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

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"My parents didn't want to move to Florida, but they turned 60 and that's the law." —Jerry Seinfeld

"I was just heading down to Buckhead to get the newspaper and the next thing I knew I was on I-95 heading for Florida." — Jimmy Buffett

INTRODUCTION

A great many lawyers, CPAs, and financial advisors have clients who reside in Florida or spend a good deal of time there and have the need to know about a number of unique Florida laws that can significantly impact individuals and businesses there.

These include many rules beyond typical will and trust laws, which lawyers throughout the country can navigate when their clients move to Florida or have a substantial presence in Florida. Florida has restrictive constitutional homestead disposition limitations, a unique elective share statute, documentary stamp taxes that can even impact transfers between spouses or to wholly owned entities, vehicle liability rules, and creditor protection statutes and case law that would often not be expected by someone who is not familiar with Florida's unique laws.

This article is intended to provide non-Florida lawyers, trust officers, and financial advisors with important information that will apply to Florida clients and that can significantly impact planning design and implementation. It is not just alligators, mosquitoes, and sharks that can bite clients and their advisors!

Over 300 hours were spent researching and writing this article. The author sincerely thanks Stetson Law School students Carly Ross, Eric Moody, and Kacie Hohnadell, and recent Stetson Law School graduate Alexandra Fugate, as well as law partners Kenneth Crotty, Esq., and Christopher Denicolo, Esq., for all of their work, comments, and contributions to this article and predecessor materials that have been used to complete this. Also, property and casualty insurance agent, Chuck Wasson, and elder law attorney, Charlie Robinson, Esq., made substantial contributions to this work.

Part II of this article will appear in a subsequent issue of this publication and will cover many topics, including Florida required inheritance rules with respect to homestead, elective share avoidance techniques, and unique creditor protection opportunities and traps for the unwary. Stay tuned!

2013 FLORIDA COMPLIANCE CALENDAR

To guide the practitioner through the new year, we have prepared a 2013 Florida Advisor Calendar Checklist giving dates for entity maintenance, 529 plan entry, tax return, and property tax deadlines, and other important dates that all successful Floridians and their advisors should know about.

Our 2013 Florida Advisor Calendar Checklist

Filing period for annual reports of corporations, LLCs, LLPs, LPs, and non-profits	January 1–May 1
Gasparilla Pirate Festival in Tampa	January 26
Deadline for purchasing a Florida 529 Prepaid College Plan at previous year's prices	January 31

Spring Break	February 23–April 20
Homestead application deadline	March 1
Bike Week in Daytona Beach	March 8–17
Florida corporate income tax due	March 15–April 1
Hurricane Season	June 1–November 30
Fantasy Fest in Key West	October 18–27
First day of Hanukkah (time to buy gift for your Jewish tax lawyer)	November 27
Deadline for early payment of property taxes with discount (check your county tax appraiser's website for exact deadlines)	4%.....November 30 3%.....December 31 2%.....January 31 following year 1%.....February 28 following year
Property tax deadline	Typically March 31, but check your tax appraiser's website to be sure
TRIM Notice — right to contest appraisal	Varies — see your tax appraiser's website immediately after you receive notice
Vehicle tag renewal	Annually on owner's birthday
Open enrollment for HMOs	Varies — check with your employer's human resource department

VERY TREACHEROUS NEW DURABLE POWER OF ATTORNEY ACT

In 2010, the Florida Legislature revamped its Durable Power of Attorney statute in several ways (Chapter 709 of the Florida Statutes).

A Durable Power of Attorney form with optional clauses is included as Exhibit 1 at the end of this article.

The new law specifically prohibits the use of "springing powers of attorney" executed after September 30, 2010, meaning that powers of attorney signed after that date which provide that they have no effect until the incapacity of the principal will have no force whatsoever. Although springing powers of attorney signed prior to October 1, 2011 are grandfathered in, they will now only be enforceable if the agent receives a letter signed by the principal's primary Florida doctor attesting to incapacity. The new law also requires that any power of attorney signed after the above referenced date contain explicit authority for each action that an agent would take. A general authorization of power will not be enforceable.

Also, many powers and authorities will not be effective in a post-September 30, 2011 power of attorney unless the principal separately initials or signs specific places below seven separately enumerated categories of powers, which include giving the agent the power to: (1) create an inter vivos trust; (2) amend, revoke, or terminate a trust created by or for the benefit of the principal; (3) create or change rights of survivorship; (4) create or change a beneficiary designation; (5) waive the principal's rights to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; (6) disclaim property or powers of appointment; and (7) make a gift as described in Fla. Stat. §709.2202(3).

The new statute also provides that an agent is not eligible to be compensated for the services rendered unless one of the following applies:

1. The agent is the spouse or an heir of the principal.

2. The agent is a Florida resident that has never been an agent for more than three principals at the same time.

3. The agent is a Florida licensed lawyer or CPA.

4. The agent is a financial institution that has Florida trust powers.

Six Catastrophes That Can Happen as Result of New Florida Durable Power of Attorney Act

1. Signing a springing power of attorney — it will have no force or effect after September 30, 2011.

2. Not enumerating each and every power that the agent will need to exercise, in that a general authorization provides no power or authority — specific enumeration is required for a post-September 30, 2011 power of attorney.

3. Authorizing the agent to conduct certain actions, without separately signing or initialing each provision, will not be sufficient to allow the agent to do any of the following: (a) create an inter vivos

trust (living trust) — the terms of the trust agreement may prevent amendment or termination by an agent under a power of attorney; (b) amend, revoke, or terminate a trust created by or for the benefit of the principal (if the trust instrument allows it); (c) make a gift subject to Fla. Stat. §709.2202(3); (d) create or change rights of survivorship; (e) create or change a beneficiary designation; (f) waive the principal's rights to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; or (g) disclaim property or powers of appointment.

4. Executing a power of attorney after September 30, 2011 without having two witnesses and a notary to each signature authority — these are required for a post-September 30, 2011 power of attorney. Before October 1, 2011, two witnesses would be sufficient if the power of attorney was not a "durable power of attorney," or if the agent would not be transferring real estate or signing other documents that required notarization and "equal dignity." Note: Health care powers of attorney require that the two witnesses not be related to the person giving the power.

5. An agent is not eligible for compensation, unless: (1) the agent is the spouse or an heir of the principal; (2) the agent is a Florida resident who has never been an agent for more than three principals at the same time; (3) the agent is a Florida licensed lawyer or CPA; or (4) the agent is a financial institution that has Florida trust powers. How many illegal contracts will be entered into as a result of this?

6. Granting someone a power of attorney whom you do not trust 100% — untrustworthy agents may seek to have principals sign new powers of attorney because of recent articles and publicity, and will then take advantage of them.

HEALTH CARE POWERS OF ATTORNEY WITNESS AND NOTARIZATION REQUIREMENTS

The signing of a health care power of attorney must be witnessed by two individuals who are not relatives of the principal, and also must be notarized.

The health care power of attorney document is included as Exhibit 2 at the end of this article.

FLORIDA TAX LAW

No Individual, Partnership, S Corporation, or Trust Income Taxes or Tax Returns!

Florida has no individual, partnership, S corporation, or trust income taxes, but does impose sales tax on sales and rentals of many items, a 5% income tax on C corporation income, documentary stamp taxes on real estate transfers and mortgages, and intangible taxes on borrowing.

Florida's Constitution prohibits a state income tax and would be very difficult to amend.

Florida had an intangibles tax that was based upon the value of stocks, mutual funds and bonds other than Florida municipal bonds. This tax was reduced to $1.50 per $1,000 of value of non-exempt intangible assets in 1999, and was eliminated beginning in 2007.

Because there are no individual income taxes or S corporation taxes, Florida imposes a number of other taxes and charges that many people from other states are not accustomed to seeing, and a number of planning considerations and tax uncertainties are discussed below.

The Florida Department of Revenue is said by many to have aggressive and inflexible auditors and revenue agents, while the advisory staff in Tallahassee is said to be much more reasonable and informative. Taxpayer advisory opinions cost nothing to request, so oftentimes it is better to ask permission than forgiveness when contemplating state tax-associated conduct.

No Inheritance or Estate Taxes

Previously, Florida had a "pickup tax" that was imposed upon estates of Florida residents. This tax was coined a "pickup tax" because Florida essentially "picked up" all, or a portion of, the amount of the credit for state death taxes allowed on the federal estate tax return. On December 31, 2004, the federal law changed to make the federal credit a deduction for state estate taxes, which eliminated Florida's pickup tax. Although the tax was eliminated, estates are still required to file an Affidavit of No Florida Estate Tax Due with the state of Florida, regardless of whether the estate is required to file a Form 706 or 706NA federal estate tax return. The probate estates of decedents required to file the federal estate tax return cannot be closed, according to most probate judges, unless or until a Closing Letter is received from the IRS. Where there are modest estate tax returns to facilitate allowing a surviving spouse to have portability of unused estate tax exemption, it may be necessary to keep the probate estate open until a clearance letter is received from the IRS. This will be a further burden of filing an estate tax return for a modest estate. Hopefully a probate judge will permit the closure of an estate before a clearance letter is received, where the estate tax return was filed voluntarily and not by reason of being required by the IRS.

C Corporation and Business Taxes

Florida does impose a 5.5% income tax on the net income of C corporations, making S corporations and partnerships more attractive comparably than C corporations for business and investment activities in Florida. C corporations that zero out income each year by paying compensation to officers and directors will pay no tax in Florida unless deductions for compensation or other expenses are disallowed. A Florida limited liability company (LLC) that elects to be treated as a C corporation for federal income tax purposes will be subject to Florida income tax accordingly.

Tangible Taxes

Businesses pay a tangible personal property tax based on the value of their physical non-real estate assets. The millage, or rate of taxation, is set by the Board of County Commissioners, School Board, City Council and governing bodies of other independent special taxing districts and authorities. The millage is set by calculating a rate per $1,000 valuation that will produce each county's budget revenues from ad valorem taxes. One mill represents $1 of tax on each $1,000 of taxable valuation. The tax rates typically range from approximately 15 to 20 mills (15%–20% of the value of physical business assets).

Unemployment Tax

Renamed the "Reemployment Tax" in the 2012 legislative session, Florida's unemployment tax requires employers to pay a tax based on wages of their employees as part of efforts to help Florida's job seekers get reemployed. The rate for initial employers is 2.7% of payroll for the first 10 quarters (based on the employees' annual salary up to $8,000). After that, the rate is recalculated based on the employer's history, with a maximum rate of $432 a year per employee.

Workers' Compensation

In addition to the above taxes, Florida employers that employ four or more part- or full-time employees are also required to obtain workers' compensation coverage. The rates vary and are dependent on the business's industry classification, its history of workers' compensation claims, salaries paid to employees, and other factors. Chapter 440 of the Florida Statutes establishes workers' compensation coverage requirements for employers. If an employer is unable to obtain coverage through the private insurance market, the employer can contact the Florida Workers' Compensation Joint Underwriting Association at (941) 378-7400.

Sales Tax on Sale of Tangible Assets and Rentals

A 6% general sales tax applies statewide. In addition, most counties in Florida apply a discretionary sales surtax on top of that. County surtax rates currently range from .5% to 1.5%, but 40 out of 67 Florida counties have a 1% addition and a consequent 7% sales tax. Exhibit 3, included at the end of this article, is a chart from the Florida Department of Revenue with each county's total sales tax rate.

This sales tax does not apply to the "isolated sale" of business assets where no business broker is involved with the sale, under the exceptions in Rule 12A-1.037 of the Florida Administrative Code, which states that "[t]he sale of business assets in conjunction with the sale of the business... other than inventory and aircraft, boats, mobile homes and motor vehicles, qualifies as an isolated sale provided the sale and the transfer of the assets of the business is completed within thirty (30) days from the date of the agreement for the sale of the business." The rule also states that, if there is a business broker, agent or auctioneer involved with the sale, the exception above does not apply on the theory that the sale is not isolated, so sellers of businesses should be made aware of this issue. This tax would not apply when the stock of a company is sold as opposed to an asset sale. Florida also does not have a Bulk Sales Act.

Florida has an annual "back to school" three-day sales tax holiday each year in August where no sales tax is collected on clothing, footwear and certain accessories ($75 and under per item) as well as school supplies that are $15 and under per item.

Sales Tax on Rent

The sales tax also applies to rent, even when paid between related entities, and the Florida Department of Revenue has been known to take the position that rent will be considered as paid in almost any instance where monies pass directly or indirectly between related entities with a lessor/lessee relationship. Also, if the "tenant" pays mortgage payments on behalf of the real estate entity, the Department will take the position that this is rent according to Technical Assistance Advisement 10A-026. This has been known to occur even when the operating entity makes distributions to its shareholders and the shareholders separately make contributions to the capital of the real estate company, although there are older Technical Assistance Advisements that would indicate that this does not necessarily need to be the case. Technical Assistance Advisement 07A-011, for instance, points out that the Department has previously recognized that there may be situations wherein "income" or "profit" flowing between related entities would not be "rental consideration."

Because the statute of limitations on sales tax never runs unless and until a sales tax return has been filed, many taxpayers pay a small amount of rent or lease a small part of the property to another user and pay sales tax and file returns.

Many taxpayers will not be able to deduct interest and depreciation from rental activity that would otherwise be available because of the passive activity loss rules. Internal Revenue Code §469(c)(7) may nevertheless permit these deductions where a "tenant entity" and the real estate owner entity have generally identical ownership, and the real estate is used in the tenant's trade or business.

Section 469(c) directs that activities may be treated as a single activity if they constitute an appropriate economic unit for the measurement of gain or loss for purposes of §469. If the rental activity can be grouped to the taxpayer's trade or business activity, they can avoid the passive loss rules that limit deductibility.

Regs. §1.469-4(c)(2) lists five nonexclusive factors that are to be given the greatest weight in determining whether activities constitute an appropriate economic unit: (i) similarities and differences in types of trades or businesses; (ii) the extent of common control; (iii) the extent of common ownership; (iv) geographical location; and (v) interdependencies between or among the activities.

Regs. §1.469-4(d)(1)(i) further provides that, even where a rental activity and a trade or business activity constitute an appropriate economic unit, they may be grouped together only if one of the following three elements are met: (A) the rental activity is insubstantial in relation to the trade or business activity; (B) the trade or business activity is insubstantial in relation to the rental activity; or (C) each owner of the trade or business activity has the same proportionate ownership in the rental activity, in which case the portion of the rental activity that involves the rental of items of property for use in the trade or business activity may be grouped with the trade or business activity.

The author is not sure why the word "insubstantial" is contained in the regulation, or what it is intended to mean. The Treasury regulations do not define the term "insubstantial" and there is very little case law addressing this issue. In *Candelaria v. U.S.*, 518 F. Supp. 2d 852 (W.D. Tex. 2007), the court attempted to craft a definition of this term. The court found that, in determining insubstantiality, the analysis should focus on "pertinent factors" including the following: the relationship of income between the rental activity and business activity (using the 80/20 rule); whether the entities work together as a single business unit rather than two distinct entities; and whether the rental activity was created solely for the other business entity's benefit.

Florida imposes sales tax on residential rentals, known as "transient accommodations," unless there is a bona fide written lease for a period of longer than six months. Fla. Admin. Code Rule 12A-1.061 provides that, to be considered a lease for a period longer than six months, a written lease agreement effective the first day of a month must run through the first day of the seventh consecutive month, and a lease starting at any other day in the month must be in effect until the day after the corresponding day of the seventh month. For example, a lease agreement effective July 1 must be effective through January 1, and a lease effective July 28 must be effective through January 29. For a written lease to be considered "bona fide" it cannot contain a provision allowing the lessee to cancel the lease at any time without penalty or a provision that would allow the lessee to avoid full payment of the stated amount of the rent. Any lease for one or more years must be in writing with two witnesses to each signature to be enforceable.

Years ago, there was a loophole that provided that no sales tax would be due on the mortgage payments made by the tenant if the tenant was a guarantor of the mortgage debt. This loophole was legislated out of the law several years ago, but some practitioners and taxpayers are not aware that they have significant exposure for sales tax on ongoing rent payments.

The sale of a motor vehicle, airplane, boat, or other titled transportation vehicle occasions the requirement to pay a 7% sales tax, and the Florida Department of Revenue has been known to actively track physical airplanes and boats to check whether sales tax was paid when they were acquired by out-of-state companies or other entities that Floridians are sometimes erroneously advised to set up and maintain in an attempt to avoid these taxes.

Sales tax is also due when a vehicle, boat, or airplane is transferred to or from a wholly owned or brother/sister company or other limited liability entity, partnership or corporation, even where there is no consideration. In these types of transfers, consideration is presumed according to Fla. Admin. Code Rule 12A-1.007(25)(d).

Rule 12A-1.007(25)(b)(2) indicates that the transfer of title as a gift into a revocable or irrevocable trust is also not taxable. The pertinent language is as follows: "The transfer of title as a gift into a revocable or irrevocable trust is not taxable. A transfer subject to a lien(s) will not qualify as a gift when any outstanding lien(s) is assumed by the trust."

As discussed below, many planners now use irrevocable trusts to limit liability for investment properties and activities while avoiding sales taxes on transfers to the trust entity, documentary stamp taxes on conveyances of real estate, and the extra premiums or lower liability insurance coverages offered for corporate-owned real estate by many insurance carriers in Florida.

Documentary Stamp Tax on Real Estate Transfers

In addition, many Floridians are surprised to learn that they have to pay a $^{7}/_{10}$-of-1% documentary stamp tax on the transfer of real estate. This tax does not apply to gifts of real estate, but if real estate is gifted subject to a mortgage, the amount owed on the mortgage will be deemed consideration, subject to the $^{7}/_{10}$-of-1% tax.

Documentary stamp tax is also not applicable in a bankruptcy proceeding, so it is not unusual to find borrowers and lenders going to legal counsel to obtain a "pre-packaged bankruptcy" arrangement, when property is given to a lender as a "deed in lieu of foreclosure." This process can also enable the debtor to avoid taxable income from the discharge of indebtedness under Internal Revenue Code §108.

The Florida Department of Revenue regularly checks deeds that have been recorded where documentary stamp tax has not been paid, particularly where there is a mortgage on the property that has been ignored in the determination of documentary stamp tax amount and reporting.

Typically, the Department of Revenue will accept the tax assessor value of the property to determine the documentary stamp tax where that is greater than the mortgage balance. Before the 2007–2008 real estate crisis, tax assessor values were commonly 75%–80% of the "real fair market value" of real estate, but, at the present time, we most commonly find that the tax assessor "just value" is at or within 5% of the correct market value.

Many married couples are surprised to learn that they have to pay a documentary stamp tax when property is transferred from one spouse to the other (or other spouse's trust), or from joint names to an individual name. This is because the "shift in mortgage responsibility" is considered taxable. For example, a married couple with joint ownership of a property subject to a $200,000 mortgage would pay documentary stamp tax based upon $100,000 if the property were transferred from both spouses to one spouse. The author does not know whether this tax could be avoided by stating in the deed or by separate agreement that the conveying spouse will remain wholly or equally liable on the underlying indebtedness. The Department of Revenue routinely reviews deeds and sends notices of tax, interest and penalties due when real estate is conveyed subject to a mortgage and no documentary stamp tax is paid.

When unencumbered real estate is transferred to a company owned solely and in the same percentages as the real estate transferor or transferors, documentary stamp tax will not be imposed based upon the rationale that there is not consideration for the transfer. This is the result of the Florida Second District Court of Appeal decision of *Kuro Inc. v. State Dept. of Revenue*, 713 So. 2d 1021 (Fla. Dist. Ct. App. 1998), which was followed by the Florida Supreme Court in *Crescent Miami Center, LLC v. Florida Dept. of Revenue*, 903 So. 2d 913 (Fla. 2005).

After the *Kuro* and *Crescent Miami Center*opinions were released, many planners avoided documentary stamp tax by first having clients convey property to identically owned LLCs and then transferring ownership in the LLC to an arm's-length purchaser or other parties. The step transaction doctrine has never been applied in a Florida tax case, and apparently does not apply in Florida taxation matters.

To partly close this loophole, the Florida Legislature in 2009 passed Florida Stat. §201.0201, which provides that the transfer of an LLC interest that corresponds to real estate transferred to the LLC within three years will be considered to be a documentary stamp taxable sale, unless the transfer is within an exception.

The exceptions include: (1) the transfer of an LLC interest to a trust that is disregarded for federal income tax purposes; and (2) a gift transfer of the LLC interest where there is no consideration.

Documentary stamp tax will, however, be due on a transfer of real estate that is encumbered by debt. Fla. Stat. §201.0201 specifically limited the effect of *Kuro* and *Crescent Miami Center* to transfers of unencumbered property so that a taxable sale is considered to have occurred to the extent of indebtedness when an exception would otherwise apply.

Converting Co-Ownerships to LLC or Other Entity Ownership

The Florida conversion statute permits a general partnership to convert into an LLC, limited liability partnership, limited partnership, or limited liability limited partnership without the need to retitle the real estate by deed, although the articles of conversion are typically recorded in the court house

records, and oftentimes a warranty deed from the name of the former entity to the name of the new entity will be prepared and recorded to avoid having confusion on the public records. Typically, we use warranty deeds instead of quit claim deeds because most title insurance policies will benefit a subsequent owner who acquires title by warranty deed, but not if subsequent title is acquired by quit claim deed.

Where partners own real estate directly or under a general partnership, the entity can be converted into an LLC without the payment of documentary stamp tax. Co-owners of real estate who consider themselves to be partners in a partnership may therefore be able to convert the individual co-ownership into an LLC ownership without paying documentary stamp tax. However, Department of Revenue personnel can be expected to ask for copies of previously filed partnership income tax returns (Form 1065) and of a written general partnership agreement, although these do not seem to be necessary. Co-owners of property who engage in a reasonable level of business activity can be considered to be partners. Florida courts have routinely held that, to form a partnership, there must be a contribution by both parties "to the labor or capital of the enterprise, ... a mutuality of interest in both profits and losses, and an agree[ment] to share in the assets and liabilities of the business." *Williams v. Obstfeld*, 314 F.3d 1270, 1275 (11th Cir. 2002), quoting *Dreyfuss v. Dreyfuss*, 701 So. 2d 437, 439 (Fla. Dist. Ct. App. 1997); *see Jackson-Shaw Co. v. Jacksonville Aviation Authority*, 510 F. Supp. 2d 691, 727 (M.D. Fla. 2007).

Sometimes the transfer will be to the trustee of a land trust owned by the successor entity so that there can be confidentiality in the public records with respect to the successor ownership and less chance of a Department of Revenue review of the matter from a stamp tax standpoint. Transfers of real estate to a revocable trust or a typical land trust owned by the transferor will not trigger documentary stamp tax, but if the land trust is owned by another entity, stamp taxes may be triggered based on whether a transfer to the owner entity would have triggered the tax.

Documentary Stamp Tax Imposed Upon an Issuance of Debt

Florida also has a documentary stamp tax on the issuance of indebtedness, which is based on $0.35 per $100 of debt, but the stamp tax on debt not secured by a mortgage is capped at $2,450, so there is no documentary stamp tax on *such* debt exceeding $1,285,710. The tax is payable by any of the parties to a taxable transaction.

A promissory note issued in Florida cannot be enforced in court unless or until the documentary stamp tax has been paid, but late payment of the tax will be permitted.

One-Time Intangible Tax Imposed Upon Issuing Real Estate Mortgages

Where the debt is secured by a mortgage on Florida real estate, there is no way to avoid this tax, and an additional $^{2}/_{10}$ of 1% state intangible tax is also charged on the mortgage itself, bringing the cost of mortgage borrowing to $^{55}/_{100}$ of 1% for the first $2,450 of mortgage debt, and $^{2}/_{10}$ of 1% for amounts exceeding that. The tax is not imposed on security interests granted in entities that own real estate, as discussed below.

As a result of the above, the total taxes imposed on mortgage borrowing are based upon .55% of the amount loaned.

One way to avoid Florida intangible taxes imposed upon borrowing is by placing real estate under a Land Trust, LLC or other entity, and having a promissory note and a pledge or security agreement arrangement executed and delivered outside of Florida without a mortgage being placed on the property. While the lender cannot be assured that the borrowing entity cannot mortgage the property to give a superior lien to another lender, a security interest or pledge arrangement will give a family member full and complete *legal* rights to any and all proceeds from a sale or encumbrance of the property, and if the property is the primary or designated secondary residence of the borrower, interest can be deductible under Internal Revenue Code §163 as qualified residence interest.

Under §163, qualified residence interest, which includes both interest on acquisition indebtedness and home-equity indebtedness, can be deductible if secured by a qualified (primary or designated secondary) residence. A secured debt is defined in Regs. §1.163-10T as "a debt that is on the security of any instrument (such as a mortgage, deed of trust, or land contract) that makes the interest of the debtor in the qualified residence specific security for the payment of the debt." Therefore, a note secured by a valid pledge or lien upon ownership of a land trust or other "income tax disregarded entity" would be deductible, provided that the land securing it qualifies as a primary or secondary residence under the statute.

Section 163 provides that acquisition indebtedness is any indebtedness that is incurred in acquiring, constructing, or substantially improving a qualified residence and is secured by the residence, but this

provision limits the amount of acquisition indebtedness to $1 million ($500,000 for a married individual filing a separate return). Qualified residence interest also includes home-equity indebtedness, which is indebtedness other than acquisition indebtedness, but this amount is limited to $100,000. The general view is that these deductions are in the aggregate, so interest on any amount of mortgage debt over the $1 million threshold will not be deductible if the debt is on a single loan. However, in CCA 200940030, the Chief Counsel's Office seemed to expand this view by allowing the home-equity deduction ($100,000) in addition to the $1 million cap in a single loan.

It is also important to note that a "qualified residence" is the taxpayer's principal residence and one other dwelling the taxpayer uses as a residence during the year, which means that interest can be deductible on two residences. For example, interest is deductible on a mortgage secured by a taxpayer's principal residence and a vacation home that a taxpayer uses as a personal residence for a certain amount of time during the year.

Some lenders have been willing to accept unrecorded mortgages as stand-by collateral for promissory notes, whereby the lender receives the signed mortgage document and has the right to record it if and when circumstances reflected in a loan agreement occur. Typically, the tax is due at the time of recording, but Fla. Admin. Code Rule 12.C-2.005 provides that if "there is no written instrument, or if the written instrument is not presented for recordation, the nonrecurring tax of two mills is due and payable within 30 days following the creation of the obligation."

Why Many Loan Closings Are Performed on Boats and Airplanes

Where there is not a mortgage on Florida real estate, the documentary stamp tax can be avoided by having the promissory note signed and delivered to the lender outside of Florida. Oftentimes large transactions are conducted on boats or airplanes outside of the territorial waters, or in the Atlanta airport. Sometimes clients will simply appoint agents to sign a promissory note on their behalf, and lenders will appoint agents to receive the promissory note outside of Florida.

Real Estate Taxes

Land owners are taxed annually based upon city and county taxes of approximately 2% of "tax assessed value" each year. Tax assessed value typically ranges from 75% to 90% of the actual "just market value" of a particular property. This tax is divided between the state, the county, and any applicable city where the property is located. Each person is allowed to declare one residence to be his or her homestead for property tax reduction purposes, if he or she truly resides there.

The homestead tax exemption allows $50,000 of value to not be taxed, and thus saves approximately $1,000 a year in taxes. Additional small exemptions are available for widows or widowers, the disabled, disabled veterans who are 65 and older, low-income seniors who are 65 and older, and deployed members of the military.

More importantly, "exempt homestead" property has the benefit of a cap on increased value, which cannot exceed the lesser of 3% of the prior year's value or the increase in the consumer price index each year. And when values go down, the value resets at the lower amount. When property values go up, people who have owned homes in Florida for many years pay much less in property taxes than their neighbors. In addition, to protect older citizens who want to downsize their homes without paying more property tax than they have been, an amendment to the Florida Constitution passed in 2008 permits the lower value tax base to be "ported" to a subsequent home if certain rules are followed.

Ownership for purposes of the homestead property tax exemptions can include direct personal ownership, ownership under a revocable trust, and beneficial ownership under a lease for 98 years or longer. For example, property subject to a 99-year lease that has 52 years left to run will qualify for the homestead tax exemption.

Qualified Personal Residence Trust (QPRT) planning can be handled without loss of homestead exemption advantages, if during the retained use term and thereafter the grantor has continued exclusive use rights, and after the retained use term, if the grantor enters into a 98-year or longer lease with the QPRT, under which fair market value can be paid. Proper trust language providing residency and use rights under a trust can qualify for continuation or initiation of homestead tax status, and after the retained use term the grantor can enter into an arm's-length lease that qualifies as a 98-year or longer lease, which may be terminable upon agreed events, to qualify for homestead exemption status under the Florida Constitution and Fla. Stat. §196.041. County property appraisers are generally willing to review submitted documents and offer comment or confirmation that the homestead exemption will continue before implementation. Other unique and potentially treacherous homestead-related Florida laws are discussed below.

LEGAL INTEREST RATES, USURY LIMITS, AND SELF-CANCELLING INSTALLMENT NOTE

THOUGHTS

Most loans made in Florida cannot bear interest above 18%, although certain loans exceeding $500,000 may bear an interest rate of up to 25% per annum. The law does not distinguish between corporations and individuals. Banking institutions are subject to other rules, however.

This caused many self-cancelling installment note arrangements to violate usury laws when the interest rates were much higher than they are now, and if and when interest rates increase, this concern will again affect many self-cancelling installment note structures.

By way of background, self-cancelling installment notes are often used for federal estate tax planning purposes, whereby a higher interest rate must be used, in exchange for which the note can be forgiven upon death, if the lender has better than a 50% chance of living at least 12 months at the time the loan was entered into. If the lender lives for at least 18 months, then there is an irrevocable presumption that the 50% probability test in the preceding sentence was met. The note must be set to balloon before the lender's life expectancy, as of the date the loan is made. Because of the possibility that the seller may die during the course of the term, the note must bear interest at above the otherwise applicable federal rate or have an increase in principal to take into account the "risk premium" that the lender deserves.

Most of the recognized software programs for interest rate calculations show one interest rate to apply if the note is amortized with equal annual payments of principal and interest, and a higher rate to apply to an interest-only note with a 100% balloon upon maturity. The interest rate is lower with the amortizing note because less principal is owed and thus less forgiveness will occur on death during the term.

The interest rate for self-cancelling installment notes is based on the Internal Revenue Code §7520 rates at the time the note is made. For example, an 85-year-old lender in November 2012, where the §7520 rate is 1% with a life expectancy under Mortality Table 2000CM is 6.22 years, could sell assets in exchange for a six-year note and the interest rate for an interest-only note would be 13.683% while the interest rate for an amortizing note would only be 11.4546%.

During periods when the §7520 rate is higher, in some situations only an amortizing note could be used because the interest rate on a interest-only self-cancelling installment note would be too high.

As an alternative to the interest rates described above, it is possible to increase the principal of the note as the premium given to the lender in exchange for entering into the sale transaction.

According to one software program, with a November 2012 self-cancelling installment note for the 85-year-old mentioned above, a 1% interest rate could be used if the principal was increased by 38.7905% (a $1,000,000 note would instead be a $1,387,905 note) for an amortizing note, or by 212.5823% for an interest-only note under the above example.

In situations where the §7520 rate is higher, this would avoid all usury concerns, but if the health of the lender improves dramatically, repayment of the note at the end of the term would cause his or her estate to actually grow instead of getting smaller, although it might be possible to swap the note for a lower principal/higher interest note if this is not part of a "step transaction" to pay the note off early.

See the article titled, "Interesting Interest Questions: Interest Rates for Intra-Family Transactions" by the author and Floridians Jerry Hesch, Esq., and Christopher Denicolo, Esq., which was published in the 2011 March/April *Tax Mgmt. Est., Gifts & Tr. J.* (Vol. 36, No. 2).

CREDITOR PROTECTION

Florida is world-renowned for its generous creditor exemption laws, which date back to the years well before air conditioning, where debtors would be assured the best new start possible if they would move here. The creditor-exempt assets have no limits on value and are completely immune to levy, seizure, or garnishment. Nevertheless, there are many exceptions and traps for the unwary that must be understood by those who advise Floridians. We first address homestead creditor protection, followed by certain protections codified in Florida's statutes, and tenancy by the entireties.

Homestead Creditor Protection

Homestead protection, which is embodied in the state constitution, is one such protection and perhaps one of the broadest homestead laws in the country.

In 1862, the U.S. Congress passed the Homestead Act, which enabled a head of household to claim ownership of 160 acres of public land that they had resided on and improved for five years, and the Florida Constitution has since provided for absolute creditor protection for an unlimited value of property outside of the city limits for up to 160 acres. The protected 160 acres can include non-homestead uses like owning and operating a mobile home park, according to the court in *Davis v.*

Davis, 864 So. 2d 458 (Fla. Dist. Ct. App. 2003). Inside city limits, an unlimited value can be protected for up to one-half acre, but the use has to be purely as a homestead.

Homestead creditor protection is not necessarily limited to estates held in fee simple. Some Florida courts have found that homestead creditor protection can be extended to include long-term leasehold interests. For example, in *Geraci v. Sunstar EMS*, 93 So. 3d 384 (Fla. Dist. Ct. App. 2012), the court determined that a 100-year lease entered into in 1976 qualified for creditor protection in 2012. Stating that any beneficial interest in land may entitle its owner to the exemption, the court directed that the proper inquiry to determine whether a property qualifies for protection is: 1) whether the debtor intended to make the property his or her homestead; and 2) whether the debtor used the property as his or her primary residence. Unfortunately, not all Florida court decisions support the position that long-term leasehold interests qualify for creditor protection, and there is no guarantee that a debtor will be successful when claiming the homestead exemption for a long-term leasehold interest.

Homestead Protection Even Trumps Florida Fraudulent Transfer Statute

In 2001, the Florida Supreme Court ruled in *Havoco of America, Ltd. v. Hill*, 790 So. 2d 1018 (Fla. 2001), that the constitutional homestead protection laws trump the statutory fraudulent transfer rules, so a person can intentionally defeat creditors by putting assets into a homestead or paying off a homestead mortgage immediately before or after a judgment is entered.

The remaining risk for Florida homeowners is that, if three creditors can force the homestead owner into bankruptcy, the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act provides a 1,215-day ownership requirement, a 720-day residency requirement, and a possible 10-year fraudulent transfer look-back period.

In addition to homestead protection, married couples can own their homesteads as tenants by the entireties, which prevents the creditors of one spouse from penetrating the joint ownership, unless the creditors have a judgment against both spouses. In such circumstances, the protection offered for homestead need not be used, so the Bankruptcy Act exception described above will not apply and the debtor spouse can file bankruptcy and keep the entire homestead, assuming that a fraudulent transfer of the homestead into tenancy by the entireties has not occurred within four years before the bankruptcy filing.

Homestead Disposition Prohibitions Surprise Many

It is especially important to note that the Florida Constitution prohibits an individual owner of homestead property from transferring or devising (during his or her lifetime or upon death) the property without consent of a spouse, and if the owner of homestead property dies with a minor child the disposition of the homestead under any will or trust will be ignored! If the homestead owner is married, the spouse will receive a life estate or may elect to have a 50% ownership interest and the children will receive a vested remainder interest or a 50% co-tenancy interest if the surviving spouse elects to receive 50% co-ownership. If there is no surviving spouse, then the children inherit directly. If there is a minor child, there is no way for the homestead owner to have the property pass into trusts for the descendants.

These rules and solutions for the problems they present will be explained in depth in Part II of this article.

Tenancy by the Entireties

The Florida law of tenancy by the entireties can be quite tricky, and a great many married couples assume that all of their joint assets are protected from the creditors of one spouse, without realizing that what they actually own is a joint tenancy with a right of survivorship that does not satisfy all six of the unities required for tenancy by the entireties.

Of particular concern will be brokerage and bank accounts where the couple checked the joint tenancy with right of survivorship box instead of the tenancy by the entireties box when opening the account. When this occurs, it is not possible to change the account agreement, and a new account needs to be opened to receive the assets from the prior account.

A good many other issues can apply when married couples attempt to own their assets as tenants by the entireties, and oftentimes a family limited partnership or family LLC will be established to be owned primarily by the husband and wife as tenants by the entireties to protect underlying assets using both tenancy by the entireties and charging order laws (which are mentioned below) at the same time.

Where one spouse lives in Florida and another spouse lives in one of the other states that recognize tenancy-by-the-entireties property, the creditor protection will most likely apply for the Florida resident spouse. The treatment of the other spouse will be subject to the law of the jurisdiction where the other spouse resides.

Married couples living in northern states who own property in Florida may also claim the tenancy-by-the-entireties creditor immunity, which has been held to apply for real estate and may also apply for intangibles, such as bank and brokerage accounts. In the case of *In re Cauley*, 374 Bankr. 311 (Bankr. M.D. Fla. 2007), the Bankruptcy Court for the Middle District of Florida in 2007 allowed non-Florida residents to protect real estate located in Florida held as tenancy by the entireties from bankruptcy creditors, despite the fact that the property was not considered to be their homestead. While non-Florida residents are not afforded homestead protections, tenancy by the entireties is created by common law and is not provided for in either statutes or the Florida Constitution. There is no case law that limits the protection of property held by tenancy by the entireties to Florida residents only, so according to *Cauley*, these protections apply to both residents and non-residents, and bankruptcy courts must apply the law of the state that is the situs of the debtor's real estate, so married couples living anywhere can apparently acquire Florida real estate as tenants by the entireties and protect it from the creditors of any one spouse!

Personal property held by tenants by the entireties is governed by the state of residence of the owners, and does not have the protection of Florida law if held in Florida. *See In re Estate of Siegel*, 350 So. 2d 89 (Fla. Dist. Ct. App. 1977).

The common law rules with respect to the elements required to qualify a property interest as tenancy by the entireties are reflected below, and were adopted from the English Common Law as it existed in 1776. The Florida Constitution specifically states that "[t]he common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state." These elements have been applied by subsequent pronouncements of Florida courts occurring after 1868 when the Constitution was adopted.

To qualify property as tenants by the entireties, six unities must be satisfied. If any of these unities are not satisfied, then the joint asset will not be considered a tenancy-by-the-entireties asset, and the consequent creditor protection from the creditors of any one spouse will not apply. These unities are as follows:

1. *Unity of possession* — both spouses have joint ownership and control — it may be acceptable that a deposit agreement allows either spouse to withdraw independently of the other on the theory that the power to withdraw is an expression of an authority of agency given by each spouse to the other.

2. *Unity of interest* — each spouse has the same interest in the account — it is not a problem if one spouse deposits all or most of the funds into the account as long as each spouse has the same interest immediately after the deposit.

3. *Unity of time* — the interests of both spouses in the asset must originate simultaneously in the same instrument, such as on the signature card. Do not try to convert an individual trust into a tenancy-by-the-entireties trust. Instead, transfer assets from the individual trust to a new tenancy-by-the-entireties trust.

4. *Unity of title* — both spouses must have ownership under the same title.

5. *Survivorship* — on the death of one spouse, the other spouse becomes the sole owner of the entireties property.

6. *Unity of marriage* — of course, the owners must be legally married under Florida law. Many clients become confused and believe that joint accounts with any third party or a significant other will be protected. Same-sex marriages from other states will not be recognized by Florida courts for purposes of this exemption. Fla. Stat. §741.212.

Assets held jointly before the marriage should be re-transferred from the spouses jointly to themselves as tenants by the entireties.

Note that in the case of *In re Caliri*, 347 Bankr. 788 (Bankr. M.D. Fla. 2006), joint accounts created before marriage were found not to qualify as tenancy by the entireties where the couple did not overtly transfer their interests to themselves as tenants by the entireties after the marriage.

It may be possible to place the beneficial ownership of a trust under a tenancy-by-the-entireties-owned LLC that may be disregarded for federal income tax purposes. Perhaps the client's will can state "I own an LLC jointly with my spouse and on the death of the survivor of us the ownership of that LLC shall be transferred to be held under the trust, and the trust shall be administered and distributed pursuant to its terms" (This may work but should be thought through carefully.)

Experts do not all agree on whether a tenancy-by-the-entireties-owned LLC can be disregarded as a

"single-member entity" for federal income tax purposes, but this should be the proper treatment in a non-community property state. For a more in-depth explanation of this issue, you can read 704 T.M., *Disregarded Entities* (U.S. Income Series).

Other Unlimited Creditor Exemptions

Florida also offers unlimited protection for properly situated annuity contracts, life insurance contracts, regular and Roth IRAs, 401(k) plans, other qualified pension plans, 529 plans, wages of the head of household, and wage accounts (and the wages therein for up to 60 days after deposit) as well as tenancy-by-the-entireties protection, which can apply to any kind of asset. These other unlimited creditor protections are described in more detail below.

None of the above exemptions are subject to any limitation on value, but every creditor-exempt asset other than homestead is subject to Florida's four-year fraudulent transfer statute, which is based upon the Uniform Fraudulent Transfer Act.

Wages of the head of household are protected from creditors, even for up to six months after they have been deposited in a bank account under Fla. Stat. §222.11, but for closely held businesses or professional practices, it can be difficult to satisfy the court-imposed tests of whether wages actually constitute profits or distributions from a business. Properly drafted employment agreements and compliance with periodic wage provisions can be crucial.

Fla. Stat. §222.14 offers unlimited protection for the cash surrender values of life insurance policies and proceeds of annuity contracts. Under the Florida Supreme Court case of *Goldenberg v. Sawczak*, 791 So. 2d 1078 (Fla. 2001), the court specifically held that this protection applied to moneys received from surrendering an annuity contract prior to maturity.

Fla. Stat. §222.13 also provides that, whenever any person residing in Florida dies leaving insurance on his or her life, such insurance will inure exclusively to the benefit of the person for whose use and benefit such insurance is designated in the policy, and the proceeds will be exempt from the claims of creditors of the insured, unless the insurance policy or a valid assignment provides otherwise. Nevertheless, if the beneficiary of the life insurance resides outside of Florida, his or her creditors may access it depending upon state law where he or she resides, and life insurance payable to an estate or to a revocable trust that has legal obligations to pay creditors will not be protected. Also, life insurance not owned by the insured will not be protected.

The author encourages clients to have the beneficiary of life insurance policies be irrevocable trusts for specified individuals to protect against the creditors of those individuals.

Unemployment compensation benefits as defined in Fla. Stat. §433.051(2) are exempt from all claims of creditors, as are disability payments (including lump sum proceeds from a settlement) under Fla. Stat. §222.18.

Pensions, IRAs, and other retirement accounts are protected from the creditors of any owner, participant or beneficiary, if the owner and the beneficiary live in Florida, under Fla. Stat. §222.21. This statute was the subject of significant controversy in the past few years, as to whether a non-spouse beneficiary of an IRA or pension account who resides in Florida would have the benefit received exposed to his or her creditors. This was resolved by a 2011 revision in the statute, which specifically provides that the exemption applies to "an inherited individual retirement account."

Florida Prepaid Tuition Fund and 529 plans are not subject to attachment, garnishment or legal process pursuant to Fla. Stat. §222.22.

The statutory creditor exemptions extend after death to a debtor's probate estate, pursuant to Fla. Stat. §732.402. "If a decedent was domiciled in this state at the time of death, the surviving spouse, or, if there is no surviving spouse, the children of the decedent shall have the right to a share of the estate..."

Private Annuity Planning

Grantor Retained Annuity Trusts (GRATs) are trusts created by a grantor who contributes assets to the trust and retains a right to receive payment from the trust for a retained term. Private annuities paid under a private annuity arrangement (such as a GRAT or where assets are sold to a trust in exchange for a lifetime annuity payment right) should be protected under Fla. Stat. §222.14, if properly drafted as an "annuity agreement." In *In re Mart*, 88 Bankr. 436 (Bankr. S.D. Fla. 1988), the bankruptcy court sitting in Miami found that payments received under a private annuity agreement established between a grantor and a trust that he funded were exempt from creditors under the Florida creditor exemption annuity statute. This decision has been discussed by two *Florida Bar Journal* articles, which debate the issue: "Unraveling the Mysteries of the Florida Exemptions for Life Insurance and Annuity Contracts, Part 1," by Jonathan E. Gopman, Esq., Matthew N. Turko, Esq., and Howard M. Hujsa, Esq.; and

"Creditor Rights Under Private Annuities and Grantor-Retained Annuity Trusts in Florida," by the author, David L. Koche, Esq., and Michael C. Markham, Esq. The second article reviews the Florida law of creditor access to irrevocable trusts, and suggests language that can be used to help confirm that an annuity payment right qualifies as a creditor exempt "annuity contract" under the statute.

Protecting QPRT Rights

Many taxpayers establish QPRTs to exclude their homes from federal estate tax. With real estate values solidifying and the excess supply of vacant homes and condominiums decreasing in Florida, QPRTs remain popular.

QPRT terms provide that the grantor will continue to have the right to use and occupy the residence for a term of years specified in the trust agreement. Once the possessory term has passed, the trust typically provides that ownership of the residence will remain in the trust and will be divided among beneficiaries after the death of the survivor of the grantor and the grantor's spouse.

It would seem that creditors of a grantor could usurp the possessory rights during the retained interest term, but one solution to this would be for the QPRT to sell the home and convert to an annuity payment trust because Regs. §25.2702-5(c)(8) requires the QPRT to specify that, within 30 days of ceasing to qualify as a QPRT, the trustee must convert the assets to a separate trust that meets the requirements of a qualified annuity trust for the benefit of the grantor. The only other alternative allowed under the regulations would be to distribute the assets to the grantor, which opens them up to both creditor claims and estate taxes.

A properly drafted conversion annuity provision should qualify as a creditor exempt annuity under Fla. Stat. §222.14. This annuity would terminate at the end of the retained term, and the remaining proceeds would be transferred to the remainder beneficiaries of the trust.

Sample language that we have used in a QPRT to facilitate this process is as follows:

If the Trust ceases to be a Qualified Personal Residence Trust with respect to certain property, such property shall, within thirty days, be held in a separate share and the interest of the Grantor shall be converted into a qualified annuity interest (as defined by Treas. Reg. §25.2702-3 and the requirements for such interest shall be deemed incorporated into this Article) with the smallest fixed annuity payments permitted by Treas. Reg. §25.2702-5(c)(8)(ii)(C) to be made to the Grantor each calendar month for the balance of the Retained Possession Term, provided that the Trustee is authorized to make the conversion at an earlier time. The commencement date of the qualified annuity interest shall be determined in accordance with Treas. Reg. §25.2702-5(c)(8)(ii)(B), and the Trustee may defer and determine the payment of any annuity amount as provided in that Regulation. If the Trust ceases to be a Qualified Personal Residence Trust with respect to certain property, the intent of the Grantor is to provide for issuance of an annuity contract to the Grantor based on the terms of this Agreement.

A Look at 529 College Plans

Under Fla. Stat. §222.22, money paid into or out of, the income of, and the assets of any qualified tuition program are protected from the creditors of the account owner, contributor, or beneficiary. Additionally, the plan's earnings are not subject to federal income tax, so long as the earnings are used for qualified educational expenses, including tuition, fees, books, and room and board.

The State of Florida offers two types of 529 plans: prepaid tuition and dorm plans, and savings plans. The Florida Prepaid College Plan is the largest prepaid program in the nation and offers various tuition fees and packages, including a dormitory option, which is not offered by many states. This plan allows you to prepay the cost of tuition, required fees, and dormitory housing so that your child's education costs will be paid for by the time he or she is ready for college.

529 plans do not have to be owned individually. Clients who have investments held under family limited partnerships, LLCs, and/or irrevocable trusts for descendants can have these entities purchase 529 plan investments to pay college-related expenses.

529 plans also provide significant creditor protection. Under Fla. Stat. §222.22(1), money paid into or out of, the income of, and the assets of qualified tuition programs authorized by Internal Revenue Code §529 are protected from creditors of the plan's owner, contributor, or beneficiary. Some other states that provide creditor protection for qualified tuition programs include Colorado, Oklahoma, Oregon, Mississippi, and Kentucky.

These plans also offer significant tax benefits. The plan's earnings are not subject to federal income tax, so long as the earnings are used for qualified educational expenses, which can include tuition, required fees, books, supplies, and room and board. 529 plans can be used to absorb otherwise taxable gains, to act as a tax shelter for the contributor, or as a vehicle for the gift tax annual exclusion when funding 529 plans for descendants. The article, "Unconventional Uses of 529 Plans

Should Not Be Ignored by Taxpayers and Their Advisors," written by the author and David L. Koche, Esq., for the March/April 2011 *Tax Mgmt. Est., Gifts & Tr. J.* (Vol. 35, page 130), provides further 529 plan strategies.

Clients who have 529 plans that are worth less than what they invested may find it advantageous to start new 529 plans. The old 529 plan can be viewed as a tax shelter for the client, and once it reaches the original investment amount, the client might want to cash it in without paying tax. The gain on the new plan will also not be subject to income tax. This principle is best illustrated by an example.

Example: John Smith opens a 529 plan for his son and invests $50,000, which is now worth $30,000. If he simply waits until the plan is worth $50,000 again and then his son spends these funds on college, there will be no income tax savings. However, if he starts a new 529 plan with $30,000 and then both 529 plans grow to $50,000, he can use the newer one for college tax free, and can cash in the older one without paying taxes. This saves the taxes on $20,000 worth of growth that would have otherwise been taxable if the funds were not invested in a 529 plan.

Charging Order Protection

Generally, a creditor who receives a charging order with respect to a member's (or partner's) interest in the entity does not have any authority to mandate distributions from the entity or to participate in the management and affairs of the entity.

While many advisors believe that the creditor holding a charging order can be taxed on income attributable to the member interest under partnership tax law, this is probably not the case. 812 T.M., *Family Limited Partnerships and Limited Liability Companies* (EGT Series), correctly states as follows:

While some commentators, relying on a revenue ruling dealing with an assignee of a partnership interest, believe a creditor with a charging order will be taxed on the income allocable to the interest subject to the order, it is more likely that the creditor will not suffer unfavorable tax consequences. Because any distributions from the entity to the creditor should be treated as a reduction in the amount owed to the creditor by the owner of the interest, under general tax principles the owner of the interest would recognize the income.

Fla. Stat. §608.433 was amended in 2011 to provide charging order protection for multiple-member LCCs after the Florida Supreme Court got confused and surprised lawyers everywhere by concluding that the previous statute did not provide charging order protection. The revised statute applies retroactively and specifically indicates that "a charging order is the *sole and exclusive remedy* by which a judgment creditor of a member or member's assignee may satisfy a judgment from the judgment debtor's interest in a limited liability company or rights to distributions from the limited liability company." The statute also specifically provides for protection for multiple-member LLCs, stating that "in the case of a limited liability company having more than one member, the remedy of foreclosure on a judgment debtor's interest in such limited liability company or against rights to distribution from such limited liability company *is not available to a judgment creditor* attempting to satisfy the judgment and *may not be ordered by a court*."

It is unclear whether charging order protection is available for a multiple-member LLC when all of the member interests are subject to charging orders and/or pledges that make it unlikely or impossible for any member to expect to receive any distributions from the entity. Fla. Stat. §608.402(21) imposes a requirement that a "member" must have an "economic interest" in the LLC if the judgment exceeds what would reasonably expected to be derived from the member interest. If the judgment creditor could receive all expected future distributions from the LLC, it seems that the individual members may no longer have an "economic interest" in the LLC. Thus, it is possible that the individuals would no longer meet the statutory definition of a "member" and could lose charging order protection if there is no reasonable expectation of ever receiving a distribution from the entity.

Single-member LLC ownership offers no substantive protection from a charging order standpoint, but may help buy time where there is a judgment against the sole member. Under Fla. Stat. §608.433(6), a charging order is not the "sole and exclusive remedy" available to judgment creditors of a single-member LLC where the court of equity concludes that there are no other sources to satisfy the applicable judgment.

Many planners therefore advise clients who wish to use "single-member LLCs" to have a separate member, which may be an irrevocable trust that is disregarded for income tax purposes so that the LLC can remain disregarded as well. Some planners have single-member LLCs formed in Delaware, Nevada, or other states that have legislation that is favorable to single-member LLC charging order protection, but there are no direct cases on point as to whether the law of another state can apply in

a situation where the debtor and the use, possession and management of the underlying assets are situated in a state that does not offer single-member LLC charging order protection.

UNAUTHORIZED PRACTICE OF LAW — CAN YOU ADVISE FLORIDIANS IN FIRST PLACE?

Florida Legal Practice Rule 4-5.5 permits a lawyer who is licensed outside of Florida to perform services that either (a) "arise out of or are reasonably related to the lawyer's practice in the jurisdiction in which the lawyer is admitted to practice" or (b) "are performed for a client who resides in or has an office in the jurisdiction in which the lawyer is authorized to practice" as long as the non-Florida lawyer does not (1) establish an office or other regular presence in Florida for the practice of law, (2) hold out to the public or otherwise represent that the lawyer is admitted to practice in Florida, or (3) appear in court or before an administrative agency unless authorized to do so by the applicable tribunal. This exception will not apply for a lawyer who has been suspended from practicing in any jurisdiction, or has been disciplined or held in contempt in Florida for any legal misconduct. Separate rules apply for lawyers admitted to practice only in jurisdictions outside of the United States.

In addition, a lawyer admitted and authorized to practice law in another state may provide legal services on a temporary basis in Florida if undertaken in association with a Florida admitted lawyer who actively participates in the matter.

It is safest to have a Florida lawyer actively involved to review documents and strategies to assure that the work is done properly. Malpractice liability insurance policies may also limit coverage for work done outside of the home state of a law firm having occasional Florida clients.

The Florida Supreme Court has shown that it will not be lenient on those who attempt to practice law here without a license. For example, Jay Mitton, an attorney who was not licensed to practice in Florida, and his company used to hold seminars on asset protection and estate planning in Florida. In 2000, the Florida Bar filed a complaint against Mitton, alleging that he was engaging in the unauthorized practice of law at these seminars. Mitton claimed that he never practiced law in Florida, but was caught up in Florida's justifiable concern about non-Florida attorneys practicing law in the state without a license. The Florida Supreme Court entered an order permanently and perpetually enjoining Mitton and his asset protection company from practicing law in Florida. The court's decision in this matter can be found at its website, *http://www.floridasupremecourt.org*, case number SC00-2171. Mittens rebuttal to commentaries on this decision can be found at his website: *http://jaymitton.com/floridarebuttal.html.*

Specific questions regarding the practice of law in Florida by an attorney licensed in another jurisdiction may be answered by the Florida Bar by calling (850) 561-5840.

There has been a significant increase in the phenomenon of accountants forming companies and other entities for clients, and this is a violation of the unauthorized-practice-of-law rules. Certified public accountants risk licensing sanctions or even loss of licensing for engaging in the unauthorized practice of law. Further, the vast majority of these accountants simply form the entity on the Secretary of State website and provide no documentation to confirm ownership, Operating Agreements or By-Laws, or to issue stock or partnership interests. This is an extremely dangerous practice, but the Florida Bar is apparently unwilling to take steps to prevent the significant risk of harm that can befall individuals or families who believe that they are receiving appropriate protection and tax characteristics that will simply not be the case upon IRS or Florida Department of Revenue audit or creditor challenge.

Part II of this article will review a number of very important Florida laws, planning techniques, and traps for the unwary. This will include a review of the Florida Trust Code, creditor protection using Florida trusts, property insurance crisis information, Florida elective share, liability protection planning, and much more.

EXHIBIT 1 — FLORIDA DURABLE POWER OF ATTORNEY

DURABLE POWER OF ATTORNEY

I, _____, the principal, currently a resident of Florida, hereby designate my spouse, _____, as my attorney-in-fact and Agent (subsequently called my Agent) in my name and for my benefit. My Agent or Agents, as appointed above, or the alternate or alternates provided for under the following paragraph below, if applicable, shall have the powers enumerated below, provided that such powers bestowed upon my Agent shall not be reduced or limited in any manner solely by reason of the fact that my Agent is not an ancestor, spouse, or descendant of mine.

If my spouse, _____, is unable or unwilling to serve as my Agent due to health, incapacity or resignation, then I appoint _____ as my attorney-in-fact and Agent, provided that if HE/SHE is unable or unwilling to serve, then I appoint _____, as my attorney-in-fact and Agent.

1. **GENERAL GRANT OF POWER.** To exercise or perform, without prior court approval, any act, power, duty, right or obligation whatsoever that I now have or may hereafter acquire, relating to any person, matter, transaction or property, real or personal, tangible or intangible, now owned or hereafter acquired by me, including, without limitation, the following specifically enumerated powers. I grant to my Agent full power and authority to do everything necessary in exercising any of the powers herein granted as fully as I might or could do if personally present, with full power of substitution or revocation, hereby ratifying and confirming all that my Agent shall lawfully do or cause to be done by virtue of this power of attorney and the powers herein granted. This Durable Power of Attorney is not terminated by subsequent incapacity of the principal except as provided in Chapter 709, Florida Statutes, and shall apply to any interest in property owned by me, including, without limitation, my interest in all real property, including homestead real property; all personal property, tangible or intangible; all property held in any type of joint tenancy, including a tenancy in common, joint tenancy with right of survivorship, or a tenancy by the entirety; all property over which I may hold a general, limited or special power of appointment; chooses in action; and all other contractual or statutory rights or elections, including, but not limited to, any rights or elections in any probate or similar proceeding to which I am or may become entitled. I also authorize my Agent to provide services other than those rendered as an Agent under this Power of Attorney, such as driving for me, performing errands for me, and rendering such other services separate and apart from serving as Agent.

(a) *POWERS OF COLLECTION AND PAYMENT.* To forgive, request, demand, sue for, recover, collect, receive, hold all such sums of money, debts, dues, commercial paper, checks, drafts, accounts, deposits, legacies, bequests, devises, notes, interests, stock certificates, bonds, dividends, certificates of deposit, annuities, pension, profit sharing, retirement, social security, insurance and other contractual benefits and proceeds, all documents of title, all property, real or personal, tangible or intangible property and property rights, and demands whatsoever, liquidated or unliquidated, now or hereafter owned by, or due, owing, payable or belonging to, me or in which I have or may have hereafter acquired an interest; to have, use, and take all lawful means and equitable and legal remedies and proceedings in my name for the collection and recovery thereof, and to adjust, sell, compromise, and agree for the same, and to execute and deliver for me, on my behalf, and in my name, all endorsements, releases, receipts, or other sufficient discharges for the same;

(b) *POWER TO ACQUIRE, SELL AND TRANSFER.* To acquire, purchase, exchange, grant options to sell, and sell and convey real or personal property, tangible or intangible, or interests therein, on such terms and conditions as my Agent shall deem proper;

(c) *MANAGEMENT POWERS.* To maintain, repair, improve, invest, manage, insure, rent, lease, encumber, and in any manner deal with any real or personal property, tangible or intangible, or any interest therein, that I now own or may hereafter acquire, in my name and for my benefit, upon such terms and conditions as my Agent shall deem proper;

(d) *MOTOR VEHICLES.* To apply for a Certificate of Title upon, and endorse and transfer title thereto, for any automobile, truck, pickup, van, motorcycle or other motor vehicle, and to represent in such transfer assignment that the title to said motor vehicle is free and clear of all liens and encumbrances except those specifically set forth in such transfer assignment;

(e) *BUSINESS INTERESTS.* To conduct or participate in any lawful business of whatever nature for me and in my name, execute partnership agreements and amendments thereto, incorporate, reorganize, merge, consolidate, recapitalize, sell, liquidate, or dissolve any business, elect or employ officers, directors and agents, carry out the provisions of any agreement for the sale of any business interest or the stock therein; and exercising voting rights with respect to stock, either in person or by proxy, and exercise stock options;

(f) *TAX POWERS.* To act without limitation on my behalf with regard to federal income taxes, state and local income taxes, gift and other tax returns of all sorts, including where appropriate, joint returns, FICA returns, payroll tax returns, claims for refunds, requests for extensions of time to file returns or pay taxes, extensions and waivers of applicable periods of limitation, protests and petitions to administrative agencies or courts, including the tax court, regarding tax matters, and any and all other tax-related documents, including but not limited to consents and agreements under Internal Revenue Code Section 2032A, 26 U.S.C. §2032A, or any successor section thereto and consents to split gifts and closing agreements, for all tax periods and for all jurisdictions; to complete Internal Revenue Service Form 2848, Power of Attorney and Declaration of Representative (or other prescribed form) on my behalf as well as to perform all other functions contemplated by that form whether they are required or merely permissible; to consent to any gift and to utilize any gift-splitting provisions or other tax election; to prepare, sign and file any claims for refund of any tax; to post bonds, receive confidential information and contest deficiencies determined by the Internal Revenue Service or any state or local taxing authority; to exercise any and all elections that I may have under federal, state or local tax laws including without limitation the allocation of any generation-skipping tax exemption to

which I may be entitled; and to the extent that I may have omitted some power or discretion, I hereby grant to my attorney-in-fact the power to amend the Internal Revenue Service form power of attorney (presently Form 2848 or 2848-D) in my name;

(g) *SAFE DEPOSIT BOXES.* To have access at any time or times to any safe deposit box rented by me, wheresoever located, and to remove all or any part of the contents thereof, and to surrender or relinquish said safe deposit box, and any institution in which any such safe deposit box may be located shall not incur any liability to me or my estate as a result of permitting my Agent to exercise this power;

(h) *BANKING POWERS.* To make, receive, and endorse checks and drafts, deposit and withdraw funds, acquire and redeem certificates of deposit, in banks, savings and loan associations and other institutions, execute or release such deeds of trust or other security agreements as may be necessary or proper in the exercise of the rights and powers herein granted, and to have the authority to conduct banking transactions as provided in Section 709.2208(1), Florida Statutes;

(i) *MEDICAL DECISIONS.* In the event of my incapacity or incompetency, I specifically authorize my Agent to provide medical attention and services for me, including choice of a physician; choice of a hospital or nursing home; the unrestricted power to determine upon the advice of a physician whether I am in need of surgery, and at the sole discretion of my Agent, to authorize or withhold surgery or other medical or life supporting treatment; and also to provide such other care, comfort, maintenance and support as my Agent may determine. In addition to, and without limiting the foregoing medical related powers, I hereby further designate that the Agent appointed and serving under this document shall be considered as my Health Care Surrogate to make health care decisions for me and to provide informed consent if I am incapable of making health care decisions or providing informed consent as set forth in Florida Statute 765 to authorize my Agent to make various property related decisions on my behalf, which may relate to my health care. Accordingly, I confirm that in connection therewith, my Agent shall be treated as my personal representative for all purposes relating to my Protected Health Information, as provided in 45 C.F.R. §164.502(g)(2).

I have provided my Agent or Agents with this right to make medical decisions to apply in case the separate Health Care Power of Attorney and/or similar documents that I have in the past executed are for any reason not applicable or if the Agent or Agents appointed under any separate Health Care Power of Attorney are unable, unwilling, or unavailable to act on my behalf. Notwithstanding this purpose, no physician, hospital, nursing home, or other entity or facility shall be required to verify whether there is any Health Care Power of Attorney or other instrument or document in place and may assume that my Agent or Agents herein appointed and serving under this document has the full power and authority provided in the above paragraph;

(j) *EXERCISE HEALTH CARE INFORMATION RELEASE RIGHTS.* I intend that any Agent serving under this document shall be my health care representative within the meaning of, and have all of the same rights as I have under the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §1320(d) and 45 C.F.R. §160-164, and any health care provider or facility may rely upon any oral or written statement from an individual named under this document as Agent or alternate Agent that they are acting on my behalf in order to receive such information.

(k) *SPECIAL POWERS.* I recognize that, under the Florida Statutes for Powers of Attorney executed after September 30, 2011, I must specifically initial or sign below each power enumerated below that would be given to my named Agent(s).

These powers are as follows, and such of the following powers and authority below which I have initialed or signed shall be granted to my Agent(s), *including my successor Agent(s)*, provided that if I have not initialed or signed below one or more of the following particular powers, then I intend to not provide such powers and grant such authority to my Agent(s):

(1) To create an inter vivos trust on my behalf and to fund such inter vivos trust or to fund a previously established inter vivos trust so long as such trust does not interfere with any existing testamentary plan of mine, provided that my Agent may not amend, alter or revoke any inter vivos trust agreement that I have already created up through the date of signature of this Power of Attorney, unless any such trust agreement is otherwise amended before my incapacity to specifically provide otherwise, it being my present intention not to execute any trust agreement that would allow my Agent to amend, alter or revoke it. In the interest of thoroughness, my Agent shall also have the following powers with respect to inter vivos trusts:

(i) to execute a new revocable trust agreement on my behalf with such trustee(s) as my Agent shall select. The revocable trust shall provide that during my lifetime the trustee(s) shall distribute income or principal as I direct or as the trustee(s) shall determine for my benefit. At my death, the remaining trust assets shall be distributed in the same manner as would otherwise

apply under my existing testamentary estate plan. Any such Trust shall provide that I may amend or revoke the trust at any time. My Agent is further authorized to assign, transfer, deliver, and convey any or all of my assets, including any rights to receive income or assets from any source, to the trustee(s) of any revocable trust created by my Agent or by me.

(ii) to transfer an interest of the principal in real property, investments, accounts with financial institutions or securities intermediaries, insurance, annuities, and other property to the trustee of a revocable trust created by the principal as settlor.

(iii) to amend or revoke any trust over which I hold the right or power to amend or revoke, provided, however, my Agent shall have no authority to amend or revoke any trust created by me, unless any such trust agreement is otherwise amended before my incapacity to specifically provide otherwise, it being my present intention not to execute any trust agreement that would allow my Agent to amend, alter or revoke it.

(iv) to petition the appropriate court on my behalf to establish and fund a 42 U.S.C. §1396p(d)(4)(A) special needs trust (hereinafter "special needs trust") for my benefit.

(v) to execute a 42 U.S.C. §1396p(d)(4)(C) pooled trust sub-account (hereinafter "pooled trust sub-account") joinder agreement on my behalf with the Commonwealth Community Trust or similar non-profit organization.

_____- Initial

(2) To make gifts, grants or transfers, including transfers to benefit others, even if these gifts, grants or transfers do not benefit me, including the following:

Making transfers exceeding the federal gift tax annual exclusion under Internal Revenue Code Section 2503(b), 26 U.S.C. 2503(b), as amended, as amended (currently $13,000 per donee per year), and including forgiving debt or other obligations owed to me, completing charitable pledges, whether or not legally enforceable, and making transfers either outright or in trust to such persons or organizations as my attorney-in-fact shall deem appropriate, including, without limitation, the following actions: (i) to take advantage of the annual exclusion under federal gift tax law provided such gifts are reasonable to all concerned; (ii) to pay for tuition, medical care, or both, for my descendants; provided, however, such payments shall be made directly to the entity or individual providing such services, and such payments shall not be subject to the federal gift tax; (iii) transfer by gift in advancement of a bequest or devise to beneficiaries under my Will or inter vivos trust agreement; (iv) release of any life interest, or waiver, renunciation, or declination of any gift to me by will, trust or deed; (v) to make unlimited gifts to my spouse, if any, if such spouse is a United States citizen; and (vi) in the event that I become a resident of a long term care facility, the power to gift and to complete the transfer of my interest in my primary residence to one or more family members. Notwithstanding the above, no such gift, grant or transfer may be made to or for the benefit of my Agent unless either (i) if I am not incompetent or incapacitated, my Agent has obtained my prior written consent, or if I am not capable of giving consent due to my incompetence or incapacity, then the prior written consent of the adult beneficiaries who would receive ownership or who would be the Primary Beneficiaries of any Trusts established with the majority of the assets passing under the residuary estate under my Will or Revocable Trust; or (ii) it is approved by an independent attorney-in-fact appointed by a Court of competent jurisdiction after due notice to my adult descendants or other Primary Beneficiaries under my estate plan. The decision of my Agent as to whether to make a gift and the amount of any gift shall be binding on all of my relatives. In the interest of thoroughness, my attorneys have also provided the following form language that I explicitly hereby approve and which shall be fully applicable by my initials or signature below:

(i) My Agent is authorized to make gifts, grants or other transfers of any of my real or personal property to, or for the benefit of a person, without consideration either outright or in trust (including the forgiveness of indebtedness), including my Agent, including by the exercise of a presently exercisable general power of appointment held by the me, subject to the following conditions and limitations:

A. The aggregate amount of gifts in any calendar year with respect to a particular donee may exceed the annual dollar limits of the federal gift tax exclusion under Internal Revenue Code Section 2503(b), 26 U.S.C. §2503(b), as amended, without regard to whether the federal gift tax exclusion applies to the gift, and if my spouse agrees to consent to a split gift pursuant to Internal Revenue Code Section 2513, 26 U.S.C. 2513, as amended in an amount per donee may exceed twice the annual federal gift tax exclusion limit; and

B. consent, pursuant to Internal Revenue Code Section 2513, 26 U. S.C. §2513, as amended to the splitting of a gift made by my spouse in an amount per donee may exceed the

aggregate annual gift tax exclusions for both spouses.

(ii) My Agent may make a gift of my property only as the Agent determines is consistent with my objectives if actually known by the Agent and, if unknown, as the Agent determines is consistent with the my best interest based on all relevant factors, including:

A the value and nature of my property;

B. my foreseeable obligations and need for maintenance;

C. minimization of taxes, including income, estate, inheritance, generation skipping transfer, and gift taxes;

D. eligibility for a benefit, a program, or assistance under a statute or regulation; and

E. my personal history of making or joining in making gifts.

(iii) I direct my Agent, other than my spouse, to give notice and an accounting of any gifts made by my Agent under this Power of Attorney to [Name] 15 days prior to making a gift of any of my assets. This requirement is in addition to any other requirements for gifts in this Power of Attorney.

(iv) I further authorize my Agent to make gifts to charities, provided that such gifts qualify for a charitable deduction under the income and gift tax provisions of the Internal Revenue Code as from time to time amended.

_____- Initial

(3) To establish, change, close, or convert a custodian, pay on death, or any other type of investment or money holding account or arrangement with any bank, trust company, investment broker, or other securities dealer, including any beneficiary designation or survivorship features related thereto; to have the authority to conduct investment transactions as provided in Section 709.2208(2), Florida Statutes.

_____- Initial

(4) To make on my behalf any and all statutory elections and disclaimers available to me at law; and to exercise or disclaim any rights that I may hold with respect to a general, limited or special power of appointment, provided that my Agent may not exercise any such power of appointment in favor of, or for the benefit of, my Agent unless either (i) if I am not incompetent or incapacitated, my Agent has obtained my prior written consent, or if I am not capable of giving consent due to my incompetence or incapacity, then the prior written consent of the adult beneficiaries who would receive the majority of the assets subject to the power of appointment in question if such power of appointment was not exercised; or (ii) it is approved by an independent attorney-in-fact appointed by a court of competent jurisdiction.

_____- Initial

(5) To deal with all retirement plans of which I am a member including individual retirement accounts, rollovers, and voluntary contributions; to direct any pension fund, insurance, or annuity company, the United States Social Security Administration, or any other party making payments to me to make such payments directly to a financial institution for direct deposit into my account; to create or change any beneficiary designation relating to any such accounts, plans or assets referenced in this paragraph; and to waive any rights that I might have to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan.

_____- Initial

(6) To create and change the ownership and survivorship rights relating to any interest in property owned by me, including, without limitation, my interest in all real property, including homestead real property; all personal property, tangible or intangible; all property held in any type of joint tenancy, including a tenancy in common, joint tenancy with right of survivorship, or a tenancy by the entirety.

_____- Initial

(7) To lend money and property to any spouse or descendants of mine on such terms, including, but not limited to, interest rates, security, and duration as my Agent may deem advisable. Additionally, my Agent may make loans at interest rates below market levels. My Agent shall not lend money to himself or herself at interest rates below market levels.

_____- Initial

(l) *MISCELLANEOUS POWERS.*

(i) To apply for public benefits on my behalf with any federal, state or local agency, without restriction, and to receive and apply such benefits on my behalf; to maximize my entitlement to federal and state medical, welfare, housing and other programs, by all legitimate and proper means within the sound and trusted discretion of my attorney-in-fact. The authority herein granted shall include, but not be limited to, converting my assets into assets that do not disqualify me from receiving such benefits, and the power to create, fund and maintain an Income Trust pursuant to 42 U.S.C. §1396(d)(4)(B) in order to qualify me for Medicaid or other public assistance benefits. I also empower my Agent to share and distribute any and all such information.

(ii) To retain such accountants, attorneys, social workers, consultants, clerks, employees, workmen, or other persons as my Agent shall deem appropriate in connection with the management of my property and affairs and to make payments from my assets for the charges of such persons so employed.

(iii) To execute stock powers or similar documents on my behalf and delegate to a transfer agent or similar person the authority to register any stocks, bonds, or other securities either into or out of my name or a nominee's name.

(iv) To convey or mortgage homestead real property.

(v) Notwithstanding anything in this instrument to the contrary, my Agent shall have no power or authority with respect to any incidents of ownership or rights which I own in any life insurance policy insuring the life of my Agent.

(vi) To represent me in any receivership or bankruptcy or other Court proceeding of a similar nature as my truly authorized Agent, attorney-in-fact, or proxy.

(vii) To waive any conflict of interest that may arise between my Agent and a lawyer or other professional who has worked for me during my lifetime, both on my behalf, and on my Agent's behalf, it being my intention to avoid unnecessary expenses and delays that might occur as the result of my Agent having to obtain independent legal counsel, unless or until otherwise advised. Nevertheless, my Agent shall have the power to hire independent legal counsel to advise him or her and shall be entitled to reimbursement related to such independent legal counsel.

(viii) To execute, on my behalf, any instrument which may be requisite or expedient to effectuate any result or thing pertaining to my property or to me.

(m) To perform the powers that are listed below, with any duplication of powers being construed to most fully expand, and not limit, the authority and authorizations herein provided:

1. *General Authority* — the power to:

1.1. demand, receive, and obtain by litigation or otherwise, money or another thing of value to which the principal is, may become, or claims to be entitled, and conserve, invest, disburse, or use anything so received or obtained for the purposes intended;

1.2. contract in any manner with any person, on terms agreeable to the Agent, to accomplish a purpose of a transaction and perform, rescind, cancel, terminate, reform, restate, release, or modify the contract or another contract made by or on behalf of the principal;

1.3. execute, acknowledge, seal, deliver, file, or record any instrument or communication the Agent considers desirable to accomplish a purpose of a transaction, including creating at any time a schedule listing some or all of the principal's property and attaching it to the power of attorney;

1.4. initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to a claim existing in favor of or against the principal or intervene in litigation relating to the claim;

1.5. seek on the principal's behalf the assistance of a court or other governmental agency to carry out an act authorized in the power of attorney;

1.6. engage, compensate, and discharge an attorney, accountant, discretionary investment manager, expert witness, or other advisor;

1.7. prepare, execute, and file a record, report, or other document to safeguard or promote the principal's interest under a statute or regulation;

1.8. communicate with any representative or employee of a government or governmental subdivision, agency, or instrumentality, on behalf of the principal;

1.9. access communications intended for, and communicate on behalf of the principal, whether by mail, electronic transmission, telephone, or other means; and

1.10. do any lawful act with respect to the subject and all property related to the subject.

2. *Real Property* — the power to:

2.1. demand, buy, lease, receive, accept as a gift or as security for an extension of credit, or otherwise acquire or reject an interest in real property or a right incident to real property;

2.2. sell; exchange; convey with or without covenants, representations, or warranties; quitclaim; release; surrender; retain title for security; encumber; partition; consent to partitioning; subject to an easement or covenant; subdivide; apply for zoning or other governmental permits; plat or consent to platting; develop; grant an option concerning; lease; sublease; contribute to an entity in exchange for an interest in that entity; or otherwise grant or dispose of an interest in real property including my residence or a right incident to real property;

2.3. pledge or mortgage an interest in real property or right incident to real property as security to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

2.4. release, assign, satisfy, or enforce by litigation or otherwise a mortgage, deed of trust, conditional sale contract, encumbrance, lien, or other claim to real property which exists or is asserted;

2.5. manage or conserve an interest in real property or a right incident to real property owned or claimed to be owned by the principal, including:

2.5.1. insuring against liability or casualty or other loss;

2.5.2. obtaining or regaining possession of or protecting the interest or right by litigation or otherwise;

2.5.3. paying, assessing, compromising, or contesting taxes or assessments or applying for and receiving refunds in connection with them; and

2.5.4. purchasing supplies, hiring assistance or labor, and making repairs or alterations to the real property;

2.6. use, develop, alter, replace, remove, erect, or install structures or other improvements upon real property in or incident to which the principal has, or claims to have, an interest or right;

2.7. participate in a reorganization with respect to real property or an entity that owns an interest in or right incident to real property and receive, and hold, and act with respect to stocks and bonds or other property received in a plan of reorganization, including:

2.7.1. selling or otherwise disposing of them;

2.7.2. exercising or selling an option, right of conversion, or similar right with respect to them; and

2.7.3. exercising any voting rights in person or by proxy;

2.8. change the form of title of an interest in or right incident to real property; and

2.9. dedicate to public use, with or without consideration, easements or other real property in which the principal has, or claims to have, an interest.

3. *Tangible Personal Property* — the power to:

3.1. demand, buy, receive, accept as a gift or as security for an extension of credit, or otherwise acquire or reject ownership or possession of tangible personal property or an interest in tangible personal property;

3.2. sell; exchange; convey with or without covenants, representations, or warranties; quitclaim; release; surrender; create a security interest in; grant options concerning; lease; sublease; or, otherwise dispose of tangible personal property or an interest in tangible personal property;

3.3. grant a security interest in tangible personal property or an interest in tangible personal property as security to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

3.4. release, assign, satisfy, or enforce by litigation or otherwise, a security interest, lien, or other claim on behalf of the principal, with respect to tangible personal property or an interest in tangible personal property;

3.5. manage or conserve tangible personal property or an interest in tangible personal property on behalf of the principal, including:

3.5.1. insuring against liability or casualty or other loss;

3.5.2. obtaining or regaining possession of or protecting the property or interest, by litigation or otherwise;

3.5.3. paying, assessing, compromising, or contesting taxes or assessments or applying for and receiving refunds in connection with taxes or assessments;

3.5.4. moving the property from place to place;

3.5.5. storing the property for hire or on a gratuitous bailment; and

3.5.6. using and making repairs, alterations, or improvements to the property; and

3.6. change the form of title of an interest in tangible personal property.

4. *Investments* — the power to:

4.1. establish, continue, modify, or terminate an account with respect to investments;

4.2. pledge investments as security to borrow, pay, renew, or extend the time of payment of a debt of the principal;

4.3. receive certificates and other evidences of ownership with respect to investments; and

4.4. exercise voting rights with respect to investments in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote.

5. *Special Investments* — the power to:

5.1. buy, sell, exchange, assign, settle, and exercise commodity future contracts and call or put options on stocks or stock indexes traded on a regulated option exchange.

6. *Banks and Other Financial Institutions* — the power to:

6.1. continue, modify, and terminate an account or other banking arrangement made by or on behalf of the principal;

6.2. establish, modify, and terminate an account or other banking arrangement with a bank, trust company, savings and loan association, credit union, thrift company, brokerage firm, or other financial institution selected by the Agent;

6.3. contract for services available from a financial institution, including renting a safe deposit box or space in a vault;

6.4. withdraw, by check, order, electronic funds transfer, or otherwise, money or property of the principal deposited with or left in the custody of a financial institution;

6.5. receive statements of account, vouchers, notices, and similar documents from a financial institution and act with respect to them;

6.6. enter a safe deposit box or vault and withdraw or add to the contents;

6.7. borrow money and pledge as security personal property of the principal necessary to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

6.8. make, assign, draw, endorse, discount, guarantee, and negotiate promissory notes, checks, drafts, and other negotiable or nonnegotiable paper of the principal or payable to the principal or the principal's order, transfer money, receive the cash or other proceeds of those transactions, and accept a draft drawn by a person upon the principal and pay it when due;

6.9. receive for the principal and act upon a sight draft, warehouse receipt, or other document of title whether tangible or electronic, or other negotiable or nonnegotiable instrument;

6.10. apply for, receive, and use letters of credit, credit and debit cards, electronic transaction

authorizations, and traveler's checks from a financial institution and give an indemnity or other agreement in connection with letters of credit; and

6.11. consent to an extension of the time of payment with respect to commercial paper or a financial transaction with a financial institution.

7. *Operation of Entity or Business* — the power to:

7.1. operate, buy, sell, enlarge, reduce, or terminate an ownership interest;

7.2. perform a duty or discharge a liability and exercise in person or by proxy a right, power, privilege, or option that the principal has, may have, or claims to have;

7.3. enforce the terms of an ownership agreement;

7.4. initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to which the principal is a party because of an ownership interest;

7.5. exercise in person or by proxy, or enforce by litigation or otherwise, a right, power, privilege, or option the principal has or claims to have as the holder of stocks and bonds;

7.6. initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to which the principal is a party concerning stocks and bonds;

7.7. with respect to an entity or business owned solely by the principal:

7.7.1. continue, modify, renegotiate, extend, and terminate a contract made by or on behalf of the principal with respect to the entity or business before execution of the power of attorney;

7.7.2. determine:

7.7.2.1. the location of its operation;

7.7.2.2. the nature and extent of its business;

7.7.2.3. the methods of manufacturing, selling, merchandising, financing, accounting, and advertising employed in its operation;

7.7.2.4. the amount and types of insurance carried; and

7.7.2.5. the mode of engaging, compensating, and dealing with its employees and accountants, attorneys, or other advisors;

7.7.3. change the name or form of organization under which the entity or business is operated and enter into an ownership agreement with other persons to take over all or part of the operation of the entity or business; and

7.7.4. demand and receive money due or claimed by the principal or on the principal's behalf in the operation of the entity or business and control and disburse the money in the operation of the entity or business;

7.8. put additional capital into an entity or business in which the principal has an interest;

7.9. join in a plan of reorganization, consolidation, conversion, domestication, or merger of the entity or business;

7.10. sell or liquidate all or part of an entity or business;

7.11. establish the value of an entity or business under a buy-out agreement to which the principal is a party;

7.12. prepare, sign, file, and deliver reports, compilations of information, returns, or other papers with respect to an entity or business and make related payments; and

7.13. pay, compromise, or contest taxes, assessments, fines, or penalties and perform any other act to protect the principal from illegal or unnecessary taxation, assessments, fines, or penalties, with respect to an entity or business, including attempts to recover, in any manner permitted by law, money paid before or after the execution of the power of attorney.

8. *Insurance and Annuities* — the power to:

8.1. continue, pay the premium or make a contribution on, modify, exchange, rescind, release, or terminate a contract procured by or on behalf of the principal which insures or provides an annuity to either the principal or another person, whether or not the principal is beneficiary under the contract;

8.2. procure new, different, and additional contracts of insurance and annuities for the principal and the principal's spouse, children, and other dependents, and select the amount, type of insurance or annuity, and mode of payment;

8.3. pay the premium or make a contribution on, modify, exchange, rescind, release, or terminate a contract of insurance or annuity procured by the Agent;

8.4. apply for and receive a loan secured by a contract of insurance;

8.5. surrender and receive the cash surrender value on a contract of insurance or annuity;

8.6. exercise an election;

8.7. exercise investment powers available under a contract of insurance or annuity;

8.8. change the manner of paying premiums on a contract of insurance or annuity;

8.9. change or convert the type of insurance or annuity with respect to which the principal has or claims to have authority described in this section;

8.10. apply for and procure a benefit or assistance under a statute or regulation to guarantee or pay premiums of a contract of insurance on the life of the principal;

8.11. collect, sell, assign, hypothecate, borrow against, or pledge the interest of the principal in a contract of insurance or annuity;

8.12. select the form and timing of the payment of proceeds from a contract of insurance or annuity;

8.13. pay, from proceeds or otherwise, compromise or contest, and apply for refunds in connection with, a tax or assessment levied by a taxing authority with respect to a contract of insurance or annuity or its proceeds or liability accruing by reason of the tax or assessment; and

8.14. create or change the beneficiary designation for a contract of insurance or annuity owned by me, provided that my Agent shall not be permitted to changed the beneficiary on any life insurance policy or annuity that insures the life of such Agent.

_____- Initial

9. *Estates, Trusts, and Other Beneficial Interests* — the power to:

9.1. accept, receive, receipt for, sell, assign, pledge, or exchange a share in or payment from the fund;

9.2. demand or obtain money or another thing of value to which the principal is, may become, or claims to be, entitled by reason of the fund, by litigation or otherwise;

9.3. exercise for the benefit of the principal a presently exercisable general power of appointment held by the principal;

9.4. initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to ascertain the meaning, validity, or effect of a deed, will, declaration of trust, or other instrument or transaction affecting the interest of the principal;

9.5. initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to remove, substitute, or surcharge a fiduciary;

9.6. conserve, invest, disburse, or use anything received for an authorized purpose;

9.7. reject, renounce, disclaim, release, or consent to a reduction in or modification of a share in or payment from the fund;

9.8. withdraw and/or receive income or principal from any trust regarding which I have the right of withdrawal or receipt, to request and receive the income or principal of any trust regarding which the trustee has discretionary authority to make distributions to or on my behalf, and to execute any receipt, release, or other document that may be required of me by such trustee.

10. *Claims and Litigation* — the power to:

10.1. assert and maintain before a court or administrative agency a claim, claim for relief, cause of action, counterclaim, offset, recoupment, or defense, including an action to recover property or other thing of value, recover damages sustained by the principal, eliminate or modify tax liability, or seek an injunction, specific performance, or other relief;

10.2. bring an action to determine adverse claims or intervene or otherwise participate in litigation;

10.3. seek an attachment, garnishment, order of arrest, or other preliminary, provisional, or intermediate relief and use an available procedure to effect or satisfy a judgment, order, or decree;

10.4. make or accept a tender, offer of judgment, or admission of facts, submit a controversy on an agreed statement of facts, consent to examination, and bind the principal in litigation;

10.5. submit to alternative dispute resolution, settle, and propose or accept a compromise;

10.6. waive the issuance and service of process upon the principal, accept service of process, appear for the principal, designate persons upon which process directed to the principal may be served, execute and file or deliver stipulations on the principal's behalf, verify pleadings, seek appellate review, procure and give surety and indemnity bonds, contract and pay for the preparation and printing of records and briefs, receive, execute, and file or deliver a consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement, or other instrument in connection with the prosecution, settlement, or defense of a claim or litigation;

10.7. act for the principal with respect to bankruptcy or insolvency, whether voluntary or involuntary, concerning the principal or some other person, or with respect to a reorganization, receivership, or application for the appointment of a receiver or trustee which affects an interest of the principal in property or other thing of value;

10.8. pay a judgment, award, or order against the principal or a settlement made in connection with a claim or litigation; and

10.9. receive money or other thing of value paid in settlement of or as proceeds of a claim or litigation.

11. *Personal and Family Maintenance* — the power to:

11.1. perform the acts necessary to maintain the customary standard of living of the principal, the principal's spouse, and the following individuals, whether living when the power of attorney is executed or later born:

11.1.1. the principal's children;

11.1.2. other individuals legally entitled to be supported by the principal; and

11.1.3. the individuals whom the principal has customarily supported or indicated the intent to support;

11.2. make periodic payments of child support and other family maintenance required by a court or governmental agency or an agreement to which the principal is a party;

11.3. provide living quarters for the individuals described in Section 11.1 by:

11.3.1. purchase, lease, or other contract; or

11.3.2. paying the operating costs, including interest, amortization payments, repairs, improvements, and taxes, for premises owned by the principal or occupied by those individuals;

11.4. provide normal domestic help, usual vacations and travel expenses, and funds for shelter, clothing, food, appropriate education, including post-secondary and vocational education, and other current living costs for the individuals described in Section 11.1;

11.5. pay expenses for necessary health care and custodial care on behalf of the individuals described in Section 11.1;

11.6. act as the principal's personal representative pursuant to the Health Insurance Portability and Accountability Act, Sections 1171 through 1179 of the Social Security Act, U.S.C. Section 1320d, as amended, and applicable regulations, in making decisions related to the past, present,

or future payment for the provision of health care consented to by the principal or anyone authorized under the law of this state to consent to health care on behalf of the principal;

11.7. continue any provision made by the principal for automobiles or other means of transportation, including registering, licensing, insuring, and replacing them, for the individuals described in Section 11.1;

11.8. maintain credit and debit accounts for the convenience of the individuals described in Section 11.1 and open new accounts;

11.9. continue payments incidental to the membership or affiliation of the principal in a religious institution, club, society, order, or other organization or to continue contributions to those organizations;

11.10. to do all acts necessary to provide me with living quarters by purchase, lease, or other arrangement, or by paying operating costs of my existing residence;

11.11. to provide care providers to assist me with my activities of daily living and health care;

11.12. to provide me with opportunities to engage in recreational activities and travel as my health permits;

11.13. to make necessary arrangements at any hospital, nursing home, assisted living home, or similar facility and to assure that my needs are provided for at such facility;

11.14. if, in the judgment of my Agent, I will never be able to return to my residence from such facility, my Agent may, with respect to any of my tangible personal property that my Agent believes that I will never need again, i) transfer custody and possession (but not title) of the property to the person designated in my will as the recipient of such property, ii) store such property, or iii) sell or otherwise dispose of such property on terms that my Agent deems in my best interests;

11.15. if, in the judgment of my Agent, I will never be able to return to my residence from such facility, to give my pet(s) to such person(s) selected by my Agent who will accept them as companion animals;

11.16. to make advance arrangements for my funeral and burial, if I have not previously done so myself; and

11.17. to do all other acts necessary for maintaining my customary standard of living.

12. *Benefits from Governmental Programs or Civil or Military Service* — the power to:

12.1. execute vouchers in the name of the principal for allowances and reimbursements payable by the United States or a foreign government or by a state or subdivision of a state to the principal, including allowances and reimbursements for transportation of the individuals described in Section 11.1, and for shipment of their household effects;

12.2. take possession and order the removal and shipment of property of the principal from a post, warehouse, depot, dock, or other place of storage or safekeeping, either governmental or private, and execute and deliver a release, voucher, receipt, bill of lading, shipping ticket, certificate, or other instrument for that purpose;

12.3. enroll in, apply for, select, reject, change, amend, or discontinue, on the principal's behalf, a benefit or program;

12.4. prepare, file, and maintain a claim of the principal for a benefit or assistance, financial or otherwise, to which the principal may be entitled under a statute or regulation;

12.5. initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation concerning any benefit or assistance the principal may be entitled to receive under a statute or regulation; and

12.6. receive the financial proceeds of a claim described in Section 12.4 and conserve, invest, disburse, or use for a lawful purpose anything so received.

13. *Retirement Plans* — the power to:

13.1. select the form and timing of payments under a retirement plan and withdraw benefits from a plan;

13.2. make a rollover, including a direct trustee-to-trustee rollover, of benefits from one

retirement plan to another;

13.3. establish a retirement plan in the principal's name;

13.4. make contributions to a retirement plan;

13.5. exercise investment powers available under a retirement plan;

13.6. borrow from, sell assets to, or purchase assets from a retirement plan; and

13.7. create or change the beneficiary designation for a retirement plan.

_____- Initial

14. Taxes —

14.1. My Agent is authorized to prepare, sign, and file federal, state, local, and foreign income, gift, payroll, property, Federal Insurance Contributions Act, and other tax returns, claims for refunds, requests for extension of time, petitions regarding tax matters, and any other tax-related documents, including receipts, offers, waivers, consents, including consents and agreements under Internal Revenue Code Section 2032A, 26 U.S.C. Section 2032A, as amended, closing agreements, and any power of attorney required by the Internal Revenue Service or other taxing authority with respect to a tax year upon which the statute of limitations has not run and the following 25 tax years;

14.2. pay taxes due, collect refunds, post bonds, receive confidential information, and contest deficiencies determined by the Internal Revenue Service or other taxing authority;

14.3. exercise any election available to the principal under federal, state, local, or foreign tax law; and

14.4. act for the principal in all tax matters for all periods before the Internal Revenue Service, or other taxing authority.

15. *Charitable Pledges* — My Agent is authorized to complete any written charitable pledges I have made, whether legally enforceable or not.

16. *Separation or Divorce* — My Agent is authorized to limit any support provided to my spouse to that which may be required by law, if I have been legally separated or divorced from such spouse.

17. *Elections and Disclaimers* — My Agent is authorized to make statutory elections, including, but not limited to, elections under augmented estate, family allowance and homestead property statutes. My Agent is further authorized to renounce, disclaim, or refuse to accept any gift, inheritance, life insurance proceeds or property to which I am entitled.

_____- Initial

18. *Providing for Grantor's Disabled or Incapacitated Children* — My Agent is authorized in my Agent's sole and absolute discretion from time to time and at any time to act with respect to any disabled or incapacitated child of mine who is dependent upon me in whole or in part for support, regardless of age, as follows:

18.1. My Agent may pay to or apply for the benefit for such child such amounts as my Agent, in my Agent's sole and absolute discretion, may from time to time deem necessary or advisable for the satisfaction of such child's special needs. As used herein, special needs refers to the requisites for maintaining such child's health, safety and welfare when, in the sole and absolute discretion of the Agent, such requisites are not being provided by any public agency, office or department of any state or of the United States. Special needs shall include, but not be limited to, dental expenses, special equipment, programs of training, education, treatment and necessary recreation and entertainment.

18.2. This authorization to my Agent is granted expressly for such child's extra and supplemental care, in addition to and over and above the benefits such child otherwise receives or may receive as a result of such child's handicap or disability from any local, state or federal governmental agency or from any private agencies, any of which provides services or benefits to handicapped persons. It is my express purpose that my Agent exercise this power only to supplement other benefits received by such child.

18.3. It is my intent that my Agent shall ask that my disabled child's guardian or conservator seek support and maintenance for such child from all available public resources, including the Supplemental Income Program (SSI), the Medicaid Program, the Social Security Disability

Program (SSD), the Medicare Program, and any additional similar or successor programs available from state, local, private or federal sources. My Agent shall take into consideration the applicable resources and income limitations of any public assistance programs for which such child is eligible when determining whether to make any discretionary distributions.

18.4. It is my further intent that no payments made hereunder by my Agent to such child or for such child's benefit shall be used to supplant or replace public assistance benefits of any county, state, federal or governmental agency that serves persons with disabilities that are the same or similar to the impairments of such child. For purposes of determining my disabled child's eligibility for such benefits, no asset of mine shall be considered available to such child. If any department or agency requests that my Agent make payments to or on behalf of such child for equipment, medication or services that other organizations or agencies are authorized to provide or to petition the Court or any other administrative agency for payment out of my assets or income for this purpose, then my Agent shall deny such request. My Agent is also authorized to contest and defend, including appeals, at my expense, any proceeding in any court of competent jurisdiction (1) seeking to reduce or eliminate such child's eligibility for benefits, (2) seeking reimbursement from me for benefits extended to such child, or any other proceeding for the same or any similar purpose.

18.5. No asset or income of mine shall be paid to or made subject to claims against such child of voluntary or involuntary creditors for the provision of care and services, including residential care, by any public entity, office, department or agency of any state, of the United States or of any other governmental agency.

18.6. Upon my disabled child's death, my Agent may, at his or her discretion, pay the expenses of such child's funeral.

18.7. If it is determined by a court that the existence of the powers granted in this Section to my Agent renders my disabled child ineligible to receive SSI, Medicaid, or similar governmental benefits, or if by reasons of the grant of such powers, my income or assets are found by a court to be subject to garnishment, attachment, execution or bankruptcy proceedings by any creditor of such child, then the special powers granted to provide benefits for such child herein shall terminate and thereafter be null and void.

18.8. My Agent may delegate to any person selected by my Agent any power I may now or in the future have as parent and/or guardian for such period of time as may be permitted by law.

18.9. To the extent that I am permitted by law to do so, I herewith nominate, constitute and appoint my Agent to serve as guardian for any disabled descendant or person that I am supporting, and if I am not permitted by law to so nominate, constitute and appoint, I request in the strongest possible terms that any court of competent jurisdiction that may receive and be asked to act upon a petition by any person to appoint a guardian or similar representative for such child give the greatest possible weight to this request.

18.10. To provide a care manager to supervise and monitor my disabled child's care upon such terms and conditions as my Agent deems appropriate.

19. *Domicile* — My Agent is authorized to establish a new residency and domicile for me, in or out of the United States, and to maintain multiple residencies and domiciles, and to acquire or otherwise become eligible and apply for citizenship or citizenships, all upon such terms and for such purposes as my Agent shall deem appropriate.

20. *Redirect Mail* — My Agent is authorized to open, read, respond to, and redirect my mail, and to represent me before the U.S. Postal Service in all matters relating to my mail service.

21. *Pets* — I authorize my Agent to pay the expenses associated with the feeding, care (including veterinary costs), and shelter of my pets, to acquire new pets for me, to transfer ownership or possession of my pets, and to establish any trusts or other arrangements deemed appropriate for the benefit of my pets and my enjoyment and regard for such pets and the descendants thereof. I further authorize my Agent to make a gift of my pet(s) to the individual(s) designated in my estate planning documents to receive said pet(s) at the time of my death.

22. *Waiver of Privilege* — My Agent is authorized to waive attorney-client, physician-patient, and other similar privileges to permit consultations between my Agent and my attorney, physician, and other advisors.

2. **INTERPRETATION AND GOVERNING LAW.** This instrument is to be construed and interpreted as a general Durable Power of Attorney. The enumeration of specific powers herein granted is not intended to, nor does it, limit or restrict the general powers herein granted to my Agent or as granted by Florida

Statute Section 709.2201(2), which Section 709.2201 is hereby incorporated by reference herein. This instrument is executed and delivered in the State of Florida, and the laws of the State of Florida shall govern all questions as to the validity of this power and the construction of its provisions.

3. **THIRD PARTY RELIANCE.** Third parties may rely upon the representations of my Agent as to all matters to any power granted to my Agent, and no person who may act in reliance upon the representation of my Agent or the authority granted to my Agent shall incur any liability to me or my estate as a result of permitting my Agent to exercise any power. My Agent shall execute any affidavit as may be required by a third party to verify my Agent's authority to act under this document.

4. **PHOTOCOPIES.** Photocopies or electronically transmitted copies hereof are considered to be equivalent to an originally signed Power of Attorney, as provided in Florida Statute Section 709.2106. A copy of this instrument showing that I have signed it and that it was witnessed and notarized shall be the equivalent of an original for any and all purposes. I recognize that I could elect to have an original document required for presentation, and have decided not to.

5. **DISABILITY OF PRINCIPAL.** It is my intent in executing this instrument that the power conferred on my Agent shall be exercisable commencing with the date hereof, notwithstanding any later disability or incapacity that I may suffer, so that this Durable Power of Attorney shall not be affected by disability of the principal except as provided by Florida Statute Chapter 709, Part II.

6. **NONDELEGABILITY.** This Durable Power of Attorney shall be nondelegable except as provided in Florida Statute Section 518.112, relating to investment functions.

7. **RESORT TO COURTS.** In the event that it becomes necessary to resort to court action, I hereby authorize my Agent to seek on my behalf and at my expense:

(a) A declaratory judgment from any court of competent jurisdiction interpreting the validity of this document or any of the acts authorized by this document, but such declaratory judgment shall not be necessary for my Agent to perform any act authorized by me in this document; or

(b) A mandatory injunction requiring compliance with my Agent's instructions by any person obligated to comply with instructions given by my Agent; or

(c) Actual and punitive damages against any person obligated to comply with instructions given by my Agent who negligently or willfully fails or refuses to follow such instructions.

In any judicial action under this section, including, but not limited to, the unreasonable refusal of a third party to allow my Agent to act pursuant to the powers granted herein, and challenges to the proper exercise of authority by my Agent, my Agent shall be entitled to seek recovery for damages and costs from such third party, including reasonable attorney's fees, in accordance with Florida Statute Section 709.2116(3).

8. **WAIVER OF CERTAIN DUTIES OF AGENT.** I recognize under the Florida Statutes that certain duties of loyalty and standards of care that would normally be owed by an appointed Agent to me as principal may be waived in order to give the appointed Agent more freedom with respect to taking actions that may be in the best interests of the Agent and/or family members or others as opposed to me individually. I understand that circumstances may arise whereby it would be in the best interest of one or more family members of mine to transfer assets from my name into their names, or to take other actions that would benefit relatives, close friends, or charities in lieu of benefitting me individually under this instrument.

Having full faith and confidence in my selected Agent or Agents, and in any alternate Agent herein named, I specifically relieve such Agent or Agents of the following duty or duties, provided that this provision shall not apply to any Agent who is not related to me:

(a) Any duty to act loyally for my sole benefit;

(b) Any duty not to create a conflict of interest that impairs my Agent's ability to act impartially in my best interest;

(c) Any duty to act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances; and

(d) Any duty to cooperate with a person who has authority to make health care decisions on my behalf in order to carry out my reasonable expectations to the extent actually known by my Agent and, otherwise, act in my best interest.

9. **REIMBURSEMENT AND LIABILITY OF AGENT.** My Agent shall be entitled to compensation for services performed under this Durable Power of Attorney as provided under applicable law, and he or

she shall be entitled to reimbursement for all reasonable expenses and costs incurred as a result of carrying out any provision of this Durable Power of Attorney, and shall be released from any and all liability for any actions and decisions made in good faith. Further, I agree to indemnify and hold harmless any Agent serving for my benefit, except to the extent attributable to clearly gross negligence or willful misconduct, and authorize my Agent to execute Agreements which may indemnify and hold harmless third parties for providing goods or services to me, such as adult congregate living facilities (ACLFs), Leases, personal care contracts, and other arrangements.

IN WITNESS WHEREOF, I have executed this Durable Power of Attorney this ___ day of _____ 201_, and I have directed that photographic copies of this Power of Attorney shall have the same force and effect as an original.

I RECOGNIZE THAT IF I HAVE NOT INITIALED ANY OF THE ITEMS IN THIS DOCUMENT CALLING FOR ME TO SEPARATELY SIGN OR INITIAL, THEN MY AGENT(S) WILL HAVE SIGNIFICANTLY LIMITED POWERS AS THE RESULT OF THIS DOCUMENT, AND THAT THIS DOCUMENT WAIVES ANY LEGAL RIGHTS THAT I MIGHT OTHERWISE HAVE IN ORDER TO GIVE MY AGENT GREATER FLEXIBILITY. I FURTHER RECOGNIZE THAT THIS DOCUMENT WILL NOT BE EFFECTIVE UNDER FLORIDA LAW UNLESS THERE ARE TWO WITNESSES TO MY SIGNATURE, AND NOTARIZATION BELOW.

WITNESS:

_____

Witness

_____

Witness

STATE OF FLORIDA)

COUNTY OF PINELLAS)

ON THIS _____ day of _____, 201_, before me, the undersigned notary, personally appeared _____, known to me, or who produced _____ as identification, and who did take an oath, to be the person whose name is subscribed to the above instrument, and being informed of the contents of said instrument, acknowledged that HE/SHE voluntarily executed the same for the uses and purposes herein contained.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

_____

Notary Public

My Commission Expires:

EXHIBIT 2 — FLORIDA HEALTH CARE POWER OF ATTORNEY

HEALTH CARE POWER OF ATTORNEY

I, _____, do hereby appoint my spouse, _____, or if and as applicable, the alternate agent or agents appointed below as my Health Care Surrogate ("Agent") under Florida Statute Section 765, and any other applicable law, to make health and personal care decisions for me.

If the above-named Agent or Agents named by me shall be unavailable, by reason of death, disability, resignation, or refusal to act, then _____ shall serve as alternate Agent.

If at any time more than one Agent is appointed under this Agreement, then any of such Co-Agents shall have the power and authority to act on my behalf without the consent or joinder of the others.

By this document I intend to create a Health Care Power of Attorney effective upon signature hereof which shall not be affected by my subsequent incapacity.

GRANT OF POWERS. I grant to my Agent, full authority to make any and all decisions for me regarding my health care. My Agent's authority to interpret my desires is intended to be as broad as possible. Accordingly, my Agent is authorized to take any and all actions on my behalf as are deemed appropriate by my Agent to provide for my medical and personal care, including, without limitation, the following:

A. To consent, refuse, or withdraw consent to any and all types of medical care, treatment, surgical procedures, diagnostic procedures, medication, and the use of mechanical or other

procedures that affect any bodily function, including, but not limited to artificial respiration, nutritional support and hydration, and cardio-pulmonary resuscitation;

B. To have access to medical records and information to the same extent that I am entitled to, including the right to disclose the contents to others;

C. To authorize my admission to or discharge (even against medical advice) from any hospital, nursing home, residential care, assisted living or similar facility or service;

D. To contract on my behalf for any health care or occupancy related service or facility, without my Agent incurring personal financial liability for such contracts;

E. To hire and fire medical, social service, and other support personnel responsible for my care;

F. To authorize, or refuse to authorize, any medication and procedure intended to relieve pain, even though such use may lead to physical damage, addiction, or hasten the moment of my death;

G. To make anatomical gifts of part or all of my body for medical purposes, authorize an autopsy, and direct the disposition of my remains, to the extent permitted by law;

H. To exercise my right to privacy and my right to make decisions regarding my medical treatment even though the exercise of my right might hasten my death or be against conventional medical advice;

I. To use, make, alter, or otherwise act as my Agent in accordance with my Living Will, with specific power to revise or execute a new Living Will;

J. To transport me to a foreign country or jurisdiction and to permit me to receive experimental, controversial or unorthodox medical treatment or pain alleviation;

K. To take any other action necessary to do what I authorize here, including but not limited to granting any waiver or release from liability required from any hospital, physician, or other health care provider; signing any documents relating to refusals of treatment or the leaving of a facility against medical advice, and pursuing any legal action in my name, and at the expense of my estate to force compliance with my wishes as determined by my Agent, or to seek actual or punitive damages for the failure to comply;

L. To request that a Do Not Resuscitate Order be issued by a physician on my behalf if and when deemed appropriate to facilitate carrying out my intentions as set forth under this document, my Living Will, or otherwise. I recognize that, according to applicable law, paramedics, hospitals, and other agencies may be required to resuscitate individuals under certain circumstances unless there is a valid Do Not Resuscitate Order executed by a licensed physician;

M. To apply for insurance or third party payor benefits, and to apply for public benefits, such as Medicare and Medicaid, for me and to have access to information regarding my coverage, income, and assets to the extent required to make such application; and

N. To consult with health care providers to make appropriate health care decisions which my Health Care Surrogate believes that I would have made for myself under the circumstances.

I encourage any acting Agent to confer and consult with the other alternate Agents named herein, if practical, prior to making decisions; but this requirement shall not diminish the power and authority of my Agent or Agents.

THIRD PARTY RELIANCE. No person who relies in good faith upon any representations by my Agent or successor Agent shall be liable to me, my estate, my heirs or assigns for recognizing the Agent's authority.

RESORT TO COURTS. In the event that it becomes necessary to resort to court action, I hereby authorize my Agent to seek on my behalf and at my expense:

A. A declaratory judgment from any court of competent jurisdiction interpreting the validity

of this document or any of the acts authorized by this document, but such declaratory judgment shall not be necessary for my Agent to perform any act authorized by me in this document; or

B. A mandatory injunction requiring compliance with my Agent's instructions by any person obligated to comply with instructions given by my Agent; or

C. Actual and punitive damages against any person obligated to comply with instructions given by my Agent who negligently or willfully fails or refuses to follow such instructions.

COOPERATION FROM HEALTH CARE PROVIDERS AND INSTITUTIONS. My attending physician, any consulting physician and any other health care provider, as well as any health care facility supplier or other party providing health care services or items to me, shall provide my Agent or Agents with information sufficient to permit my Agent or Agents to make informed health care decisions for me. My Agent or Agent's right to consultation and cooperation shall be considered equal to that of mine. My Agent or Agents shall specifically be given information related to my health, including (without limitation): the diagnosis, the prognosis, the alternative treatment of modalities available, the possible risks versus benefits of treatment, the side effects of medication, the financial impact or proposed treatment, and the likely outcome of a refusal to consent.

REIMBURSEMENT OF AGENT. My Agent shall not be entitled to compensation for services performed under this Health Care Power of Attorney, but he or she shall be entitled to reimbursement for all reasonable expenses incurred as a result of carrying out any provision of this Health Care Power of Attorney, and shall be released from any and all liability for good faith efforts.

SEVERABILITY. The powers delegated under this Health Care Power of Attorney are separable, so that the invalidity of one (1) or more powers shall not affect any others.

PHOTOCOPIES. My Agent is authorized to make photocopies of this document as frequently and in such quantity as my Agent shall deem appropriate. All photocopies shall have the same force and effect as any original. I specifically direct my Agent to have a photocopy of this document placed in my medical records if such a copy does not already constitute a part of my medical records.

My Agent and any successor thereto shall be considered my "Personal Representatives" within the meaning of, and have all of the same rights as I have under the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §1320(d) and 45 C.F.R. §§160–164. I authorize the release of any and all Protected Health Information, as defined by 45 C.F.R. §164.502(g)(2), to my Agent(s) named above, and to the Law Firm of Gassman Law Associates, P.A. upon request thereby.

By signing this document I indicate that I understand the contents of this document and the effect of this grant of powers to my Agent, and intend that this document be valid in any jurisdiction in which it is presented, and revoke any prior Power of Attorney for health care executed by me.

Executed this _____ day of _____, 201_.

WITNESS:

_____

Witness

_____

Witness

I declare that the person who signed or acknowledged this Health Care Power of Attorney did so in my presence and that HE/SHE appears to be of sound mind and under no duress, fraud, or undue influence. I am not the person appointed as Agent by this document, nor am I the patient's health care provider, or an employee of the patient's health care provider. I further declare that I am not related to the principal by blood, marriage, or adoption, and to the best of my knowledge, I am not a creditor of the principal nor entitled to any part of HIS/HER estate under a Will now existing or by operation of law.

WITNESS:

_____

Witness

_____

Witness

STATE OF FLORIDA)

COUNTY OF PINELLAS)

ON THIS ____ day of _____, 201_, before me _____ (name of notary) the undersigned notary, personally appeared _____, known to me, or who produced _____ as identification, and who did take an oath, to be the person whose name is subscribed to the above instrument, and being informed of the contents of said instrument, acknowledged that HE/SHE voluntarily executed the same for the uses and purposes herein contained.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

Notary Public

_____

My Commission Expires:

EXHIBIT 3 — CHART FROM FLORIDA DEPARTMENT OF REVENUE WITH EACH COUNTY'S TOTAL SALES TAX RATE

Discretionary Sales Surtax Rates for 2012

COUNTY	TOTAL SURTAX RATE	EFFECTIVE DATE	EXPIRATION DATE
Alachua	**None**		
Baker	1%	Jan. 1, 1994	None
Bay	.5%	Jan. 1, 2011	Dec. 2020
Bradford	1%	Mar. 1, 1993	None
Brevard	None		
Broward	None		
Calhoun	1.5% (1%)	Jan. 1, 2009	None
	(.5%)	Jan. 1, 2009	Dec. 2018
Charlotte	1%	Jan. 1, 2009	Dec. 2014
Citrus	None		
Clay	1%	Feb. 1, 1990	Dec 2019
Collier	None		
Columbia	1%	Aug. 1, 1994	None
Dade	See Miami-Dade for rates.		
De Soto	1%	Jan. 1, 1988	None
Dixie	1%	Apr. 1, 1990	Dec. 2029
Duval	1% (.5%)	Jan. 1, 1989	None
	(.5%)	Jan. 1, 2001	Dec. 2030
Escambia	1.5% (1%)	Jun. 1, 1992	Dec. 2017
	(.5%)	Jan. 1, 1998	Dec. 2017
Flagler	**1%** (.5%)	Jan. 1, 2003	Dec. 2012⇐
	(.5%)	Jan. 1, 2003	Dec. 2012⇐
Franklin	1%	Jan. 1, 2008	None
Gadsden	1.5% (1%)	Jan. 1, 1996	None
	(.5%)	Jan. 1, 2009	Dec. 2038
Gilchrist	1%	Oct. 1, 1992	None
Glades	1%	Feb. 1, 1922	Dec. 2021
Gulf	1%	Jan. 1, 2010	None
Hamilton	1%	Jul. 1, 1990	Dec. 2019
Lake	1%	Jan. 1, 1988	Dec 2017
Lee	None		
Leon	1.5% (1%)	Dec. 1, 1989	Dec. 2019
	(.5%)	Jan. 1, 2003	Dec. 2012⇐
Levy	1%	Oct. 1, 1992	None
Liberty	1.5% (1%)	Nov. 1, 1992	None
	(.5%)	Jan. 1, 2012	Dec. 2020
Madison	1.5% (1%)	Aug. 1 1989	None
	(.5%)	Jan. 1, 2007	None
Manatee	.5%	Jan. 1, 2003	Dec. 2017
Marion	None		
Martin	**None**		
Miami-Dade	1% (.5%)	Jan. 1, 1992	None
	(.5%)	Jan. 1, 2003	None
Monroe	1.5% (1%)	Nov. 1, 1989	Dec. 2018
	(.5%)	Jan. 1, 1996	Dec. 2015
Nassau	1%	Mar. 1, 1996	None
Okaloosa	None		
Okeechobee	1%	Oct. 1, 1995	None
Orange	.5%	Jan. 1, 2003	Dec. 2015
Osceola	1%	Sept. 1, 1990	Aug 2025
Palm Beach	None		
Pasco	1%	Jan. 1, 2005	Dec. 2014
Pinellas	1%	Feb. 1, 1990	Dec. 2019
Polk	1% (.5%)	Jan. 1, 2004	Dec. 2018
	(.5%)	Jan. 1, 2005	Dec. 2019
Putnam	1%	Jan. 1, 2003	Dec. 2017
St. Johns	None		
St. Lucie	.5%	Jul. 1, 1996	Dec. 2026

Hardee	1%		Jan. 1, 1998	None	Santa Rosa	.5%	Oct. 1, 1998	Dec 2018
Hendry	1%		Jan. 1, 1988	None	Sarasota	1%	Sept. 1, 1989	Dec 2024
Hernando	.5%		Jan. 1, 2005	Dec 2014	**Seminole**	**None**		
Highlands	1%		Nov. 1, 1989	Oct. 2019	Sumter	1%	Jan. 1, 1993	None
Hillsborough	1%	(.5%)	Dec. 1, 1996	Nov. 2026	Suwannee	1%	Jan. 1, 1988	None
		(.5%)	Oct. 1, 2001	None	Taylor	1%	Aug. 1, 1989	Dec. 2029
Holmes	1%		Oct. 1, 1995	Dec. 2013	Union	1%	Feb. 1, 1993	None
Indian River	1%		Jun. 1, 1989	Dec. 2019	Volusia	.5%	Jan. 1, 2002	Dec. 2016
Jackson	1.5%	(1%)	Jun. 1, 1995	Dec. 2025	Wakulla	1%	Jan. 1, 1998	Dec. 2017
		(.5%)	Jul. 1, 1996	Dec. 2015	Walton	1%	Feb. 1, 1995	None
Jefferson	1%		Jun. 1, 1988	None	Washington	1%	Nov. 1, 1996	None
Lafayette	1%		Sept. 1, 1991	None				

Each county that has a surtax levy that is new, revised, or extended is indicated in bold. Any county that has a surtax that expires in 2012 is also in bold and has an ⇐ beside the expiration date.

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