GUTTER CHAVES JOSEPHER RUBIN FORMAN FLEISHER MILLER P.A.

TAX, BUSINESS, & ESTATE AND TRUST LITIGATION UPDATE

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CONTENTS

1. No Section 121 Gain Exclusion When Seller of Residence Obtains it Back in Foreclosure

2. Table of Revised Income Tax Return Filing Due Dates

3. Ashes of a Cremated Decedent are not Property Subject to Division among Heirs [Florida]

4. Congress Sneaks in Some Important Procedural Tax Changes

5. IRS to Provide New Exception to Partnership Formation Nonrecognition When There Are Foreign Partners

6. No Four Year Statute of Limitations for Fraudulent Conveyance

7. Tax Court Voids Portion of Code Section 482 Cost Sharing Regulations

8. No Need to File §83(b) Election with Tax Return

9. Living at the Casino Does Not Make You a Professional Gambler

10. State Legal Marijuana Dispensaries Lose Out on Business Deductions

11. First Time Abate

12. Partnership Rules Not Applicable to Determining Recourse vs Nonrecourse Status of Debt Outside of Subchapter K

13. No Theft Loss for Securities "Pump-and-Dump"

ABOUT OUR FIRM

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14. Florida Case Law Update - Trust, Estate & Guardianship Litigation

15. Did You Know?

16. Firm Announcements

17. AFR Rates

1. No Section 121 Gain Exclusion When Seller of Residence Obtains it Back in Foreclosure

By Charles (Chuck) Rubin

Marvin sold his principal residence for $1.4 million on an installment basis. He reported current gain of $657,796, and excluded $500,000 of that gain from income under Code Section 121 as a sale of a principal residence. The remaining $157,796 of gain was reported on the installment basis. After the sale, Marvin reported $56,920 of gain from cash installment payments received.

The buyer defaulted on his debt and Marvin foreclosed and took the property back. He recognized the remaining $97,153 in long-term capital gains, per the reacquisition of real property rules of Section 1038. Marvin did not resell the residence within a year of his reacquisition.

The IRS asserted that the original $500,000 Section 121 exclusion could not be used to offset gain on the sale and reaquisition, and thus applying the rules of Section 1038 Marvin had gain of $448,080 at the time of the foreclosure and reacquisition. Marvin argued that just because he foreclosed on the property does not mean that the initial $500,000 gain exclusion should not be available to him for purposes of the Section 1038 gain computation.

The Tax Court agreed with the IRS. It noted that Congress did put a special rule in Section 1038(e) that provides if a principal residence is reaquired, and then is resold within 1 year thereafter, the original Section 121 exclusion will continue to apply. Since Marvin did not resell within a year, he could not use this provision. The Tax Court reasoned that if the original Section 121 exclusion applied in a Section 1038 computation of gain for persons that did not resell within 1 year, then there would be no need for Section 1038(e) and it would be a meaningless Code provision. Thus, to give effect to Congress putting Section 1038(e) in the Code, Congress must have recognized that for situations when there is no resale within a year, that Section 121 would not apply.

DeBough, 106 AFTR 2d ¶2015-5192 (CA8 8/28/2015)

More About Our Firm

The firm and its attorneys have been recognized in numerous peer rating guides, such as U.S. News & World Report law firm rankings, Best Lawyers, Martindale-Hubbell, Chambers, Who's Who in American Law, Florida Trend's Legal Elite, Superlawyers, and South Florida Legal Guide Top

2. Table of Revised Income Tax Return Filing Due Dates

By Charles (Chuck) Rubin

We have created a cheat sheet summary of the new filing dates enacted in the recently enacted Surface Transportation and Veterans Health Care Choice Improvement Act of 2015. Note that most of these will start applying only to filings for the 2016 tax year.

Download a PDF of the entire chart here.

3. Ashes of a Cremated Decedent are not Property Subject to Division among Heirs [Florida]

By Charles (Chuck) Rubin

The parents of a deceased child were the sole heirs of the child's estate. The child's remains were cremated, and the parents could not agree on the final disposition of his assets. The father petitioned the probate court to divide the ashes equally among the mother and father as the heirs of the child.

Florida's probate code defines "property" as "both real and personal property or any interest in it and anything that may be the subject of ownership." The probate court found that the ashes were not "property" subject to division in accordance with the division of other property of the decedent, and the appellate court agreed. The appellate court noted that while there is a legitimate claim of entitlement by the next of kin to possession of the remains of a decedent for burial or other lawful disposition, this does not give rise to a property right and does not convert those remains to "property" for disposition purposes.

Wilson v. Wilson, 4th DCA, May 21, 2014

4. Congress Sneaks in Some Important Procedural Tax Changes

By Charles (Chuck) Rubin

On July 31, 2015, President Obama signed HR 3236, the "Surface Transportation and Veterans Health Care Choice Improvement Act of 2015." While you wouldn't know it from the title, Congress included some important procedural tax changes that are of special interest to tax return preparers and estate administrators.

Due Date for FBAR/FinCEN Form 114. Starting next year, this has been moved up from June 30 to April 15. For the first time, taxpayers can obtain a six month extension to October 15. This will put the filing schedule in line with the federal income tax return filing deadlines for most individuals. At this point, it is unknown if a separate filing will be needed to obtain the extension or whether a federal income tax return extension request will be sufficient – hopefully only one extension request will be needed.

Filers residing abroad are automatically extended until June 15, and can get an extension until October 15 (which is shorter than the current extension period available to December 15). First time filers who file late may be eligible to receive late filing penalty relief if they file by October 15.

Due Date for Partnership Income Tax Returns/Form 1065 and S Corporation Income Tax Returns/Form 1120S. This has been moved up by a month, to March 15 for calendar year returns and the 15th day of the third month following the close of the fiscal year for fiscal year entities. A maximum six month extension is available.

Due Date for C Corporation Income Tax Returns/Form 1120. This has been moved back a month to April 15 for calendar year returns and the 15th day of the fourth month following the close of the fiscal year for fiscal year partnerships.

Maximum Extension Due Dates for Trusts/Form 1041. The maximum extension for calendar year taxpayers will be 5 1/2 months to September 30.

Maximum Extension Due Dates for Exempt Organization Forms 990. This is 6 months to November 15 if not otherwise required to file an income tax return, for calendar year filers.

Due Date for Form 3520-A, Annual Information Return of a Foreign Trust with a U.S. Owner. This will be the 15th day of the 3rd month after the close of the trust's taxable year, with up to a six month extension.

Due Date for Form 3520, Annual Information Return of a Foreign Trust with a U.S. Owner. This will be April 15 for calendar year filers, with up to a six month extension.

Six Year Statute of Limitations for Basis Overstatement. The extended six year statute of limitations for 25% or more omissions from gross income on an income tax return now expressly provides than an overstatement of basis is an omission from gross income for this purpose. This overrules Home Concrete & Supply, LLC, 132 S.Ct. 1836 (2012) which held that an overstatement of basis was NOT an omission from gross income.

Consistent Basis Reporting. Code Section 1014 is modified to require that the basis of property reported on an income tax return must be consistent with the values determined for such property for estate tax purposes. Thus, taxpayers cannot claim a higher basis than the estate tax value. Based on the provision only applying to property whose inclusion in the decedent's estate increased the liability for estate tax, it would appear that this provision would not apply if due to deductions taken on the estate tax return there was no estate tax due (but this exception should not apply to the new reporting discussed below). Accuracy-related penalties applicable to underpayments under Code Section 6662 will apply to violations of this provision.

New Code Section 6035 now requires an estate required to file an estate tax return to furnish to the IRS and to each person acquiring an interest in gross estate property a statement identifying the value of each interest in such property. This statement must be delivered within 30 days of the earlier of the date the return is filed or the date the estate tax return was due (with extensions). If the value is subsequently adjusted (e.g., by audit or amendment), a supplemental statement must be provided within 30 days.

Presumably, the IRS will provide a form for use in this reporting. The penalty for each failure is $250, to a maximum of $3 million. If the failure to report was intentional, the penalty is increased to $500, with exceptions for reasonable cause.

These new provisions apply to estate tax returns filed after July 31, 2015. They should not apply to returns filed only to claim portability of the DSUE amount if a return was not otherwise required.

What happens if the estate does not know within the 30 day deadline who will receive what assets? It would appear that the estate would need to provide a list of all possible assets to each particular potential recipient to avoid a violation of this provision. Perhaps a rule that would extend this to within 30 days of receipt of the subject asset would have been better or can be included by the IRS in its instructions or regulations. Executors may also want to give notice to themselves if they are beneficiaries, to assure compliance, unless final rules provide otherwise.

UPDATE:

The IRS has now issued guidance delaying taxpayer obligations to follow the new rules. The Notice provides:

> For statements required under sections 6035(a)(1) and (a)(2) to be filed with the IRS or furnished to a beneficiary before February 29, 2016, the due date under section 6035(a)(3) is delayed to February 29, 2016. This delay is to allow the Treasury Department and IRS to issue guidance implementing the reporting requirements of section 6035. Executors and other persons required to file or furnish a statement under section 6035(a)(1) or (a)(2) should not do so until the issuance of forms or further guidance by the Treasury Department and the IRS addressing the requirement s of section 6035. (emphasis added)

Notice 2015-57

5. IRS to Provide New Exception to Partnership Formation Nonrecognition When There Are Foreign Partners

By Charles (Chuck) Rubin

In Notice 2015-54, the IRS indicates it will be issuing regulations under Code Section 721(c) which will provide that transfers of appreciated property to controlled partnerships that have a related foreign partner will not qualify for nonrecognition treatment unless a specific "gain deferral method" is followed.

FACTS: Code Section 721(a) provides that no gain or loss is recognized on the contribution of property to a partnership by a partner. Since 1997, Code Section 721(c) has given authority to the IRS to issue regulations that nonrecognition would be unavailable if any gain on appreciated contributed property would be included in the gross income of a foreign person when recognized. Until now, the IRS has not exercised that authority. In Notice 2015-54, the IRS has advised that regulations will be issued that will allow for gain recognition when there are foreign partners of the partnership, absent compliance with a gain deferral method safe harbor. The Notice provides significant detail on what the regulations will provide.

Many practitioners believed that no regulations would ever be issued under Section 721(c), at least as to U.S. contributors, since it requires that it operates only if any built-in gain will be eventually included in the gross income of a non-U.S. person. This would be difficult to accomplish since Section 704(c) allocates built-in gain back to the contributing partner when recognized, and thus does not allow for a shift of that gain from a U.S. contributing partner to a different foreign partner.

The IRS indicated that it thought these rules are being manipulated via misvaluations of contributed property, and they also imply that some of the allocation of gain methods under Section 704(c) may not operate to avoid all gain allocable to foreign persons (which gain allocations may result in no U.S. taxation of such gains). While such movement abroad is circumscribed as to transfers to foreign corporations under Section 367(a), ever since the repeal of Sections 1491-1494 there is no corollary limitation in regard to transfers to partnerships. Thus, the IRS felt it necessary to breathe life into Section 721(c) to protect the fisc.

The new regulations will provide that Section 721(a) nonrecognition will not apply when a U.S. Transferor contributes an item of Section 721(c) Property (or portion thereof) to a Section 721(c) Partnership, unless the Gain Deferral Method is applied with respect to the Section 721(c) Property. That's the new rule in a nutshell, with the details being in the definitions of the capitalized terms.

A "U.S. Transferor" is any U.S. person other than a domestic partnership – thus, the regulations will apply to all U.S contributors (other than domestic partnerships). "Section 721(c) Property" is appreciated property other than cash, securities, and tangible property with appreciation not exceeding $20,000. A Section 721(c) Partnership is a domestic or foreign partnership (a) with a (direct or indirect) foreign partner that is related to a U.S. Transferor, and (b) the U.S. Transferor and related persons own 50% or more of the partnership.

If Section 721(c) applies to void nonrecognition of gain, nonrecognition is still available if the "gain recognition method" is applied. This requires (1) the partnership uses the "remedial" allocation method of Treas. Regs. Section 1.704-3(d) for built-in gain as to currently contributed property (which acts to allocate income and loss items among partners to work down the disparity between book and tax basis differences arising from contributions of appreciated property), and also as to subsequently contributed property until all built-in gains are recognized or 60 months, whichever is earlier, (2) while there is remaining built-in gain all Section 704(b) income, gain, loss and deduction with regard to that property will be allocated in the same proportions among the partners, (3) new reporting requirements are met, (4) the U.S. Transferor recognizes built-in gain upon an Acceleration Event. An "acceleration event" is any transaction that either would reduce the amount of remaining built-in gain that a U.S. Transferor would recognize under the Gain Deferral Method if the transaction had not occurred or could defer the recognition of the built-in gain (other than transfers of partnership interests to domestic corporations under Section 351 or 381), and (5) the U.S. Transferor agrees to an extended 8 year statute of limitations on these tax items.

Helpfully, a general exception to the new rules will apply if the aggregate built-in gain of Section 721(c) Property in a year is $1 million or less, if there is no Gain Deferral Method then in operation. How nice it would be for taxpayers if all new complex regulations enacted to address the few taxpayers engaged in aggressive tax planning would have reasonably generous de minimis exceptions from applicability, like these.

While the regulations are not yet out, when they do come out they will have an August 6, 2015 effective date (or earlier deemed contributions from check-the-box elections made on or after this date) for most of their provisions. This should not be a problem for taxpayers given the reasonably detailed provisions in the Notice.

The IRS indicated it will also adopt additional rules under Section 482 to address controlled transactions involving partnerships in cases where they believe that taxpayers are inappropriately shifting income to related foreign partners.

COMMENTS: There is good news and bad news for taxpayers here.

The bad news is that ANYTIME a contribution of appreciated property is made to a partnership, a review of the application of Section 721(c) will now be needed if there is a non-U.S. partner. Importantly, Section 721(c) applies whether the contribution is to a domestic or a foreign partnership. Thus all practitioners that deal with partnerships or LLCs, including those focused principally on estate planning, will need to apply these rules whenever appreciated property is contributed to the entity (although the requirement of a foreign direct or indirect partner will likely quickly eliminate most closely-held partnerships and LLCs from the rules). Since Section 721(c) is not presently on the radar of most practitioners, this is a trap for the unwary. The addition of more complexity to Subchapter K is also not a welcome event - the ballooning complexity of that Subchapter over the years is a trend that these new rules continue.

The good news is multifaceted. First, Section 721(c) will only apply in limited circumstances. There needs to be a foreign partner (but be wary of the "indirect" rule). There will need to be appreciation over $1 million. Also, the applicable U.S. Transferor and persons related to the U.S. Transferor must own more than 50% of the partnership. Second, even if Section 721(c) does apply, there is not significant downside to adopting the Gain Recognition Method as a method of avoiding gain recognition beyond administrative inconvenience.

Notice 2015-54

6. No Four Year Statute of Limitations for Fraudulent Conveyance

By Charles (Chuck) Rubin

Florida Statutes Section 726.110 generally provides for a four year statute of limitations in regard to fraudulent conveyances (or if longer, 1 year after the transfer was or could have reasonably been discovered by the claimant). Fraudulent conveyance law generally allows a creditor to pursue a third party that received assets from a debtor if the transfer was a fraudulent conveyance.

In a recent Florida case, a judgment holder sought to collect a judgment against a transferee on assets transferred by the debtor. This was done under proceedings supplementary under Florida Statutes Section 56.29, which is a procedural mechanism for collecting on a money judgement. The property of the transferee was at risk since Florida Statutes Section 56.29 provides "[w]hen any gift, transfer, assignment or other

conveyance of personal property has been made or contrived by the judgment debtor to delay, hinder, or defraud creditors, the court shall order the gift, transfer, assignment or other conveyance to be void and direct the sheriff to take the property to satisfy the execution."

The language of this statute is similar in language and concept to the general fraudulent conveyance statutes. Based on such similarity, the transferee argued that the statute of limitations under those statutes should apply to protect the transferee – since that period had run it was too late to collect against the transferee.

No such luck, said the first District Court of Appeal. The statute for collections under proceedings supplementary on a judgment are not tied to the fraudulent conveyance statutes of limitations. Instead, the judgment holder instead can proceed against the transferee (if the transfer was made to delay, hinder or defraud creditors) for the 20 year entire term of the judgment. Transferees thinking they are protected under a 4 year fraudulent conveyance statute in all events may have to adjust their assumptions.

While not applicable in the subject case, however, if a bankruptcy is involved then this extended period may not be applicable. In re: C.D. Jones & Company, Inc., 2015 WL 2260707 at footnote 18 (United States Bankruptcy Court, N.D. Florida 2015).

Biel Reo, LLC v. Barefoot Cottages Development Co., LLC, 156 So.3d 506 (1st DCA 2014)

7. Tax Court Voids Portion of Code Section 482 Cost Sharing Regulations

By Charles (Chuck) Rubin

There are tax advantages for U.S. taxpayers to jointly develop intangible personal property with related non-U.S. entities. For an overview, see my prior post here.

Treasury Regulations provide detailed guidance on what costs must be shared between the co-developers if they want the IRS to respect the cost sharing arrangement. Under those regulations, stock-based compensation of one of the parties, such as restricted stock, nonstatutory stock options, statutory stock options (ISOs and ESPPs), stock appreciation rights, and phantom stock, must be shared.

The Tax Court has stricken as invalid Reg. § 1.482-7(d)(2) which requires such sharing of stock-based compensation costs. The Court found the rules to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, because such cost-sharing does not generally occur in the real world between unrelated parties. The IRS was required to show some real world use of sharing of these costs because of the general arms-length standards of the Section 482 regulations (citing Xilinx v. Commissioner, which case also held that Congress never intended for the commensurate-with-income standard relating to intangible property to supplant the arm's-length standard). The Tax Court found that the regulations had not abandoned the arm's length standard, and left for another day the question whether the IRS could do so in future regulations.

Altera Corporation and Subsidiaries, (2015) 145 TC No. 3

8. No Need to File §83(b) Election with Tax Return

By Charles (Chuck) Rubin

Not a big item, but a helpful one – under proposed regulations a taxpayer need no longer file a copy of their Code §83(b) election with their income tax return for the year of the election.

Normally under Code §83, a taxpayer who receives property in connection with performing services does not include that property in income until the property is transferable or not subject to a substantial risk of forfeiture. Since it may be advantageous to bring that property into income when received (when it may have a lower value than later), taxpayers can nonetheless elect to include it when received under §83(b). To make the election, the taxpayer must file the election within 30 days of the property transfer and file a copy of the election with their income tax return for that year. Since the filing of a copy with the return may inhibit taxpayers from filing their returns electronically, this second requirement is now removed. However, the filing of the election within 30 days is still required.

The proposed regulations are proposed to apply on January 1, 2016. Nonetheless, taxpayers may rely on them for transfers occurring on or after January 1, 2015.

Preamble to Prop Reg 07/16/2015, Prop Reg § 1.83-2

9. Living at the Casino Does Not Make You a Professional Gambler

By Charles (Chuck) Rubin

Professional gamblers can offset their losses from gambling against their gambling winnings. They can also deduct their other gambling expenses. Non-professionals (those not engaged in the trade or business of gambling) are limited in deducting their losses against gains as miscellaneous itemized deductions.

In a recent Tax Court decision, the taxpayer was employed full time by the Port Authorities of New York and New Jersey. He did not have a permanent home – instead he kept his belongings in a storage locker. After work, he would drive 125 miles to Atlantic City and stay overnight at casino hotels and gamble. He also gambled elsewhere.

Even though he did this all the time, the Tax Court did not find him to be a professional gambler In making its determination, it reviewed various factors under Code Section 183 that determines whether there is a true profit objective (a requirement for trade or business status) and found that objective lacking. These factors included:

a. He did not carry on the activity in a businesslike manner, including maintaining complete and accurate books and records;

b. He did not adjust his system or attempt to improve profitability by modifying his gambling methods;

c. He did not have, nor develop, any material level of expertise;

d. He had no history of success in any business activities (other than his unrelated day job);

e. He had substantial income from sources other than his gambling;

f. The taxpayer testified that he enjoyed gambling – elements of personal pleasure or recreation is a factor against trade or business status.

Boneparte, TC Memo 2015-128

10. State Legal Marijuana Dispensaries Lose Out on Business Deductions

By Charles (Chuck) Rubin

Federal income tax is a tax on "net" income – gross income less allowable deductions. Unless, however, you are a drug dealer – Code Section 280E does not allow sellers of federally controlled substances to deduct their business expenses.

Since the time of enactment of Code Section 280E, numerous states have legalized the sale of marijuana products for medical and recreational purposes. Since such sales are legal under state law, should they punished for federal tax purposes via the disallowance of deductions? After all, Code Section 280E was aimed at illegal drug dealers, and these marijuana sellers are duly licensed under local law.

The 9th Circuit Court of Appeals has ruled that Code Section 280E applies to such state legal marijuana dispensaries. The court noted that Code Section 280E is based on legality under federal law, not state law. So as long as marijuana is illegal under federal law, absent a change in the Internal Revenue Code, marijuana dispensaries lose out on their business deductions. This effectively raises the rate of tax imposed on such businesses. In years when business expenses are high enough, the taxes may approach the net cash flow of the business and thus approach confiscatory rates of tax.

The only thing that will allow these dispensaries to remain in business is that cost of goods sold (i.e., the cost to purchase inventory) is not a deduction that is lost under Code Section 280E. Otherwise, if the cost of goods sold could not be deducted, it is likely that the taxes imposed on such businesses would equal or exceed their actual net profit.

So if you think federal law is irrelevant to marijuana sales in states that have legalized its sale – it still matters for federal income taxes!

Olive v. CIR, Tax Court Case No.l 13-70510 (July 9, 2015)

11. First Time Abate

By Charles (Chuck) Rubin

Taxpayers who file a return late, make a late payment, or make a late tax deposit are subject to penalties. What is not known by most taxpayers, and a lot of tax practitioners, is that the IRS has a program to abate these penalties for those that have not been subject to them recently. The program for abatement is known as First Time Abate.

First time abatement is an administrative waiver and not statutorily mandated. The program has been underutilized largely because the IRS has not publicized the program and fails to provide taxpayers with guidance when clearly applicable.

To participate, a taxpayer must be otherwise compliant, must have not been previously required to file the return, and must have had no penalties imposed for the prior three years. As showing reasonable cause can be difficult in some situations, this program may provide relief to taxpayers who would otherwise be forced to pay penalties.

Details of the program are in IRM 20.1.1.3.6.1.

12. Partnership Rules Not Applicable to Determining Recourse vs Nonrecourse Status of Debt Outside of Subchapter K

By Charles (Chuck) Rubin

Code Section 752 and its regulations provide extensive rules as to determining whether partnership debt is recourse or nonrecourse. Such determinations are relevant for basis determination purposes under Subchapter K (the Subchapter applicable to partnership taxation) and other Subchapter K purposes.

In Chief Counsel Advice, the IRS concluded that, for purposes of determining whether a limited liability company taxed as a partnership has either cancellation of debt (COD) income under Code Sec. 61(a)(12) or gains from dealings in property under Code Sec. 61(a)(3) upon foreclosure of its property, the Code Section 752 rules do not govern whether the debt at issue was recourse or nonrecourse. Instead, the Section 752 rules apply only for Subchapter K purposes.

Why was recourse vs. nonrecourse status relevant? This is because when a taxpayer disposes of encumbered property, and the encumbrance exceeds the value of the property, different tax results apply depending on whether the debt is recourse or nonrecourse. If it is a recourse debt, the amount realized on the sale attributable to the debt is limited so as to bring the amount realized only up to the fair market value of the property. The excess of the recourse debt over the fair market value of the property is treated as COD income. The bad news is that COD income is taxed at ordinary income rates. The good news, sometimes, is that COD income may be avoidable if one of the exceptions under Section 108 apply (relating to when cancellation of indebtedness income need not be recognized).

If the debt is nonrecourse, then the entire amount of the nonrecourse debt is included in the amount realized, and there is no COD income. Here the good news and bad news is flipped – all of the income is eligible for long term capital gains rates (if otherwise applicable based on holding period and character of the asset), but no opportunity for avoidance of COD income under Section 108 applies.

Chief Counsel Advice 201525010

13. No Theft Loss for Securities "Pump-and-Dump"

By Charles (Chuck) Rubin

Pump-and-dump occurs when corporate officers or other shareholders fraudulently promote shares of a company and engage in fraudulent sales to increase the value of shares. This is injurious to other shareholders who suffer losses when the value of the stock ultimately collapses.

Such shareholders will be able to deduct their losses, but to the extent they are long-term capital losses they can only use them to offset long-term capital gains and another $3,000 in income each year. To avoid these limitations, such shareholders would prefer to be able to deduct their losses as theft losses under Code Section 165(c)(3). That section allows a theft loss if a theft occurs is determined under applicable state law

In a recent case, a victim of a pump-and-dump scheme was denied theft loss treatment. Both court decisions and IRS pronouncements establish that for a theft loss to occur in most states, there must be a direct flow of property or funds from the victim to the wrongdoer, or that the wrongdoer at least specifically targeted the victim. For example, the IRS has long taken the position that stock acquired on the open market that loses value due to corporate misconduct is not eligible for the theft-loss deduction.

Since the victim here purchased his shares on the open market and not from the perpetrators of the fraud, these limitations prevented a theft for state law purposes. This is the case even though it is possible that some of the shares of the perpetrators may have been purchased by the victim, because the sale flowed through the open market mechanism.

The state here was Ohio, and Ohio does characterize embezzlement, wrongful conversion, forgery, counterfeiting, deceit, and fraud as "theft offenses." However, the term "theft offense" does not itself define a substantive crime in Ohio — it is merely a list of other crimes that are grouped together in the Ohio Revised Code. As such, it does not constitute a "theft" for federal theft loss deduction purposes.

Greenberger, Et Al. v. U.S., 115 AFTR 2d 2015-XXXX, (DC OH), 06/19/2015

14. Florida Case Law Update - Trust, Estate & Guardianship Litigation

By Jenna Rubin, unless otherwise noted

The following is a comprehensive summary of recent Florida cases and other developments in this area.

Saadeh v. Connors, 166 So.3d 959 (Fla. 4th DCA 2015)

In this portion of the Saadeh guardianship saga, the court was asked to determine whether an attorney representing a court-appointed guardian in a guardianship proceeding owes a duty to the ward under a third-party beneficiary theory. The Court ultimately found that it did.

This case began with an emergency temporary guardianship proceeding, in which a court-appointed attorney was appointed to represent the alleged incapacitated person, a professional guardian was appointed, and that guardian had his own counsel. As part of an "agreed" order to "settle" the guardianship, the court entered an ordered agreeing that the alleged incapacitated person would execute a trust instead of a plenary guardianship. The agreed order did not settle the matter, unfortunately, and the litigation continued.

Eventually, the alleged incapacitated person was found competent and brought suit against multiple players in the guardianship proceeding, including the guardian's attorney for professional negligence. He alleged that the guardian's attorney attempted to improperly advise him about the mechanics of the trust.

The guardian's attorney argued that there was no privity of contract between her and the alleged incapacitated person, and thus she owed him no duty. The trial court agreed.

The Appellate Court reversed, holding that the alleged incapacitated person was, in fact, the intended third party beneficiary of the services provided by the guardian's attorney. The Court first considered the Guardianship Statutes. It held that since the court must appoint counsel to represent an emergency temporary guardian, and that during the temporary guardianship, the emergency temporary guardian is the alleged incapacitated person's fiduciary, even though there is no lawyer-client relationship between the alleged incapacitated person and the lawyer for the emergency temporary guardian, counsel for the emergency temporary guardian owes a duty of care to the temporary ward.

The Court also compared a guardianship proceeding with an adoption proceeding, noting that both involve the protection of an incapacitated person. The Court had held in Rushing v. Bosse that privity of contract was not necessary where a child was the intended beneficiary of an adoption and the defendants were the attorneys for the adoptive parents.

The Court finally explained, through a 1996 opinion of former Attorney General Robert Butterworth, that since F.S. 744.108 authorizes payment of fees to an attorney who renders services to a guardian on a ward's behalf, the statute itself recognizes that the services performed by an attorney who is compensated from the ward's estate are performed for the ward even though the attorney technically provides the services to the guardian.

The Court concluded, "we find that [the ward] and everything associated with his well-being is the very essence, i.e. the exact point, of our guardianship statutes. As a matter of law, the ward in situations as this, is both the primary and intended beneficiary of his estate. To tolerate anything less would be nonsensical and would strip the ward of the dignity to which the ward is wholly entitled."

Pierre v. Brown, 169 So.3d 262 (Fla. 3d DCA 2015), 2015 WL 4111330

In this guardianship fee dispute, the Court affirmed a harsh result for a successor guardian who incurred fees in cleaning up a mess created by the initial guardian.

The initial guardian of the ward incurred over $200,000 in fees. That prior guardian secured assets of the ward, repaired a residence the ward inherited from his mother, reduced the mother's funeral bill and recovered compensation paid to a disbarred attorney. These actions resulted in a deposit of $150,000 into a trust for the ward, on top of the ward's $78.40/month disability income and $1,400/month rental income from the real property. Virtually all of the wards assets were paid out as fees to the initial guardian.

Once the successor guardian was appointed, he discovered that no tax returns had been filed for the ward since 2004, and the income tax obligations of the mother's estate and real estate taxes were never paid. The successor guardian hired an accounting firm to prepare the ward's delinquent tax returns, hoping to use losses from prior years to set off the income tax, and resulted in savings to the ward. He then twice sought his fees and costs incurred, as well as the fees of the accounting firm. The trial court entered orders significantly reducing the fees sought by the successor guardian.

The Court upheld the trial court's orders, stating that it was unable to find that the trial court abused its discretion in determining the award of fees and costs to the successor guardian. The Court was not bothered by the fact that the orders contained findings of facts not supported by the record, since it felt that the reduced fees were appropriate given the small size of the estate, nor was it bothered by the fact that the successor guardian was being penalized by the reduced status of the estate which he was in no way responsible for.

Carroll v. Israelson, 169 So.3d 239 (Fla. 4th DCA 2015), 2015 WL 3999486

The focus of this case was the applicability of F.S. 732.507(2), dealing with the effect of divorce on a decedent's will which included a devise to his former spouse and a trust for her family.

The decedent and his former spouse divorced one month before his death. Understandably, at the time of his death, he had not yet changed his estate plan to remove his former spouse from his will. At his death, the will provided for the residuary of his estate to pass to his former spouse, and if she predeceased him, to a family trust created under her revocable trust. The former spouse's revocable trust gave her the right to receive income and principal from the trust and to revoke or modify the trust at any time. Upon her death, a family trust would be created for the benefit of her niece and nephew.

At the time of their divorce, the decedent and his former spouse entered into a marital settlement agreement in which each party agreed to waive their right to share in the other's estate. Thus, at the time of their divorce, since they had no children, the decedent's mother became his sole intestate heir.

Following the decedent's death, the former spouse's brother attempted to probate the decedent's will. In response, his mother filed a petition to determine beneficiaries, arguing that the devise to the former spouse's trust was void pursuant to the marital settlement agreement and F.S. 732.507(2), so the estate should pass to her by intestacy. She argued since the former spouse could access the assets of her revocable trust, the disposition to that trust was void, and additionally, the family trust does not even exist until the

former spouse's death. The former spouse's brother argued that the decedent's intent was that if the former spouse predeceased him, his estate would pass for the benefit of the niece and nephew, and filed an affidavit from the former spouse stating that she would modify the trust so that the provisions for the niece and nephew were irrevocable. The trial court "engaged in the legal fiction" that the former spouse had predeceased her ex-husband, and allowed the manipulation of her revocable trust to create the family trust for the benefit of the niece and nephew.

The Court reversed, holding that F.S. 732.507(2) does not allow for "post-death legal gymnastics" to manipulate the terms of the will. F.S. 732.507(2) provides that, "Any provision of a will executed by a married person that affects the spouse of that person shall become void upon the divorce of that person or annulment of the marriage. After the dissolution, divorce, or annulment, the will shall be administered and construed as if the former spouse had died at the time of the dissolution, divorce, or annulment of the marriage, unless the will or the dissolution or divorce judgment expressly provides otherwise."

The Court explained that a provision that "affects" a former spouse, does not necessarily mean a provision which provides a direct pecuniary benefit to a former spouse. Any provision which has an effect on the former spouse would also become void upon the dissolution. So, not only did the provision leaving the residue of the estate to the former spouse have an effect on her, but the bequest to the family trust did as well. Since she was alive and had complete control over her revocable trust, she could merge that trust to any other trust and alter the terms of the family trust. Because F.S. 732.507(2) becomes operative on the date of dissolution, the attempt to modify the revocable trust to make the family trust irrevocable would be too late, since as of the date of dissolution, the trust as written affected the former spouse and thus the disposition to that trust was already void.

Brown v. Brown, 169 So.3d 286 (Fla. 4th DCA 2015), 2015 WL 4269921

This decision serves as a nice reminder about a court's jurisdiction over real property. A circuit court in an estate proceeding cannot direct a personal representative to divide and distribute a decedent's real estate in another state, since the court lacks in rem jurisdiction to order and partition the sale of that real property. To properly partition out of state real property, a personal representative is required to open an ancillary action in that state. F.S. 64.022.

Flegal v. Guardianship of Swistock, 169 So.3d 278 (Fla. 4th DCA 2015), 2015 WL 4269079

This case centered around the ownership of stock shares and due process within a guardianship proceeding. The dispute arose over the ownership of stock shares which were initially purchased by a father and his daughters as joint tenants with right of survivorship.

Prior to his incapacity, the father sued his daughters in Pennsylvania over ownership of these shares. He claimed even though he had transferred the shares to his daughters as joint tenants with rights of survivorship, he did not actually intend to gift the stock to them. As evidence of this intent, he established that he had paid for the stock, kept possession of the certificates, retained all dividends and paid income taxes on the dividends. He asked the daughters to sign the stock back to him, but they refused, so he sought a declaration that he was the sole owner of the stock.

While this litigation was pending, the daughters filed a petition to determine their father's capacity and appoint them as plenary guardians. The father moved to dismiss, arguing that they had only brought the guardianship to avoid the outcome of the Pennsylvania action about the ownership of the stock. The examining committee concluded he was not incapacitated, so the daughters dismissed their petition.

About a year later, the father suffered a stroke. A daughter not involved in the stock ownership litigation filed for guardianship and sought to be appointed as emergency temporary guardian (ETG). She listed the stock as property subject to the guardianship. The trial court entered an order setting a hearing on that daughter's petition, and mailed the order to the other daughters who received it just four days before that hearing.

At the first guardianship hearing, the trial court appointed the daughter as ETG. Once she was appointed as ETG, the daughter and the ward's counsel submitted a proposed order requiring the shares to be transferred to her as guardian. Without notice to the other daughters or a hearing, the court signed the order. The father died the next day.

The daughter later sought to be discharged as ETG and filed her final report. She also transferred the shares from herself as guardian to herself as personal representative of the father's estate.

The Pennsylvania court ultimately found in favor of the daughters and held that the stock was held as joint tenants with rights of survivorship. Five months after the ETG filed her final report, the other daughters filed an untimely objection about the ownership of the shares. They argued they lacked notice and an opportunity to be heard, and asked the court to disapprove of the ETG's final report.

The guardianship court ultimately entered an order approving the final report and noted that the other daughters had objected but that their objection was untimely. The court also approved the distribution of the shares to the estate. The daughters moved to vacate the discharge order and argued that they were deprived of their stock without due process.

The Court noted that Rule 5.648(b) only requires notice of the petition for appointment of an ETG be served on the alleged incapacitated person and his attorney, not the daughters. The daughters argued that since Rule 5.401 provides that "every petition or motion for an order determining rights of an interested person...shall be served on interested persons," they should have received notice before the stock transfer occurred as interested persons. The Court agreed, since their interests were affected by the court's order. The Court also found, however, that their objection to the ETG's report was untimely, so they therefore abandoned or waived any objection to that report.

In re Estate of Maldonado, --- So.3d --- (Fla. 5th DCA 2015)

In this case, the former spouse of a decedent appealed an order directing the personal representative to distribute the estate's assets and close the estate. The decedent and his ex-wife divorced in 1993 in Puerto Rico, but the Puerto Rico order dissolving the marriage did not distribute the spouses' marital assets. When the decedent died in 2005, his son sought to probate his will in Florida. At the same time, the ex-wife filed

suit in Puerto Rico seeking an award of marital assets. She ultimately received a judgment for one-half of the marital assets.

In 2006, the ex-wife filed a motion to intervene in the probate proceedings and an affidavit explaining the Puerto Rico judgment and her claim against the estate. In 2007, she again filed a renewed motion to intervene and statement of claim. The decedent's son objected to the claim as untimely, and in 2010 the court entered an order striking the 2007 claim. The personal representative then sought to close the estate and the ex-wife's counsel made no objection to the personal representative's request that the estate be distributed. The court directed the personal representative to distribute the assets and close the estate.

The ex-wife then sought to appeal the closing of the estate, claiming that her 2006 claim was still pending. The Court held that this argument was not preserved on appeal because she did not object to the personal representative's request to distribute the assets and close the estate. She also argued that the court reversibly erred in striking her 2007 statement of claim. The Court rejected this argument, because she did not appeal the 2010 order striking her claim in a timely matter.

Fiel v. Hoffman, --- So.3d --- (Fla. 4th DCA 2015), 2015 WL 4549604

This case involved the effect of the Slayer Statute and undue influence on a murdered decedent's will. The decedent was murdered by his wife, who also murdered the decedent's mother, to ensure that she and her family would receive the decedent's estate on his death. The decedent's will provided that if the decedent's mother did not survive him, his estate would go to his wife. If neither the mother or wife survived him, his estate would go to his wife's daughter by another marriage and her children.

The trial court held that the wife was not entitled to participate in the estate based on F.S. 732.802 (the "Slayer Statute"), and that the statute required the court to treat her as having predeceased her husband, leaving her daughter and her daughter's children, and not the decedent's intestate heirs, as the beneficiaries of the estate. But the trial court also held that the decedent's intestate heirs have a cause of action for undue influence in the execution of the decedent's wills leaving everything to his wife and her family. Both issues were raised on appeal.

The Court first addressed the Slayer Statute issue. The decedent's cousins argued that the Slayer Statute should be interpreted to also bar the daughter and her children from inheriting. The Court found that the Slayer Statute is clear and ambiguous and disinherits only the slayer or anyone who participates in the killing of the decedent from any rights to the victim's estate. The Court refused to extend the prohibition on inheritance to the heirs of the slayer.

The Court then held that the decedent's intestate heirs were able to state a cause of action for undue influence, even though the "undue influencer" was the wife, and not her family, because they alleged that the entire will was tainted by the wife and the bequests in favor of her family could not be severed from the rest of the will. The Court cited to the distinction between circumstances where only a portion of the will was procured by undue influence and circumstances where it appeared the entire instrument was the result of undue influence. It held that the intestate heirs' allegations that the contested wills were entirely tainted

and that the wife's actions were undertaken not only to benefit herself but also her family were enough to state a cause of action for undue influence as to the entire will.

Goldman v. Estate of Goldman, --- So.3d --- (Fla. 3d DCA 2015)

This decision deals with an award of attorney's fees and costs against a party without a finding of bad faith by the trial court. An attorney, in her capacity as Guardian Ad Litem, inadvertently disclosed confidential financial and medical information of the ward to the ward's nieces and nephews. The trial court held a hearing regarding sanctions against the nieces and nephews, and found that the file had been sent inadvertently and not in bad faith, but still imposed sanctions against them for obtaining the confidential information in violation of the court's confidentiality order.

The nephews and nieces appealed because the trial court did not make an express finding of bad faith conduct. The Court agreed with the nephews and nieces that such a finding was necessary. It cited the Moakley v. Smallwood decision, which held that the trial court has the inherent authority to impose fees against an attorney for bad faith conduct, but that the sanction must be based on an express finding of bad faith conduct and must be supported by detailed factual findings. Moakley v. Smallwood, 826 So.2d 221, 226 (Fla. 2002). The Court found that this requirement had been expanded to situations involving fees against a litigant as well as an attorney, and thus the trial court's failure to make specific findings regarding bad faith conduct as to each party or attorney against sanctions are to be imposed required reversal.

Adelman v. Elfenbein, --- So.3d --- (Fla. 4th DCA 2015), 2015 WL 5026178

Following the dismissal of a petition for incapacity because the court found sufficient least restrictive alternatives to guardianship, the petitioner brought a subsequent "petition to reopen" the guardianship, alleging that the fiduciary appointed in the alleged incapacitated person's advance directive documents was not providing adequate care for that person. The trial court entertained the petition, conducted a trial, and ultimately appointed a professional guardian for the ward.

The Court reversed, holding that the trial court lacked jurisdiction to enter the order appointing the professional guardian. It held that once a court makes an appropriate finding of least restrictive alternatives to guardianship and chooses not to appoint a guardian, the appropriate method for reviewing that finding is by filing a timely motion for rehearing pursuant to Fla. Prob. R. 5.020(d), or filing an appeal pursuant to Fla. Prob. R. 5.100 and Fla. R. App. P. 9.130(b). Because the petitioner did neither, the trial court no longer had continuing jurisdiction over the incapacity proceeding. The Court did not agree that the trial court has parens patriae responsibility to the alleged incapacitated person, and that the law provides adequate remedies to prevent abuse by a fiduciary pursuant to an advanced directive, through the Florida Power of Attorney Act (F.S. 709.2101-.2402) and the Adult Protective Services Act (F.S. 415.101-.113).

15. Did You Know?

When you get a kidney transplant, they usually just leave your original kidneys in your body and put the 3rd kidney in your pelvis.

16. FIRM ANNOUNCEMENTS

New Firm Website. The firm has done a total redesign of our website - take a look at www.floridatax.com. We hope you find it helpful, informative, and interesting! If you catch any typos or problems with the site that slipped by us, please send an email to crubin@floridatax.com with the problem.

2015 Legislative and Case Law Update. On July 31, 2015, Jenna G. Rubin spoke at the 35th Annual Real Property, Probate & Trust Law Section of the Florida Bar's Legislative Update and Case Law Seminar. Her presentation focused on legislative updates to Florida's statutes dealing with the assessment of attorneys' fees and costs against a share of an estate or trust and the electronic noticing of trust accounts.

Welcome to our New Associate. The Firm is happy to welcome Lauren Klein as our newest associate attorney. Lauren received a Masters of Laws in Taxation from the University of Florida in 2013 and has been practicing since. She will practice principally in the areas of tax, estate planning and probate and trust administration, and tax controversies.

ACTEC Florida Fellows Institute. Jenna G. Rubin has been selected to participate in the inaugural Florida Fellows Institute of the American College of Trust and Estate Counsel (ACTEC).

DAILY TAX AND BUSINESS UPDATES AVAILABLE. View prior articles, updates that we didn't have room for in this newsletter, or read the above postings when they are first published, by visiting http://www.rubinontax.blogspot.com and http://www.rubinonprobatelit.blogspot.com. To read this issue, or past issues, online, visit http://www.floridatax.com/httpdocs/Resources.html (and scroll to the bottom of the page).

Most of the postings in this newsletter are first published on the Internet during the preceding month. If you use Twitter, you can be notified of postings as they occur by following #RubinOnTax. If you use Flipboard, search for the magazine "Rubin on Tax (and More)."

Having problems receiving this newsletter? Make sure that the E-mail addresses "taxandbusinessupdate@mail-list.com" and "crubin@floridatax.com" are marked as a friend or otherwise set to clear your spam filters! Subscribe and unsubscribe instructions accompany the email sending this newsletter - if not, send subscribe and unsubscribe instructions to crubin@floridatax.com. To be properly processed, unsubscribe instructions need to come from the applicable email address or send instructions to crubin@floridatax.com with the specific address being unsubscribed.

Feel free to forward this newsletter on to anyone who you think may be interested.

The Usual Disclaimer: This newsletter summarizes for informational purposes only information of interest to the clients and friends of Gutter Chaves Josepher Rubin Forman Fleisher Miller P.A. The information is condensed from, and a general summary of, legislation, court decisions, administrative rulings and other

information, and should not be construed as legal advice or opinion, and is not a substitute for the advice of counsel.

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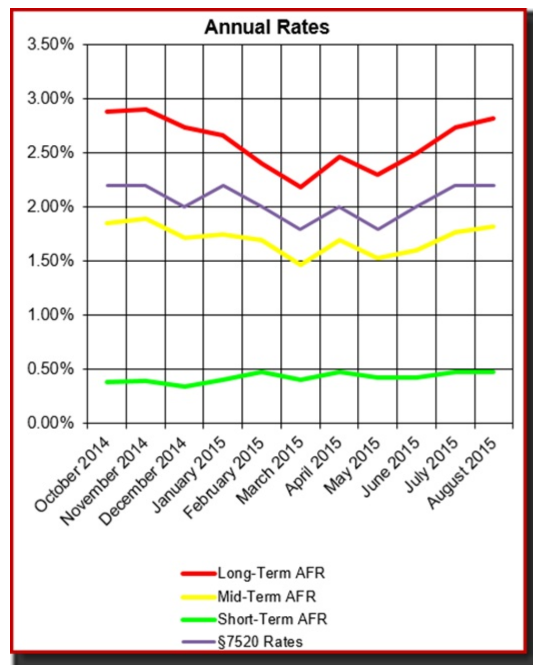
[CONTINUE TO NEXT PAGE FOR CHARTS AND ATTACHMENTS!]

17. AFR RATES

APPLICABLE FEDERAL RATES

Short-Term AFR	Annual	Semi annual	Quarterly	Monthly	Long-Term AFR	Annual	Semi annual	Quarterly	Monthly
October 2014	0.38%	0.38%	0.38%	0.38%	October 2014	2.89%	2.87%	2.86%	2.85%
November 2014	0.39%	0.39%	0.39%	0.39%	November 2014	2.91%	2.89%	2.88%	2.87%
December 2014	0.34%	0.34%	0.34%	0.34%	December 2014	2.74%	2.72%	2.71%	2.70%
January 2015	0.41%	0.41%	0.41%	0.41%	January 2015	2.67%	2.65%	2.64%	2.64%
February 2015	0.48%	0.48%	0.48%	0.48%	February 2015	2.41%	2.40%	2.39%	2.39%
March 2015	0.40%	0.40%	0.40%	0.40%	March 2015	2.19%	2.18%	2.17%	2.17%
April 2015	0.48%	0.48%	0.48%	0.48%	April 2015	2.47%	2.45%	2.44%	2.44%
May 2015	0.43%	0.43%	0.43%	0.43%	May 2015	2.30%	2.29%	2.28%	2.28%
June 2015	0.43%	0.43%	0.43%	0.43%	June 2015	2.50%	2.48%	2.47%	2.47%
July 2015	0.48%	0.48%	0.48%	0.48%	July 2015	2.74%	2.72%	2.71%	2.70%
August 2015	0.48%	0.48%	0.48%	0.48%	August 2015	2.82%	2.80%	2.79%	2.78%
September 2015	0.54%	0.54%	0.54%	0.54%	September 2015	2.64%	2.62%	2.61%	2.61%

Mid-Term AFR	Annual	Semi annual	Quarterly	Monthly	Section 7520 Rates	
October 2014	1.85%	1.84%	1.84%	1.83%	October 2014	2.20%
November 2014	1.90%	1.89%	1.89%	1.88%	November 2014	2.20%
December 2014	1.72%	1.71%	1.71%	1.70%	December 2014	2.00%
January 2015	1.75%	1.74%	1.74%	1.73%	January 2015	2.20%
February 2015	1.70%	1.69%	1.69%	1.68%	February 2015	2.00%
March 2015	1.47%	1.46%	1.46%	1.46%	March 2015	1.80%
April 2015	1.70%	1.69%	1.69%	1.68%	April 2015	2.00%
May 2015	1.53%	1.52%	1.52%	1.52%	May 2015	1.80%
June 2015	1.60%	1.59%	1.59%	1.58%	June 2015	2.00%
July 2015	1.77%	1.76%	1.76%	1.75%	July 2015	2.20%
August 2015	1.82%	1.81%	1.81%	1.80%	August 2015	2.20%
September 2015	1.77%	1.76%	1.76%	1.75%	September 2015	2.20%



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