GUTTER CHAVES JOSEPHER RUBIN FORMAN FLEISHER MILLER P.A.

TAX, BUSINESS, & ESTATE AND TRUST LITIGATION UPDATE

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CONTENTS

Lenders Beware–Retroactive Tax Lien Trumps Recorded Mortgage [Florida]

Possession May Be Nine-Tenths of the Law - but Watch out for the Other One-Tenth

Specificity Needed in Powers of Attorney for Information Returns

Ding, Dong, the Witch is Dead

What Happens to Monetary Penalties When Convicted Defendant Dies with Pending Appeals?

New Useful Florida Homestead Concepts Diagram

Audit of Predeceased Spouse Permitted for Purposes of DSUE Adjustment for Surviving Spouse's Estate

Time to Revise Your Partnership and LLC Agreements?

Failure to Disclose Adjusted Basis on Disclosure Form Costs Taxpayer $33M+ Charitable Deduction

Florida Case Law Update - Trust, Estate & Guardianship Litigation

Did You Know?

Firm Announcements

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.

Lenders Beware–Retroactive Tax Lien Trumps Recorded Mortgage [Florida]

By Charles (Chuck) Rubin

Under Florida law, a mortgage lender's lien against real property takes priority over later filed liens. However, under Fla.Stats. §197.122(1), ad valorem tax liens filed against Florida real property will take priority over a previously filed mortgage – such tax liens become super liens. Not great for lenders, but at least they can deal with exposure to these tax liens against their security by making sure ad valorem taxes are properly paid (e.g., through mortgage escrows and/or covenants in the mortgage to keep taxes current).

Fla.Stats. §196.161 allows a property assessor to go back 10 years and assess taxes, a penalty of 50% of taxes, and 15% interest, for taxes that the assessor lost out on if the owner of the property was improperly granted a homestead exemption. If a lien for these taxes is superior to a mortgage that has been filed prior to the filing of this lien, a mortgage lender's risk for unpaid ad valorem taxes would be significantly increased.

In a recent case, a mortgage lender recorded a mortgage against real property in September 2007. In January 2014, the county recorded a tax lien under Fla.Stats. §196.161 against the property. In May 2015, the lender foreclosed its mortgage. The trial court held that the county's tax lien was inferior to the lender's mortgage lien. So far, so good for the mortgage lender.

On appeal, the county argued that Fla.Stats. §197.122(1) gives superiority to ad valorem tax liens, and thus, the special 10 year tax lien under Fla.Stats. §196.161 was superior to the lender's mortgage lien. The lender argued that Fla.Stats. §196.161(3) gives the lender superiority – that provision provides "[p]rior to the filing of such notice of lien, any purchaser for value of the subject property shall take free and clear of such lien." Equating itself to a purchaser, the mortgage lender argued Fla.Stats. §196.161(3) gives it the superior lien.

The appellate court noted that yes, Fla.Stats. §196.161(3) does allow BUYERS of real property to acquire real property without being subject to this 10 year lien if the tax lien is filed after the purchase. However, Fla.Stats. §196.161(3) says nothing about making the 10 year lien subordinate to previously filed liens. Thus, the super lien granted to the tax collectors under Fla.Stats. §197.122(1) trumps mortgage holders.

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

Mortgage holders will now need to deal with this exposure when making loans, if the property has been granted homestead status. Note that there are other ad valorem tax liens that allow a 10 year retroactive adjustment period, including Fla.Stats. §193.703 (reduction in assessment for living quarters of parents or grandparents), Fla.Stats. §196.075 (additional homestead exemption for persons 65 years or older), Fla.Stats. §196.011, and Fla.Stats. §193.155 (Save our Homes annual limitation in value increases for homestead property). So presumably, the same exposure to mortgage lenders will apply for these other potential retroactive adjustments. The last one could be especially onerous since the potential tax adjustments if the Save our Homes cap is found not to apply to a parcel of real property can be significant.

Increasing the risks to mortgage lenders will likely result in higher costs to borrowers. Perhaps the Florida legislature may want to reorder the tax lien priorities for these retroactive liens.

Miami-Dade County v. Lansdowne Mortgage LLC, 2017 WL 4655060 (3rd DCA 2017)

Possession May Be Nine-Tenths of the Law - but Watch out for the Other One-Tenth

By Charles (Chuck) Rubin

Prudential Insurance Company of America issued a life insurance policy on the life of Russell. Russell's wife, Sherry, was the beneficiary. The policy contained $332,000 of term life coverage and $332,000 of accidental death coverage.

Russell died on June 24, 2015. On June 26, 2015, Sherry made a claim. On January 21, 2016, Prudential settled the life portion by paying $343,240.50 into a Prudential Alliance Account in Sherry's name. This account was an interest-bearing account, and Sherry could draw against it by check or withdrawal.

On January 26, 2016, a grand jury indicted Sherry for the murder of Russell. Between January 29 and February 3, 2016, Sherry wrote three checks withdrawing $83,855.50 from the account. On February 8, 2016, Prudential notified Sherry that it had frozen the account at a time when it held $259,616.51.

On May 25, 2016, Prudential filed an interpleader complaint in federal court to join four potential beneficiaries under the policy, presumably due to concerns under a slayer statute that disqualifies a murderer from receiving insurance benefits payable because of his or her crime. It also sought to deposit into the court registry total death benefits of $591,564.90, plus applicable interest. Importantly, Prudential made no mention to the court of the $343,240.50 already paid to Sherry's account nor Sherry's withdrawals from that account. It also appears that Prudential did not give notice of the court registry petition to Sherry and/or other parties. The court granted Prudential's motion.

About three months later, Sherry filed an answer and counterclaim. She alleged that Prudential illegally took $259,616.51 from her account and placed it into the court's registry without her permission. She also alleges fraud and breach of contract related to her agreement with Prudential to place the distributed term life benefits into an account with Prudential and for her to have access and control over the account.

The court found that Prudential violated Federal Rule of Civil Procedure 67 in seeking to deposit funds into the court registry without giving notice to every party. The court vacated its earlier order and directed the distribution to Prudential of the funds previously deposited.

The court granted Prudential's interpleader request to join the other potential beneficiaries but only as to the $332,000 of accidental death benefits that had not been previously deposited to Sherry's account. It denied the request as to the funds that Prudential removed from Sherry's account since there is a question of whether Prudential rightfully possessed those funds.

Prudential sought the court to discharge it from the case and to enjoin the defendants from a further suit against it. The court declined to do that because Prudential is not a disinterested stakeholder, largely because Sherry has made a plausible counterclaim for conversion and fraud.

Prudential also sought judgment on the pleadings for the conversion claim. It claimed it did not commit the tort of conversion because it did not convert the funds for its own use. The court denied that aspect, when it found a potential benefit to Prudential in the deposit of the account funds - namely, the protection against liability if Sherry instead dissipated those funds and the other beneficiaries, would found to be entitled to receive the insurance proceeds. The court also noted that if Prudential had been transparent about how it obtained the account funds it sought to deposit, the court would never have allowed them to be deposited in the registry without the approval of the other parties. Importantly it noted that "Prudential now has possession of Sherry Bailey's allegedly converted funds and it is potentially liable for conversion." Thus, the court is allowing Sherry's conversion claim to proceed.

The court also allowed Sherry's fraud claim to proceed, based on her allegations that Prudential willfully removed money from her account in violation of state law, or in the alternative committed fraud when it remove money from the account after assuring her that the money in the account would be secure and her money.

The court also denied Prudential's request for attorneys' fees in the interpleader under precedent that provides unlike innocent stakeholders who unwittingly come into possession of a disputed asset, an insurance company can plan for interpleader as a regular cost of business.

By freezing Sherry's account balance and paying it into the court registry without proper notice, Prudential's self-help to avoid the risk of double liability may have opened itself up to liability for conversion, fraud, and

breach of contract. Perhaps Prudential may ultimately be successful in fending off Sherry's claims, but the trial court at this point indicated there might be merit to those claims.

Perhaps Prudential need not have taken any action in this regard. The court notes that under the Georgia statutes, O.C.G.A. § 33-24-41 provides: "Whenever the proceeds of . . . a life . . . insurance policy . . . become payable . . . and the insurer makes payment of the proceeds . . . the payments shall fully discharge the insurer from all claims under the policy or contract unless, before payment is made, the insurer has received . . . written notice . . . [that another] person claims to be entitled to the payment or some interest in the policy or contract." Perhaps Prudential received the requisite written notice, or there are other bars to the protection of the statute, but if not, Prudential need not have frozen and effectively seized the account to protect itself from liability to the other beneficiaries. Interestingly, Prudential tried to use this statute as a defense to Sherry's claims. The court noted, however, that the statute protects Prudential only against claims by another claimant to the policy proceeds – not the claims being made here by Sherry.

There is a kernel of trust in the bromide "possession is nine-tenths of the law." While it may have seized possession of Sherry's remaining proceeds, the other one-tenth of the law may end up costing it dearly.

Prudential Ins. Co. of Am. v. Bailey, 2017 U.S. Dist. LEXIS 161097 (USDC for So. Ga., September 29, 2017)

SPECIFICITY NEEDED IN POWERS OF ATTORNEY FOR INFORMATION RETURNS

By Charles (Chuck) Rubin

Most practitioners are familiar with the Form 2848, Power of Attorney and Declaration of Representative. This form is signed by a taxpayer and designates an eligible person to represent the taxpayer before the IRS. IRS personnel will typically not provide information or otherwise discuss a taxpayer's circumstances with a representative until they are provided with a Form 2848.

The Form requires a description of the matters for which the representation is authorized, including, where relevant, the type of tax involved, the federal tax form number, the specific year(s) or period(s) involved, and, in estate matters, the decedent's date of death. The portion of the form where this is done looks like this:

3 Acts authorized (you are required to complete this line 3). With the exception of the acts described in line 5b, I authorize my representative(s) to receive and inspect my confidential tax information and to perform acts that I can perform with respect to the tax matters described below. For example, my representative(s) shall have the authority to sign any agreements, consents, or similar documents (see instructions for line 5a for authorizing a representative to sign a return).

Description of Matter (Income, Employment, Payroll, Excise, Estate, Gift, Whistleblower, Practitioner Discipline, PLR, FOIA, Civil Penalty, Sec. 5000A Shared Responsibility Payment, Sec. 4980H Shared Responsibility Payment, etc.) (see instructions)	Tax Form Number (1040, 941, 720, etc.) (if applicable)	Year(s) or Period(s) (if applicable) (see instructions)

For a given year, a taxpayer will typically fill in the type of tax in the first column, Form 1040 if individual income tax is at issue in the second column, and the year at issue in the third (e.g., "2016"). You would think that if you filled in "1040," then the IRS would be authorized to discuss with the representative all forms filed with or attached to the Form 1040. But you would be wrong, or at least so says the IRS.

In a recent Chief Counsel Advice, the IRS advised that such a Form 1040 would not be adequate to cover civil penalties relating to the nonfiling or incomplete filing of an international information return that was or should have been attached to the Form 1040. Thus, for example, the IRS will not discuss penalty issues with a representative relating to a Form 5471, Information Return of U.S. Persons With Respect To Certain Foreign Corporations, if the Form 2848 only listed Form Form 1120. The Advice is based on Reg. § 601.503(a)(6), which requires "a clear expression of the taxpayer's intention concerning the scope of the authority granted to the recognized representative."

Is the IRS taking too narrow a reading? Maybe, but it is what is, and practitioners should endeavor to list all applicable information returns that may be relevant to the purpose of the Form 2848. It is not a disaster if the Form 2848 is too narrow since a new Form 2848 that covers the requisite forms can always be obtained and submitted. It is highly unlikely that a court will ever adjudicate this issue, so unless the IRS changes its mind it looks like taxpayers are stuck with this interpretation.

The Advice also notes that the designation of a Form 1040 or Form 1120 likewise does not give authorization to issues relating to information returns that are NOT attached to the income tax return.

What if the Form 2848 says "Form 1040" and the Description section says "Income, and all civil penalties?" In the past, this was allowable, but the Advice advises that changes in the instructions and the form require specificity such that discussions of tax, civil penalties, payment and interest can only be had as to the specific form listed. What if the Description says "Form 1040, and all information returns required to be filed therewith?" No answer to that one yet.

DING, DONG, THE WITCH IS DEAD

--Here lies the remains of the Code §2704 Proposed Regulations. RIP, 2016-2017--

As part of President Trump's mandated review of federal regulations, the Secretary of Treasury has issued a report specifically recommending the elimination of the Code §2704 Proposed Regulations. While these regulations may reappear in revised form someday, it is highly unlikely that the current version will ever be finalized.

Of less general import, the Secretary also recommended the withdrawal of proposed regulations under Section 103 defining a political subdivision.

Other regulations were not targeted in their entirety – instead the Secretary recommended only partial revocation. These are:

> -Final Regulations under Section 7602 on the Participation of a Person Described in Section 6103(n) in a Summons Interview
>
> -Regulations under Section 707 and Section 752 on Treatment of Partnership Liabilities
>
> -Final and Temporary Regulations under Section 385 on the Treatment of Certain Interests in Corporations as Stock or Indebtedness

Lastly, the Secretary recommended substantial revisions to these regulations:

> -Final Regulations under Section 367 on the Treatment of Certain Transfers of Property to Foreign Corporations
>
> -Temporary Regulations under Section 337(d) on Certain Transfers of Property to Regulated Investment Companies (RICs) and Real Estate Investment Trusts (REITs)
>
> -Final Regulations under Section 987 on Income and Currency Gain or Loss With Respect to a Section 987 Qualified Business Unit

Second Report to the President on Identifying and Reducing Tax Regulatory Burdens, October 2, 2017

WHAT HAPPENS TO MONETARY PENALTIES WHEN CONVICTED DEFENDANT DIES WITH PENDING APPEALS?

This was the question in a recent Second Circuit Court of Appeals case. The defendant was convicted of securities fraud, mail and wire fraud and obstruction of justice, and entered into a negotiated guilty plea to criminal tax charges. Asset forfeiture, a fine, and a restitution order resulted, among other consequences. Bail bond had also been forfeited, due to violations of the bail order. At the time of death, appeals were pending on the criminal convictions.

The case involved the rare application of the abatement ab initio doctrine. This doctrine provides that when a convicted defendant dies while his direct appeal is pending, his death abates not only the appeal but also all proceedings in the prosecution from its inception.The effect is to leave the defendant as if he had never been indicted or convicted. This doctrine is rooted in the interests of finality and just punishment. Finality requires that a defendant not stand convicted without resolution of the merits of an appeal, and recognition of the purposes of just punishment leads to the conclusion that to the extent that the judgment of conviction orders incarceration or other sanctions that are designed to punish the defendant, that purpose can no longer be served.

The court addressed the impact of the ab initio doctrine to the following aspects of the case:

Convictions. The defendants convictions were abated, except those for which no appeal was pending. Since the defendant pled guilty to the tax evasion counts and waived his right to appeal, those did not abate.

Restitution. Other courts have split on the question whether restitution obligations abate at death, since it is usually more in the nature of making the victim whole and less about punishment. Those courts allowing abatement do so because restitution depends on a valid, final conviction, which does not occur due to the pending appeal. Others that hold that restitution does not abate do so because they consider restitution to be compensatory, not punitive in nature. The Second Circuit sided on the side of abatement at death and voided the restitution obligations. The opinion discussed whether if restitution had already been paid, then the payment and punishment would have been complete and irretreivable and thus could not be abated. However, it did not decide this issue since the restitution payments were stayed during the pendency of the appeal and thus had not been "paid.".

Bail Bond Forfeiture. If the ab initio doctrine wipes out the conviction, is a bail bond forfeiture also eliminated? The court ruled no. The court indicated that the bail bond forfeiture was not part of the conviction but related to a violation of a civil contractual agreement – that is, it was a civil matter and nota criminal matter. Since the ab initio doctrine is a criminal doctrine, it does not apply to the bail bond forfeiture.

U.S. v. Brooks, 2017 WL 4158790 (2nd Cir. 2017)

NEW USEFUL FLORIDA HOMESTEAD CONCEPTS DIAGRAM

Several years ago I prepared a table to assist practitioners in determining what restrictions apply on a transfer of homestead property at death or during lifetime. You can access it here.

Homestead status has other implications, including protections from creditors, inclusion or exclusion from the probate estate, and ad valorem tax implications. The Florida Statutes also employ the term "protected homestead" in defining some of these aspects. The whole area makes for a set of interrelated and unrelated concepts and implications that is difficult to both comprehend and apply.

To help with understanding these concepts, and how the statutory term "protected homestead" fits in, I have created a new diagram. You can download a copy here.

Note that the chart does not address ad valorem tax considerations of homestead.

AUDIT OF PREDECEASED SPOUSE PERMITTED FOR PURPOSES OF DSUE ADJUSTMENT FOR SURVIVING SPOUSE'S ESTATE

A husband died in 2012, and his estate filed a gift tax return to report a deceased spousal unused exclusion (DSUE) and elected portability. The IRS sent a letter to husband's estate accepting the estate tax return as filed. Portability allows a surviving spouse or the estate of that surviving spouse to use the unused unified credit of the predeceased spouse for estate and gift tax purposes.

His wife died in 2013. Her estate filed an estate tax return that applied the husband's DSUE amount to reduce her estate taxes. Notwithstanding any period of limitation in section 6501, after the time has expired under section 6501 within which a tax may be assessed under chapter 11 or 12 with respect to a deceased spousal unused exclusion amount, the Secretary may examine a return of the deceased spouse to make determinations with respect to such amount for purposes of carrying out this subsection.

Under the authority of Code §2010(c)(5)(B) , the IRS examined the return of the husband's estate. Finding unreported lifetime gifts made by the husband before 2010, the IRS reduced the DSUE amount and thus increased the estate taxes due by the wife's estate.

The Wife's estate contested the adjustment and raised numerous arguments why the DSUE reduction by the IRS was not permitted. Finding for the IRS, the Tax Court rejected all of the arguments of the taxpayer and upheld the IRS' reduction of the DSUE amount.

Code Section 2010(c)(5)(B) authorizes a review of the estate of a predeceased spouse to determine the DSUE amount available to the surviving spouse. It reads:

> Notwithstanding any period of limitation in section 6501, after the time has expired under section 6501 within which a tax may be assessed under chapter 11 or 12 with respect to a deceased spousal unused exclusion amount, the Secretary may examine a return of the deceased spouse to make determinations with respect to such amount for purposes of carrying out this subsection.

Argument – The Estate Tax Closing Document Is a Closing Agreement Under Code §7121, and the IRS is Estopped from a Further Review of the Husband's Estate

Under Code §7121(a) the IRS may enter into written agreements with any person relating to the liability of such person. Agreements under Code §7121 are final. The IRS cannot reopen a matter for which a closing agreement has been executed unless there is a showing of fraud or malfeasance or misrepresentation of a material fact. Under Treas. Regs. §601.202(b) & 301.7212-1(d)(1), only the prescribed forms, Form 866, Agreement as to Final Determination of Tax Liability, and Form 906, Closing Agreement on Final Determination Covering Specific Matters, qualify as closing agreements. No such forms were used here.

In extraordinarily rare cases, courts have bound the Commissioner to an agreement in the absence of a properly executed Form 866 or Form 906. In such cases, there has been a period of negotiation between the parties and a clear exchange of offer and acceptance. Here, no such negotiation took place and thus the court held there was no closing agreement.

As to estoppel, cases where courts have held that a taxpayer was adversely affected and the Commissioner was estopped, the adversely affected parties would have been forced to bear the cost of taxes that they would not otherwise have borne. Estoppel may also apply when a party with a withholding responsibility that acted in reliance on a previous Government position and received no benefit from a failure to pay a tax is now required to pay a tax that would normally be borne by another. Here, there was no risk of double taxation, and there were no facts showing that either estate acted in reliance on the Estate Tax Closing Document. Therefore, estoppel could not be applied.

Argument – The Examination of Husband's Estate was an Improper Second Examination

Code §7605(b) protects taxpayers from an impermissible second examination. The Commissioner does not conduct a second examination when he does not obtain any new information. The Commissioner did not request additional information from the husband's estate, and consequently, there was no second examination. Even if the Commissioner had conducted a second examination of the return for Franks estate, he would not have violated Code §7605(b) as to Minnies estate. The Tax Court and others have found that only the examined party is protected from second examinations. Here, the party that is claiming protection against the effects of a purported second examination (i.e., the wife's estate) was not the party that underwent the examination (i.e., the husband's estate).

Argument – Code §2010(c)(5)(B) Effective Date Precludes DSUE Adjustment for Gifts Made Before 2010

The estate argued that because the gifts at the center of this case were given before the effective date of Code §2010(c)(5)(B), the Commissioner cannot make adjustments to the DSUE as a result of those gifts. The Tax Court noted it is clear that the effective date of Code §2010(c)(5)(B), the estate tax amendment, is for decedents dying after December 31, 2010. Because both husband and wife died after December 31, 2010, Code §2010(c)(5)(B) applies to both their estates and that is the end of the story – there is no exclusion for gifts made before the effective date of the statute.

Argument – Code §2010(c)(5)(B) As Applied is Contrary to Congressional Intent and is a Due Process Violation since It Overrides the Statute of Limitations

The Supreme Court has held that the statutory text is the most persuasive evidence of congressional intent. Congress adopted a statute that explicitly gave the Commissioner the power to examine the returns of the predeceased spouse and adjust the amount of the DSUE outside of the period of limitations under Code §6501. This is a clear indication that the Commissioners exercise of this power is not in violation of congressional intent.

The wife's estate also argued that Code §2010(c)(5)(B) is unconstitutional for want of due process of law in that there is no statute of limitations. However, while the IRS may adjust or eliminate the DSUE amount reported on such a return, the IRS may assess additional tax on that return only if that tax is assessed within the period of limitations on assessment under Code §6501 applicable to the tax shown on that return. Thus, the statute is not unconstitutional.

Estate of Minnie Lynn Sower et al. v. Commissioner, No. 32361-15, 149 T.C. No. 11

TIME TO REVISE YOUR PARTNERSHIP AND LLC AGREEMENTS?

In June, the IRS reissued proposed regulations that adopt new centralized partnership audit procedures. These will replace the current TEFRA audit rules.

The short story is that by default, the PARTNERSHIP is responsible for paying any additions to tax, although the partnership can elect to push this out to the partners. The new rules also replace the "tax matters partner" with a "partnership representative" – this representative has greater authority to act without the involvement of the partners than in the past. There is also an opt-out election that smaller qualified partnerships can take.

Partnerships and LLCs should amend their partnership and operating agreements to provide for the changes in the law, although perhaps they may want to wait for final regulations to be issued. For more detail on the changes and items that should be addressed in the agreements, click HERE.

Failure to Disclose Adjusted Basis on Disclosure Form Costs Taxpayer $33M+ Charitable Deduction

Under Treas. Regs. §1.170A-13, taxpayers making substantial noncash charitable contributions are required to disclose information regarding the contribution on Form 8283.

In March 2002, a partnership paid $2.95 million to acquire a remainder interest in property. A year and a half later, it assigned the interest to a university and claimed a charitable deduction of $33,019,000. The Form 8283 that the taxpayer submitted with its income tax return to disclose the contribution required the donor to provide the "Donor's cost or other adjusted basis," but the partnership left that disclosure blank.

The IRS sought to disallow the deduction for the taxpayer's failing to meet the reporting requirements. The taxpayer responded with a substantial compliance argument.

On review, the Tax Court held a taxpayer can raise substantial compliance, since the applicable regulations are directory and not mandatory. Reviewing other case law, the Tax Court noted that in determining whether there was substantial compliance the court considers whether the taxpayer provided sufficient information to permit the IRS to evaluate the reported contributions, with an eye to the purpose of the substantiation requirements. That purpose is to alert the IRS, in advance of audit, of potential overvaluations of contributed property and thereby deter taxpayers from claiming excessive deductions in the hope they would not be audited. The court went on to comment that given the significant disparity between the claimed fair market value of the contributed property and the price paid for the property just 17 months earlier, had the basis of the property been disclosed it would have alerted the IRS to a potential overvaluation of the contributed property. Since the missing information kept the IRS from being able to evaluate its reported contribution without an audit, the Tax Court determined that substantial compliance could not be used to save the taxpayer from having its deduction disallowed.

RERI HOLDINGS I, LLC, JEFF BLAU, TAX MATTERS PARTNER, v. COMMISSIONER, 149 T.C. No. 1 (July 3, 2017)

Florida Case Law Update - Trust, Estate & Guardianship Litigation

By Jenna Rubin

Winslow v. Deck, --- Fla.2d DCA --- (Fla. 4th DCA 2017)

This decision centers on technical pleading requirements and a trial court's unwillingness to allow a party to amend their pleading to comply with those rules. Specifically, this decision deals with the dismissal of a counterpetition for administration as untimely pursuant to F.S. 733.212(8), which gives interested persons 3 months to contest the validity of a will, among other things. The Court reversed the trial court's dismissal.

The decedent in this case left two competing wills- one leaving his assets to his two children, the other leaving his assets to his friend. His daughter petitioned to have the first will admitted to probate and was appointed as personal representative. Later, the friend filed the second will, with an emergency petition to revoke the daughter's letters of administration, a counterpetition for administration, an objection to the daughter's petition for appointment as personal representative, and a declaration that the proceeding was adversary. Notably, she failed to file any pleading asking that the first will be revoked. The court upheld the letters of administration issued under the first will.

A year later, the daughter moved to dismiss the friend's counterpetition with prejudice, arguing that the friend lacked standing to contest the first will. She stated that after receiving notice that the decedent's estate would be administered according to the first will, she had three months to object to the probate of the first will, and despite her numerous pleadings, she failed to do so. The court agreed, dismissing the counterpetition with prejudice.

The Court reversed, finding that trial courts should not prevent a petitioner from challenging a will because of a technical defect in the petitioner's pleading without allowing for a reasonable opportunity to amend. It noted that while the friend's pleadings were not models of clarity, they were sufficient to withstand a motion to dismiss, because it was clear from the allegations contained in those filings that she sought to revoke the probate of the first will and admit the second will.

Hernandez v. Hernandez, --- So.3d --- (Fla. 3d DCA 2017)

In guardianship cases, the probate court has discretion to determine who is an "interested person" in a particular proceeding based on the particular purpose of, and the matter involved in, that proceeding. In this proceeding relating to the payment of attorney's fees from a Ward's assets, the Ward's son alleged that he had standing as an interested person to object to the payment of those fees.

The attorney's fees being sought in this case generated from the following proceedings:
(1) After one of the Ward's sons allegedly mistreated her, her other son petitioned to be appointed as her plenary guardian, to which the first son objected.
(2) Once the second son was appointed as plenary guardian for his mother, he engaged in an adversary proceeding against the first brother and his family for mistreating the mother.
(3) The second son, as guardian, petitioned to sell the Ward's property to pay for her care, to which the first son objected.

The first son did not receive notice of the petitions for fees. Nonetheless, the probate court approved the petitions for fees, and denied the first son's objections to those orders, finding that he was not an "interested person" entitled to notice of these petitions with standing to object. The first son appealed, arguing that he

was an an interested person in this proceeding because he was an active participant in the guardianship and filed a request for copies under FPR 5.060.

The Court disagreed. It noted that F.S. 744.108 provides that a petition for fees cannot be approved without prior notice to the guardian and the ward. The Florida Supreme Court in Hayes v. Guardianship of Thompson, 952 So.2d 498 (Fla. 2006) considered whether the language of F.S. 744.108 limited standing to only the guardian and the ward, and held that the determination of who is an "interested person" in a particular guardianship proceeding varied from time to time and must be determined according to the particular purpose of, and the matter involved in, the proceeding. Simply being next of kin does not confer "interested person" status, nor does filing a notice and request for copies under FPR 5.060 and being an active participant in the proceedings.

Ultimately, the Court held that Chapter 744 and the Hayes decision allow the probate court to strike a balance between ensuring that petitions for attorney's fees are carefully scrutinized and ensuring that these petitions are not subject to endless challenges by those whose only interest is to maximize their potential inheritance, and that the probate court had properly balanced the two in finding that the son lacked standing to object. It emphasized that a petitioners' involvement in guardianship proceedings that were necessitated by their own mistreatment of the ward and misappropriation of the ward's funds does not entitle them to then participate in proceedings involving requests for attorney's fees.

DID YOU KNOW?

It takes a lobster approximately seven years to grow to be one pound.

FIRM ANNOUNCEMENTS

Recent awards and accolades:

- Chambers and Partners firm recognition in Tax, with individual rankings for Robert Chaves, Richard Josepher and Charles Rubin
- Top Law Firm in South Florida - South Florida Business Journal
- U.S. News and World Report/Best Lawyers - Tier 1 Rankings for firm in Tax Law, Trusts & Estates Law, Litigation - Tax, and Litigation - Trusts & Estates
- U.S. News and World Report/Best Lawyers - Lawyer of the Year (Richard Josepher - Litigation and Controversy-Tax)
- Estate Planning Law Firm of the Year - USA by Worldwide Financial Advisor Magazine
- Estate Planning Lawyer of the Year - USA (Charles Rubin) by 2017 Global 100

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