GUTTER CHAVES JOSEPHER RUBIN FORMAN FLEISHER MILLER P.A.

TAX, BUSINESS, & ESTATE AND TRUST LITIGATION UPDATE

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An Electronic Newsletter of Gutter Chaves Josepher Rubin Forman Fleisher Miller P.A.

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ABOUT OUR FIRM

We are a boutique law firm that seeks to protect and enhance the individual, family and business wealth of our clients in the following principal practice areas: Planning to Minimize Taxes (U.S. & International) - Probate & Trust Litigation - Estate Planning, Charitable, Marital & Succession Planning - Business Structuring & Transactions - Trusts & Estates Administration - Tax Controversies - Creditor Protection.

1. Some 2015 Florida Law Changes

By Charles (Chuck) Rubin

Below are some statutory changes enacted in Florida in 2015 that you may not have noticed:

GRANDPARENT VISITATION RIGHTS. In a major rewrite of Chapter 752, statutory rights of a grandparent to obtain visitation rights with a grandchild were substantially narrowed. Under new Fla.Stats. §752.011, these rights can be legally enforced only if (a) both parents of a minor grandchild are deceased, missing or in a persistent vegetative state, or (b) one parent is in such condition, and the other has been convicted of a felony or an offense of violence evincing behavior that poses a substantial threat of harm to the grandchild's health or welfare.

The opportunities for visitation were broader under prior law, but most of them had been stricken down as unconstitutional under Florida law as violating the parents' right of privacy, part of which is treated as including the parents' freedom as to child-rearing.

A report on the problems with the older statutes is available here.

HEALTH CARE SURROGATE PROVISIONS. Chapter 765 has been revised to now allow an individual to name a surrogate to make health care decisions for them and/or to access their health information without the need for a determination of incapacity.

LIMITED LIABILITY COMPANIES. A provision in the articles of organization of an LLC that limits the authority of a person to transfer LLC real property is not effective to non-members and non-managers unless recorded in the public records in the county of the applicable real property.

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

CUSTODIAL GIFTS TO MINORS. Custodial gifts in the past had to terminate either by age 18 or 21, depending on the method of creation of the account. Some accounts now may be extended by the transferor to age 25.

2. Power of Attorney Holder Cannot Sign for Another

By Charles (Chuck) Rubin

Tax practitioners are familiar with Form 2848. With that form, a taxpayer authorizes an attorney, accountant, or other authorized representative to act as attorney-in-fact for the taxpayer as to the specified tax matter in dealing with the IRS.

When the form is prepared, the representative has to sign it. In a recent Chief Counsel Advice, the question was raised whether one duly authorized representative can sign for another representative on the Form 2848. Unsurprisingly, the advice provides that this is not permissible. The nature of the written declaration of the representative is for the signer to declare, under penalties of perjury, his status and that he is subject to the provisions of Circular 230. Allowing someone else to make that declaration is inconsistent with the purpose of the declaration.

Note that this is a different question from whether one named representative, as representative of the taxpayer, can appoint another representative for the taxpayer (i.e., to sign the Form 2848 on behalf of the taxpayer). But I hope I didn't get your hopes up on that scenario – that is not permitted either, by the express terms of the Form 2848 - unless the taxpayer had specifically authorized it in Section 5a of the Form 2848 that named the original representative that is seeking to name an additional representative.

Chief Counsel Advice 201544024

3. Congress Tinkers with Family Partnership Rules

By Charles (Chuck) Rubin

The recently enacted Bipartisan Budget Act of 2015 moves around the family partnership rules so as to clarify their application.

THE OLD RULE

Section 704(e)(1) provided that a person is recognized as a partner of a partnership if capital is a material income-producing factor, whether the partnership was obtained by purchase or gift. This was commonly referred to as the "family partnership rule."

THE PURPOSE OF THE OLD RULE

A transfer of a partnership interest by gift (or even by sale) opens the door to an impermissible assignment of income. That is, income from property or a business can be transferred in a manner that would be a disrespected assignment of income if such a transfer was conducted outside of the partnership form. The family partnership rule is a safe harbor from IRS attack based on assignment of income principles when capital is a material income-producing factor in the partnership. Per the focus on capital, the safe harbor will not provide protection for service businesses or other businesses where capital is not a major requirement.

CONGRESSIONAL CONCERN

To be considered partners for federal income tax purposes, the legal partners must have joined together with an intent to conduct an active trade or business. Some taxpayers have argued that this rule does not apply if the family partnership rule applies. That is, they claim that the family partnership rule is an alternative way of being considered a partner, without the requirement of an active trade or business.

SO WHAT DID CONGRESS DO?

It moved the family partnership rule out of Section 704(e)(1) and into Section 761(b). As it now reads, Section 761(b) makes clear that one still has to meet the general requirements of being a member of a partnership. The family partnership rule is now only a qualification to the above general rule such that in testing whether one is a partner a gift transfer cannot be used as a challenge if capital is a material income-producing factor. Section 761(b) now reads:

> (b) Partner. For purposes of this subtitle, the term "partner" means a member of a partnership. In the case of a capital interest in a partnership in which capital is a material income-producing factor, whether a person is a partner with respect to such interest shall be determined without regard to whether such interest was derived by gift from any other person.

MISC.

Code Sections 704(e)(2) (relating to special rules on allocation of income on gifted interests) and 704(e)(3) (relating to purchases of interests by family members being treated as a gift transaction) are left behind in Section 704(e), and are renumbered as (e)(1) and (e)(2) respectively.

EFFECTIVE DATE OF CHANGE

For partnership tax years beginning after 12/31/2015.

4. Can Correction of a Scrivener's Error Retroactively Fix a Tax Problem with a Trust?

By Charles (Chuck) Rubin

Yes, in a recently released Private Letter Ruling in regard to an irrevocable trust.

There were actually two problems with the trust. First, the settlors retained powers to change the beneficial interests of the trust, creating an incomplete gift. Second, those retained powers also created a problem under Code Section 2036.

The trust was reformed in state court to create both a completed gift and to take away the retained powers that were problematic under Code Section 2036. The IRS allowed the reformation to implement the revised tax consequences, retroactive to the creation of the trust.

Does this mean that such corrections will always be respected retroactively by the IRS? A key requirement here was that the changes were made to effectuate the settlors' original intent. This was evidenced by the other provisions of the trust agreement, and an affidavit by the attorney who drafted the trust. Absent those facts, it is unlikely that the IRS would have allowed such retroactive treatment – scrivener's error or otherwise.

PLR 201544005

5. Is the Charitable Deduction for Trusts Limited to Adjusted Basis?

By Charles (Chuck) Rubin

No, says a U.S. District Court.

An irrevocable trust received distributions from a partnership in one year and purchased property. In a later year it contributed the property to a qualified charity, after the property had appreciated in value. It took an income tax charitable deduction for the fair market value of the property.

Code Section 642(c)(1) allows for an income tax charitable for trusts. It reads:

> [T]here shall be <u>allowed as a deduction</u> in computing its taxable income (in lieu of the deduction allowed by section 170(a), relating to deduction for charitable, etc., contributions and gifts) <u>any amount of the gross income</u>, without limitation, which

> pursuant to the terms of the governing instrument is, during the taxable year, paid for a purpose specified in section 170(c) (determined without regard to section 170(c)(2)(A))… (emphasis added)

The IRS argued that the "gross income" language (1) limits a trust's deduction to the amount of gross income it contributed to charity; (2) gross income does not include unrealized appreciation; and (3) a liberal construction of the statute allowing fair market valuation would negate the gross income derivative requirement. Thus, it sought to limit the deduction to the trust's adjusted basis in the contributed property.

The District Court began its analysis by noting that the policy behind the charitable contribution is to encourage charitable deductions. This was not a good start for the IRS.

Another policy issue was that the IRS sought to apply the rule that an income tax deduction is a matter of legislative grace and that the burden of clearly showing the right to the claimed deduction is on the taxpayer. While there is such a rule, the court noted statutes regarding charitable deductions are not matters of legislative grace, but rather "expression[s] of public policy." As such, provisions regarding charitable deductions should be liberally construed in favor of the taxpayer.

The Court also noted a distinction between Section 642, and Section 170 (relating to charitable deductions for individuals). Unlike Section 170, Section 642 has no limiting language on the amount of the deduction, including limits relating to appreciation in contributed property. The Court perceived the IRS as seeking to impose limitations where Congress clearly declined to do so.

One of the IRS' arguments was that the contribution had to be traced to gross income. While this is true, there is no requirement that the payment had to be traced to income from the same tax year as the contribution. So the fact that the property was purchased in a prior tax year with income from that year was not a problem. That the contribution was paid out of trust principal and not income was also not an issue – the Court found that such an argument conflated fiduciary accounting principles with the federal tax concept of gross income.

Since the case is not an appellate court case but only an interpretation of a District Court, the precedential value of the decision is limited. Given the substantial amounts at issue, the IRS may appeal.

Green v. U.S., U.S. District Court for the Western District of Oklahoma, Case No. CIV-13-1237-D (11-4-2015)

6. Identity Theft Victims Can Now Get a Copy of Fraudulently Filed Returns

By Charles (Chuck) Rubin

Many taxpayers, upon filing (or trying to file electronically) their income tax return, hear back that the IRS has already received a filed return for them. Typically, this is due to a fraudulent return filed using the taxpayer identification number and name of the taxpayer that seeks a fraudulent refund of taxes already paid to the IRS – the IRS version of identity theft.

In the past, the defrauded taxpayer was unable to see what had been filed with the IRS. In a change of policy, the IRS now will allow the defrauded taxpayer to see the fraudulently filed tax return, subject to some redactions.Taxpayers that previously could not get a look at the fraudulent return can do so now for prior years – requests can be made for up to six preceding tax years.

If you would like to receive such a copy, go to https://www.irs.gov/Individuals/Instructions-for-Requesting-Copy-of-Fraudulent-Returns and follow the directions for preparing and submitting a request letter.

7. Private Foundation Can Limit Grant Scholarships to Students Attending Specific Schools

By Charles (Chuck) Rubin

A private foundation that makes a grant to an individual for travel, study, or other similar purposes makes a "taxable expenditure" that is subject to a penalty excise tax under Code Section 4945. However, if the grant is made on an objective and nondiscriminatory basis for a scholarship or fellowship to be used to study at qualified educational organizations, and the IRS approves the grant process and criteria, then that grant will not be a taxable expenditure.

What if scholarships are funded, but only for students meeting qualification criteria at a few named schools? Is this "nondiscriminatory" for this purpose?

In Private Letter Ruling 201548023 the IRS approved the taxpayer's grant making procedures, even though the scholarships were limited to students attending three named schools. And in Private Letter Ruling 201548022, the IRS also approved procedures limiting scholarships to students attending one named school.

8. An Illustration of How NOT to Do an Related Party Loan

By Charles (Chuck) Rubin

While the Internal Revenue Code does have provisions that may impact the tax consequences of related party loans, conceptually there is nothing wrong with a related party loan. Loans can have favorable tax aspects, including deductibility of interest payments, principal repayments by entities being treated as such instead of taxable distributions, and bad debt deductions if the obligations cannot be repaid. Since the IRS will often seek to recast related party loans as gifts, capital contributions, or something other than a loan, taxpayers must observe all proper formalities and meet the criteria for both a "loan," and when a bad debt deduction is sought that the loan became "worthless."

On the "loan" side, the lender generally must show at the time of the funds advance, there was a real expectation of repayment and an intent to enforce collection. On the "worthless" side, the lender must be able to show that the debt was truly worthless in the year a deduction for worthlessness is sought.

A recent appellate decision shows the IRS will use bad facts to void loan treatment when a shareholder loans funds to a related corporation. The shareholder sought to write off $800,000 that she loaned to the corporation and that was not repaid.

Here is a list of the bad facts in the case. They are an education on what to AVOID in these situations:

- Generally speaking, the loan was not made on terms that an outsider would have undertaken.
- The loan was unsecured.
- The loan was funded over a period of time as a line of credit. During that period of time, the finances of the borrowing corporation declined – nonetheless, the lender continued to fund the loan.
- No payments of interest or principal ever were made.
- The borrowing corporation did not enter bankruptcy, and continued to operate two years after the year a worthless debt deduction was sought.
- The borrowing corporation did not recognize any cancellation of indebtedness income.
- The lender's only effort to enforce the debt was to make a demand for repayment of $5,000 in the year of the write off. No legal action was ever commenced.
- There were no opinions of accountants or financial consultants that the note was worthless.
- There was no evidence of borrower creditworthiness at the time of the loan was advanced (a loan to an insolvent entity will often not be characterized as a loan).
- The loan was a line of credit loan, but it had no covenants that advances could be suspended if certain income or other benchmarks were not attained or maintained.
- No event of default occurred in the year that worthlessness was claimed.

SHAW v. COMM., 116 AFTR 2d 2015-XXXX, (CA9), 11/18/2015

9. GULAG AMERICA

A few years back, Congress passed FATCA. While purportedly aimed at reaching money of tax evaders hidden offshore, a practical effect has been it is nearly impossible for U.S. persons to hold or open bank or brokerage accounts outside of the U.S. That is, for a tax policy objective, the freedom enjoyed by U.S. persons to hold their liquid assets wherever they want in the world has been substantially curtailed.

The construction of Gulag America under the guise of tax policy continues apace with the passage and signing of the Fixing America's Surface Transportation (FAST) Act in the last few days. The Act adds new Section 7345 to the Internal Revenue Code. This provision provides that if the IRS Commissioner certifies that a taxpayer is delinquent in his her federal taxes to the tune of $50,000 or more, the Secretary of State can take action to deny, revoke or limit the taxpayer's passport. That is, persons with delinquent taxes may now be barred from leaving the U.S.

The U.S. has enforced its taxes for over one hundred years with civil and criminal enforcement mechanisms. Apparently, that enforcement arsenal is no longer sufficient, and U.S. citizens in financial straits will now lose their travel "privileges."

10. IRS Suggests Using Transcripts in Lieu of Estate Tax Closing Letter

By Charles (Chuck) Rubin

A federal estate tax closing letter shows that the IRS has either accepted an estate tax return as filed, or after audit final adjustments have been agreed to. They do not close the statute of limitations, but provide comfort to executors that they can make distributions or pay creditors with little likelihood of IRS review of the estate tax computations.

In the past, closing letters were automatically issued. Earlier this year the IRS indicated that would no longer happen – taxpayers now need to specifically request a closing letter, and must wait at least 4 months from filing of the estate tax return before making the request.

The IRS has now indicated on its website that an estate tax transcript can be used as an alternative method for taxpayers to determine that the IRS has accepted an estate tax return or closed an audit. More particularly, the IRS provides:

> "Transaction Code 421 [on a transcript] indicates an Estate Tax Return (Form 706) has been accepted as filed or that the examination is complete. Please note that the Transaction Code 421 explanation will display "Closed examination of tax return" in all instances. If Transaction Code 421 is not present, the tax return remains under review."

The IRS goes on to provide how taxpayers or their representatives can request a tax transcript from the IRS (either online or via the mail). It also notes that "[t]he decision to audit a Form 706 is typically made four to six months after the filing date. Please wait four to six months after filing Form 706 before submitting a request for an account transcript."

Since many probate courts require an estate tax closing letter before closing an estate when an estate tax return is filed, it remains to be seen whether an IRS estate tax transcript will be accepted as a valid substitute for those returns.

11. Are Income Tax Refunds Due to a Decedent Subject to Estate Taxes?

By Charles (Chuck) Rubin

I've always thought so, but apparently at least one estate thought not, and took the issue to the Tax Court.

A decedent died before filing his income tax return for the prior calendar tax year. Once the return was prepared after death, it showed the decedent was due a refund of $429,315. A smaller refund was also later determined to be due for the short year of the decedent's death.

The decedent's estate did not include the refund amounts on the estate tax return. The estate argued that the overpayment as of the date of death was not a property interest of the decedent – it was only a mere possibility or expectancy which would not be a property interest under applicable state law. It argued that there is no property interest until the refund has been declared by the Government.

The Tax Court determined that there were other cases acknowledging that tax refunds are part of the gross estate. Further, it noted that the IRS by law "shall" refund any balance due to the taxpayer – this mandatory obligation was clearly relevant. Thus, it included the refunds in the gross estate.

The Tax Court did note that if the refund could be subject to offset by the IRS for other tax liabilities of the decedent, then case law would permit excluding the refund. That was not the case here, however.

Estate of Russell Badgett, Jr. v. Comm., T.C. Memo 2015-226 (November 24, 2015)

12. Deeds to Trustees [Florida]

By Charles (Chuck) Rubin

One statute that most Florida real estate and trust lawyers have to deal with at some time is Fla.Stats. Section 689.07(1). Let's read it together:

> (1) Every deed or conveyance of real estate heretofore or hereafter made or executed in which the words "trustee" or "as trustee" are added to the name of the grantee, and in which no beneficiaries are named, the nature and purposes of the trust, if any, are not set forth, and the trust is not identified by title or date, shall grant and is hereby declared to have granted a fee simple estate with full power and authority in and to the grantee in such deed to sell, convey, and grant and encumber both the legal and beneficial interest in the real estate conveyed, unless a contrary intention shall appear in the deed or conveyance; provided, that there shall not appear of record among the public records of the county in which the real property is situate at the time of recording of such deed or conveyance, a declaration of trust by the grantee so described declaring the purposes of such trust, if any, declaring that the real estate is held other than for the benefit of the grantee.

Thus, the statute appears to grant fee simple title to the grantees in a deed, even though they are designated takers "as trustee" if no other information regarding the trust is included and the trust was not previously recorded in the public records. And so concluded a Florida Circuit Court judge, in ruling that two co-trustees owned real property conveyed to them "as trustee" in fee simple without further description and without a recorded trust instrument. In so ruling, the court was providing that the two trustees could partition the property, sell it, and keep the proceeds for themselves.

This was the case, even though the two trustees were siblings holding the trust property for over 30 years for 6 siblings under an unrecorded trust agreement. During those 30 years, the trust property was operated as a trust asset for the benefit of all the beneficiaries. Further, the trust agreement was recorded in June 2013. Thus, the Circuit Court ruling, if upheld, would provide a windfall to the trustees to the detriment of the beneficiaries.

Fortunately for the beneficiaries, the 1st District Court of Appeals reversed the Circuit Court, on two theories.

First, the DCA noted that Section 689.07(1) (and its predecessors going back 100 years) was enacted to protect innocent third parties from "secret" trusts, and not to provide a windfall to trustees. More particularly, the statute allows third parties to deal with the trustees as fee simple owners in regard to title, conveyancing and mortgages, and need not be concerned about contrary provisions in trust agreements that may restrict the trustee or vest beneficial ownership in others – that is, the third parties are entitled to rely on the public record as to ownership rights even though there is a suggestion of a trust by the trustee language in the deed. Clearly, in this case the trustees do not fall within the class of "uninformed outsiders" that are protected by this statute.

Second, the legislature attempted to put this issue to bed fifty years ago when it enacted Section 689.07(4), which reads:

> (4) Nothing herein contained shall prevent any person from causing any declaration of trust to be recorded before or after the recordation of the instrument evidencing title or ownership of property in a trustee; nor shall this section be construed as preventing any beneficiary under an unrecorded declaration of trust from enforcing the terms thereof against the trustee; provided, however, that any grantee, transferee, assignee, or mortgagee, or person obtaining a release or satisfaction of mortgage from such trustee for value prior to the placing of record of such declaration of trust among the public records of the county in which such real property is situate, shall take such interest or hold such previously mortgaged property free and clear of the claims of the beneficiaries of such declaration of trust and of anyone claiming by, through or under such beneficiaries, and such person need not see to the application of funds furnished to obtain such transfer of interest in property or assignment or release or satisfaction of mortgage thereon.

This statute was intended to prevent trustees from using 689.07(1) as a sword against beneficiaries to cut off their beneficial interests – the trustees are still bound by their fiduciary obligations under the trust agreement. Further, this statute expressly allows for recording of the trust instrument AFTER the recording of the deed.

The case provides an interesting history lesson regarding this statute, and how it is intended to operate. It does not appear that the 2013 breakout of these provisions out of Section 689.071 to their new home in Section 689.07 changes the analysis.

Heiskell and Morris v. Morris, 1st DCA, Case Nos. 1D15-364 & 1D15-365. Opinion filed December 18, 2015

13. FIRPTA WITHHOLDING RATE BUMPED UP TO 15%

By Charles (Chuck) Rubin

The Protecting Americans from Tax Hikes Act of 2015 was recently signed into law. Section 324 of the Act modifies Code Section 1445 to increase the required withholding amount on dispositions by nonresident aliens and foreign entities of U.S. real property interests from 10% to 15%.

Nonetheless, the prior 10% rate will continue to apply dispositions of a residence if (a) the amount realized is $1 million or less, (b) the transferee will use the property as a residence, and (c) the $300,000 or less exemption from withholding does not apply.

I guess since the withholding tax is imposed on non-U.S. persons, this provision does not contradict the title of the Act which reads "protecting Americans from tax hikes" (emphasis added), at least if one reads the term "American" as only including tax residents of the USA and excluding tax residents of other countries in the Americas. Technically, this is not a tax hike anyway - just a withholding tax that is subject to refund if the seller's U.S. income taxes are less than the 15% withholding.

14. 2013 Gift Tax Assessment for 1972 Gift Upheld by Tax Court - 41 Years of Separation

By Charles (Chuck) Rubin

The IRS has 3 years to assess gift taxes for gifts disclosed in a gift tax return. If a gift tax return is not filed, the statute of limitations never begins to run. Nonetheless, it is rare for the IRS to assess gift taxes relating to gifts that occurred many years in the past.

A recent Tax Court case confirms that the IRS is not legally barred from assessing gift taxes many, many years after the gift when no gift tax return is filed, if it so desires. Here, Sumner Redstone gifted shares of stock in a closely held entity to two trusts for his children in 1972. Due to litigation commencing in 2006, the IRS became knowledgeable of the gifts, and ultimately assessed gift taxes in 2013 for the 1972 tax year.

The Tax Court found that such assessment was valid, despite the 41 year spread between the taxable gift and the tax assessment.

Mr. Redstone argued that the doctrine of laches should bar the assessment. Laches is an equitable concept that will bar actions after an extended period of time, even if a legal statute of limitations is still open. The Tax Court noted that the U.S. is not subject to the defense of laches in enforcing its rights. Further, it found the facts supporting the application of laches are not present here - it would have required that the IRS had been aware of the 1972 gifts but sat on its rights and that the taxpayer suffered undue prejudice as a result. Here, the IRS did not become aware of the gift transfers until 2010.

Interestingly, back in the 1970's the IRS made inquiries of Mr. Redstone relating to gifts made in 1972 in context of political contributions that Congress was investingating. Mr. Redstone argued that this review was an examination, so that a second examination in 2011-2013 violated the one examination rule of Section 7605(b). The Tax Court rejected this, finding that the review in the 1970's did not give rise to an examination. Further, a violation's effect is limited to giving rise to procedural obstacles to the conduct of the second examination, such as blocking the exam or the enforcement of summons. Such a violation does not invalidate a deficiency coming from that second examination.

Sumner Redstone v. Commissioner, TC Memo 2015-237

15. Improper Decanting [Florida]

By Charles (Chuck) Rubin

In a case of first impression, Florida's 5th District Court of Appeals interpreted Fla.Stats. §736.04117 relating to the ability of a trustee to decant a trust into a new trust arrangement. A trustee transferred the funds of a trust held for the current beneficiary (the settlor's son) into a special needs trust also held for the current beneficiary of that same beneficiary. The trustee could do this since the trustee had the right under the first trust agreement to distribute all or part of the principal to the son in his absolute discretion.

The appellate court found two deficiencies with the decanting. First, Fla.Stats. §736.04117(1)(a)1. requires that the "beneficiaries of the second trust may include only beneficiaries of the first trust." Under the special needs trust the remaindermen after the death of the son were other beneficiaries of the pooled trust. Such other beneficiaries were not beneficiaries of the first trust – instead, the remaindermen under the first trust were other relatives of the settlor. So the new trust arrangement included beneficiaries that were not beneficiaries of the first trust. While not explicitly addressed, this finding implies that the focus on same beneficiaries includes both current beneficiaries, and future beneficiaries such as remaindermen.

The second deficiency was that the trustee did not provide the 60 days adanced notice of the intent to decant to the qualified beneficiaries, as required by Fla.Stats. §736.04117(4).

Pursuant to these violations, the appellate court ordered the funds of the special trust returned to the original trust.

An interesting question is whether failing to give the requisite 60 days notice is enough to void the new trust funding in all events – the statute does not explicitly provide what the penalty is for a violation of that notice provision. This case will not answer that question, since there was also the other violation of including new beneficiaries so we don't know if the 60 day notice violation would have been enough by itself to void the new trust funding.

Harrell and Dake v. Badger, 5th DCA, Case Nos. 5D14-1145 and 5D14-3469 (2015)

16. 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.

Gossett v. Gossett, 40 Fla. L. Weekly D2766a (Fla. 4th DCA 2015)

In this decision on the equitable doctrine of "renunciation," the Court held that a trust beneficiary who challenged a trust document did not have to repay distributions made to him from the trust in order to challenge the trust document.

Prior to the initiation of the litigation, the decedent's wife and trustee of his trust sent the decedent's son distributions under the last version of the trust, and intended that he accept the distributions to prohibit him from challenging the validity of the last version of the trust. In his lawsuit to set aside the last versions of the trust, he renounced any interest he may have had in those trusts, but alleged that Florida law did not require him to return the money he had already received because he was entitled to an equal or greater amount under the prior versions of the trust.

The trial court held that the son was required to return all prior distributions before challenging the later versions of the trust. The Appellate Court reversed, finding that the rationales for the renunciation rule do not apply to the distributions to the son. First, renunciation protects the trustee if the trust is invalidated, which the Court held was not relevant here because the son was entitled to more than the distributions he received. Second, renunciation is required to demonstrate that the lawsuit is sincere and not vexation. The Court dismissed this rationale, stating that vexation and insincere claims are always present and no more so here. Finally, renunciation is necessary to ensure that the property is available for disposition, which the Court held was not relevant since he was entitled to more than the distributed amount if he prevailed.

Keul v. Hodges Blvd. Presbyterian Church, --- So.3d --- (Fla. 1st DCA 2015)

This decision deals with whether a POD designation can be invalidated for undue influence , as well as the right of a probate court to require a party to return POD funds to an estate instead of entering a money judgment against the party for the amount of the funds.

The decedent's 2009 will provided that at her death, her entire estate would go to Hodges Boulevard Presbyterian Church. A few days before she died, the decedent's neighbor/friend/caregiver/attorney in fact/health care surrogate claimed the decedent asked her to help her get a POD form to change her beneficiary designation to leave all of her assets to the neighbor and her family.

Following the decedent's death, the church objected to the inventory and sought to remove the neighbor as personal representative, arguing that the neighbor had failed to include the POD account in the inventory. The trial court ultimately found that the neighbor used her confidential relationship with the decedent and actively procured the POD designation, and as a result it invalidated the POD designation.

The neighbor attempted to argue on appeal that Florida law does not allow a POD designation to be invalidated for undue influence. The Appellate Court disagreed. It found that Florida has a legitimate public policy interest in preventing the abuse of confidential relationships. It noted that even though a POD designation is an inter vivos transfer, it has the attributes of a testamentary transfer since it has no effect until the death of the owner, and thus under Florida law, it is subject to challenge on grounds such as undue influence, fraud, duress, and overreaching. It disagreed with the neighbor that because the banking statute governing POD designations (F.S. 655.82) does not contain the undue influence provisions found in the probate code, it cannot be challenged for undue influence.

The neighbor also argued that the trial court lacked authority to order her to return the funds to the estate. The Court held that such an order is clearly proper pursuant to F.S. 733.812. The fact that failure to comply with a court order can justify a finding of civil contempt which may ultimately lead to incarceration, does not make the remedy unconstitutional.

Gordin v. Estate of Maisel, --- So.3d --- (Fla. 4th DCA 2015), 2015 WL 7566353

This decision centers around whether a probate court can appoint a curator without revoking the prior appointment of personal representatives. The Court held that it was improper for the probate court to do so.

The probate court admitted the decedent's will to probate, appointing his daughter and grandson as co-personal representatives of the estate. The decedent's son filed a petition for revocation of the will, claiming that he was entitled to a forced share of the estate because the decedent lived in Puerto Rico when he died, that the decedent lacked testamentary capacity and was subject to undue influence when he executed the will, and that he had three previous wills. The son also filed a petition for administration seeking to admit one of those previous wills to probate, and a petition to remove the personal representatives and appoint a curator.

Without hearing evidence, the probate court appointed an attorney as curator. The letters of curatorship gave the curator the full powers of a personal representative. The personal representatives appealed, arguing that it was legally improper for the probate court to simultaneously appoint a curator and a personal representative to act on behalf of the estate.

The Court agreed with the personal representatives. It noted that while there is little guidance in the law regarding when a curator should be appointed, the few cases and statutes that do exist are instructive in this situation. The 1st DCA in In re Estate of Miller noted that a typical situation in which a curator is appointed is where there is a delay in the appointment of a personal representative. Similarly, F.S. 731.201 defines a "curator" as "a person appointed by the court to take charge of the estate of a decedent until letters are issued." Further, FPR 5.122(e) provides instructions for a curator to account for and deliver estate property to the personal representative. Thus, the role of the personal representative is intended to succeed the role of the curator in the administration of the estate.

The Court also found that the simultaneous appointment of a curator and a personal representative created an inherently conflicting scenario in which two persons have virtually the same power to exert over the estate. The curator was not appointed to serve as a joint personal representative, in which case the law provides instructions as to how decisions are to be made.

Ultimately, the Court noted that the probate court has the authority to remove a personal representative and appoint a curator to serve until a successor personal representative can be appointed, however, where the personal representatives are not temporarily removed and their powers are not temporarily suspended, a curator cannot be appointed.

Mathis v. Estate of Mathis, --- So.2d --- (Fla. 3d DCA 2015), No. 3D14-2332

This case deals with the ability of a beneficiary to seek further administration of an estate pursuant to Florida Probate Rule 5.460. The decedent executed a last will leaving her homestead property to her daughter. The will also provided that if the property was sold for whatever reason, the proceeds from the sale would be divided and distributed among her daughter, her son, and her other children and grandchildren.

For ten years following the decedent's death, the son continued to live at the property. When a tax deed sale was imminent, the daughter filed a petition for administration and sought the appointment of a curator. The son paid the outstanding property taxes to avoid the tax deed sale. The curator filed a petition to determine homestead status and the trial court admitted the will to probate. Once the trial court entered the order determining homestead status, the curator was discharged. The daughter then sold the property, and the new owners attempted to evict the son. The son filed a petition seeking subsequent administration, alleging that because his sister had sold the property, he was entitled to his percentage of the proceeds, as well as reimbursement for the property taxes he had paid. The trial court denied his petition.

The Court reversed and held that pursuant to Florida Probate Rule 5.460(a), the son was entitled to seek subsequent administration of the estate to determine his interest in the estate and to effectuate the provision in the will entitling him to a percentage of the sale proceeds.

Rocke v. American Research Bureau et al., --- So.2d --- (Fla. 2d DCA 2015)

For anyone looking for a refresher on the doctrine of dependent relative revocation, this decision is a good read. In this case, after 9 years of litigation, the Court ultimately determined that the probate court's failure to apply the doctrine of dependent relative revocation incorrectly resulted in the distribution of an estate worth $12 million to the decedent's intestate heirs rather than to the beneficiary of one of her prior wills.

The decedent had executed a series of wills prior to her death. Each of those wills, while slightly varied, left a bequest to the Northwestern University (Go Wildcats!!) medical school, to the decedent's second cousin, to her attorney, to her attorney's assistant, and to her accountant. The decedent's second cousin challenged the decedent's last will (which divided her residuary among the attorney, assistant and accountant, and not her), alleging undue influence on the part of the decedent's lawyer and his assistant. The probate court ruled that the lawyer and his assistant exerted undue influence on the decedent, and thus the residuary devises to them contained in the last will were void. However, the probate court also ruled that the remainder of the provisions of the will were valid and would control the disposition of the remaining assets of the estate, and thus held that the residue of the estate passed by intestacy because the final will's revocation clause, revoking all prior wills, remained valid.

On appeal, the Court considered whether the probate court should have effectuated a prior residuary clause in favor of the cousin under the doctrine of dependent relative revocation. The doctrine of dependent relative revocation, as adopted by the Florida Supreme Court, means that where a "testator makes a new will revoking a former valid one, and it later appears that the new one is invalid, the old will may be re-established on the ground that the revocation was dependent on the validity of the new one, [the] testator preferring the old will to intestacy." Stewart v. Johnson, 194 So.2d 869, 870 (Fla. 1940).

The presumption of dependent relative revocation arises where there is a showing of similarity between a decedent's testamentary instruments. This similarity is construed broadly, and does not mean that the specific beneficiaries have to be the same. The fact that certain people are consistently not beneficiaries of the decedent's testamentary documents can be enough. The probate court may consider any admissible extrinsic evidence when measuring similarity for purposes of the doctrine's application. Once the doctrine's presumption arises, pursuant to F.S. 90.302(2) and 733.107(2), the burden of proof then shifts to the opponent of the presumption to show that the testator held an independent, unaffected intention to revoke the otherwise affected will.

The Court held that because the party opposing the presumption could not prove that the last will's revocation clause was untainted by the same undue influence that infected its residuary clause and that the decedent had an independent intention to revoke all prior wills at the time she executed the last will so that the bulk of her estate would pass by intestacy, the revocation clause of the last will was also invalid. Because the decedent's prior documents were deemed to be "sufficiently similar," and because the decedent seemed to prefer testacy over intestacy, the Court held that the residuary clause in a prior will leaving the decedent's estate to the cousin should have been honored rather than distributing the residuary through intestacy.

Legal Aid Soc'y of Palm Beach Cnty., Inc. v. Guardianship of Jaffe, --- So.3d --- (Fla. 4th DCA 2015)

This case involves a dispute under Florida's Public Guardianship law following a trial court's order allowing one guardian to withdraw and appointing Legal Aid Society of Palm Beach County, Inc. ("Legal Aid") in its place.

This situation was created by an apparently difficult ward who had at least six court-appointed guardians, the most recent being Ferd and Gladys Alpert Jewish Family & Children's Service of Palm Beach County, Inc. ("AJFCS"). Unable to control the ward, AJFCS sought to withdraw as guardian and suggested that the Statewide Public Guardian be appointed its place. It did not put the Statewide Public Guardian or Legal Aid (the local public guardian) on notice, as required by Florida Probate Rule 5.560(c). The probate court approved of AJFCS's resignation and appointed Legal Aid as the successor guardian.

Legal Aid immediately sought a rehearing, asserting that it could not accept the appointment because if it took another ward it would exceed the statutory ratio of staff-to-wards provided in F.S. 744.708(7). The probate court granted the rehearing, and to remedy the over-capacity concern, it ordered AJFCS to "swap" with Legal Aid, and take over as guardian of a ward of Legal Aid.

On appeal, the Court held that the trial court had no authority to appoint Legal Aid as guardian of the ward. It reviewed the history of Florida's Public Guardianship law and the statutes governing public guardianship offices throughout the state. It found that F.S. 744.708(7) does not allow a trial court to compel the public guardian to exceed the statutorily imposed ratio. Nor can a trial court appoint the public guardian without notice to the public guardian under Florida Probate Rule 5.560.

The Court was concerned with the trial court's proposal to "swap" the wards to allow Legal Aid to remain within its ratio of staff-to-wards. The Court disagreed that swapping was a solution to the issue, because wards are not fungible - every ward has a guardianship plan, public guardians must personally visit their wards quarterly to develop some rapport with the ward, and a guardian is only able to withdraw if the court is assured that the ward's interest will not be placed in jeopardy. The Court recognized that the trial court was in a difficult position, and suggested that if the ward was truly a danger to herself, the court could have approved an involuntary hospitalization or placement, or could have requested the involvement of the Statewide Public Guardianship Office and the chief judge to review the capacity of the public guardian in Palm Beach County.

17. DID YOU KNOW?

A 10-gallon hat barely holds 6 pints.

18. FIRM ANNOUNCEMENTS

The firm wishes all of you a happy and healthy 2016!

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).

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[CONTINUE TO NEXT PAGE FOR CHARTS AND ATTACHMENTS!]

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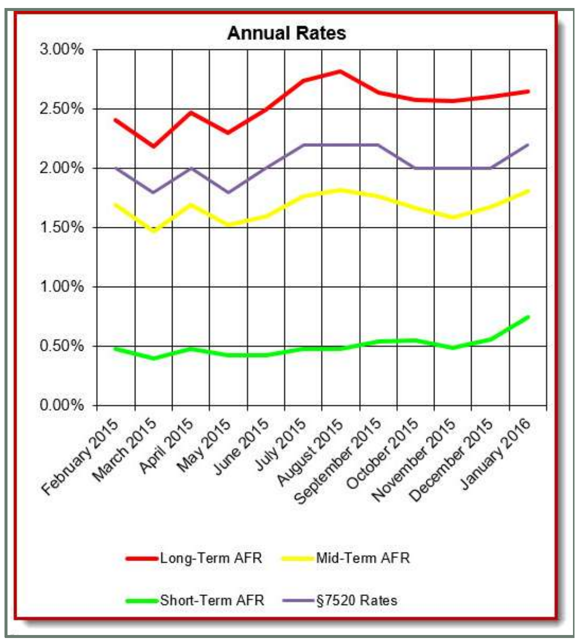
19. AFR RATES - JANUARY 2016

APPLICABLE FEDERAL RATES

Short-Term AFR	Annual	Semi annual	Quarterly	Monthly	Long-Term AFR	Annual	Semi annual	Quarterly	Monthly
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%
October 2015	0.55%	0.55%	0.55%	0.55%	October 2015	2.58%	2.56%	2.55%	2.55%
November 2015	0.49%	0.49%	0.49%	0.49%	November 2015	2.57%	2.55%	2.54%	2.54%
December 2015	0.56%	0.56%	0.56%	0.56%	December 2015	2.61%	2.59%	2.58%	2.58%
January 2016	0.75%	0.75%	0.75%	0.75%	January 2016	2.65%	2.63%	2.62%	2.62%

Mid-Term AFR	Annual	Semi annual	Quarterly	Monthly	Section 7520 Rates	
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%
October 2015	1.67%	1.66%	1.66%	1.65%	October 2015	2.00%
November 2015	1.59%	1.58%	1.58%	1.57%	November 2015	2.00%
December 2015	1.68%	1.67%	1.67%	1.66%	December 2015	2.00%
January 2016	1.81%	1.80%	1.80%	1.79%	January 2016	2.20%



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