EXCERPT FROM THE BOOK *CREDITOR PROTECTION FOR FLORIDA PHYSICIANS*

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SECTION J: FLORIDA PREPAID TUITION FUND AND 529 PLANS

Internal Revenue Code Section 529 provides that no tax will be paid on income earned under pre-paid college and living expenses programs, and also for "529 Savings Plans" that are used to pay for college and college permitted living expenses, including graduate school.

The Florida Statutes provide that these 529 Plans are creditor protected, even if the owner of the plan is completely free to withdraw all of the plan monies and spend them on him or herself.

Physicians with children or grandchildren (or even nephews or nieces) likely to attend college should strongly consider funding one or more 529 Plans. These plans are very much like mutual fund investments and there are over 100 to choose from. Their costs are usually lower than an average mutual fund investment. They are simple to set up and use.

As stated above, no income tax is payable on 529 plan earnings so long as all monies are spent on college tuition and living expenses for the initial or a subsequently named beneficiary. Nevertheless, the "plan" is owned by the person designated in the documents, which may be the contributing physician.

Under state law the contributing physician has the right to withdraw any or all of the plan assets for his or her own use, provided that income tax and a 10% of income excise tax will apply to the extent of earnings in the contract that are withdrawn. If the monies are not spent on college and college related living expenses then this tax does not apply.

Monies paid into or out of, the assets of, and the income of any validly existing qualified tuition program (including the Florida Pre-Paid Post-Secondary Education Expense Trust Fund) are not subject to attachment, garnishment or legal process pursuant to Florida Statute Section 222.22. This protection is against the creditors of any program participant, purchaser, owner contributor or beneficiary.

Further, monies paid into or out of, and the income held under a health savings account or medical savings account authorized under Internal Revenue Code Sections 220 and 223 respectively, as are creditor proof, as are educational IRAs.

Some planners have speculated that 529 plans sponsored by states other than Florida may not be creditor protected because the legislature does not have the power to require that out of state intangibles would qualify for tenancy by the entireties protection. Most planners believe otherwise. The legislature

clearly intended to protect all 529 plans owned by Florida residents, as evidenced by the fact that the requirement that a plan be in Florida was explicitly removed from the Statute in 2005.

529 plans are further favored for gifting purposes, in that taxpayers can place assets in a 529 plan and consider the transfer to have been made one-fifth over five consecutive taxable years, beginning in the year of the transfer, if the gift tax return is filed with a special election being made. For example a grandparent with a $13,000 per year gifting allowance could place $65,000 (5 times $13,000) into a 529 plan and declare that this is the grandparent's gifting for the designated grandchild for the 5 year term, in lieu of having to gift over the next 4 years. If the 529 plan assets grow in value then this can be a very effective gifting opportunity.

The bankruptcy law has special rules that apply to 529 plans that are funded within 2 years of filing a bankruptcy. Presently up to $5,475 may be contributed to a 529 plan at least 1 year before bankruptcy without challenge, but appropriate legal counsel should be hired to review these rules with any physician who thinks that they may need to file bankruptcy and are interested in funding a 529 plan.

For non-Floridians the 2005 Bankruptcy Act exempts up to $5,475 contributed no earlier than two years and no later than one year before the date of filing bankruptcy. However, the 2005 Bankruptcy Act is unclear on whether the provisions that invalidate 529 plan contributions made within one year of filing will apply when state law exempts 529 plans. It is therefore unknown whether Florida's 529 plan exemptions will apply to residents who file bankruptcy. The exceptions under the bankruptcy code are as follows:

(a) Contributions to a 529 plan made by a debtor are not included in the bankruptcy estate to the extent that such contributions (a) were made no later than 365 days before the date of filing for bankruptcy and (b) the designated beneficiary of the 529 plan was a child, stepchild, grandchild, or step-grandchild of the debtor for the taxable year in which the funds were contributed.

(b) Contributions made not earlier than 720 days nor later than 365 days before the date of filing bankruptcy are only excluded from the estate to the extent of $5,475.

The exemptions that exclude 529 plan contributions from the bankruptcy estate only apply to the extent that the 529 plan provides adequate safeguards to prevent contributions on behalf of a designated beneficiary in excess of those necessary to provide for qualified higher education expenses.