October 6, 2016
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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.

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## No Later Voiding of Unnecessary QTIP Elections if Portability

**CITE**: Rev. Proc. 2016-49

**RELEVANT LAW:**

A QTIP election, once made, is irrevocable. The election has various implications, including:

> GOOD: Allowance of the marital deduction.
>
> ADVERSE: §2044 includes the QTIP trust property in the gross estate of the surviving spouse, and §2519 will take dispositions of the QTIP trust property.
>
> ADVERSE: Absent a "reverse QTIP" election under §2652(a)(3), the surviving spouse is treated as the transferor of the property for GST purposes under §2652(a).

A decedent's estate should be able to make a QTIP election even though one is not needed (e.g., adequate unified credit would allow for no estate tax even without the election). See the discussion on this below. If unneeded, the above adverse consequences still apply.

### 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

Rev. Proc. 2001-38 provides that the election will be void and the above adverse consequences will NOT apply if the election was not needed to reduce the estate tax liability to zero, and the procedures of the Revenue Procedure are followed. Note that the procedure does describe various circumstances when it will nonetheless not apply.

**RULING PRONOUNCEMENTS:**

The voiding procedures of Rev. Proc. 2001-38 are not available if a portability election is made (unless the DSUE amount is zero, or in other limited circumstances).

In estates in which the estate makes the portability election, QTIP elections will not be treated as void.

**COMMENTS:**

The premise of Rev. Proc. 2001-38 was that no one would intentionally make an unneeded QTIP election, since the adverse effects are significant. With portability, this is not the case. For example, the adverse effects may be mitigated or eliminated - the surviving spouse may have an enhanced gross estate but is also now receiving the DSUE amount to reduce or eliminate future transfer tax on it. Therefore, with portability the adverse effects are ameliorated or eliminated, so it is no longer appropriate to allow for automatic voiding of the QTIP election when it was unneeded to reduce estate tax at the first spouse's death.

With portability, at times it may be advantageous to make an unnecessary QTIP election for what would otherwise be an exempt credit shelter trust. For example, by including the bypass trust in the gross estate of the surviving spouse, its assets can now receive a basis step-up at the death of the second spouse - that would not be the case if the trust was an exempt bypass trust. This is more the case for lower value estates where growth in the QTIP trust is not projected to put the surviving spouse's estate into a taxable situation. The estate tax cost of inclusion under §2044 is offset, at least in part, by the DSUE amount coming over. Thus, this ruling may be a boon to some taxpayers.

By affirmatively making an unnecessary election in combination with portability, can the IRS nonetheless void the election of its own accord if it provides an advantage to the surviving spouse's estate, like the above basis step-up? Clearly, the IRS may want to void it, since it provides a basis step-up for what would otherwise have been a by-pass trust. Both the old and the new procedures are relief provisions for taxpayers, and require them to undertake steps to come within them to void the election - they really don't address what the IRS can do on its own motion. The procedures imply that if the taxpayer takes no action, then the QTIP election remains in force. Rev. Proc. 2001-38 was silent on the issue whether the IRS could void the election on its initiative - that makes sense since there was little reason for it to do so. Now, however, the IRS may want to do so to remove the above basis step-up effect. Can it do so, even though the taxpayer cannot? The 2016 procedure contains the language "In estates in which the executor made the portability election, QTIP elections will not be treated as void." Clearly, this means the taxpayers cannot use the voiding procedures to later take a second look at the situation and decide to void the prior QTIP election, and that makes sense. But should this be read as a commitment by the IRS that it won't void the election as unnecessary on its own initiative and motion - or just that the taxpayer cannot gain the relief of voiding an election in these circumstances? There are many who think the procedure is a statement by the IRS to not act on its own motion to void, but perhaps that quoted sentence applies only in context of the procedure - i.e., TAXPAYER requests for relief - since the IRS would not need to use the procedure to void then that statement may have no applicability?

If the IRS does challenge such a QTIP election, could it prevail in its challenge? It would be difficult, since there are only 3 requirements to make a QTIP election, and none of them relate to whether it is needed to reduce estate tax.

Note that taxpayers can still get the same basis step-up and transfer of DSUE without these issues by leaving the assets of the first spouse outright to the surviving spouse. But they cannot do so when a trust for the surviving spouse is desired (e.g., for asset protection, spendthrift, or remarriage purposes), so the procedure

is valuable for supporting this tax planning opportunity when a trust is desirable. Of course, making a QTIP trust election for the bypass trust comes with other potential adverse consequences, and thus may not often be desirable. For example, if the bypass trust is expected to materially appreciate in value, making the QTIP election exposes that appreciation to estate tax at the second spouse's death if available unified credit amounts are exceeded, as well as potential generation skipping tax.

## Hillary Clinton Advises of Changes She Would Make to the Estate Tax Rate

And its not downward – surprise!

Last week, Hillary advised that she would like to move the highest estate tax rate from its current 40% to 65%. She would also implement a 50% and 55% bracket.

## Mission Near Impossible - Reliance on Professionals Defense to Late Filing and Payment Penalties

An estate sought relief for $1.189 million in penalties for the late filing of a Form 706 and the late payment of estate taxes when the filing and payment were over a year late. The U.S. District Court granted the government's motion for summary judgment upholding the penalties, and the 6th Circuit Court of Appeals affirmed the lower court. The late filing and payment were principally attributable to the estate attorney who was responsible for the filings. The courts ruled for the government notwithstanding the following favorable facts supporting reasonable cause: (1) the executor was elderly, (2) he only had a high school diploma, (3) he had never interacted with attorneys before serving as executor, (4) he had never served as an executor, (5) the attorney was suffering from brain cancer and her competency was deteriorating during the applicable period, (6) the attorney told the executor that extensions had been obtained whenever questioned about the filing status, but this was a lie, (7) the State of Ohio refunded the penalties as to state estate taxes for reasonable cause, and (8) the government conceded that the executor heavily relied on the attorney.

The penalties for failure to timely file a tax return and pay tax do not apply if the failure is due to reasonable cause and not due to willful neglect. Code §6651(a). Treas. Regs. §301.6651-1(c)(1) requires the taxpayer seeking to avoid the penalties for late filing "to show that the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time." A failure to pay will be considered to be due to reasonable cause to the extent that the taxpayer has made "a satisfactory showing that he exercised ordinary business care and prudence in providing for payment of his tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship if he paid on the due date."

The principal case on the issue of reliance on a professional to avoid late filing and payment penalties by an estate is United States v. Boyle, 469 U.S. 241 (1985). There, the U.S. Supreme Court intentionally established a bright line that the burden of prompt filing is on the executor, not on an agent or employee of the executor, with exceptions to apply only in a "very narrow range of situations." The executor has the "obligation to ascertain the statutory deadline and then to meet that deadline, except in a very narrow range of situations." Id. at 249-50. The Court explained that "tax returns imply deadlines. Reliance by a lay person on a lawyer is of course common; but that reliance cannot function as a substitute for compliance with an unambiguous statute." Id. at 251. The Court therefore concluded that "Congress has charged the executor with an unambiguous, precisely defined duty to file the return within nine months . . . That the attorney, as the executor's agent, was expected to attend to the matter does not relieve the principal of his duty to comply with the statute." Id. at 250. Thus, executors seeking to avoid responsibility for late filing or late payment based on reliance on a professional begin the process with the weight of the case law against them. A review of the particular facts of this case and the appellate court's treatment of them will illustrate how difficult a burden the executor has.

Boyle leaves open the possibility that an executor's qualifications may impact the reasonableness analysis, with a concurring opinion noting that "senility, mental retardation or other causes" might render an individual incapable of complying with the statutory deadlines. The estate here noted that the executor lacked the sophistication of the executor in Boyle. Nonetheless, the executor in Boyle was not experienced in the field of federal estate taxation and relied on his attorney for instruction and guidance - both of those facts also applied here. Ironically, the actions by the executor in firing the attorney, hiring a new attorney, and then having the return and payment handled, once the failures became known were cited by the appellate court to prove the executor's ability to manage the estate. While not cited in this case, in Baccei v. U.S., 632 F3d 1140 (9th Cir. 2011), trustee was denied relief for late payment of estate taxes when his accountant filed a deficient request for extension of time to pay the estate taxes - citing Boyle and other cases, the court noted that a taxpayer "cannot rely on its employee or agent to escape responsibility for the nonperformance of nondelegable tax duties."

The estate also sought relief based on the attorney's deteriorating medical situation. While sympathetic, the appellate court noted that the question is whether the executor, and not the attorney, was reasonable in missing the deadline. Since the deadline would have been missed whether the attorney acted reasonably or not, that did not impact the reasonableness of the executor in relying on the attorney. The appellate court also relied on Valen Mfg. Co. v. United States, 90 F.3d 1190 (6th Cir. 1996) to demonstrate that the focus is on the taxpayer, and not the agent. There, an employee's active concealment of her failure to file the company's tax return and pay its liabilities was not enough to relieve the taxpayer of late filing and payment penalties. It also cited an unpublished decision in Vaughn v. United States, 635 F. App'x 216 (6th Cir. 2015), where Mo Vaughn, a former Major League baseball player, relied on a wealth-management firm and tax accountant to prepare and file his tax returns and make payments. Rather than pay the taxes, the manager embezzled millions of dollars. The appellate court there found the felonious actions of Mr. Vaughn's agents did not excuse him from the expectation that a taxpayer would know that he must file a return and pay taxes.

This case and the authorities cited therein set a high bar for taxpayers, but not necessarily an impossible one. In this case, the court did note that the executor was aware of the filing deadline, and also had various warnings that the attorney was not properly handling matters. Perhaps the absence of such facts might have resulted in a different finding. The appellate court also noted the case of Brown v. United States, 630 F. Supp. 57 (M.D. Tenn. 1985). While lacking precedential punch since it preceded both Valen and Vaughn, reasonable cause was allowed for an executor when the executor was 78 years old, only had a high school education, lacked experience in tax matters, was in failing health, and relied on an attorney to do the return and the attorney was hospitalized two weeks before the filing deadline. The appellate court noted that in Brown the executor was incapable of replacing the attorney. So, given the right circumstances, reasonable cause for late filing based on reliance on a professional might garner relief - but that will clearly be the exception and not the rule.

## ARTICLE ABSTRACT: CARRIED INTERESTS AND TAX TREATMENT OF FEE WAIVERS: AN ATTEMPT AT REFORM IN THE PROPOSED REGULATIONS

**TITLE**: Carried Interests and Tax Treatment of Fee Waivers: an Attempt at Reform in the Proposed Regulations

**AUTHOR(S):** William M. Funk

**PUBLICATION**: Business Entities, July/August 2016

**ABSTRACT (Key Points & Discussions):**

Managers of investment partnerships regularly attempt to structure their carried interests so as to be nontaxable upon issuance, and to avoid ordinary income treatment on partnership allocations and distributions relating to those partner interests. In so doing, they seek treatment as regular partners on distributions under Code §§704/731, and they seek to avoid treatment as interests received by a non-partner under Code §707(a) or as a guaranteed payment under Code §707(c).

Fund managers are often paid under a bifurcated regime, such as the 2-and-20 arrangement. Under that arrangement, the manager will receive a fixed fee, such as a 2% of value under management fee, and a share of profits, such as a 20% profits interest. These arrangements sometimes allow the manager to forgo payment of the 2% fixed fee and instead effectively exchange that fee for an additional profits interest beyond the 20%.

The article reviews and analyzes Proposed Treas. Regs. §1.707-2, which regulations seek to provide more certainty in regard to whether partnership interests issued for services, such as carried interests, will be taxable under Code §§704/731.

The article then addresses the particular question of how the conversion of a 2% fix management fee into an additional share of profits by the manager will be taxed. Its conclusion is that if properly structured (A) taxation of income allocated to and distributed to the partner on the newly issued profits interest will be treated as regular partnership transactions including under Code §§704/731, and not under Code §§707(a) or §707(c), but nonetheless (B) the exchange of the 2% fixed fee for an additional profits interest is taxable - principally because there is an ascertainable value of the additional profits interest team received (as measured by the fixed fee being foregone), in contrast to what was likely the initial nontaxable issuance of the initial 20% profits interest.

These new proposed regulations were issued in 2015.

## IRS Attempts Collection Against Surviving Spouse and Marital Deduction Property

In a recent U.S. District Court case from the Southern District of California, the court ruled on several motions to dismiss relating to the IRS' attempt to impose liability on a surviving spouse for estate taxes on the estate of her decedent husband, even though the property received by the surviving spouse was eligible for the marital deduction. The IRS attempted various approaches. Some of the more interesting approaches are discussed below, along with the court's resolution.

The facts are somewhat lengthy. Boiling them down to the key aspects, Allen Paulson (the decedent) entered into a prenuptial agreement with his spouse-to-be, Madeleine Pickens. The agreement included obligations for Mr. Paulson to make certain gifts to Ms. Pickens when he died. Mr. Paulson's living trust made provisions for Ms. Pickens, but gave her the ability to elect to receive either under the prenuptial agreement or the living trust provisions. The living trust provided for substantial gifts to a marital trust.

After Mr. Paulson's death, the IRS granted an extension of time to file the Form 706 and to pay estate taxes. When filed, the Form 706 reported a total gross estate of $187,729,626, a net taxable estate of $9,234,172, and an estate tax liability of $4,459,051, and this tax amount was assessed on November 26, 2001. The estate elected to pay $706,296 in tax and deferred the remaining tax under Code §6166.

The estate tax return was selected for audit. During the audit, disputes arose between the estate and trust fiduciaries, Ms. Pickens, and some beneficiaries. Under a 2003 settlement, Ms. Pickens gave up the distributions provided under both the prenuptial agreement and the living trust, instead choosing to receive direct distributions from the living trust of two residences and stock in a country club. These amounts were paid to Ms. Pickens as trustee of a trust bearing her name, the Madeleine Anne Paulson Separate Trust (or so it appears, since the trust bears both her first name and her married last name).

The IRS proposed a deficiency of almost $38 million in estate taxes. A Tax Court determination, based on the stipulation of the parties, resulted in an increase in the estate taxes of $6,669,447. The estate elected to add this to its Code §6166 deferred payment obligation.

In 2010, the IRS rescinded Code §6166 treatment due to missed installment obligation payments. This rescission was affirmed by the Tax Court in 2011 after a taxpayer challenge.

Additional litigation between interested parties resulted in the resignation of the executor in 2013. As of 2015, the estate tax liability stood at $10,261,217. The U.S. filed a complaint seeking judgment against the estate and various persons in their fiduciary and individual capacities, including Ms. Pickens. Various cross-claims were also filed between the parties. What follows below are some of the more interesting defenses raised by Ms. Pickens and the court's rulings on them.

Statute of Limitations on Collections. Ms. Pickens claimed that a portion of the tax being sought relates to the 2001 assessment, and is thus time barred by the ten-year statute of limitations. The U.S. argued that the 2001 assessed taxes were previously paid, and that the remaining tax relates to the 2006 post-audit assessment. Thus, applying a first-in, first-out approach to the taxes, this left all of the remaining taxes available for collection within the ten-year window. The court ruled in favor of the U.S.

Liability for Tax as Statutory Executor. The U.S. sought to hold Ms. Pickens responsible, in her representative capacity, for the tax as the executor of the estate under Code §2002. Ms. Pickens was never appointed and never served as the executor of the estate. Recall that the estate had an executor, but he resigned in 2013. The U.S. argued that Ms. Pickens is a statutory executor, subject to this liability, because she now owns property that formerly belonged to the decedent. Code §2203 defines an executor for these purposes as "the executor or administrator of the decedent, or, if there is no executor or administrator appointed, qualified, and acting within the United States, then any person in actual or constructive possession of any property of the decedent." The court noted that since there was no executor at the current time, the Code §2202 claim against her can proceed.

Transferee Liability as a Fiduciary of the Marital Trust. The government sought to impose transferee liability on Ms. Pickens under Code §6324(a)(2) as trustee of the Marital Trust. The court noted "it is unclear how Plaintiff can plausibly articulate a claim for relief against Ms. Pickens based on a role that she never assumed by virtue of the Marital Trust never being funded" and dismissed the Code §6324(a)(2) claim relating to trustee status.

Transferee Liability as a Beneficiary. The government also sought to impose transferee liability on Ms. Pickens under Code §6324(a)(2), this time as a beneficiary of the living trust. Reading the statute alone, one would likely side with the government on this. It reads: "If the estate tax imposed by chapter 11 is not paid when due, then the spouse, transferee, trustee (except the trustee of an employees' trust which meets the requirements of section 401(a)), surviving tenant, person in possession of the property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, who receives, or has on the date

of the decedent's death, property included in the gross estate under sections 2034 to 2042, inclusive, to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax." Here we have a "beneficiary" receiving property includible in the gross estate and there being unpaid estate tax.

However, case law has limited the meaning of the term "beneficiary" in Code §6324(a)(2) to mean only the beneficiary of a life insurance policy. The court declined to depart from that limited interpretation and dismissed the U.S.' Code §6324(a)(2) claim relating to beneficiary status.
Transferee Liability as a Fiduciary of the Madeleine Anne Paulson Separate Trust. The government also sought to impose transferee liability on Ms. Pickens under Code §6324(a)(2) as trustee of the Madeleine Anne Paulson Separate Trust. Noting that the settlement assets were paid to Ms. Pickens as trustee of that trust, the court allowed the claim to proceed against her in her individual capacity.

IRS as Third Party Beneficiary. In the 2003 settlement agreement, Ms. Pickens agreed to indemnify other parties to the agreement for estate taxes attributable to assets she received. The IRS sought to piggy-back on those indemnification provisions to collect from Ms. Pickens based on it being a third party beneficiary of the settlement contract. The court allowed the IRS to proceed on that claim.

**COMMENTS:**

As to Statutory Executor Argument. One might wonder why the IRS is seeking to hold Ms. Pickens liable in her representative capacity, since if the transfers to her were respected as eligible for the marital deduction (as they opinion indicates they were), one would presume that the tax apportionment provisions of the subject documents and/or state law would direct payment of the estate taxes away from the assets she received. However, while such apportionment provisions may dictate who can sue who for contribution and indemnification, there is no general bar as to the IRS collecting from assets that are eligible for the marital deduction even if the dispositive documents or state law indicate otherwise.

The IRS also may have had a more hidden motive. There is language in the opinion that the IRS is seeking to obtain a judgment against the estate by naming its executor or administrator in a representative capacity so as to reduce the estate tax liability to a judgment under Code §7402, and to extend the statute of limitations for collection of that tax under Code §6502.

Ms. Pickens argued that the IRS' position would render every beneficiary of an estate a statutory executor when the appointed, qualified, and acting executor resigns. An interesting argument, but one that apparently did not impress the court.

As to Transferee Liability as a Beneficiary. The limitation of the term "beneficiary" to a beneficiary of a life insurance trust is a warning to not always take unambiguous statutory language at its face value.

As to Transferee Liability as a Fiduciary of the Madeleine Anne Paulson Separate Trust. Bad luck for Ms. Pickens on this one. Having ruled that Ms. Pickens has no transferee liability as a beneficiary, if the settlement agreement paid the assets directly to Ms. Pickens instead of a trust for her, there probably would be no transferee liability.

As to IRS as Third Party Beneficiary. Taxpayers often include tax indemnification provisions in their settlement and other agreements. The recognition of third party beneficiary rights in the IRS suggests that such agreements be drafted in a manner (if practical and possible) in a manner that eliminates such a third party beneficiary claim. One has to wonder again where the IRS is going with this, since Ms. Pickens indemnification relates only to taxes on the assets she received. As marital deduction property, there should be no taxes and thus no indemnification. The opinion does give mention of other settlement agreement language that perhaps overcomes this limitation.
Overall, the case also demonstrates that the IRS is not immune from the well-known litigation strategy of throwing it all against the wall to see what sticks.

*U.S. v. Paulson, Case No. 3:15-cv-02057, U.S. District Court, Southern District of California (September 6, 2016)*

## REGULATIONS ISSUED TO MAKE MARRIAGE REFERENCES GENDER NEUTRAL

Further to the recent U.S. Supreme Court cases recognizing same-sex marriages, the IRS has issued final regulations that codify same-sex marriages for federal tax purposes, regardless of gender. Under Treasury Regulations § 301.7701-18(a), the terms "spouse," "husband," and "wife" mean an individual lawfully married to another individual, and the term "husband and wife" means two individuals lawfully married to each other.

Different jurisdictions have different rules and definition for marriage - what applies for federal tax purposes? The regulations adopt two different rules to determine when there is a "marriage." For persons married in the U.S., there will be a marriage if it is recognized by the state, possession, or territory of the U.S. in which the marriage takes place. The domicile or residence of the parties is not relevant - the U.S. will focus on the place of celebration. For foreign marriages, it will be recognized if the relationship is denominated as marriage and would be recognized as marriage under the laws of at least one state, possession, or territory of the U.S.

Note that legal relationships that are not denominated as marriage, such a registered domestic partnership, civil union, or other similar relationship, will NOT be treated as a marriage.

*T.D. 9785, 08/31/2016, Reg. § 1.7701-1, Reg. § 20.7701-2, Reg. § 25.7701-2, Reg. § 26.7701-2, Reg. § 31.7701-2 , Reg. § 301.7701-18*

## TREASURY PROVIDES RELIEF FOR LATE 60-DAY ROLLOVERS

The Internal Revenue Code allows qualified plan participants and IRA owners to withdraw assets from a plan or IRA and contribute them to another (or the same) plan or IRA without being taxed on the distribution, if the rollover occurs within 60 days. If the deposit occurs after 60 days, the taxpayer can seek a Private Letter Ruling that avoids taxation if the taxpayer has good cause. Unfortunately, such a route is expensive, requiring a $10,000 user fee.

In Rev.Proc. 2016 – 47, Treasury is now allowing taxpayers that make a late rollover to avoid tax without having to seek a Private Letter Ruling if the lateness is attributable to certain listed circumstances. If a taxpayer qualifies, he or she sends a certification letter to the recipient plan or IRA administrator or custodian. The taxpayer is then off the hook for being taxed, unless the IRS audits and finds that the taxpayer really did not meet the criteria for avoiding taxation.

To qualify to use the procedure, the taxpayer must not have previously been denied a waiver by the IRS for the particular distribution at issue. The taxpayer must also complete the rollover as soon as practicable once the reason for not rolling over timely has ended (with a 30 day safe harbor applying to this requirement).

Here are the 11 reasons for a late rollover that will allow use of the procedure:

> (a) an error was committed by the financial institution receiving the contribution or making the distribution to which the contribution relates; (b) the distribution, having been made in the form of a check, was misplaced and never cashed; (c) the distribution was deposited into and remained in an account that the taxpayer mistakenly thought was an eligible retirement plan; (d) the taxpayer's principal residence was severely damaged; (e) a member of the taxpayer's family died; (f) the taxpayer or a member of the taxpayer's family was seriously ill; (g) the taxpayer was incarcerated; (h) restrictions were imposed by a foreign country; (i) a postal error occurred; (j) the distribution was made on account of a levy under § 6331 and the proceeds of the levy have been returned to the taxpayer; or (k) the party making the distribution to which the roll over relates delayed providing information that the receiving plan or IRA required to complete the rollover despite the taxpayer's reasonable efforts to obtain the information.

*Rev.Proc. 2016 – 47*

Spouses Need to Exercise Care in Transferring Property between Them When Subject to a Marital Agreement [Florida]

Many prenuptial and postnuptial agreements provide for a class of property known as Separate Property. Such Separate Property will often not be subject to claim by or transfer to the non-owning spouse upon death or divorce. When Separate Property is provided for in the agreement, the participants need to exercise care in transferring property between and among them to avoid unintended consequences.

This was illustrated in a recent case when a Separate Property provision was included in a prenuptial agreement. The agreement also contained a paragraph that provided if a party acquires real property in his or her own name it shall be that party's Separate Property.

What occurred is that the husband transferred funds from his own separate account to a separate account of his wife. The wife then acquired real property in her name with those funds. Eight months later, she transferred the property by quitclaim deed to the husband, where it remained until divorce.

The trial court found the property to be the Separate Property of the wife at the time of divorce, and thus belonged to her. This was based on the above-described provision that if a party acquires real property in her own name it shall be her Separate Property.

The appellate court reversed the trial court and found the property to be the Separate Property of the husband. It determined that when the property was first acquired, it was the wife's Separate Property because it was in her name. However, since the agreement also allowed a party to gift away his or her Separate Property, when she quit claimed that property to her husband it was then titled in his name and became his Separate Property.

The fact pattern here is pretty specific. However, there is a general lesson here. Transfers of property between and among spouses can have unintended consequences when there is a marital agreement in place. If some type of erroneous transfer occurs, and the parties seek to correct it, they should consider an amendment to the agreement so as to clarify the treatment of the correction. Further, such transfers may invoke difficult contractual interpretations, as evidenced by this case with the trial court and the appellate court reach different conclusions, again suggesting care in such transfers.

*Colino v. Volino, 41 Fla. L. weekly D1990b (5th DCA, August 26, 2016)*

## Florida Case Law Update - Trust, Estate & Guardianship Litigation

This section will return following Jenna Rubin's return from maternity leave.

## Did You Know?

Leonardo Da Vinci invented the scissors.

## FIRM ANNOUNCEMENTS

Charles (Chuck) Rubin was named 2017 Lawyer of the Year in Tax Law by Best Lawyers for the South Florida region. He was also named the USA Estate Planning Lawyer of the Year by FinanceMonthly in its annual Global Awards.

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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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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!]***

# AFR RATES - OCTOBER 2016

APPLICABLE FEDERAL RATES

| Short-Term AFR | Annual | Semi annual | Quarterly | Monthly | Long-Term AFR | Annual | Semi annual | Quarterly | Monthly |
|---|---|---|---|---|---|---|---|---|---|
| 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% |
| February 2016 | 0.81% | 0.81% | 0.81% | 0.81% | February 2016 | 2.62% | 2.60% | 2.59% | 2.59% |
| March 2016 | 0.65% | 0.65% | 0.65% | 0.65% | March 2016 | 2.33% | 2.32% | 2.31% | 2.31% |
| April 2016 | 0.70% | 0.70% | 0.70% | 0.70% | April 2016 | 2.25% | 2.24% | 2.23% | 2.23% |
| May 2016 | 0.67% | 0.67% | 0.67% | 0.67% | May 2016 | 2.24% | 2.23% | 2.22% | 2.22% |
| June 2016 | 0.64% | 0.64% | 0.64% | 0.64% | June 2016 | 2.24% | 2.23% | 2.22% | 2.22% |
| July 2016 | 0.71% | 0.71% | 0.71% | 0.71% | July 2016 | 2.18% | 2.17% | 2.16% | 2.16% |
| August 2016 | 0.56% | 0.56% | 0.56% | 0.56% | August 2016 | 1.90% | 1.89% | 1.89% | 1.88% |
| September 2016 | 0.61% | 0.61% | 0.61% | 0.61% | September 2016 | 1.89% | 1.89% | 1.89% | 1.89% |
| October 2016 | 0.66% | 0.66% | 0.66% | 0.66% | October 2016 | 1.95% | 1.94% | 1.94% | 1.93% |

| Mid-Term AFR | Annual | Semi annual | Quarterly | Monthly | Section 7520 Rates | |
|---|---|---|---|---|---|---|
| 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% |
| February 2016 | 1.82% | 1.81% | 1.81% | 1.80% | February 2016 | 2.20% |
| March 2016 | 1.48% | 1.47% | 1.47% | 1.47% | March 2016 | 1.80% |
| April 2016 | 1.45% | 1.44% | 1.44% | 1.44% | April 2016 | 1.80% |
| May 2016 | 1.43% | 1.42% | 1.42% | 1.42% | May 2016 | 1.80% |
| June 2016 | 1.41% | 1.41% | 1.41% | 1.41% | June 2016 | 1.80% |
| July 2016 | 1.43% | 1.42% | 1.42% | 1.42% | July 2016 | 1.80% |
| August 2016 | 1.18% | 1.18% | 1.18% | 1.18% | August 2016 | 1.40% |
| September 2016 | 1.22% | 1.22% | 1.22% | 1.22% | September 2016 | 1.40% |
| October 2016 | 1.29% | 1.29% | 1.29% | 1.29% | October 2016 | 1.60% |