OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR ASSOCIATE DISTRICT COUNSEL, SOUTH FLORIDA

FROM: Joseph W. Clark
                        Senior Technician Reviewer, Branch 2 (General Litigation)

SUBJECT:

This responds to your request for advice dated June 25, 1998. This document is not to be cited as precedent.

LEGEND:

Taxpayer X
Taxpayer Y

This memorandum responds to your request that we reconsider our previous advice regarding the use of a nominee lien or levy. ███ Therefore, consistent with our prior advice, it is proper for you to support the Complaint to Set Aside Fraudulent Transfers filed by the taxpayer.

BACKGROUND

In a memorandum dated July 10, 1997, you requested our advice on the use of a nominee lien and levy to reach assets transferred by Taxpayer X to a joint revocable trust for the benefit of himself and his wife Taxpayer Y. The assets were first transferred from Taxpayer X to himself and Taxpayer Y to be held as tenancies by the entireties, and then to the joint revocable trust. Both transfers took place pursuant to a prenuptial agreement entered into by the parties the day before they were married. The agreement stated that the "consideration for this Agreement is the contemplated marriage of the parties and the releases, waivers and other promises and covenants separately and mutually undertaken by the parties by entering into this Agreement."

Florida law does not allow a creditor to reach property held as a tenancy by the entirety to satisfy the individual debts of one spouse. In re Wincorp, Inc., 185 B.R. 914, 918 (Bankr. S.D. Fla. 1995). For this reason, you suggested that the Service seek to set aside the transfers as fraudulent under Florida's version of the Uniform Fraudulent Transfer Act (UFTA), found in Chapter 726 of the Florida Statutes.

In our memorandum dated February 5, 1998, we agreed with your previous assertion that the promise to marry and release of marital rights may not qualify as "value" for the purposes of Florida Fraudulent Transfer Act. Although there was some adverse Florida precedent, those cases had been decided under the prior Florida statute. Cases from other jurisdictions which have also adopted the UFTA or the Uniform Fraudulent Conveyance Act suggest that because value is viewed from the point of view of the creditor, i.e. is the property transferred of potential value to the creditor, a promise to marry and release of marital rights would not constitute value. See HBE Leasing Corp. v. Frank, 61 F.3d 1054, 1059 (2d Cir. 1995); Interpool Limited v. Patterson, 890 F. Supp. 259, 267 (S.D.N.Y. 1995); Musso v. Herman, 85 B.R. 683, 696 (Bankr. E.D.N.Y. 1988). Relying on these cases, a tenable claim can be made that the transfer of property in exchange for such promises should be set aside as to those creditors who meet the other requirements for protection under the act.

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DISCUSSION

Recently, you indicated that the taxpayer has now sought to void the suspect transfers himself. In his Complaint to Set Aside Fraudulent Transfers ("Complaint"), the taxpayer avers that the elements of Florida's Fraudulent Transfer Act have been satisfied. <u>See, e.g.,</u> Complaint, Paragraphs 22-24 (averring that transfers by Taxpayer Y were fraudulent under Fla. Stat. § 726.105); Paragraphs 31-32 (averring that transfers by taxpayer were fraudulent under Fla. Stat. § 726.106). An admission by a party can be accepted by the adverse party as fact without the necessity of supporting evidence. <u>See</u> <u>Fernandez v. Fernandez</u>, 648 So. 2d 712, 713 (Fla. 1995); <u>Carvell v. Kinsey</u>, 87 So. 2d 577, 579 (Fla. 1956). Given the allegations and admissions of the taxpayer, we see no reason that you cannot proceed to support the motion to set aside the transfers, if such a motion would benefit the Government's case.

If you have any questions, please contact the General Litigation attorney assigned to this case at (202) 622-3620.

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