rouse + copeland LLC
ATTORNEYS

From: CLR
Date: Wednesday, November 08, 2023
Re: Confidential attorney/client communication

Memo

When did the transfer occur?

If there is no Will, O.C.G.A. § 53–2–7 (Vesting of Title to Property) provides that title to realty is immediately vested in the heirs of an intestate upon his or her death, although if an administrator is later appointed in land then vests in the administrator and does not revest in the heirs until the administrator assents. On the other hand, if a Will is proved, upon the death the devisees named in the Will have an inchoate title to realty which is an assignable property right. *Allan v. Allan*, 236 Ga. 199, 201 (1976). *See also Higdon v. Ga. Farm Bureau, etc., Ins.*, 204 Ga.App. 192, 193 (1992) and *Bradley v. Bradley*, 225 Ga. App. 530, 532, 484 S.E.2d 280, 283 (1997). And although an interest does not vest until assented to by the executor, once assent is given it relates back to the date of death. *Bradley* at 532. In any event, title is never in an "estate," but is instead in the heirs or the personal representative as ordered by the Probate Court.0

In contrast, the CUVA statute itself contemplates that land can be owned by an Estate. O.C.G.A. § 48–5–7.4(a)(1)(C)(ii). This implies that the date of transfer is actually the date on the assent to devise, and not the date of death. This can effect the deadlines of when owners claiming CUVA rights have to act. Thus, for purposes of CUVA, title to Gregory's part interest in the land was transferred by his estate in January 18, 2023, when the assent was filed (even though Georgia law would otherwise deem it to "relate back to" the date of death in 2022).

Taxing statutes are generally construed in favor of the taxpayer, but in statutes that create an "exemption from taxation" ambiguities are resolved in favor of taxability. *Cherokee Brick & Tile Co. v. Redwine*, 209 Ga. 691, 693 (1) (1953). *See also Ga. Dep't. of Rev. v. Owens Corning*, 283 Ga. 489, 490 (2008).

Was a “part” of the CUVA property transferred?

Turning to the CUVA statute (O.C.G.A. § 48–5–7.4), subsection (i)(1) addresses acquisition of all or part of CUVA property during the term of the covenant. The word “part” is not defined in the statute. One issue therefore is whether “part” only means some physical part of the physical whole of the land in CUVA, or does it also mean a part interest in the whole of the land in CUVA? Georgia cases using the words “part of the property” address the phrase across a variety of different situations and appear to use it in only in the physical sense. Cases instead add language such as “part interest” and similar words to make this distinction amongst uses. So it appears this “part transfer” subsection should only apply when physical parts are carved off, as opposed to part interests in the title. Subsection (j) then mandates the procedure to follow in making “an application for continuation.” This appears to require a procedure that a transferee/devisee must follow to claim the “no breach” status allowed by subsection (i).

In short, subsection (i) and (j) don’t appear to apply because transfer of a “part” means something other than a transfer of a part interest in a tract of land.

Breach on death of owner

So instead we look to subsection (n). By its terms it waives the breach penalty *if* the breach is solely due to the death of an owner who was a party to the covenant. By necessary implication, this means that the death of an owner *is* a breach. This appears to be because the Legislature wants people who inherit land to be able to take the land without any CUVA restrictions on it, so that they can do what they wish with the property without penalty.

A. When death results in transfer of a part of a tract of land

In situations involving transfer on death of a part of land, this “death of owner” subsection can be harmonized with subsections (i) and (j), because those two subsections allow the original covenant to be held by the transferee in a sort of “no breach status” *if* the subsection (j) procedures

are followed. Reading everything together, on the death of a co-owner, there is a no-penalty breach that takes the property out of CUVA unless the subsection (j) procedures are followed, in which case the matter transforms to a situation where there is no breach at all, assuming the application for continuation is filed.

B. When death results in transfer of a part interest in land

In situations such as the Arnsdorffs' situation, involving transfers of a part interest in land, under subsection (n) this causes a no-penalty breach. Such a breach leaves the issue of the notice of breach that is required by the CUVA statute. Subsection (k.1) governs the notice. After notice of breach is given to the owner, she has 30 days from the notice to remediate. There is no apparent way to remediate this, although the rest of the (k.1) notice procedure needs to be adhered to, including physical inspection and follow up notice. At that point, per subsection (h) the existing covenant is terminated, and a new application must be filed to reinstate CUVA.

To guard against a later judicial determination that a partial interest transfer also falls under subsection (i), and thus that a possible remediation would be following the procedure of subsection (j), speaking generally you should wait to see if an application for continuation is filed, and notify the owner that you will instead treat it as a new application. Regardless, after the 30 days, the Board is statutorily required to do a physical inspection, though this requirement appears to have no real relevance in this circumstance, and then must notify the Taxpayer that the condition described in subsection (n) remains. The owner is allowed to appeal, if they believe something is not correct about the determination.

There is no guidance on how the timelines of subsection (j) and (k.1) interact. Subsection (j) allows the application for continuation to be filed by the last date for filing tax returns in the following year. Here, the transfer (for CUVA purposes, not general Georgia property law) occurred in 2023, giving the owners until the 2024 deadline.

Conclusion

None of this is certain. The statute as currently drafted is unclear,

contradicts long-standing Georgia property law, and may contradict itself as well. The different procedures for transfer of a part of the property vs. transfer of a part interest in legal title appear to track the statutory language, but the policy seems muddled. At any rate, the affected owners who want the land back in CUVA will need to apply for continuation, or for a new covenant altogether, depending on the circumstances. These applications might be able to at least use the same form, which would help deal with the uncertainty. During this, the assessors' office will need to meet the various procedural requirements of subsection (k.1), including the 30-day notice of breach, and the follow-up physical inspection, even though a physical inspection is most unlikely to change things in this circumstance[1].

Turning to the Arnsdorff's case, it appears they received the 30-day notice. I didn't see a follow-up notice to them, sent after the physical inspection that subsection (k.1) requires. That inspection needs to be done and that notice needs to be sent, starting the clock on any appeal they wish to file. I know they said they intended to go to court if they did not get CUVA treatment for 2023. That may be the only way to get an answer about the uncertainty of the procedure to follow.

In short, for now you need to do the physical inspection and send the Second Notice required by the language of subsection (k.1). We can then see whether the Arnsdorffs appeal, and what issue(s) they raise.

[1] "Further, the Department's regulation does not contemplate whether it is practicable for the taxpayer to correct an alleged breach, only that the taxpayer be given notice and opportunity to do so." *Morgan Cnty. Bd. of Tax Assessors v. Ward*, 318 Ga. App. 186, 191 (2012).