during the assessment year itself (a 12-month study). **Barnum Independent School District No. 91 v. Commissioner of Revenue**. Tax Ct. No. 7364-R, 2002 WL 205500 (Minn. T. Ct. February 7, 2002).

■ **BANKRUPTCY COURT MARSHALS IRS AND MINNESOTA DOR AWAY FROM BANKRUPTCY ESTATE TO PROTECT OTHER CREDITORS.** The Bankruptcy Court ruled that the IRS and the DOR must seek satisfaction of their tax claims against a debtor's bankruptcy estate by proceeding first against the debtor's million-dollar residential estate rather than the more liquid assets in the bankruptcy estate. The residential property, not part of the bankruptcy estate, was encumbered by tax liens in favor of the IRS and DOR. The court ruled that the "marshalling" doctrine could be used to require IRS and DOR to satisfy tax claims against property despite absence of "common debtor." The Bankruptcy Court precluded the IRS and the DOR from depleting bankruptcy estate assets to the detriment of unsecured creditors. Enforcing the liens against the property requires the IRS and DOR to pursue the formal levy and forced sale procedure, which neither agency wanted to do. **Ramette v. United States and Minnesota Department of Revenue**, No. 01-4130, 2001 WL 1669004 (Bankr. Minn. December 21, 2001).

■ **PROPERTY TAX — MOTION FOR COSTS AND DISBURSEMENTS DENIED.** The Minnesota Tax Court declined to award costs or disbursements to either party when it was difficult to determine the prevailing party for multiple years of real property taxes tried in a consolidated action. The prevailing party was difficult to determine when estimated market value increased for all years but the tax was reduced for only one year. **J.C. Penney Properties Inc. v. County of Hennepin**, No. 26456, 27192, 2002 WL 58466 (Minn. T. Ct. January 8, 2002).

■ **TUITION PAYMENTS TO RELIGIOUS SCHOOL NOT DEDUCTIBLE.** The 9th Circuit held that payments to a religious school for tuition were not deductible. Payments, allegedly allocable 45 percent to secular and 55 percent to religious education, didn't qualify as deductible "dual payments" where taxpayers offered no proof that they exceeded market value of secular education received in return. Taxpayers didn't show cost of comparable private secular education or that they intended to make charitable gift of any excess payment; and public school tuition cost wasn't appropriate/comparable standard of measure. **Sklar v. Comm.**, 89 AFTR 2d ¶2002-808 (9th Cir. 2002).

■ **TAX COURT CAN REVIEW IRS "DUE PROCESS" DETERMINATION NOT TO ABATE FAILURE TO PAY PENALTY.** Since the enactment of taxpayer collection Due Process right in the IRS Restructuring and Reform Act of 1998, the Tax Court has been slowly defining the scope of its jurisdiction under IRC §6330(d) to review IRS rulings in pre-levy hearings. In this case, the Tax Court found that it had jurisdiction under IRC §6214(a) to review an IRS refusal to abate the penalty for failure to pay tax under IRC §6651(a)(2). **Downing v. Comm.**, 118 TC No. 2 (2002).

■ **PLAINTIFFS NOT EXCUSED FROM PENALTIES FOR LATE FILINGS FOR FAILURE TO MAKE DEPOSITS.** Plaintiffs are not excused from penalties resulting from failure to file tax returns late and failure to make timely deposits. Ignoring of tax matters and the fact they totally relied on their accountants for taxes did not establish "reasonable cause." **Dogwood Forest Rest Home Inc. v. United States**, 89 AFTR 2d §2002-728 (D.C.N.C. 2002). Cf. Negligence penalty wasn't upheld against sole proprietor/insurance broker, who overstated deductions. Taxpayer reasonably relied on return preparer, who was provided with all necessary information and wasn't required to question preparer's classification of each individual expense item. **Kevin P. Osborne v. Commissioner**, TC Memo 2002-11, 2002 RIA TC Memo ¶2002-11 (2002).

■ **NO REGULAR, SEPARATE, OR EQUITABLE "INNOCENT SPOUSE" RELIEF FOR DECEASED SPOUSE.** The Tax Court held that a deceased spouse did not qualify for regular, separate, or equitable "innocent spouse" relief in connection with tax shelters that her husband had invested in years ago. Separate relief was not available because the deceased spouse was living with her husband on the day of her death and thus would not have qualified for separate relief at that time. **Estate of Barbara J. Jonson**, 118 TC No. 6 (2002).

■ **NO INNOCENT SPOUSE RELIEF FOR WOMAN WHO BELIEVED OMITTED ITEM WASN'T TAXABLE.** The 5th Circuit upheld a Tax Court decision denying innocent spouse relief to a woman under IRC Code §6015(b) and §6015(c) when she knew her husband had received a retirement distribution but believed that it wasn't taxable because it was used to pay off their mortgage. **Cheshire**, 89 AFTR 2d §2002-443 (4th Cir. 2002).

■ **COMMON LAW "MAILBOX RULE" OVERRIDES NEED TO USE CERTIFIED OR REGISTERED MAIL TO PROVE TIMELY FILING.** A District Court in Colorado has granted summary judgment to a taxpayer on the question of whether a return was filed timely, based on the common law rebuttable presumption of a delivery. The court rejected IRS's contention that in the absence of certified or registered mail under



NOTES & TRENDS

IRC Code §7502, a taxpayer assumes the risk of non-delivery. *Sorrentino v. U.S.*, 89 AFTR 2d §2002-856 (D. Col. 2002).

■ **LIABILITY NOT PROPER SUBJECT OF DISPUTE AT LEVY HEARING IF DEFICIENCY NOTICE ISSUED.** Taxpayer may not contest his underlying tax liability at a collection due process hearing under IRC Code §6330 for tax years for which he received a notice of deficiency, and Commissioner's determination to proceed with collection as to those years was not an abuse of discretion. *Nestor v. Commissioner*, 118 T.C. No. 10 (February 19, 2002).

■ **COOPERATIVE'S VALUE-ADDED PAYMENTS HELD SUBJECT TO SELF-EMPLOYMENT TAX.** Taxpayers are liable for self-employment tax under IRC Code §1402 on value-added payments (patronage dividends) they received from an agricultural cooperative of which they were active members. The court held that the value-added payments were derived from the taxpayers' business. *Bot v. Commissioner*, 118 T.C. No. 8 (February 15, 2002).

■ **SUBSTITUTE RETURNS PREPARED BY IRS HELD SUBJECT TO DEFICIENCY PROCEDURES.** Substitute return prepared by Commissioner under IRC Code §6020(b) for taxpayer is subject to deficiency procedures under IRC Code §6211 and Commissioner must follow those procedures before he can make an assessment. *Spurlock v. Commissioner*, 118 T.C. No. 9 (February 15, 2002).

■ **ARBITRAGE TRANSACTION INVOLVING ADRS RECOGNIZED FOR FEDERAL TAX PURPOSES AS HAVING "BUSINESS PURPOSE."** Arbitrage transaction involving the purchase of American Depository Receipts cum dividend and immediate resale thereof ex dividend has economic substance and a business purpose and therefore is recognized for federal income tax purposes. *Compaq Computer Corp. v. Commissioner*, 88 AFTR 2d §2001-7339 (5th Cir. 2001).

■ **PUBLISHER'S AD SALES SUBSIDIARY NOT "INDEPENDENT CONTRACTOR" UNDER PUBLIC LAW.** Wholly owned subsidiary of New York-based publisher of *Reader's Digest* that solicited sales in California of advertising pages in various editions of the magazine was not an "independent contractor" within the definition of 15 U.S.C. §381, (as known as Public Law 86-272), and therefore publisher is not exempt from California income taxation. *Reader's Digest Association Inc. v. California Franchise Tax Board*, 115 Cal. Rptr. 53 (Cal. Ct. App. 2001). See also *Commissioner of Revenue v. Jafra Cosmetics Inc.*, 433 Mass. 255, 742 N.E.2d 54 (Mass. 2001) and *Shaklee Corporation v. Commissioner of Revenue*, No. F 245496 and F245497 (Mass. App. Bd. February 7, 2000).

■ **TRANSFEREES AND FRAUDULENT CONVEYANCES: "ALTER EGO" NOMINEE.** IRS's challenge to a transfer effected by a state court's Qualified Domestic Relations Order (QDRO) was prohibited by the *Rooker-Feldman* doctrine, under which lower federal courts generally lack subject matter jurisdiction over challenges to state court judgments, since the IRS could have participated in the state court litigation which led to issuance of the QDRO. Moreover, the IRS's argument that the ex-spouse to whom a large portion of the taxpayer's interest in a retirement plan was transferred pursuant to the QDRO was actually an "alter ego" or "nominee" of the taxpayer and that, accordingly, the IRS's liens should attach to the transferred interest was rejected on the grounds that the IRS did not demonstrate that the taxpayer continued to exercise control over and enjoyed access to the funds at issue. *United States v. Taylor*, 2001 U.S. Dist. LEXIS 17825 (D. Minn. 2001).

■ **IRS CANNOT BE COMPELLED BY MANDAMUS TO GRANT TAXPAYER APPEALS OFFICE REVIEW.** Suit seeking writ of mandamus to compel IRS to grant plaintiff taxpayer administrative appeal and review conference is dismissed, and since plaintiff is not entitled as a matter of right to an administrative appeal before IRS Appeals Office, and IRS does not have a legal duty to grant an appeal. *Trowbridge v. IRS*, 89 AFTR 2d § 2002-466 (S.D. Texas 2001).

■ **MATERIAL PARTICIPATION IN "C" CORP. RECHARACTERIZES INCOME FROM PASSIVE TO ACTIVE.** The 7th Circuit, affirming the Tax Court, has held that an individual, the sole shareholder of two C Corporations, may not offset passive losses from one rental building against the passive income from another rental. The taxpayers' failure to treat rental of both buildings as single activity on return precluded appeal argument that activities should be grouped under Reg. §1.469-4(c)(1). *Krukowski v. Comm'r*, 89 AFTR 2d ¶2002-827 (7th Cir. 2002).

■ **"SPIN-OFF" FAILS UNDER IRC §355.** The Tax Court held that a purported spin-off followed by a pre-arranged taxable sale of the stock of the spun-off company did not qualify for tax-free treatment under IRC §355. The fair market value of the distributed stock for purposes of calculating the laboratory's gain is measured by the price paid for the stock by a third-party purchaser on the distribution date. *South Tulsa Pathology Laboratory v. Com.*, 118 TC No. 5 (2002).

ADMINISTRATIVE MATTERS

■ **TRANSITIONAL PERIOD FOR SALES TAX ON CONSTRUCTION MATERIALS DELIVERY CHARGES.** Delivery charges for construction materials purchased by contractors, who have qualifying contracts, are exempt from the sales tax if delivery of the construction materials is made on or before June 30, 2002. This policy addresses the dilemma of contractors, who have entered into a bona fide written lump-sum



NOTES & TRENDS

or fixed-price construction contract that does not provide for allocation of future taxes, such as the tax on delivery or transportation charges the Legislature approved in 2001 by amending Minn. Stat. §297A.61(7), effective for sales made after December 31, 2001. The law change did not include any transitional language to grandfather in existing construction contracts for the newly taxable delivery or transportation charges. *Minnesota Department of Revenue Notice No. 01-11* (December 17, 2001).

■ **CORPORATE FRANCHISE TAX — EXEMPTION FOR MUTUAL LIFE INSURANCE COMPANIES.** The Commissioner issued a revenue notice that revoked Revenue Notice 96-19. Mutual life insurance companies are exempt from the corporate franchise tax for tax years beginning after December 31, 2000, and therefore the revoked Revenue Notice was obsolete. *Minnesota Department of Revenue Notice No. 02-3* (December 31, 2001).

■ **LICENSE AND OCCUPATION TAXES — GAMBLING TAXES — AUDITS.** The Department of Revenue amended the rule requiring an organization conducting lawful gambling to complete and file an audit or a review of its activities and funds. The amendment provides that the organization must complete and file an audit or review if its gross receipts exceed the thresholds set by law. Formerly, the threshold was over \$50,000. Minn. R. 8122.0500, effective 12-10-2001.

■ **REPORTING CASH PAYMENTS OF OVER \$10,000.** The IRS National Office provided helpful guidance regarding whether §6050I, (which generally requires the filing of Form 8300, “Report of Cash Payments Over \$10,000 Received in a Trade or Business,”) when a person in a trade or business receives more than \$10,000 in cash in a single transaction, mandates the filing of Form 8300 under three scenarios where the purchaser tendered cash and then paid by check or other means after merchant discloses the possibility of filing a Form 8300. The guidance also shed light on what the IRS considers to be “receipt” of cash for purposes of §6050I. Neither §6050I nor its underlying regulations currently define what it means to “receive” cash. CCA 200152047. See also IRS regulations, effective January 1, 2002, issued under IRC §6050I and the USA Patriot Act (Public Law 107-56 (October 26, 2001)), in TD 8974; Reg. §1.6050I-1(a)(1).

■ **IRS PROPOSES NEW GOLDEN PARACHUTE RULES.** IRS proposes regulations that narrow the definition of a “disqualified individual” for golden parachute payments, and issues Revenue Procedure 2002-13 providing several stock option valuation methods, including a simplified safe harbor approach. The proposal would eliminate the nominal \$1 million figure from the disqualified shareholder test proposed by IRS in 1989, and raises the annualized compensation limit used to conduct the three-year base period test to determine a highly compensated employee. REG-209114-90.

■ **REAL ESTATE IMPACT FEES MUST BE CAPITALIZED BUT DEPRECIATION ALLOWED.** IRS announced that “impact fees” paid by real property developers are capitalized and added to the basis of the buildings being constructed rather than the land housing the structures. The decision means that the costs can be recovered over time under IRC Code §§263A and 263(a). The fees also can be included by housing developers and operators in computing the low-income housing credit. Revenue Ruling 2002-9.

■ **POWER OF ATTORNEY CHART.** Ever wondered how the various power of attorneys work together and what rights the holder of a power of attorney has? Well, the IRS has put together a chart that compares the various methods a taxpayer may grant power of attorney authority to someone or several someones. The url will take you to that chart. You might just want to print it and have it available.

<http://www.irs.gov/pub/irs-utl/lvl-auth.pdf>

■ **IRS ISSUES TAXPAYER PROTECTION RULES FOR COLLECTIONS INVOLVING LIENS AND LEVIES.** The IRS issued final collection Due Process regulations for taxpayers who want a hearing to protest IRS collection actions involving a lien or a levy. The rules implement taxpayer protections contained in the IRS Reform and Restructuring Act of 1998 (Pub. L. No. 105-206) that apply when the IRS:

- files a notice of federal tax lien (NFTL) under Internal Revenue IRC §6320, or
- intends to levy on taxpayer property under IRC §6330.

Under IRC §6320, taxpayers are entitled to be notified of an NFTL within five days after the lien is filed, and may request a hearing within an additional 30 days. IRC §6330 entitles taxpayers to 30 days’ notice before the IRS can levy on the taxpayer’s property or property rights and permits the taxpayer to request a hearing during the 30-day period. T.D. 8979 and 8980.

■ **PRACTITIONER PRIORITY SERVICE.** Practitioner Priority Service is a new toll-free, accounts-related service, for all tax practitioners, nationwide. This service — which replaces the former Practitioner Hotline — is available 7:30 a.m.-5:30 p.m. at (866) 860-4259. Visit the IRS web site at <http://www.irs.gov/news/foryou/pps.html> for more information.

■ **EMPLOYER IDENTIFICATION NUMBER.** Taxpayers can now call a single toll-free telephone number — (866) 816-2965 — to get an Employer Identification Number (EIN). As a result, practitioners will not have to file a Form 2848 (Power of Attorney) or Form 8821 (Tax Information Authorization) to get an EIN for their clients. Visit the IRS web site at <http://www.irs.gov/news/foryou/ein.html>.



NOTES & TRENDS

■ **IRS ANNOUNCES ITS NEW NATIONAL RESEARCH PROGRAM COMPLIANCE INITIATIVE.** The IRS recently announced its new compliance initiative — the National Research Program (NR). The old IRS audit program was called Taxpayer Compliance Measurement Program or TCMP and dubbed “Hell” by taxpayers because every item on a return was examined. The NR is a comprehensive effort to measure payment, filing, and reporting compliance for different types of taxes and various sets of taxpayers. Initially, the program will focus on individual income taxes. Under NR, the IRS will examine line-items on the returns using inhouse information rather than requiring the taxpayer’s assistance. In the future, it will measure other taxes and other types of taxpayers. IR 2002-05; Fact Sheet-2002-07.

■ **IRS RULES ON TAX TREATMENT OF EQUITY COMPENSATION ON PARENT AND SPUN-OFF SUBSIDIARY.** The tax consequences to both a parent corporation and its spun-off subsidiary of the later lapse of restrictions on compensatory stock and the later exercise by employees of parent and the spun-off subsidiary of nonqualified options to acquire the stock of both companies was ruled on by IRS. The bottom line is: neither company recognizes gain or loss on the lapse of stock restrictions or exercise of options; and each company is entitled to deduct amounts includible in its respective employees’ incomes as a result of the lapse of restrictions on either company’s stock and the exercise of options to acquire either company’s stock. Rev Rul 2002-1, 2002-2 IRB.

Legislation

■ **BILL SIMPLIFIES HIGHER EDUCATION REPORTING.** Legislation was enacted that simplifies the reporting requirements for higher education tuition and related expenses. The new law is designed to ease the reporting requirements tied to the HOPE and lifetime learning tax credits by eliminating the need for third-party reporting of taxpayer identification numbers of those claiming the credit and by allowing schools to report payments received from students or billed by the institutions. The provisions apply to expenses paid or assessed after December 31, 2002. Public Law 107-131.

LOOKING AHEAD

■ **MINNESOTA ELECTRONIC FILING MANDATE.** In 1999, the Minnesota Legislature passed a law requiring certain tax return preparers to electronically file individual income tax returns. The impetus behind the new requirement is the tangible benefits of time saved by not manually processing returns, reduced cost, and better and faster service for filers. The relatively new tax law is being phased in over a three-year period. Tax return preparers are required to file electronically if they prepared more than 500 individual income tax returns in 1999, 250 returns in 2000, or 100 returns in years 2001 and beyond.

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TORTS AND INSURANCE

JUDICIAL LAW

■ **EMPLOYMENT LAW AND WHISTLEBLOWER STATUTE.** Plaintiffs alleged they were fired from their jobs because they questioned whether another employee was entitled to vacation pay under the wage and hour laws. After the jury found for plaintiffs, the trial court granted defendant’s motion for a judgment notwithstanding the verdict because the vacation pay practices at issue affected only defendant’s employees, and thus did not implicate public policy. The Court of Appeals affirmed, holding that plaintiffs had not demonstrated that their report of an alleged violation of law implicated public policy, as required by prior Court of Appeals decisions.

The Supreme Court reversed, holding that the protections of the whistleblower statute are not limited to employees whose reports of a violation or suspected violation of law implicate public policy. In so holding, the Court analyzed the language of the whistleblower statute, noting that it does not contain an explicit public policy requirement. The Court concluded there was no basis to assume the Legislature intended to impose a public policy requirement, and noted that it is not free to disregard the words of a statute under the pretext of pursuing its spirit if the words are free from ambiguity. *Anderson-Johanningmeier v. Mid-Minnesota Women’s Center, Inc.*, Minnesota Supreme Court, No. C0-00-164, January 3, 2002.

■ **UNDERINSURANCE POLICY COVERAGE — EMPLOYER’S POLICY.** Plaintiff was injured in an automobile accident. The personal automobile insurer of the at-fault driver settled with plaintiff for \$100,000. Plaintiff negotiated a separate settlement with the at-fault driver’s employer’s insurer for approximately \$400,000, even though that insurer claimed that the policy did not provide coverage because the employer did not own the automobile. Plaintiff then brought an underinsured motorist (UIM) claim against his own insurer, alleging the damages exceeded the \$100,000 paid by the at-fault driver’s personal liability policy. The district court ignored the \$400,000 settlement and awarded the full amount of the UIM coverage.

On appeal, the insurer argued that the district court should have considered the \$400,000 settlement, which allegedly converted the employer’s



N O T E S & T R E N D S

policy into a policy that *applied at the time of the accident* under Minn. Stat. §65B.43, subd. 17. Because the insurer did not appeal from the district court's determination that the policy did not apply at the time of the accident, and because the insurer failed to cite any authority, the Minnesota Court of Appeals held that the settlement did not convert the employer's policy into a bodily injury liability policy that applied to the at-fault vehicle at the time of the accident. *Behr v. American Family Mut. Ins. Co.*, Minnesota Court of Appeals, No. C0-01-952, January 29, 2002.

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