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ARTICLES

LEADING PRACTITIONER COMMENTARY

What You Need to Know About Florida Law to Advise Your Clients Who Live Here — Part II

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INTRODUCTION

This is Part II of a three-part special article that is intended to provide non-Florida lawyers, accountants, trust officers, and other financial advisors with important information that will apply to Florida clients and can significantly impact planning design and implementation. Do not let you or your clients get burned in the Sunshine State!

Part III will cover Florida trust planning, the compensation of personal representatives, trustees, and lawyers for administering trusts and estates, and Florida Medicaid eligibility and assistance rules.

For Part I, see 38 *Tax Mgmt. Est., Gifts & Tr. J.* 113 (Jan./Feb. 2013).

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FLORIDA LIABILITY PLANNING

Vehicle Liability

Under Fla. Stat. §324.021(9)(b)(3), the owner of a car can be held vicariously liable for the negligence of any permitted driver. However, the law limits liability of an individual owner where the driver has insurance with a large amount of coverage. If a driver has at least $500,000 of liability insurance coverage, then the automobile owner is only liable for up to $100,000 per person, up to $300,000 per incident for bodily injury, and up to $50,000 per incident for property damages, all of which will be satisfied by payment made by the liability insurance carrier providing the coverage described above. However, if the permissive user does not have sufficient liability insurance coverage, then the vehicle owner may be liable for an additional $500,000 in economic damages, but the economic damages responsibility is reduced by amounts actually recovered from the driver and from any insurance or self-insurance covering the driver. It is not clear under the statute whether joint owners will have any limitation on liability for one another's driving negligence even when there is $500,000 of insurance in place. Also, this limitation statute does not apply to situations where an automobile has been "negligently entrusted" to an inexperienced or known dangerous driver, or where the accident occurs outside of Florida.

Hulk Hogan's son was in a tragic accident approximately 100 yards from the author's office in Mr. Hogan's car, and the case reportedly settled in the neighborhood of $5,000,000 according to a Tampa Bay Times article. Mr. Hogan would have been well advised to have put the title to this car in his son's name rather than his own.

Using LLCs to Avoid Liability

Commonly, companies will establish subsidiary limited liability companies (LLCs) to own and operate vehicles, and then manage these LLCs at arm's length. The Florida Supreme Court made it difficult for creditors to pierce a related company that is held separately in the decision of *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114 (Fla. 1984). This decision indicated that actual fraud must be shown in order to pierce the corporate veil. As a result, related brother/sister or parent subsidiary arrangements are often used, while being disregarded for income tax reporting purposes.

In *Kane Furniture Corp. v. Miranda*, 506 So. 2d 1061 (Fla. Dist. Ct. App. 1987), the court determined that a carpet installer was an independent contractor for Kane when, after leaving a bar where he had been drinking for hours, he hit and killed another driver. Using the control test from agency law, the court determined he was not an employee of Kane, and therefore Kane could not be vicariously liable.

About Florida Limited Liability Entities

Florida charges a $1,000 filing fee and a $500 annual report filing fee for limited partnerships and limited liability limited partnerships (LPs and LLLPs). Therefore, many Floridians who want to have these form them in other states. Delaware and Wyoming both recognize tenancy by entireties, and are therefore popular states for limited partnerships that are formed by Florida married couples. Wyoming's filing fee is only $100 and annual report fee is only $50. Delaware

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filing fees are $200 dollars and annual reporting fee is $200. Delaware has electronic filing but Wyoming does not.

Other popular states that do not recognize tenancy by entireties include Colorado, Nevada, and Alaska. All of these states have well developed creditor protection statutes.

The filing fee for a Florida LLC is $125 and annual report fee is $138.75.

Florida also has the "limited liability partnership" (LLP), which allows general partners in a partnership to be insulated from liabilities that they do not guarantee or personally cause. This is different than an LP or an LLLP because there is no charging order protection provided for LLPs. The filing fee for an LLP is only $50, and the annual report fee is only $25 per year.

Under the Uniform Commercial Code the pledge of an LLC ownership interest requires a physical pledge agreement and holding of an issued certificate if the LLC is certificated. This is because of Article 9 of the Uniform Commercial Code. A security agreement and a UCC-1 financing statement will not be sufficient to give a creditor a lien on an LLC interest in Florida.

Canadians Investing in Florida LLCs

Florida has many Canadian investors who invest in Florida LLCs and expect disregarded entity characterization to apply in their Canada tax filing. Unfortunately, Canada treats LLCs like C corporations instead of pass-through entities, exposing Canadian taxpayers to double taxation. One way to prevent double taxation for Canadians is to use an LP or an LLLP in lieu of an LLC, and many LLCs have converted to LLLPs upon realization of the above.

The Liability and Casualty Insurance Crisis Continues — What Citizens Insurance Does to Florida Citizens

Clients with Florida homes need to be aware of casualty and liability insurance challenges in Florida. For the majority of residential property, the only insurance carrier that will write coverage is the state-funded Citizens Property Insurance Corporation. Citizens writes only two types of policies, a normal homeowner's policy if the owner resides at the property full time or a Dwelling policy if the owner does not reside at the home. If the home is titled in an LLC, trust, or entity other than the owner's individual name, the available policy will not be as extensive as it would be otherwise.

In the past, Citizens provided $300,000 liability policies that enabled homeowners to qualify for conventional umbrella policies. Beginning in 2012, Citizens is providing only $100,000 of liability insurance on most properties, so Floridians insured by Citizens will need to purchase some type of excess insurance policy that covers liability from $200,000 to $400,000 (offered by companies such as Coastal Insurance Underwriters) or the new extended coverage personal umbrella policy that RLI insurance only recently began to offer in Florida.

Also note that Citizens' policies exclude pet liability, and many umbrella policies will also exclude such coverage if the underlying policy excludes it. A "drop down umbrella" policy will cover pet liability and often will cover otherwise excluded pool liability beginning at the first dollar of a claim, and is therefore essential for clients who cannot risk being without this coverage.

Citizens will not provide liability insurance for pools and pool accidents unless a number of requirements are met.

See http://www.gassmanlawassociates.com for two 30-minute webinars with more information on this topic: "What Mary Poppins Didn't Know About Umbrellas: Ensure that Your Insurances Will Insure You" and "Riders on the Storm: How to Make Sure Your Insurances Do Not Have Any Catastrophic Exceptions or Gaps," both presented by Alan Gassman and Chuck Wasson.

Please also see our discussion in this article on the use of a limited liability trust to shelter beneficiaries and trustees from personal liability while qualifying for conventional individual insurance rates with many carriers.

Here is a sample client letter on umbrella liability insurance:

> [DATE]
>
> CLIENT
>
> Re: UMBRELLA LIABILITY INSURANCE COVERAGE
>
> Dear ________________:
>
> As part of our planning I wanted to reiterate the importance of having an appropriately coordinated and "gap-free" liability and casualty insurance program.
>
> I am enclosing a sample letter that some clients use to help assure that they have coverage for common gaps or mistakes made in structuring liability insurance. If you would like assistance in completing this type of letter, please let me know.

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The rest of this letter is about umbrella liability insurance coverage. We believe that it is very important to have appropriate limits of liability on automobile and homeowner insurance policies. Typically, the automobile and homeowner policies will be at $500,000 coverage, and then there will be excess coverage under what is called a "personal umbrella policy."

The personal umbrella policy is used in combination with homeowners and auto policies to cover most clients' needs. If it is a true "umbrella," it will provide excess limits above and beyond your primary insurance coverage (such as homeowners, automobile or boat policy), and will also provide coverage for situations excluded or not addressed by underlying coverages. Each individual insurance company will have its own requirement for limits that you must have on your primary policies. You will want to be careful to assure that these policies are coordinated with your umbrella coverage.

Umbrella limits start at $1,000,000 and can go over $10,000,000. Pricing for these policies are based primarily on the number of houses and vehicles to be insured, with each additional $1,000,000 of coverage being less expensive than the preceding. **In your situation I would probably have $________ of umbrella liability insurance. Also, I would consider placing much of your brokerage account and other assets under a family limited partnership to further insulate you for creditor protection purposes.**

Another coverage that is often underutilized by clients is called "uninsured motorist coverage." If you are in an automobile accident caused by someone who does not have enough coverage to pay for your damages, you can pursue your own insurance company to the extent of your "uninsured motorist" coverage. We encourage clients to see what it costs to have $500,000 or more in uninsured motorist coverage to help compensate for catastrophic accidents that can happen.

Some carriers, including Citizens and carriers who have assumed policies from Citizens do not provide liability coverage for pool and pet or animal related liabilities. In this event, the umbrella liability coverage may or may not apply. **This is something that should be discussed with the insurance agency or carrier that provides liability coverage.**

If we can provide you with any further information or with assistance concerning your insurances, please let us know.

Very truly yours,

Landlord's Insulation from Potential Liability for Tenant Activities and/or Lack of Maintenance

Generally, a landlord's responsibility for injuries sustained on leased property "will depend upon the extent the landlord maintains a possessory interest or control over the instrumentality or land which contains a defect which is alleged to have been a proximate cause of the injuries suffered by the plaintiff." *Russ v. Wollheim*, 915 So. 2d 1285, 1287 (Fla. Dist. Ct. App.2005). In *Russ*, the court found that the landlord had a possessory interest or control over the activity in question where the lease provided that any alterations, additions, or improvements were subject to the landlord's prior written approval.

If a landowner has a triple net lease, then he or she most likely does not have control or a possessory interest over the property in question. However, the question of control is a fact-by-fact analysis and hinges on the exact cause of the third party's injuries. For instance, if a third party was harmed by a property defect because of lack of maintenance on the property and the landlord was required to pre-approve maintenance schedules or the cost of repairs to the leased premises as in *Russ*, then the court could find that the landlord controlled the leased premises. But if the tenant were responsible for all maintenance with no landlord oversight, which is common in a triple net lease, then the landlord may not be responsible. Further, landlords are generally not responsible for subtenant injuries. There should be no privity of contract or estate, and therefore the legal basis for suit is quite limited between these parties.

Giving a tenant carte blanche authority to make changes to property can be dangerous from a contractual standpoint, but also necessary to insulate a lessor from premises liability. At the same time, do not let your clients give total control to a tenant who may cause significant financial liability as a result of this type of authority.

A provision to limit landlord liability that the author commonly uses in related-party leases is as follows:

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THIS PARAGRAPH SHALL APPLY NOTWITHSTANDING ANY PROVISION HEREIN TO THE CONTRARY. IT IS ACKNOWLEDGED THAT LESSEE IS SOLELY RESPONSIBLE FOR THE OPERATION, SAFETY, INSPECTION, USAGE AND WITH RESPECT TO ALL OTHER ASPECTS OF THE PROPERTY THAT RELATE TO OWNERSHIP, MAINTENANCE, SAFETY, REPAIR AND OCCUPYING AND MAKING USE OF THE PROPERTY AND ALL AMENITIES THERETO DURING THE LEASE TERM, AND THAT LESSEE SHALL HAVE THE FULL AND EXCLUSIVE RIGHT TO OCCUPY AND TO USE AND TO SUBLEASE THE PROPERTY. THEREFORE, LESSEE SHALL BE SOLELY RESPONSIBLE FOR ANY AND ALL LIABILITIES OR OBLIGATIONS INCURRED RELATING TO THE PROPERTY AND TO THE USE THEREOF, AND SHALL INDEMNIFY AND HOLD HARMLESS LESSOR WITH RESPECT THERETO.

These clauses almost always make sense between related parties where there is complete trust.

Clients might consider other ways of protecting real estate from potential liability, including having plenty of liability insurance, checking regularly to make sure the tenant is maintaining the required liability insurance, keeping the property leveraged with debt, and making sure that the property is owned by a limited liability entity like an LLC or a limited liability limited partnership.

Boat Liability

A boater's liability in Florida may be determined by either Florida state or federal maritime law depending on where the accident or negligence occurred. Maritime law applies only to "navigable waters." A simplified definition of navigable waters would include waters of the United States that are used to transport goods or people in the channel of commerce. This can include oceans, rivers, streams, and lakes. State laws apply only to accidents that occur in non-navigable waters.

The following report, which cites *Cashell v. Hart*, 143 So. 2d 559 (Fla. Dist. Ct. App. 1962), provides further information on maritime liability and is taken from the Gassman Law Associates Thursday Report dated August 23, 2012 (a full version of this Thursday Report can be found at: http://www.gassmanlawassociates.com/08.23.12_Full_Report.1c.pdf):

A Pirate's Life for Me — What Boat Owners Need to Know about Their Liability

If the sea is calling your name, and you are considering buying—or have already bought—a boat, you need to understand your potential liability in the case of an accident. In order to understand your potential liability when operating a boat, you need to know which laws apply to you. Two different bodies of law apply to boat owner's liability depending on where the accident occurred. Federal Maritime (Admiralty) Law is a separate body of law governing navigation and shipping. Specifically, maritime law applies only to "navigable waters." A simplified definition of navigable waters would include waters of the United States that are used to transport goods or people in the channel of commerce. This can include oceans, rivers, streams and even lakes. State laws apply only to accidents that occur in non-navigable waters.

Maritime Liability

Under maritime law, the owner or operator of a vessel can be held liable for personal injury or loss caused by their negligence. In order to prove that a vessel owner or operator was negligent, the injured plaintiff must prove the same elements as any other negligent injury case: the vessel operator had a duty to that plaintiff, the operator breached that duty, their breach was the cause of the plaintiff's injuries, and plaintiff was somehow damaged. So what duty do you, as an owner, owe to passengers and others while operating your boat? The law says that the operator has a duty to use reasonable care under the circumstances when operating the boat. Under maritime law, a boat owner can also be held liable for injuries that occurred because his boat was not "seaworthy." Ensuring that your boat is seaworthy includes a duty to make sure that the person operating the boat is competent to drive the boat. In other words, don't let anyone with a history of causing boating accidents drive your beloved yacht. Maritime law also recognizes the tort negligent entrustment, which allows a plaintiff to sue the boat's owner for injuries caused while someone else was driving. The boat's owner must have either known, or should have known that the person to whom the boat was entrusted was likely to use it in

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a dangerous manner. The boat owner will not be liable unless they knew the person was incapable of operating the boat safely. Even if your boat collides into another one day while you're out catching tarpon, all is not lost. The boat's owner may be able to reduce liability for acts that occurred without their "knowledge or privity" due to the maritime Limitation of Liability Act. This limitation may be particularly helpful in defending a suit where injuries occurred while someone else was driving. This law establishes that even if the plaintiff's injuries were caused by the negligence of the operator of the boat, the owner of the boat is only liable up to the amount of the value of the boat or the value of the owner's interest if owned by more than one person. "Privity" means that the owner somehow personally participated in the negligence which caused or contributed to the loss or injury.

Liability for a Vessel Titled to a Corporation

If you choose to title a boat to a corporation in order to protect from liability, there are certain restraints that apply. In extreme cases, corporate protection can be lifted and the individual members of a corporation can be exposed to a lawsuit. This is called "piercing the corporate veil." Piercing the corporate veil in a maritime case requires that the individual who is hiding under the corporation is using it to commit fraud or for his own personal business. Sole ownership of a corporation, in itself, is not enough to pierce the veil.

Florida Law

Under Florida law all vessels are considered to be "dangerous instrumentalities" and anyone operating a vessel must adhere to the "highest degree of care," which is a higher standard of care than required by maritime law. The statute states that only the operator of the boat, not the owner, is liable for injuries or damage unless the owner was physically on the boat when the accident occurred or was driving it at the time. This applies even when the owner is asleep below deck. The spouse who normally drives the boat should therefore be the owner, or the boat should be titled to a corporation.

A boat owner can also be held liable for injuries or damage due to "negligent entrustment" when another person is operating the boat. In *Cashell v. Hart*, the court held that the defendant knew or should have known that the operator of the boat was inexperienced and incompetent as a navigator, and was therefore negligent for entrusting the boat to that person.

The Trick

The trick is to title the boat in a Limited Liability Company, and do not make yourself an officer or director, and make sure that you have enough liability insurance. Luckily, boat owners can purchase boat insurance that covers not only the boat and equipment attached to the boat, but also provides coverage for liability lawsuits. Policies can provide coverage of up to one million dollars, and are usually offered in $100,000 increments. State Farm, Allstate, and Nationwide all offer these types of policies.

The Trap

The trap is that practically anyone who makes important decisions regarding the boat can be held liable for a large amount of money damages if there is an accident. The best recourse is to protect yourself before you ever get to that point by having plenty of liability insurance, not trusting anyone who might be considered untrustworthy to pilot a boat, not being an officer or director of a company that owns a boat, and questioning whether the boat should even be owned. B.O.A.T. often stands for Bring Out Another Thousand, and everyone knows that the best day in the life of a boat owner is the day that they sell the boat, so advise and proceed accordingly.

Medical Malpractice

Physicians practicing in Florida face potential unlimited liability for malpractice claims, as tort reform here has for the most part been thwarted by an extremely strong personal injury law lobby. Former 2007 to 2011 Republican governor Charlie Crist is now a personal injury lawyer with the largest personal injury law firm in Florida (Morgan & Morgan). He recently changed his party affiliation from Republican to Democrat and spoke at the Democratic National Convention in Charlotte in 2012 after having been on the short list for being a Vice Presidential running mate for John McCain.

Notwithstanding the above, in 2003, legislation was passed that limits pain and suffering awards and punitives (noneconomic damages) for all claims to the greater of $500,000 or triple the amount of the compensatory damages awarded to each claimant. Joint and several liability has been abrogated by Fla. Stat.

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§768.81 so that unrelated joint tortfeasors will each be responsible for only his or her pro rata share of damages unless one employs the other or they are joint venturers or general partners in a general partnership.

Florida has strong "bad faith" laws, which basically provide that, if an insurance carrier has a reasonable opportunity to settle a claim within policy limits and fails to do so, then the carrier, and not the insured, will be responsible for any jury verdict exceeding policy limits. Insureds commonly hire independent legal counsel to write "bad faith" letters at the appropriate time.

Florida's many creditor protection laws and features remain favorable to counterbalance the rough tort system environment. A great many physicians in southeast Florida are without malpractice insurance coverage because the rates can be very high. Gynecologists also pay some of the highest rates, ranging from $85,000 to $200,000. Many neurosurgeons pay much more than $250,000 a year for a $250,000 per occurrence/$750,000 aggregate policy because of high defense costs and a rough environment.

Therefore, a great many physicians practice "bare" in South Florida, and depend upon appropriate asset protection planning and the right to declare bankruptcy. Many practices have patients sign forms to waive their right to a jury trial and to be required to engage in arbitration, but some malpractice carriers will not cover claims for practices who have had patients sign these forms.

Some physicians purchase relatively inexpensive "defense only" insurance, which pays for legal fees and costs incurred to defend a suit, but no actual coverage if the suit is lost. This obviously has a limiting effect on plaintiff's lawyers who otherwise might pursue a physician who has coverage, but causes great anxiety among Florida doctors and purportedly results in more tests, procedures and other "defensive medicine" being used.

Going Bare

The following is excerpted from the author's book, *Creditor Protection for Florida Physicians:*

> "Going bare" means not carrying malpractice insurance. The vulnerability of a doctor going bare brings to mind the dreams we have all had about being naked in public. For some physicians going bare is a form of "self insuring" against malpractice risk, and for others it is a necessity that has to be lived with. With proper planning, most physicians can enjoy at least a reasonable degree of financial security while going bare.
>
> As with insurance, the decision to go bare reflects a choice between cost and coverage. In some cases the cost of traditional malpractice coverage is affordable, particularly in specialties like OBGYN, neuro surgery or other high risk areas. In other cases, many physicians with unfortunate claim records have no choice but to go bare because they cannot obtain standard insurance coverage that most physicians are able to buy notwithstanding prior claims.
>
> Some companies offer "defense only" policies that will pay for a legal defense and expert witness costs to defend a case if one arises and are described in the previous Section. When a claim is made, the plaintiff lawyer faces spending tens of thousands of dollars pursuing a case against a physician who can mount an aggressive defense and where the result may be the filing of a bankruptcy for the doctor and no award at all for the plaintiff and his or her lawyer.
>
> Going bare has unique risks, so please read the following closely before even thinking seriously about doing so.
>
> *Do I really need malpractice insurance, how do I post a bond, and what does it really take to go bare?*
>
> Florida Statute Section 458.320 controls the rules and conduct associated with a physician who wishes to go bare, and may apply to doctors who have malpractice insurance with a carrier that is not fully registered with the State of Florida Department of Insurance.
>
> Except for the alternatives described below, the statute requires $100,000/$300,000 coverage for physicians who do not have staff privileges any hospital or ASC, and $250,000/$750,000 coverage for physicians who have staff or ASC privileges. $250,000/ $750,000 coverage generally means malpractice insurance that will cover up to $250,000 per incident and $750,000 in the aggregate "up to 3 incidents per year."
>
> The statute and applicable Board of Medicine Rules basically provide as follows:
>
>> The practitioner can maintain a $250,000/$750,000 malpractice insurance policy. Of course this is $100,000/ $300,000 if the physician does not have staff privileges. Typically these policies are "claims made" policies, meaning they cover only claims made by patients

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> during the policy term. To have continuing coverage after the policy term the physician can purchase tail coverage or have the subsequent carrier provide retroactive "nose" coverage.

While the law does require that there be a malpractice policy in place while a physician is practicing, it may not require a physician to purchase a tail or retroactive coverage when he or she switches carriers. This may save the physician tens of thousands of dollars but exposes the physician and practice to significant liability.

A commonly discussed but rarely implemented alternative to the malpractice insurance liability requirement is to post a bond or a letter of credit under an arrangement permitted by the statute. Unfortunately, the bond or letter of credit must be in the amount of $750,000, and will then be exposed up to $250,000 per claim for a physician with hospital staff privileges. The numbers go to $300,000 posted, and $100,000 exposed per claim for a physician who does not have hospital staff privileges. In addition, the physician must provide his or her own defense costs, and no degree of asset protection planning will safeguard the amounts posted. Banks will not provide letters of credit without significant collateral. The arrangement is functionally the same as a cash deposit.

What about going bare? A physician may meet the Florida Statutory requirements by assuring the Agency for Health Care Administration in writing that if there is a malpractice judgment the physician agrees to pay the plaintiff the amount of the judgment, up to $250,000. If a patient obtains a judgment against the physician and the physician does not pay the patient the $250,000, then there could be serious licensing issues.

Payment must be made within 60 days of the judgment becoming final unless a timely appeal is filed. If the Department of Health becomes aware of an unpaid judgment, it is required to notify the physician immediately. If the physician then does not satisfy the judgment within 30 days of receiving the notice, the Department of Health is required to suspend the license of the physician and proceed with a disciplinary action!

We have always been concerned that a doctor could lose his or her medical license if he or she goes bankrupt without paying a judgment after having signed the applicable statement with the Board of Medicine or Osteopathy with reference to having gone bare. Nevertheless, the Boards of Medicine and Osteopathy will apparently be of the opinion that a doctor who bankrupts out patients is using federal bankruptcy rights which trump state licensing requirements. There has been no test case for this, however. Their rationale is that the right to bankrupt out financial responsibilities trumps the obligation to satisfy the going bare obligation requirements.

Even if going bare is survivable from an insurance and risk perspective, how will managed care plans and referral sources respond to the news that a physician and panel member is going bare? Different clients have had different experiences with these situations.

A physician who goes bare must also post a sign in his or her reception area stating as follows:

> Under Florida law, physicians are generally required to carry medical malpractice insurance or otherwise demonstrate financial responsibility to cover potential claims for medical malpractice. YOUR DOCTOR HAS DECIDED NOT TO CARRY MEDICAL MALPRACTICE INSURANCE. This is permitted under Florida law subject to certain conditions. Florida law imposes penalties against uninsured physicians who fail to satisfy adverse judgments arising from claims of medical malpractice. This notice is provided pursuant to Florida law.

In some cases, it will make sense to go bare if reimbursement for services is uninterrupted and there is a significant economic difference that justifies taking material risks.

If I go bare and get sued, will I be able to go bankrupt and keep my exempt assets?

The answer is probably yes, for a well-prepared doctor who has had creditor exempt assets for a number of years, thereby eliminating the possibility of being obtained through "fraudulent transfer" or subject to being otherwise set aside. As mentioned above, it is probably possible for a doctor who has gone bare to go bankrupt without paying a judgment otherwise owed to an injured patient. A doctor can declare bank-

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ruptcy and keep his or her exempt assets if those assets were properly situated when the bad result arose, and the patient was on notice that there was no malpractice insurance.

As mentioned above, there is a loophole that allows physicians to self-insure without any back-up provision in case the physician is sued, declare bankruptcy, and cannot pay a medical malpractice judgment. Uninsured doctors can essentially declare bankruptcy to shield their main homes, retirement accounts, annuities, and life insurance from malpractice judgments. Declaring bankruptcy can also keep doctors from losing their medical licenses.

In contrast, a recent South Florida case held that a doctor without malpractice insurance who was not properly licensed was NOT permitted to bankrupt out a malpractice claim. This decision was based upon the bankruptcy rules that deny discharges where a claim is based upon fraudulent conduct by someone in a fiduciary position.

While the above case was primarily based upon the doctor not even being licensed to practice because of insufficient continuing medical education and not paying licensing fees, it is possible that a doctor who does not obtain proper tail coverage could experience the same result.

A few things to consider if self insuring (a/k/a "going bare"):

The doctor must sign a statement with the Board of Medicine or Osteopathy under penalty of perjury that they agree to settle any claims of up to $250,000 without insurance.

Hospitals may be unwilling to grant privileges to self-insured physicians. In Dade and Broward counties, where bare doctors are more prevalent, many hospitals do grant privileges to self-insured physicians, but this is less common as you move northward in the state.

Many managed care plans are unwilling to contract with self-insured physicians. This problem is less common in Dade and Broward counties, and should be carefully considered before a doctor decides to go bare.

Some doctors switch malpractice carriers to go to "first year rates" without purchasing prior act ("tail") coverage for the primary purpose of being able to confirm that they have malpractice insurance for hospital and managed care plan participation. These doctors need to understand that they are not covered when a claim is made unless the claim is reported to the carrier during the term of the policy that was in effect when the patient was treated.

Patients may not respond well when they discover you are going bare.

Referrals within the medical community may be impacted.

We strongly recommend that doctors who are going bare or who have prior act exposure with no retroactive or tail coverage consider purchasing a defense only policy, as described above.

Speaking of Physician Liability — Strict Physician Anti-Referral Rules

The Florida Patient Self-Referral Act prohibits the referral of patients by a healthcare provider to his or her own group practice or other entities unless several very specific requirements are met. Certain provisions of this Act broadly apply to all "healthcare items," meaning that any small service or item such as vitamins, special shoes, and glasses provided by a physician or other healthcare provider could be implicated by this Act.

The Florida Patient Brokering Act prevents any healthcare provider or healthcare facility from giving or receiving any form of remuneration in exchange for referrals, regardless of the source of payment for the applicable service or product. This Act makes it a third-degree felony to participate or aid in paying or receiving any remuneration in exchange for the referral or delivery of patients or healthcare goods or services and can result in loss of license, Medicare practice rights, and prosecution in the criminal system.

The Florida Anti-Kickback Statute also prohibits any healthcare provider from paying or receiving any sort of "kickback" in exchange for referring patients, and provides that any violation will be punishable as illegal patient brokering.

The various Florida fee-splitting prohibitions prevent physicians and other medical providers and institutions from dividing revenues or profits in exchange for referrals unless specific exceptions apply.

The following chart, which is excerpted from the book by Alan Gassman and Lester Perling titled, *A Practice Guide to Kickback and Self-Referral Laws for Florida Physicians*, shows the differences between the federal Stark Law and the Florida Patient Self-Referral Act:

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Category	Florida Patient Self-Referral Act	Stark Law
Applicability	Applies to **all** referrals for **health care items or services** (including, but not limited to, Designated Health Services) regardless of payor.	Limited to referrals for Designated Health Services paid for or covered by Medicare or Medicaid (including HMOs).
Financial Interest	Limited to referrals to entities with which the physician is an investor or has an "*investment interest*."	Applies to referrals to entities with which the physician has a "financial relationship" through ownership or "*investment interests*" or through "compensation arrangements"
Designated Health Services	Designated Health Services include: 1) 2) 3) *radiation therapy services* 4) *diagnostic-imaging services* (not x-rays) 5) 6) *outpatient speech-language pathology services* Note: Items 7–12 to the right under the Stark Law column are not regulated by the Florida Patient Self-Referral Act except as to the general prohibition with respect to "health care items."	Designated Health Services include: 1) *clinical laboratory services* 2) *physical therapy services* 3) *radiation therapy services* and supplies; radiology 4) other*imaging services* (includes x-rays) 5) 6) **Federal Designated Health Services also include:** 7) durable medical equipment and supplies 8) parenteral and enteral nutrients, equipment, and supplies 9) prosthetics, orthotics, and supplies 10) home health services 11) outpatient prescription drugs 12) inpatient and outpatient hospital services However, these services would still fall under "Health Care Items or Services" in Florida Statutes Section 456.053(5)(b).

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Category	Florida Patient Self-Referral Act	Stark Law
Group Practice Direct Supervision Requirements	Designated Health Services must be performed under the **direct supervision** of the referring physician or group practice, meaning that one of the following individuals must be present in the office suite when the service is performed: 1) *the referring physician*; or 2) .	Designated Health Services must be **performed by** one of the following: 1) *the referring physician*; 2) ; 3) an individual who is supervised by the referring physician; or 4) an individual who is supervised by another physician in the same group.
Group Practice Location Requirements	Does not impose specific location requirements.	To use the in-office ancillary services exception, Designated Health Services must be performed either: 1) in a "centralized building" used exclusively by the group practice; or 2) in the "same building" where physicians in the group provide the full range of services.
Group Practice Compensation	Note: The Stark Law guidance regarding group practice compensation using overall profit sharing methods and productivity bonuses should apply in Florida, but no specific guidance is provided in the Florida law.	Note: Non-Medicare/Medicaid sharing of income from Designated Health Services is not regulated by the Stark Law. Stark provides specific provisions allowing group practices to pay physicians using certain overall profit sharing methods and productivity bonuses. Allows profits from designated health services to be divided into "cost centers" consisting of at least 5 physicians. Each "cost center" can implement its own compensation methods, consistent with the Stark Law.
Prohibition Against Acceptance of Outside Referrals for Diagnostic Imaging Services	Prohibits acceptance of outside referrals for diagnostic imaging services. Allows group practice to accept outside referrals for diagnostic imaging services, so long as no more than 15% of the group's patients are obtained through such outside referrals and several strict requirements are met.	Does not specifically prohibit outside referrals.

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Category	Florida Patient Self-Referral Act	Stark Law
Prohibitions Relating to Health Care Services **OTHER THAN** Designated Health Services	Prohibits referrals for the provision of **any other health care item or service** in which the physician is an *investor*. This broad provision sweeps nearly every item or service provided by a physician under the prohibitions of this Act, and could include vitamins, food supplements, and other non-regulated items. See Florida Statute Section 456.053(5)(b).	Only applies to referrals for Designated Health Services (as described above) paid for covered by Medicare and Medicaid.
Notable Exceptions for Arrangements That **Do Not Involve** Designated Health Services	1) Publicly Traded Entity Exception; and 2) Exception for physicians who own less than 50% of an investment interest in the entity where the physician's term of investment are the same as terms offered to non-referring investors, and Designated Health Services are not furnished by the entity.	Not applicable to Stark Law.
Penalties	*Civil monetary penalties, Denial of payment, Required refunds*, and Licensure discipline.	, possible False Claims Act Liability, and exclusion from federal health care programs.

Corporate Firewall Protection: Using Corporations and Other Entities to Provide Liability Protection

Certain endeavors that would normally result in liability may be placed under an LLC, a regular corporation, or certain other limited liability entities to provide "firewall" protection. The law is very clear that the shareholder or member of a company or LLC is not responsible for liabilities of the company itself absent guarantees, personal negligence, or certain other exceptions to what we call "firewall" liability. *See* Fla. Stat. §608.4227 (discussing liability for members of an LLC).

This is why virtually all successful businesses, professional practices, and many real estate and other endeavors are established under corporations, LLCs, LLLPs, and similar entities.

It is important to make sure that business entities are properly managed from a legal documentation and fiscal standpoint. Individuals working on behalf of or managing a limited liability entity may become responsible for their own acts or acts of those that they are or should be supervising.

Many single professionals have significant furniture, equipment, and accounts receivable held under their professional practice corporations. It is often possible to structure debt, ownership, and multiple corporate arrangements to reduce exposure to creditors under professional practice circumstances. This is where firewall protection comes into place, to prevent the owner of a company or certain other entities from being responsible for liabilities of the entity.

For example, rental property should almost always be owned under limited liability companies, so that if there is a catastrophic accident on the property a tenant would not be able to sue the owners. Please note, however, that a tenant might be able to sue a manager who was shown to have negligently caused the injury to the tenant.

The Manager or Officers May Still Be Sued

Notwithstanding that the owner of a company will generally not be personally responsible for liabilities thereof, the manager or president of a company may be held personally responsible for any negligent or inappropriate conduct. Why not make your nephew who has no assets the manager of your property rental company? Clients should think through who the responsible officer or manager of a company or other entity should be when potential liability is a factor. We, therefore, normally recommend that the doctor's spouse have minimal involvement with any company

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that the doctor is involved with, at least from a management and officer standpoint. Joint ownership may be useful for other purposes. An owner is not necessarily responsible for liabilities or obligations incurred by the entity owned.

Many advisors and laypersons think that LLCs or other corporations that are disregarded for income tax purposes or treated as S corporations do not shield liability like other companies do. This is incorrect. More information on LLCs and other business entities can be found in Chapter 23 of the author's book, *Creditor Protection for Florida Physicians*, which states:

> *Using Creditor Protected Assets and Creditor Protection Techniques*
>
> This introductory chapter will give you the necessary foundation in the basic premises and rules of Asset Protection.
>
> In Part I, we examined the various disasters that can befall a physician client during his or her career. The way to combat the liability threats discussed is to use creditor protection. You may not be able to prevent being sued, but you can certainly prepare yourself and secure your assets in the meantime, so that a malpractice judgment or a car accident does not decimate you and your family.
>
> In Part II, we will examine the various methods of creditor protection, and look at what assets can be protected. This portion of the book is structured to introduce some of the basic concepts and terms of creditor protection, and then to review them a number of times in increasing detail. A definitions section follows this introduction for those who are newer to the jargon of creditor and asset protection, so fear not if you are a beginner!

HEALTH INSURANCE USING GROUP POLICIES TO ASSURE COVERAGE

It may be desirable to make sure that clients with pre-existing medical conditions can maintain health insurance by self-employment as a "group of one." We thank Thomas C. Davis, RFC, of Integrated Wealth Management for his assistance in putting together this excerpt from a Gassman Law Associates Thursday Report dated November 1, 2012 (Mr. Davis can be reached at 813-314-2284 or via email at tdavis@tcdavisnet.com):

> Many of us have self-supporting clients who have not reached the Medicare age (65), but are in need of medical insurance for themselves and, sometimes, family members.
>
> The best alternative is to obtain a small group insurance policy as a small employer. Many insurance agents recommend Blue Cross Blue Shield for this purpose because they are "in Florida to stay" and generally have good coverage.
>
> Other carriers that are commonly recommended include UnitedHealthcare and Aetna. Clients who cannot qualify for individual coverage or who have a family member who cannot qualify for an employer-sponsored policy can get coverage through self-employment. Because coverage cannot be denied to groups based on pre-existing conditions, clients may use their business to obtain health insurance.
>
> *The Trick*
>
> Florida is ranked 48th out of the 50 states for the highest rates of uninsured individuals. One main reason is that individuals can be denied coverage if they have a pre-existing condition. Florida is a guaranteed issuance state, which means an individual within a group plan cannot be denied coverage if he or she has had creditable insurance for at least 18 months prior to applying. The issue is that many individuals will not have the type of creditable coverage needed to obtain new coverage because of a pre-existing condition. All individual plans are medically underwritten. While coverage may not be denied, pre-existing conditions can be permanently excluded.
>
> The trick is that all health care insurance carriers must offer coverage to small businesses, and a pre-existing condition must be covered under these plans. Small businesses are between 1-50 employees, with the owner of the business counting as an employee. The business can be a proprietorship, a company organized as a disregarded LLC, an S-corporation, or a partnership for federal tax purposes.
>
> Under guaranteed issuance, at least two plans are available to small businesses; a small employer health benefit plan and a high-deductible plan. Carriers are not allowed to make individuals wait for coverage based on a pre-existing condition if the individual has continuous, creditable coverage that did not lapse for longer than 63 days since turning 18. This is because if an individual has ongoing coverage, then preventative care will reduce future medical costs. Importantly, while these plans can require a waiting period for individuals with pre-

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existing conditions, coverage cannot be denied as it can with individual plans. Florida Statute Section 627.6699 provides that the longest wait period allowed is 24 months. This wait period varies from individual to individual and depends on the pre-existing condition. Additionally, the only pre-existing conditions for which a wait period can occur are those that have manifested themselves in the prior 24 months.

Some insurance companies have policies that reduce the allowed statutory wait time. For example, Blue Cross Blue Shield has a maximum 12 month wait period for small business plans. Blue Cross Blue Shield also looks at previous insurance coverage and the pre-existing condition to further reduce the wait time. Aetna has a standard 12 month wait period, but this does not adjust on an individual to individual basis.

Because the wait period can be reduced when previous coverage is held by the individual, maintaining health insurance in gaps of coverage is important. Clients should be aware that temporary medical insurance policies are available on the marketplace for individuals who are between jobs. Temporary health insurance is exempt from [HIPAA], meaning that when the term is over, extended coverage will not necessarily be granted. This lack of guarantee makes small employer coverage a better option for individuals with a business.

The Traps

Pursuant to Florida Statute Section 627.6699(3)(v), a group of one must register between August 1 and August 31 in order to get the guaranteed issuance starting on October 1 of the year registered. Most carriers will enforce this enrollment rule, so a client who is on COBRA or who is perhaps receiving medical insurance from another state by reason of other arrangements should set their calendar to apply for a group plan in the month of August.

If the group has two or more employees (including the owner), then enrollment is ongoing. Therefore, small businesses that are larger than a sole-proprietorship can enroll whenever needed by contacting insurance providers.

The only downside to small business health insurance as an alternative to an individual plan is that a carrier can make an adjustment in the rate based on the pre-existing condition of up to 15% of the carrier's approved rate. This additional charge will be applied uniformly to the premiums charged to employees and dependents, so those purchasing health insurance will be responsible for the increased rate. Still, an increase in the rate charged is better than having no health insurance.

FLORIDA HOMESTEAD LAW

Homestead Limitations on Devise and Transfer

The Florida Constitution prohibits the owner of homestead property who is married and owns his or her homestead individually from transferring or mortgaging the property without permission of his or her spouse. This is why a spouse will have to sign on a mortgage if the homeowner spouse wants to borrow money, even though the non-owner spouse is not actually a borrower and is not guaranteeing the note.

If the homeowner is married with no children, then on death the surviving spouse will inherit the homestead as a matter of Florida law, unless this right has been waived. This applies even if the first dying spouse's will states that the house would pass otherwise.

Please note that these rules do not apply if the house is being treated as owned jointly with right of survivorship or tenants by the entireties between a husband and wife. In that event, the home will be completely owned by the surviving spouse, notwithstanding what a will or trust says. This will apply whether or not they have children.

If the homeowner is married and has one or more children, then upon the homeowner's death a home in his or her sole name will become owned as a "life estate" held by the surviving spouse and a "remainder interest" held by the child or children of the deceased homeowner. The surviving spouse can then choose to keep the life estate or to convert this to a 50% ownership, whereby the other 50% will be owned by the deceased homeowner's descendants. This 50% ownership conversion option became effective for homesteads owned by decedents who have died on or after October 1, 2010. The surviving spouse has six months from the decedent's death to elect to receive the undivided one-half interest.

If the spouse instead remains with a life estate then he or she will have the exclusive right to use and ownership of the home during his or her lifetime, which includes the right to rent it out to third parties or to otherwise make use of it in any reasonable way. The children or grandchildren, as "remainder beneficiaries," have no right to occupy the property during the

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time that the owner of the life estate was still alive, and become the sole owners of the property on the death of the life tenant. The life tenant has a duty to make and pay for ordinary and reasonable repairs to the house in order to prevent "waste." He or she is also responsible for paying property taxes and insurance. Remainder beneficiaries are responsible for paying for any extraordinary repairs and costs assessed to the property, as evidenced by the Fourth District Court of Appeals case, *Schneberger v. Schneberger*, 979 So. 2d 981 (Fla. Dist. Ct. App. 2008), which said that the remainder beneficiary had to pay for hurricane repair costs from the proceeds of the insurance as well as a special hurricane assessment from the homeowners association.

If the surviving spouse instead elects to be a one-half owner, every joint owner in a Florida tenancy by the entireties property has equal rights of occupancy, but any owner also has the right to require that the property be sold to the highest bidder "on the courthouse steps" in a partition action.

Homestead Inheritance Rights Avoidance Techniques

Is it possible to protect the value of the homestead by keeping it mortgaged, or by owning it under an LLC or LP?

Property owned by an LLC or LP will not qualify for the $50,000 value exclusion or the 3% per year valuation increase cap on real estate taxes unless the property is leased to the person who resides there on a 98-year or longer lease that might terminate upon certain events. Fla. Stat. §196.041(1).

It is certainly better creditor protection to own a homestead that is under one-half acres within the city limits or under 160 acres outside of city limits individually, but some Floridians will choose to own their homestead under an LLC or a LP and arrange for charging order protection to apply by having the entity owned in part by another person or a trust for descendants.

Elective Share Avoidance Techniques

Fla. Stat. §732.2065 provides that the elective share is equal to 30% of the elective estate. The alternative to this is to fund 37.5% of the elective estate into a trust, pursuant to Fla. Stat. §732.2095. The trust will provide for the spouse to receive income plus principal as needed for health, education, and maintenance, but only after taking into account other resources available to the spouse. The testator's children could be trustees of the trust and receive reasonable attorneys' fees.

Many Floridians opt to give the spouse significant monies during the marriage in exchange for a waiver of elective share and homestead inheritance rights.

Another strategy to avoid or reduce the elective share is for the client to make a completed gift to an irrevocable trust for the benefit of his or her children, or other desired beneficiaries with the client as a discretionary beneficiary of the trust, if the transfer to the trust is made within at least one year before the client's death.

Fla. Stat. §732.2035(5)(c) indicates that property transferred to a trust that has the grantor as a beneficiary is not included in the grantor's elective estate as long as the grantor's only interests in the property consist of one or more of the following:

> (1) the property could be distributed to or for the benefit of the grantor only with the consent of all persons having a beneficial interest in the property;
>
> (2) the income or principal of the property could be distributed to or for the benefit of the grantor only through the exercise or in default of an exercise of a general power of appointment held by any person other than the grantor;
>
> (3) the income or principal of the property is or could be distributed in satisfaction of the grantor's obligation of support; or
>
> (4) the grantor had a contingent right to receive principal, other than at the discretion of any person, which contingency was beyond the control of the grantor and which had not in fact occurred at the grantor's death.

Therefore, a father with three sons might establish three separate irrevocable trusts (one for each son) in a creditor protection jurisdiction such as Nevada or Alaska. Each separate irrevocable trust can have the applicable son and the grantor as discretionary beneficiaries, provided that no distributions can be made to the grantor without the consent of the son. This should prevent the assets of the trust from being included in the grantor's elective share estate upon his death.

Who would be the beneficiaries of the trust after the grantor/contributor and applicable son have passed away? The trust can include a provision providing for the son's children to be alternate beneficiaries if the son had not exercised his power of appointment before his death, and then the consent of each of the son's children would be necessary before any distributions from the trust can be made to the grantor for his benefit.

Fla. Stat. §732.2035, Property Entering Into Elective Estate, states that the following is included when calculating the elective share:

> (1) The decedent's probate estate.
>
> (2) The decedent's ownership interest in accounts or securities registered in "Pay On

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Death," "Transfer On Death," "In Trust For," or co-ownership with right of survivorship form. For this purpose, "decedent's ownership interest" means, in the case of accounts or securities held in tenancy by the entirety, one-half of the value of the account or security, and in all other cases, that portion of the accounts or securities which the decedent had, immediately before death, the right to withdraw or use without the duty to account to any person.

(3) The decedent's fractional interest in property, other than property described in subsection (2) or subsection (7), held by the decedent in joint tenancy with right of survivorship or in tenancy by the entirety. For this purpose, "decedent's fractional interest in property" means the value of the property divided by the number of tenants.

(4) That portion of property, other than property described in subsection (2), transferred by the decedent to the extent that at the time of the decedent's death the transfer was revocable by the decedent alone or in conjunction with any other person. This subsection does not apply to a transfer that is revocable by the decedent only with the consent of all persons having a beneficial interest in the property.

(5) (a) That portion of property, other than property described in subsection (3), subsection (4), or subsection (7), transferred by the decedent to the extent that at the time of the decedent's death:

1. The decedent possessed the right to, or in fact enjoyed the possession or use of, the income or principal of the property; or

2. The principal of the property could, in the discretion of any person other than the spouse of the decedent, be distributed or appointed to or for the benefit of the decedent.

In the application of this subsection, a right to payments under a commercial or private annuity, an annuity trust, a unitrust, or a similar arrangement shall be treated as a right to that portion of the income of the property necessary to equal the annuity, unitrust, or other payment.

(b) The amount included under this subsection is:

1. With respect to subparagraph (a)1., the value of the portion of the property to which the decedent's right or enjoyment related, to the extent the portion passed to or for the benefit of any person other than the decedent's probate estate; and

2. With respect to subparagraph (a)2., the value of the portion subject to the discretion, to the extent the portion passed to or for the benefit of any person other than the decedent's probate estate.

(c) This subsection does not apply to any property if the decedent's only interests in the property are that:

1. The property could be distributed to or for the benefit of the decedent only with the consent of all persons having a beneficial interest in the property; or

2. The income or principal of the property could be distributed to or for the benefit of the decedent only through the exercise or in default of an exercise of a general power of appointment held by any person other than the decedent; or

3. The income or principal of the property is or could be distributed in satisfaction of the decedent's obligation of support; or

4. The decedent had a contingent right to receive principal, other than at the discretion of any person, which contingency was beyond the control of the decedent and which had not in fact occurred at the decedent's death.

(6) The decedent's beneficial interest in the net cash surrender value immediately before death of any policy of insurance on the decedent's life.

(7) The value of amounts payable to or for the benefit of any person by reason of surviving the decedent under any public or private pension, retirement, or deferred compensation plan, or any similar arrangement, other than benefits payable under the federal Railroad Retirement Act or the federal Social Security System. In the case of a defined contribution plan as defined in s. 414(i) of the Internal Revenue Code of 1986, as amended, this subsection shall not apply to the excess of the proceeds of any insurance policy on the decedent's life over the net cash surrender value of the policy immediately before the decedent's death.

(8) Property that was transferred during the 1-year period preceding the decedent's death

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as a result of a transfer by the decedent if the transfer was either of the following types:

(a) Any property transferred as a result of the termination of a right or interest in, or power over, property that would have been included in the elective estate under subsection (4) or subsection (5) if the right, interest, or power had not terminated until the decedent's death.

(b) Any transfer of property to the extent not otherwise included in the elective estate, made to or for the benefit of any person, except:

1. Any transfer of property for medical or educational expenses to the extent it qualifies for exclusion from the United States gift tax under s. 2503(e) of the Internal Revenue Code, as amended; and

2. After the application of subparagraph 1., the first annual exclusion amount of property transferred to or for the benefit of each donee during the 1-year period, but only to the extent the transfer qualifies for exclusion from the United States gift tax under s. 2503(b) or (c) of the Internal Revenue Code, as amended. For purposes of this subparagraph, the term "annual exclusion amount" means the amount of one annual exclusion under s. 2503(b) or (c) of the Internal Revenue Code, as amended.

Family Allowance

In addition to the protections described above, there is a "family allowance," whereby a surviving spouse can receive up to $18,000 from the estate of his or her spouse for support purposes. The amount awarded to the surviving spouse must be "reasonable," and the court will look to factors such as the previous standard of living, needs of the spouse and children, age and health of the spouse, and other resources. The right to receive a family allowance can be waived by a spouse in a prenuptial agreement or other document.

The provision, Fla. Stat. §732.403, Family Allowance, provides as follows:

> In addition to protected homestead and statutory entitlements, if the decedent was domiciled in Florida at the time of death, the surviving spouse and the decedent's lineal heirs the decedent was supporting or was obligated to support are entitled to a reasonable allowance in money out of the estate for their maintenance during administration. The court may order this allowance to be paid as a lump sum or in periodic installments. The allowance shall not exceed a total of $18,000. It shall be paid to the surviving spouse, if living, for the use of the spouse and dependent lineal heirs. If the surviving spouse is not living, it shall be paid to the lineal heirs or to the persons having their care and custody. If any lineal heir is not living with the surviving spouse, the allowance may be made partly to the lineal heir or guardian or other person having the heir's care and custody and partly to the surviving spouse, as the needs of the dependent heir and the surviving spouse appear. The family allowance is not chargeable against any benefit or share otherwise passing to the surviving spouse or to the dependent lineal heirs, unless the will otherwise provides. The death of any person entitled to a family allowance terminates the right to that part of the allowance not paid. For purposes of this section, the term "lineal heir" or "lineal heirs" means lineal ascendants and lineal descendants of the decedent.

FLORIDA MARITAL LAW

Example: Ken and Barbie get married in the year 2014, and at that time Ken owns a rental house that he keeps in his personal name. After the marriage, Barbie's parents give her a $200,000 brokerage account. Ken's hobby is restoring buildings, and he works a few hours every month to improve the rental house. He also manages the house and receives rental income that he deposits into an account in his name. Barbie lets her parent's stockbroker manage her individual brokerage account, and it grows significantly. When Ken and Barbie divorce in the year 2020, Barbie will get ½ of the rental income account, and Ken will have to pay Barbie ½ of the increase in the value of the rental house that occurred between 2014 and 2020. Ken gets no part of Barbie's brokerage account. If Ken earns significantly more than Barbie, then he may have to pay alimony to Barbie for a few years, but this will be reduced to some extent to take into account that Barbie's financial needs are reduced by the brokerage account and other monies that she has received from the rental house appreciation and the rental account.

If Ken and Barbie had signed a valid prenuptial agreement before being married, then the results

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above would generally follow the premarital agreement instead of Florida law.

This example illustrates why we commonly counsel individuals who are getting married to enter into a premarital agreement or to segregate their premarital assets. It is imperative that the prenuptial agreement properly address "active appreciation" of nonmarital assets in order to avoid sharing such appreciation with an ex-spouse. Unfortunately, this clause is left out of many prenuptial agreements, thus subjecting the appreciation of nonmarital assets to equitable distribution.

Also, we encourage individuals with premarital assets or assets received by gift to not add to or make use of those assets, so that an expensive and sometimes controversial forensic accounting procedure would not have to be used in the event of a divorce.

To return to our previous example, assume that when Ken and Barbie got married he also had an IRA. Ken would be well-advised to not add to his premarital IRA, but to instead start a new postmarital IRA, so that in the event of a divorce it would be easy to determine the postmarital IRA contributions without having to spend thousands of dollars on accounting analysis and theoretical arguments that would apply to how to determine what postmarital growth comes from premarital and postmarital contributions.

Oftentimes, when we explain that assets held by one spouse would be subject to creditor claims, but could be protected if owned jointly as tenants by the entireties, the spouse with separate individual assets will consider placing these into tenancy by the entireties with the other spouse. However, the protection of these assets is sacrificed in the event of a divorce, unless the couple enters into a proper marital agreement.

Sometimes, we counsel married clients who have separate assets to consider having each spouse place an equal amount of separate assets into a joint account or investment vehicle, so that the spouses have the protection of tenancy by the entireties and the knowledge that, if they are divorced, they will equally share the joint investments and will not be put at a disadvantage by having combined their assets.

Other rules that apply in the marital law arena include the homestead inheritance rules, the elective share rules, and the family allowance. When a married person dies, he or she is not required to leave assets to a spouse, but Florida law has built-in spousal protection in the form of homestead laws, the elective share laws, and family allowance statutes. These are described above.

Each of these three spousal laws can be waived by an appropriate legal document or in a pre- or postnuptial agreement.

As to a court's ability to grant alimony, Fla. Stat. §61.08, Alimony, provides the following:

(1) In a proceeding for dissolution of marriage, the court may grant alimony to either party, which alimony may be bridge-the-gap, rehabilitative, durational, or permanent in nature or any combination of these forms of alimony. In any award of alimony, the court may order periodic payments or payments in lump sum or both. The court may consider the adultery of either spouse and the circumstances thereof in determining the amount of alimony, if any, to be awarded. In all dissolution actions, the court shall include findings of fact relative to the factors enumerated in subsection (2) supporting an award or denial of alimony.

(2) In determining whether to award alimony or maintenance, the court shall first make a specific factual determination as to whether either party has an actual need for alimony or maintenance and whether either party has the ability to pay alimony or maintenance. If the court finds that a party has a need for alimony or maintenance and that the other party has the ability to pay alimony or maintenance, then in determining the proper type and amount of alimony or maintenance under subsections (5)–(8), the court shall consider all relevant factors, including, but not limited to:

(a) The standard of living established during the marriage.

(b) The duration of the marriage.

(c) The age and the physical and emotional condition of each party.

(d) The financial resources of each party, including the nonmarital and the marital assets and liabilities distributed to each.

(e) The earning capacities, educational levels, vocational skills, and employability of the parties and, when applicable, the time necessary for either party to acquire sufficient education or training to enable such party to find appropriate employment.

(f) The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education, and career building of the other party.

(g) The responsibilities each party will have with regard to any minor children they have in common.

(h) The tax treatment and consequences to both parties of any alimony award,

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including the designation of all or a portion of the payment as a nontaxable, nondeductible payment.

(i) All sources of income available to either party, including income available to either party through investments of any asset held by that party.

(j) Any other factor necessary to do equity and justice between the parties.

(3) To the extent necessary to protect an award of alimony, the court may order any party who is ordered to pay alimony to purchase or maintain a life insurance policy or a bond, or to otherwise secure such alimony award with any other assets which may be suitable for that purpose.

(4) For purposes of determining alimony, there is a rebuttable presumption that a short-term marriage is a marriage having a duration of less than 7 years, a moderate-term marriage is a marriage having a duration of greater than 7 years but less than 17 years, and long-term marriage is a marriage having a duration of 17 years or greater. The length of a marriage is the period of time from the date of marriage until the date of filing of an action for dissolution of marriage.

(5) Bridge-the-gap alimony may be awarded to assist a party by providing support to allow the party to make a transition from being married to being single. Bridge-the-gap alimony is designed to assist a party with legitimate identifiable short-term needs, and the length of an award may not exceed 2 years. An award of bridge-the-gap alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony. An award of bridge-the-gap alimony shall not be modifiable in amount or duration.

(6) (a) Rehabilitative alimony may be awarded to assist a party in establishing the capacity for self-support through either:

1. The redevelopment of previous skills or credentials; or

2. The acquisition of education, training, or work experience necessary to develop appropriate employment skills or credentials.

(b) In order to award rehabilitative alimony, there must be a specific and defined rehabilitative plan which shall be included as a part of any order awarding rehabilitative alimony.

(c) An award of rehabilitative alimony may be modified or terminated in accordance with s. 61.14 based upon a substantial change in circumstances, upon noncompliance with the rehabilitative plan, or upon completion of the rehabilitative plan.

(7) Durational alimony may be awarded when permanent periodic alimony is inappropriate. The purpose of durational alimony is to provide a party with economic assistance for a set period of time following a marriage of short or moderate duration or following a marriage of long duration if there is no ongoing need for support on a permanent basis. An award of durational alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony. The amount of an award of durational alimony may be modified or terminated based upon a substantial change in circumstances in accordance with s. 61.14. However, the length of an award of durational alimony may not be modified except under exceptional circumstances and may not exceed the length of the marriage.

(8) Permanent alimony may be awarded to provide for the needs and necessities of life as they were established during the marriage of the parties for a party who lacks the financial ability to meet his or her needs and necessities of life following a dissolution of marriage. Permanent alimony may be awarded following a marriage of long duration if such an award is appropriate upon consideration of the factors set forth in subsection (2), following a marriage of moderate duration if such an award is appropriate based upon clear and convincing evidence after consideration of the factors set forth in subsection (2), or following a marriage of short duration if there are written findings of exceptional circumstances. In awarding permanent alimony, the court shall include a finding that no other form of alimony is fair and reasonable under the circumstances of the parties. An award of permanent alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony. An award may be modified or terminated based upon a substantial change in circumstances or upon the existence of a supportive relationship in accordance with s. 61.14.

(9) The award of alimony may not leave the payor with significantly less net income than

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the net income of the recipient unless there are written findings of exceptional circumstances.

(10) (a) With respect to any order requiring the payment of alimony entered on or after January 1, 1985, unless the provisions of paragraph (c) or paragraph (d) apply, the court shall direct in the order that the payments of alimony be made through the appropriate depository as provided in s. 61.181.

(b) With respect to any order requiring the payment of alimony entered before January 1, 1985, upon the subsequent appearance, on or after that date, of one or both parties before the court having jurisdiction for the purpose of modifying or enforcing the order or in any other proceeding related to the order, or upon the application of either party, unless the provisions of paragraph (c) or paragraph (d) apply, the court shall modify the terms of the order as necessary to direct that payments of alimony be made through the appropriate depository as provided in s. 61.181.

(c) If there is no minor child, alimony payments need not be directed through the depository.

(d)1. If there is a minor child of the parties and both parties so request, the court may order that alimony payments need not be directed through the depository. In this case, the order of support shall provide, or be deemed to provide, that either party may subsequently apply to the depository to require that payments be made through the depository. The court shall provide a copy of the order to the depository.

2. If the provisions of subparagraph 1. apply, either party may subsequently file with the depository an affidavit alleging default or arrearages in payment and stating that the party wishes to initiate participation in the depository program. The party shall provide copies of the affidavit to the court and the other party or parties. Fifteen days after receipt of the affidavit, the depository shall notify all parties that future payments shall be directed to the depository.

3. In IV-D cases, the IV-D agency shall have the same rights as the obligee in requesting that payments be made through the depository.

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