

**Steve Leimberg's Estate Planning  
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**Subject: Steven M. Hogan, Bob Pierce, Alan S. Gassman and Peter Donovan: The Florida Documentary Stamp Tax and Revocable Living Trusts – A Swamp of Confusion for the Department of Revenue**

*“The Florida Department of Revenue surprised many practitioners by failing to properly apply the law concerning documentary stamp tax in a 2018 Technical Assistance Advisement by asserting that transfers of encumbered real property to revocable trusts are subject to the tax even when the transferor of the property is the sole beneficiary of the trust. The Department of Revenue’s position is inconsistent with applicable law, including the Florida Administrative Code, and with generally accepted conventions of estate planning practice in Florida. Nevertheless, confusion and damage to Florida’s reputation as a retiree friendly and stable jurisdiction occurring as a result of this, reminding many out of state lawyers of the 2005 Olmstead decision where the Florida Supreme Court ruled that charging order protection was not a sole remedy for the creditor with a judgement against an LLC member.”*

**Steven Hogan, Bob Pierce, Alan Gassman and Peter Donovan** provide members with commentary that examines the application of Florida’s documentary stamp tax to revocable living trusts.

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Here is their commentary:

## **EXECUTIVE SUMMARY:**

The Florida Department of Revenue surprised many practitioners by failing to properly apply the law concerning documentary stamp tax in a 2018 Technical Assistance Advisement by asserting that transfers of encumbered real property to revocable trusts are subject to the tax even when the transferor of the property is the sole beneficiary of the trust. The Department of Revenue's position is inconsistent with applicable law, including the Florida Administrative Code, and with generally accepted conventions of estate planning practice in Florida. Nevertheless, confusion and damage to Florida's reputation as a retiree friendly and stable jurisdiction occurring as a result of this, reminding many out of state lawyers of the 2005 *Olmstead* decision where the Florida Supreme Court ruled that charging order protection was not a sole remedy for the creditor with a judgement against an LLC member.

## **FACTS:**

Florida transfers of real property and interests in real property are subject to a tax which is typically referred to as the "documentary stamp tax."<sup>1</sup> The amount of tax due is calculated on a flat rate based upon the amount of

consideration for the transfer.<sup>2</sup> For purposes of the documentary stamp tax, consideration includes: money paid or to be paid; discharge of indebtedness; other property exchanged; and the value of any mortgage or other encumbrance on the property, whether assumed or not.<sup>3</sup>

The documentary stamp tax rate is 70 cents per \$100 of consideration (except in Miami-Dade county, where it is 60 cents per \$100 of consideration in addition to a surtax of 45 cents per \$100 on all transfers but those involving only a single-family dwelling).<sup>4</sup> The consideration value of a mortgage for purposes of the tax is deemed to be the total balance of the mortgage including accrued interest encumbering the real property at the time of the transfer.<sup>5</sup> All parties to a transfer of real property are potentially liable for the documentary stamp tax irrespective of who agrees to pay it; however, if a party is exempt from the tax, it must be paid by a different party.<sup>6</sup>

The key for application of the documentary stamp tax is whether a transfer has actually occurred, and whether consideration for that transfer was exchanged. When real property is “transferred” to a revocable trust of which the transferor is the beneficiary, that transfer is both necessarily incomplete and without consideration. The reason for this is obvious: the transfer can be revoked at any time, and the beneficial interest in the real property has not changed. This is true whether or not the real property transferred is encumbered with a mortgage or not.

In the early 1980s, the Florida Department of Revenue attempted to revisit how transfers to revocable trusts and other transfers were to be taxed by taking the position that they were true transfers to which the documentary stamp tax applied. Fortunately, Co-Author Bob Pierce was involved in this controversy and helped to cause the Department to understand why it was proper for it to back off of this position.

This position was ultimately enshrined in Florida Administrative Code 12B-4.013(28), which states that a conveyance of real property to or from a trustee of a trust is taxable only to the extent that there is a transfer of “beneficial ownership.”<sup>7</sup> This makes it clear that a transfer of property from a grantor to a trustee is exempt to the extent that the grantor is also a beneficiary of the trust.<sup>8</sup> If the grantor is the sole beneficiary of the trust, the transfer would be completely exempt from the documentary stamp tax because there is no transfer of beneficial ownership.<sup>9</sup>

## COMMENT:

In 2018, the Florida Department of Revenue issued a perplexing Technical Assistance Advisement (“TAA”) ruling that a transfer to a revocable trust would only be exempt from documentary stamp tax if the trust qualified as a “land trust” under section 689.071, Florida Statutes. This TAA is not consistent with prior rulings, and appears to be incorrect on its face.<sup>10</sup>

Though TAAs are binding only on the parties thereto and, like PLRs from the IRS, are not themselves precedent, they are nonetheless considered to be persuasive authority by Department of Revenue auditors and when issues are litigated.

The TAA largely went unnoticed until ActionLine, a publication of the Florida Bar Real Property, Probate & Trust Law Section, published an article about the TAA in 2020 which was not as critical of the TAA as it could have been.<sup>11</sup> The TAA concludes (in contradiction to past TAA interpretations and generally accepted estate planning practices) that Florida’s documentary stamp tax applies when a property owner transfers encumbered real property to a revocable living trust, even when the property owner is the beneficiary of the trust.<sup>12</sup>

As noted in the ActionLine article, this development is a significant departure from the stance previously taken on this issue by the Department of Revenue.<sup>13</sup> To the extent the TAA can be read as the official position of the Department on this issue, it poses a substantial new tax liability to property owners and a pitfall for estate planning practitioners that will need to be corrected by Department of Revenue action or legislation.<sup>14</sup>

We believe that the Department’s TAA confused the law and reached a clearly erroneous conclusion. Despite this conclusion, estate planners should at least be aware that the TAA exists and that this could create confusion if the Department and upset senior citizens, who already have plenty to worry about, if the Department attempts to impose documentary stamp taxes when they are not actually due.

The TAA at issue myopically focuses on Florida Administrative Code Rule 12B-4.013(28) without including important context about what documentary stamp taxes are, and the transactions to which they apply. Specifically, the

TAA focuses on whether the examples given in subsection (28) of the rule on taxable and exempt conveyances to or from a trustee apply to revocable trusts. Bafflingly, the TAA concludes that only trusts created pursuant to section 689.071 (the Florida Land Trust Act) gain the benefit of those exemptions.

The problem is that this is not what the rule actually says, and this is not how documentary stamp taxes work.

Subsection (28) of the rule at issue states that “[a] deed to or from a trustee conveying real property is taxable to the extent that the deed transfers the beneficial ownership of the real property and to the extent that there is consideration for the transfer.<sup>15</sup> The question addressed by the TAA is to what kind of trusts this subsection applies.

By its terms, subsection (28) refers to “Trusts pursuant to chapter 689” as the subject it is addressing. The first part of Chapter 689 is made up of sections 689.01-689.07. These statutes address conveyance of real estate in general, and specifically what the effect is of transferring real estate when trusts are involved. Those portions of Chapter 689 have nothing to do with land trusts and are equally applicable to other types of trusts.

Ignoring this, the TAA concludes (with no citation of authority) that the stated exemptions in Rule 12B-4.013(28) were promulgated based on Florida Statute s. 201.02(4), which imposes documentary stamp tax on transfers to trusts created under s. 689.071 (“land trusts”). Despite the fact that neither the rule nor the statute support this conclusion, the TAA goes on to reason that because the rule does not speak to trusts created under Chapter 736 (including revocable trusts), the exemptions laid out in Rule 12B-4.013(28) do not apply to such Chapter 736 trusts.<sup>16</sup>

This conclusion is directly contradicted by the language of the rule itself. Subsection (28)(h) of the rule states that the conveyances described in subsection (28) are “equally taxable or exempt as provided in this rule,” regardless of certain enumerated issues. One of these issues is whether or not the trust is a land trust under section 689.071. In context, this makes it clear that the rule applies to all conveyances to or from a trustee, regardless of whether the trust is a land trust or not.<sup>17</sup>

## **Conclusion**

The TAA is simply wrong, and this is an embarrassment to Florida's legal and tax system. This conclusion makes sense in light of the fact that other TAAs addressing this subject (including those cited in the ActionLine article) had no trouble concluding that trusts that were not land trusts gained the benefit of the rule's provisions.

On this point, it is notable that subsection (28)(i), which specifically states that documentary stamp taxes do not apply to deeds to a trustee of a revocable trust from a grantor who has power to revoke the trust, has been in the rule in substantively the same form since at least 2003, and the 2018 TAA is the first document reading it to apply only to land trusts.<sup>18</sup>

The Department's TAA does more than fail to apply an exemption in the way estate planners would traditionally expect. Its reasoning directly contradicts the plain language of the underlying rule itself and the statutory scheme that it implements.

The TAA will result in untold problems for senior citizens in Florida who may receive tax and penalty notices, or who may not place property into revocable trusts and thus increase probate and related administrative costs for themselves. Florida's reputation as an efficient and predictable place to retire and avoid unnecessary taxes and estate administrative costs is blemished by this error, which will hopefully be resolved in the not too distant future.

**HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!**

*Steven Hogan*  
*Bob Pierce*

# Alan Gassman

# Peter Donovan

## CITE AS:

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## CITATIONS:

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<sup>1</sup> *Florida Documentary Stamp Tax*, FLORIDA DEPT. OF REVENUE, [https://floridarevenue.com/taxes/taxhttps://floridarevenue.com/taxes/taxesfees/pages/doc\\_stamp.aspx](https://floridarevenue.com/taxes/taxhttps://floridarevenue.com/taxes/taxesfees/pages/doc_stamp.aspx) (last visited Feb. 12, 2021) (citing Fla. Stat. Ann. § 201.02).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* (citing Fla. Stat. Ann. § 201.02(1)(a)).

<sup>4</sup> *Id.* (citing Fla. Stat. Ann. §§ 201.02(1)(a), 201.031).

<sup>5</sup> *Id.* (citing Fla. Stat. Ann. § 201.02(1)(a)).

<sup>6</sup> *Id.* (citing Fla. Stat. Ann. § 201.08).

<sup>7</sup> Fla. Admin. Code Ann. R. 12B-4.013(28)

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<sup>8</sup> Fla. Admin. Code Ann. R. 12B-4.013(28)(a)

<sup>9</sup> *Id.*

<sup>10</sup> TAA No. 18B4-003 (Dec. 7, 2018), *available at* [https://revenuелaw.floridarevenue.com/LawLibraryDocuments/2018/12/TAA-122319\\_18B4-003%20Redacted-Summary.pdf](https://revenuелaw.floridarevenue.com/LawLibraryDocuments/2018/12/TAA-122319_18B4-003%20Redacted-Summary.pdf).

<sup>11</sup> Carroll, Robert T. *Are Transfers of Encumbered Property to Revocable Trusts Subject to Documentary Stamp Tax?* ACTIONLINE. The Florida Bar Real Property, Probate & Trust Law Section. 28, 28. (fall 2020).

<sup>12</sup> Carroll, *supra* note 1, at 28. See, e.g. TAA No. 09B4-003 at p. 2 (April 14, 2009), *available at* [https://revenuелaw.floridarevenue.com/LawLibraryDocuments/2009/04/TAA-38221\\_DOC%20TAA%2009B4-003.pdf](https://revenuелaw.floridarevenue.com/LawLibraryDocuments/2009/04/TAA-38221_DOC%20TAA%2009B4-003.pdf) (exempting transfer of a couple's jointly owned condominium into their revocable living trust); TAA No. 93(b)4-014R (Revised) at p.1 (Aug. 27, 1993), *available at* [https://revenuелaw.floridarevenue.com/LawLibraryDocuments/1993/08/TAA-37820\\_397ce9e0-0c8d-4580-b402-3db5895a9894.pdf](https://revenuелaw.floridarevenue.com/LawLibraryDocuments/1993/08/TAA-37820_397ce9e0-0c8d-4580-b402-3db5895a9894.pdf) (exempting transfer into a revocable living trust of an encumbered property held by a mother and son as tenants in common).

<sup>13</sup> *Id.*

<sup>14</sup> Carroll, *supra* note 1, at 30.

<sup>15</sup> Fla. Admin. Code Ann. R. 12B-4.013(28).

<sup>16</sup> *Id.*

<sup>17</sup> It should be noted that the statutory citations in subsection (28)(h) are currently incorrect, as the statutes themselves have changed without the rule being updated accordingly. Subsection (28)(h) was previously subsection (32)(h) in the 2003 version of the rule, which is the oldest version available online. Available at <https://www.flrules.org/gateway/ruleNo.asp?id=12B-4.013>. This subsection is identical in the current version, but it cites to section 689.071(1) as the reference for the “powers and authority” of land trust trustees, and section 689.071(4) as the reference for a beneficiary's interest to be deemed personal property. Those citations were correct in 2003, but they are wrong



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today, as the pertinent provisions are sections 689.071(3) and (6), respectively. The 2003 version can be found here:

[http://www.leg.state.fl.us/STATUTES/index.cfm?App\\_mode=Display\\_Statute&Search\\_String=&URL=Ch0689/SEC071.HTM&Title=-%3E2003-%3ECh0689-%3ESection%20071#0689.071](http://www.leg.state.fl.us/STATUTES/index.cfm?App_mode=Display_Statute&Search_String=&URL=Ch0689/SEC071.HTM&Title=-%3E2003-%3ECh0689-%3ESection%20071#0689.071) while the current version is here:

[http://www.leg.state.fl.us/STATUTES/index.cfm?App\\_mode=Display\\_Statute&Search\\_String=&URL=0600-0699/0689/Sections/0689.071.html](http://www.leg.state.fl.us/STATUTES/index.cfm?App_mode=Display_Statute&Search_String=&URL=0600-0699/0689/Sections/0689.071.html) ]

<sup>18</sup> See the version of 12B-4.013 from 2003, with the pertinent subsection being (32)(i).