GASSMAN CROTTY & DENICOLO P.A.
ATTORNEYS AT LAW

THE THURSDAY REPORT

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Re: The Hello Spring Report

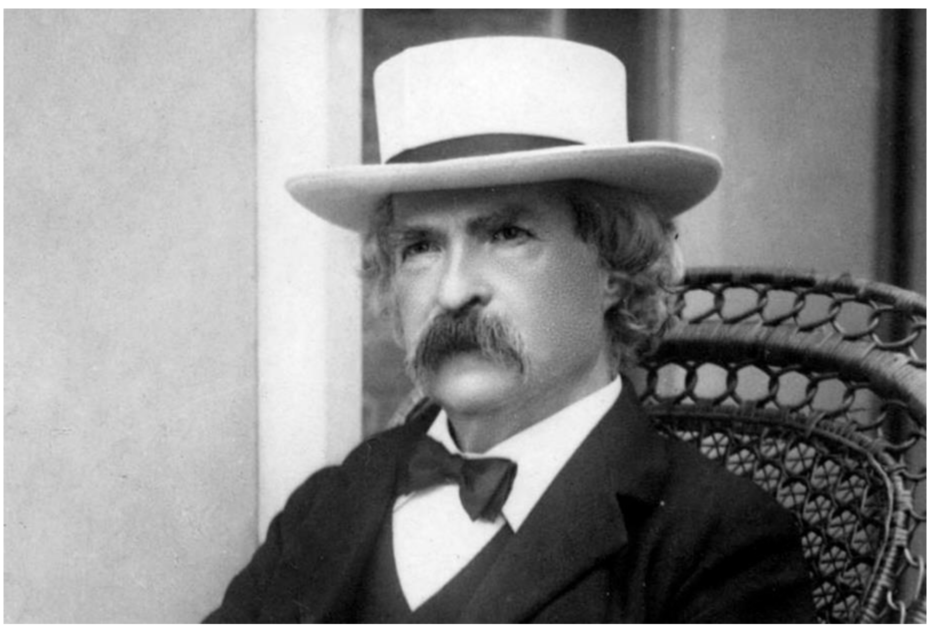
It's Gonna Be a Bright (Bright) Bright (Bright) Sunshiny Report

In This Issue:

We welcome contributions for future Thursday Report topics. If you are interested in making a contribution as a guest writer, please email Alan at agassman@gassmanpa.com

This week marks the beginning of spring and as Robin Williams once said, "Spring is nature's way of saying, Let's party!" However, for us Floridians it also means you can run, you can hide, but the pollen will find you.

Quote of the Week

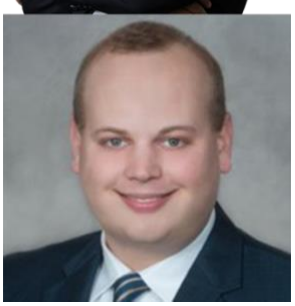


It's spring fever. That is what the name of it is. And when you've got it, you want - oh, you don't quite know what it is you do want, but it just fairly makes your heart ache, you want it so!

- Mark Twain

Don't Come Around Here No More: Going Down the Rabbit Hole and Avoiding Issues With Internal Revenue Code Section 2036(a)(2) – Update

by Alan Gassman, Ken Crotty, Chris Denicolo and John Beck



The following is an article updated from the previous issue of Thursday Report

EXECUTIVE SUMMARY

In a series of chess-like moves, the IRS has advanced on the board to challenge family limited partnerships (and family limited liability companies) where the taxpayer has failed to follow some obvious, and not-so-obvious, rules of the game. In response, the Tax Court has issued the Powell and Cahill decisions, which should be of concern to many taxpayers and practitioners.

The Tax Court has been using Section 2036(a)(2) of the Internal Revenue Code as a flamingo croquet mallet to hit the poor hedgehogs (in this case, the value of the assets of the partnership) through the arches of playing cards and into the hole (or back into the decedent's estate as a retained life interest).

The decisions in Cahill and Powell may make the IRS more confident than ever that it can win the croquet match, holding the transferors responsible for estate taxes related to interests that they have already relinquished.
The objective is to use statutes and case law to stand up to the authority figures of this new forum of "Wonderland," so that taxpayers can wake up from this nightmare in time to safely avoid the clutches of the IRS's Queen of Hearts, as she tries to persuade the courts to tax interests that the taxpayer has already given away while trumpeting, "[O]ff with their heads!"

A creative and imaginative mind, such as Alice's, is often the key to winning the chess game and be crowned "Queen, or King, of Wonderland."

"Why it's simply impassible!"

"Why, don't you mean impossible?"

"No, I do mean impassible. (chuckles) Nothing's impossible!"

Many practitioners believe that the Powell and Cahill cases are based on bad facts and will likely be overturned on appeal. The authors of this article agree that these decisions will likely be overturned, but this article is based on the assumption that these decisions will be upheld.

COMMENT

DOWN THE RABBIT HOLE: THE FIVE SEPARATE PRINCIPLES. Working with arrangements that have section 2036(a)(1) or 2036(a)(2) risks requires an understanding of five separate principles that interact in most factual situations and are discussed in detail in this paper. A brief summary of each principle, and how they interact should be firmly in the practitioner's mind, is as follows:

1. FINDING YOUR WAY THROUGH THE DOOR TO WONDERLAND: GOOD NEWS FIRST. There is no gift on formation when assets are placed in a limited partnership in exchange for discounted limited partnership interests. The 2005 B*ongard* decision explicitly confirmed that a tremendous amount of value can disappear, be gifted, or be sold at a significant discount shortly after formation of a limited partnership or LLC where the following occurs:

(1) all interests are received pro rata to contributions;

(2) capital accounts that are pro rata to contributions, and appropriately implemented, are required under the entity documents and are respected; and

(3) a reasonable period of time passes between funding and any transfer of partnership interests at a discount. A reasonable period of time may be 30-60 days.

The ability to put $900,000 of assets into a partnership for a 90% limited partnership interest, which is worth much less than $900,000, is a valuable planning opportunity but only if handled properly.

If the above three requirements have been met, the "disappearing value" is not considered to be a gift as long as a reasonable period of time passes between formation, funding, and any transfer of partnership interests.

2. "BEWARE THE JABBERWOCK, MY SON! THE JAWS THAT BITE, THE CLAWS THAT CATCH!": THE TAX LAW GIVETH THEN TAKETH AWAY. Under Internal Revenue Code Section 2036(a), a person will be considered to own assets that have been transferred during his or her lifetime, even if the person has no ownership interest therein, if the person has retained any of the following rights within three years before death unless the transfer of the assets met the somewhat elusive bonfire transaction for valuable consideration exception described below.

The retained rights that cause the problem can be any one or more of the following:

(1) The right to possession or enjoyment of, or the right to the income from, the property, or

(2) The right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

Under section 2036(a)(2), the right to participate, to any degree, in the determination of if and when to make a distribution or liquidation of assets from an entity will cause a 2036 inclusion. *Estate of Cahill v. Commissioner* is a Tax Court Memorandum decision published on June 18, 2018, that involved a split-dollar life insurance agreement, where the decedent held the innocuous right to participate in any vote or agreement with respect to a possible amendment to the split-dollar agreement. Judge Thornton, who was the lead judge in the *Powell* decision, was the sole judge in the Cahill Tax Court Memorandum decision, and held that retaining this power meant that Mr. Cahill should be considered as retaining a right "with respect to the amounts transferred sufficient enough to apply sections 2036(a)(2) and 2038(a)(1)".

Tax Court Memorandum decisions have no precedential value but provide insight into how the Judge is interpreting the law and will often be influential with respect to subsequent Tax Court decisions.

Special General Partnership Interests give the Special General Partner the exclusive right to make decisions with respect to allocations among the partners, liquidations and/or distributions, and amendments to the agreement. If coupled with a Managing General Partnership interest, this will allow the taxpayer to only manage assets as a fiduciary in the same way that the 1972 *Byrum* case permitted, as described in Section 5 below, and thereafter.

3. A PRISONER OF THE RED KNIGHT LESS RESCUED BY THE WHITE KNIGHT: THE 3 YEAR RULE. As stated above, unless the subsequent transfer or release is for good and valuable consideration under a bona fide sale, if a 2036(a) right is held for even a moment, a release or transfer of the retained right will not eliminate the problem if the relinquishment was not performed more than three years prior to the transferor's death.

4. PAINTING THE ROSES RED TO SAVE YOUR HEAD: THE BONA FIDE SALE EXCEPTION. In several well-known section 2036 cases, taxpayers have been successful in convincing the courts that the contribution to a family limited partnership in exchange for general and/or limited partnership interests qualified under the bona fide sale exclusion, so that retained 2036(a) powers did not cause estate tax inclusion. However, this line of reasoning is successful only where both of the following apply:

(1) The contributor received back entity interests with pro rata capital account and distributions rights; and

(2) There were one or more substantial business purposes for the entity funding that were not related to estate and gift tax savings.

In several other cases, courts did not find a sufficient or sincere non-business purpose to justify the application of the Bona Fide Sale Exception, and the bar has been set pretty high for future cases. In order to confront this high bar, make sure to keep documentation evidencing and substantial reasons for the arrangement beyond estate tax savings. Strong reasons for this type of arrangement may include the following:

(1) To avoid family disputes;

(2) To aggregate entities for management purposes; and/or

(3) To handle serious creditor protection concerns.

It is best to document multiple bona fide purposes in order to have a reasonable chance of meeting the Bona Fide Sale Exception.

5. A MAD TEA-PARTY: AN APPOINTED AGENT UNDER POWER OF ATTORNEY CONSIDERED AS AN ALTER EGO. In a few cases elderly persons contributed assets to FLP's or LLC's and general partnership interests that would cause 2036(a)(1) or 2036(a)(2) to apply were held by a person who was also the agent under the contributor's power of attorney. The courts found that the fiduciary duty of the agent extended to influence how the agent managed the entity as general partner, even when the agent owned the general partnership interest personally and had no duty beyond the normal fiduciary obligations of a general partner.

This may extend to a situation where the trustee of an irrevocable trust, or a manager of another entity that holds the general partnership interests also holds a power of attorney for the contributor or is the trustee of the contributor's revocable trust. It seems unjust to conclude that someone who has a power of attorney over one individual would act differently when serving as trustee of a separate and distinct trust, but this is what the *Powell* and *Strangi,* and *Cahill* decisions have held. Such agents should consider resigning as an agent under the contributor's power of attorney or transferring the section 2036(a) "deemed rights" to another party who is independent with respect to the situation.

For example, Mother is 90 years old and has assets in her personal name. She has early dementia and is occasionally confusion. Her assets are with three brokerage firms, and the children are concerned that someone may take advantage of her vulnerable state. The children also have assets that she gifted them over the years and would like to have one asset manager handle all of the investments, which will eventually be their inheritance. One or more of the children have significant assets but may be at risk as the result of a marital issue, investment inexperience, or spendthrift type of situation.

They use separate lawyers for the mother and children, and the majority of her investment assets are conveyed to an LLC for ownership that is in proportion to her contribution, which is 88%. Each of the three children makes a pro rata contribution to receive partnership interests.

Mother's lawyer wants her to control the partnership as general partner, but it is agreed, after some deliberation, that it is best for the children to do this in a fiduciary manner. The children are Mother's agents under her durable power of attorney and health care power attorney, and also are nominated successor Trustees under her revocable trust.

It is finally decided that a trust for grandchildren will be set up with the local trust company serving as the Trustee and the trust will receive the general partnership interest in the partnership and certain other assets to be managed. The trust is drafted so that the local trust company may be replaced with an alternate licensed trust company by a majority vote of the children at any time and for any reason, provided that at all times a licensed trust company is serving as the Trustee of the grandchildren's trust.

Mother retains a non-voting limited partnership interest and has no right to vote on amendments or if there will be a liquidation or distribution. Mother keeps assets in her personal name that are expected to be sufficient to support herself for the remainder of her life.

As stated above, one possible innovative solution to avoid unintended 2036 issues, where a person may place assets in an entity and give away a non-controlling, non-voting, or limited partnership interest to receive a discount and other benefits for estate and gift tax purposes, is to allow the taxpayer to be considered as the owner of the controlling general partner interest and to possibly make decisions based upon a reasonable investment standard, which is fine as long as the investment control is subject to a fiduciary duty.

Conclusion

Practitioners need to decide as quickly as possible on how to handle this issue for new and existing cases and reach out to their clients regarding the choices they have.

No one knows when they will die so clients and their advisers need to plan accordingly, especially in light of the possible three year recapture rule under Internal Revenue Code Section 2035(a). The last thing you want to tell your client as an adviser is "Oh my furry whiskers, I'm late, I'm late, I'm late."

When Are You Responsible for Your Children? – Negligent Entrustment in Florida.

By Kelsey Weiss

It is generally accepted law that parents are not liable for the actions of their minor children simply because of that parental relationship.[1] However, liability is possible in some circumstances. Parents should pay careful attention to the exceptions to this principle to prevent any personal liability for the actions of children.

Negligent entrustment is a common law cause of action recognized in almost every state and Florida is no exception. In the sentient Florida case on negligent entrustment, *Gissen v. Goodwill*, the 1995 Supreme Court clearly defined four exceptions to the general principle that parents are not liable for actions of their children:

1. Where [a parent] entrusts his child with an instrumentality which, because of the lack of age, judgment, or experience of the child, may become a source of danger to others;
2. Where a child, in the commission of a tortious act, is occupying the relationship of a servant or agent of its parents;
3. Where the parent knows of the child's wrongdoing and consents to it, directs or sanctions it; and
4. Where [a parent] fails to exercise parental control over his minor child, although he knows or in the exercise of due care should have known that injury to another is a probable consequence.[2]

In *Gissen*, the Florida Supreme Court determined that the parents of an eight-year-old girl, Geraldine Goodwill, were not liable for the injuries sustained to the plaintiff when Geraldine slammed the plaintiff's finger in a door causing it to become severed and fall off. The plaintiff alleged that Geraldine's parents "carelessly and negligently failed to restrain her" even though they knew that she had "dangerous tendencies and propensities of a mischievous and wanton disposition." The court proceeding to conduct a thorough analysis of the relevant case law and determined that the common theme in all of these cases came down to showing that "the child had the habit of doing the particular type of wrongful act which resulted in the injury complained of." In this case, the plaintiff had not claimed that Geraldine had a habit of slamming doors or injuring people with doors. Therefore, the court decided that, without facts or allegations to the contrary, this was an isolated injury and thus not foreseeable meaning Geraldine's parents could not be held responsible.

The common theme of showing that the injury causing action was a habit of the child has continued to be influential after *Gissen*. In 1972 case *Spector v. Neer* out of the third District Court of Appeal of Florida, the plaintiffs were suing the parents of a child (and their insurance company) due to damage caused to the plaintiffs' home when Hurley Neer started a fire while playing with matches.[3] The court determined that Hurley's parents did "not fall within the exceptions of *Gissen*" because "[t]he fact that Hurley had a habit of doing the particular type of wrongful act which resulted in the injuries [was] nor alleged, not [did] the amended complaint state that Hurley ever set fire to anything."

While the *Gissen* court was one of the first in Florida to lay out specific exceptions in law leading to the doctrine of negligent entrustment, this doctrine actually dates back to before the publication of the First

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[1] *Spector v. Neer*, 262 So. 2d 689, 690 (Fla. Dist. Ct. App. 1972); *See Gissen v. Goodwill*, 80 So. 2d 701, 703 (Fla. 1955).
[2] *Gissen v. Goodwill*, 80 So. 2d 701 (Fla. 1955).
[3] *Spector v. Neer*, 262 So. 2d 689 (Fla. Dist. Ct. App. 1972).

Restatement of Torts in 1923.[4] Courts have since used § 390 of the Second Restatement of Torts to establish liability for anyone who supplies chattel, or any form of property, for the use of another.[5] This section is titled "Chattel for Use by Person Known to be Incompetent" and states:

> "One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them."[6]

As pointed out by the court in the 1997 case *Kitchen v. K-Mart*, another very influential case from the Florida Supreme Court, § 390 creates a foreseeability standard for negligence entrustment. In 2009, the Fourth District Court of Appeals of Florida determined in *Fina v. Hennarichs* that the parents of Nicolas Fina were liable because the accident that occurred was foreseeable.[7] In this case, Roger and Karen Fina owned an ATV and allowed their teenage son, Nicolas, to drive it on their property. Nicolas became friends with a group of children his age including thirteen-year old Sara. Nicolas allowed Sara to drive the ATV, Sara lost control while making a sharp turn, crashed into a tree, and subsequently died from her injuries. As part of the suit, Sara's estate alleged that Roger and Karen Fina were liable for Sara's death because they negligently entrusted the ATV to Nicolas, negligently trained Nicolas on how to use the ATV, and negligently supervised Nicolas leading to Nicolas negligently entrusting the ATV to Sara.

The Finas argued that because Florida law did not prohibit children from operating ATVs at the time, Nicolas's "lack of age" was insignificant. The court disagreed, however, and stated that "If a child's lack of age deprives him of the maturity to act responsibly with an ATV, then the child's parents may be liable for entrusting an ATV to that child." The Finas next argued that there was no evidence that Nicolas's lack of age showed that he was incompetent. However, the ATV came with a warning label and an operating manual that both stated that no one under sixteen should ride or operate the ATV. The court determined that because the Finas chose to disregard this warning, they were potentially liable for the foreseeable consequences of that choice. In all, the court held that the tragedy was foreseeable and there was sufficient evidence to hold Roger and Karen liable for negligently entrusting the ATV to Nicolas.

Another reason parents should pay particular heed to the doctrine of negligent entrustment lies in the additional liability that could be imposed. Florida Statute § 324.021(9)(b)(3) provides statutory caps for owner liability. However, at the very end of this statute, the legislature added language stating, "Nothing in this subparagraph shall be construed to affect the liability of the owner for his or her own negligence." Therefore, the statutory caps on damages do NOT apply to damage awards of negligent entrustment. In other words, while there may be a limit to how much a parent can owe based on their ownership of property, such as a vehicle, there is no limit to the amount of damages that parent can be personally liable for if the parent negligently entrusted the vehicle to their child.

While it might seem okay for parents to give their children more responsibility as the children grow older, parents should continually keep the doctrine of negligent entrustment in the back of their minds. However, because the injured party has the burden of showing that the injury causing activity was a habit of the child as well as foreseeable, a claim for negligent entrustment will not often be successful. In order for this type of claim to succeed, there must be the right recipe for disaster combined with parental knowledge and lack of interference.

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[4] *Kitchen v. K-Mart Corp.*, 697 So. 2d 1200, 1202 (Fla. 1997).
[5] Restatement of the Law, Torts § 390 at Comment a.
[6] Restatement of the Law, Torts § 390.
[7] *Fina v. Hennarichs*, 19 So. 3d 1081 (Fla. Dist. Ct. App. 2009).

Liability: The Other Never-Ending Story Part IV: To Be or Not to Be…A Franchisor with Liability

by Amanda Schillinger

Just when you think you can escape liability, and possibly the ghost of your murdered father,[8] the courts reel you back in. At least that is what has been done in the past to vicarious liability suits against franchisors.[9] Thankfully, most courts (outside of California, of course) have reconsidered their stand on holding franchisors liable for acts done by employees of the franchisee.[10] That is if the franchisor only imposes control over the things that matter for the purpose of protecting the franchise's trademark, leaving the courts wondering whether an employer/employee relationship is in existence.[11]

Prior to the late 1990s, courts viewed franchisor/franchisee relationships under the same scope of strict liability as it did for employer/employee relationships. Two reasons are cited for this: (1) imposing liability creates a financial motivation for the employer to ensure that his or her employee(s) exercises care when performing the job given; and (2) if an accident does occur, generally the employer is in a much better position to compensate the injured party or, at the very least, to insure against the injured party's loss. The conclusion for all of this is that vicarious liability will arise when the ability to exert "actual control" over other's activities is present.[12]

This rationale is expressed best in the *Arthur Murray, Inc*. case.[13] In this case, the Plaintiff, who was in pursuit of becoming an "accomplished" dancer, attended one of the Defendant's dance schools. Unfortunately, the Plaintiff did not grow in her dancing abilities, unlike her bill for classes, which involved the Defendant

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8 *Id.* Prince Hamlet is tormented, confused, and overall depressed in this tragedy. And who wouldn't be after finding out that your father has been murdered, your mother is married to her brother-in-law, your crown has been stolen from you, and you are now being haunted by your deceased father's spirit. Franchisors are dealing with problems just as flustering, although not quite as dramatic, when it comes to liability issues resulting from acts performed by their franchisee(s) and their franchisee(s)' employees.

9 *See generally* Jeffrey H. Wolf and Aaron C. Schepler, *Caught between Scylla and Charybdis: Are Franchisors Still Stuck between the Rock of Noon-Uniformity and the Hard Place of Vicarious Liability?* 33.2 Franchise L.J. 195 (2013).

10 *See id.* at 196.

11 *See* Shakespeare, supra note 1. The characters in *Hamlet*, who have seen the ghost of dead King Hamlet, are in constant disbelief that the spirit they are seeing is actually real and not just in their own heads. Or is it?

12 *See* Wolf, supra note 3, at 197.

13 *See generally Vokes v. Arthur Murray, Inc.*, 212 So. 2d 906 (Fla. 2d DCA 1968).

inducing the Plaintiff to enter into several contracts, along with paying out over $30,000 for lessons and "field-trips." When the Plaintiff finally took off her blind-fold[14] to see that she was incapable of meeting her goal, she sought rescission of the contracts she had entered into and the return of the money she had paid the school based on a claim of fraud.

Here, the Court held that the franchisee was the agent, and therefore, the franchisor was liable for the franchisee's breaches of its contract with the plaintiff. Additionally, the Court expressed that if the franchisor wanted to extinguish the agency relationship, it should limit the control over those activities necessary to protect its "trade name," but the Court did not clarify which of the controls the franchisor needed to let off the leash.[15]

What the Court did not really comprehend is that some, which is actually most, of the control a franchisor exerts over a franchisee is for the benefit of protecting the franchise's trademark (a problem which present courts now understand); and thus, most courts now are applying the Instrumentality Test, also known as the Modern Test.[16] This test takes into consideration that the control exerted, better known as "quality control,"[17] is not the same as the day-to-day control that other businesses exert over their employees,[18] just like avenging your father's murder is not the same as seeking revenge upon the uncle who murdered your father.[19]

The *Kerl v. Dennis Rasmussen, Inc.* case was the final step in implementing this new modern approach to help protect franchisors from vicarious liability.[20] The Plaintiff and his girlfriend, who worked at Wal-Mart, in this case were shot in a Wal-Mart parking lot by the girlfriend's former boyfriend. The Plaintiff was injured, and unfortunately, the Plaintiff's girlfriend died. In addition, the shooter was a work-release inmate at a nearby Arby's chain that was operated by the Defendant in this case. The shooter had left work without notice and without permission.

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14 One of the major conflicts faced by Prince Hamlet in Shakespeare's play is distinguishing between what is real and what is an illusion.

15 *Id*. at 198. I guess the saying is true that "conscience doth make cowards of us all." Shakespeare, supra note 1.

16 Wolf, supra note 3, at 200.

17 "A franchisor's key objective should be to sustain quality standards throughout its entire franchise system. Failing to establish and maintain quality ultimately leads to the downfall of many franchise brands." Jason Callaway, *Setting the Standard: How to Maintain Franchise System Quality Control*, International Franchise Association (IFA), https://www.franchise.org/setting-the-standard-how-to-maintain-franchise-system-quality-control (last visited Jan. 28, 2019).

18 Wolf, supra note 3, at 203.

19 Avengement normally leads to justice being served (in a legal way) while revenge tends to cause everyone in the play to die horrible deaths by poison, stabbing, drowning oneself, etc. *See* Shakespeare, supra note 1.

20 Wolf, supra note 3, at 201.

In *Kerl*, the Wisconsin Supreme Court held that franchising is qualitatively different from other business relationships; and thus, they should be treated differently in vicarious liability suits.[21] If control were to be broadly construed, then the franchisor would almost always be found liable for acts performed by the franchisee or the franchisee's employee(s).[22] The Court stated that the franchisor's main purpose in its control over "setting uniform quality, marketing, and operational standards" was to protect the corporation's trademark integrity.[23]

The Instrumentality Test, unlike the Agency Test from the Restatement Second of Employment Law, poses the right test for franchisor liability: Does the franchisor have the legal right and the practical ability to control, on a day-to-day basis, the specific act that caused the harm to the injured party?[24]

Courts also have looked to whether the business is "masking itself"[25] in that the franchisor still retains the control of the day-to-day operations of the franchisee, or whether the franchisee has retained some degree of independence under the franchise agreement.

A Franchisor can limit liability by taking the following steps:

> (1) Keeping out of the involvement of human resource practices of the franchisees;
>
> (2) Use appropriate disclaimers in the franchisee disclosure document and operations manual (i.e. include a statement such as "'the following are suggestions, not requirements'"); and
>
> (3) Have a plan set in place as to what part of the franchisee's business you are controlling and question whether those measures are necessary to maintain the integrity of the trademark.[26]

When setting up a franchise, the franchisor should be aware of these tips and be cautious in exerting too much control over the franchisee; otherwise, the franchisor could face the possibility of getting stabbed by a court with a sword soaked in poison.[27]

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[21] *Id.* at 202.

[22] 682 N.W.2d 328, 331 (Wis. 2004).

[23] Wolf, supra note 3, at 202.

[24] *Id.* at 208.

[25] The mask of course is figurative, in a way, unlike Prince Hamlet's mask that was used to conceal him while he was investigating the inner workings of the castle's occupants.

[26] Wolf, supra note 3, at 214-15.

[27] Maybe not as dramatic as being stabbed by a poisoned sword, but there is the likelihood of litigation and liability.

The hardest issue in all of this is finding the middle ground as a franchisor: how to exert enough control over the practices of the franchisee to keep the product's reputation in good-standing, but not exerting too much control as to be held accountable for any negligence or malfeasance on the part of the franchisee or its employees… "The rest is silence."[28]

Beware of the Automatic IRS Estate Tax Lien – A Trap for the Unwary When Selling Real Estate

by Chris Denicolo and Seaver Brown

Unbeknownst to many practitioners, the IRS receives an automatic estate tax lien against all assets included in a decedent's gross estate, pursuant to Internal Revenue Code Section 6324. Specifically, IRC Section 6324(a) provides that the IRS automatically receives a lien on all assets that are part of the decedent's gross estate (including real estate, and all probate and non-probate property of the decedent), without the need for the IRS to conduct an assessment, file a notice, or take any other action. The lien is intended to provide the IRS with security for the payment of the estate tax that might be due with respect to decedent's estate.

Generally, the lien has priority over all subsequent interests in the property (although it is junior to mechanic's liens or pre-existing security interests or liens in the property, and certain other "superpriority" liens), which means that a purchaser of property that is included in the decedent's gross estate would take title to such property subject to the IRS's enforcement of the lien, unless the lien is discharged.

This nuance in the tax law can create significant issues with respect to a contemplated sale of real estate that is included in the gross estate of a decedent. If a decedent's executor or the trustees of a decedent's revocable trust attempt to sell real estate that is included in the decedent's gross estate, the title company might require that the IRS' automatic estate tax lien be discharged at closing.

Prior to June 1, 2016, a discharge could be obtained by submitting an IRS Form 4422, Application for Certificate Discharging Property Subject to Estate Tax Lien, along with the applicable real estate closing documents. However, effective June 1, 2016, the IRS significantly revised the procedure necessary to obtain the discharge of the automatic estate tax lien to require that the net sales proceeds be deposited into an escrow account under an escrow agreement provided by the IRS, or paid to the IRS as a payment toward the estate tax.

Additionally, the IRS will issue only a "conditional commitment" to discharge the applicable property from the estate tax lien until either it receives proof that the net sales proceeds have been deposited into an escrow account, or the net sales proceeds are paid to the IRS, or it determines that no estate tax is due. If the escrow agent procedure is utilized, then the escrow agent would be required to hold such funds until the IRS issues a closing letter, or the IRS otherwise agrees on the release or determines that no federal estate tax return is required to be filed.

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28 Shakespeare, supra note 1.

This procedure can create considerable delays in the closing of a real estate transaction and the use of the net sales proceeds for purposes other than paying the estate tax. The IRS generally does not permit the proceeds to be used for any purposes other than satisfying mortgages or reasonable selling expenses and might prevent the funds from being used to satisfy administration expenses or other claims against the estate. The IRS will also typically require that an appraisal of real estate (or at least a broker price opinion) be obtained in order to confirm that the property is being sold for fair value.

Further, additional problems can be caused by the requirement of filing a Form 4422. This is because the Form 4422 requires that the executor set forth estimated approximate values of the assets included in the gross estate and the estimated approximate deductions that will apply with respect to determining the estate tax.

If the decedent's estate is below but close to the federal estate tax filing threshold (i.e., the Form 706 is not required to be filed, but might be if the value of the decedent's gross estate were marginally higher), then practitioners might be reluctant to file a Form 4422. The Form 4422 would provide the IRS with knowledge of the proximity of the decedent's estate to the estate tax filing threshold and could cause the IRS to investigate and ultimately require that a federal estate tax return be filed if the IRS disagrees with values of the assets in the decedent's gross estate. For such practitioners who are not filing a federal estate tax return for a decedent whose gross estate is slightly below the filing threshold, based upon bona fide appraisals of the assets in the decedent's gross estate, or upon the use of popular but potentially scrutinized estate tax planning techniques (such as private annuities and self-cancelling installment notes), this can be problematic and might invite the IRS to investigate.

From a practical standpoint, in Florida, a decedent's estate or the trustees of the decedent's revocable trust would file and record a Form DR-312 in all counties in which real estate included in the gross estate is located, if no federal estate tax return is required to be filed. This might satisfy the title company to not require a release of an estate tax lien based upon the conclusion that no estate taxes will be due because no return is required to be filed. It seems that this approach is the easiest, although that it might require that the seller find a title company who is comfortable accepting the Form DR-312 as satisfaction that there are no estate tax liens.

Another approach would be to have all real estate that is includable in the decedent's gross estate held under limited liability companies or other entities, as title companies probably will not require documents confirming the release of the IRS lien on the underlying real estate if the property is held under an entity. This is because the IRS's automatic estate tax lien attaches to the ownership of the limited liability company, and not to the assets of the limited liability company. In fact, the authors have confirmed with one title company that no such lien release is required if the real estate is held under a Florida limited liability company.

It is unclear whether a title company would require a lien release if property is held under a decedent's revocable trust, or under any other type of trust vehicle (such as an irrevocable trust or a land trust). In some instances, property held in trust may be included in the decedent's gross estate and the estate tax lien would attach to the trust's assets plus any appreciation in those assets. However, the authors have not heard of a title company requiring a lien release in such circumstances.

An alternate approach to filing the Form 4422 is to have the sales proceeds held in an escrow account pending receipt of the IRS closing letter with respect to the Form 706, assuming that the title company is comfortable with this. This approach seems to eliminate the need to file the Form 4422 but could prolong the release of the funds to the seller, which could be important, especially if the funds are needed to pay the estate tax or creditor claims. However, this approach does not overcome the possible stalemate that could occur if the estate will not be filing an estate tax return due to its good faith belief that the decedent's gross estate is below the filing threshold. This emphasizes the benefits of using a limited liability company or other entity to own real estate that is expected to be included in the decedent's gross estate.

This little-known nuance could become a big issue if the executor of an estate is anticipating immediate use of the sales proceeds to fund administration expenses, pay down claims against the estate, or otherwise be used to fund estate obligations or devises, or is reluctant to file an estate tax return due to the potential for IRS scrutiny. Accordingly, it is best to address the issue by assuring that real estate is appropriately titled to avoid the headaches associated with this process, and also to inform the executor of the nuances associated with completing the sale of any real estate included in the decedent's gross estate so that his or her expectations are in line with the process.

Alan's Forbes Blog:
The Donor Controlled Charitable Business

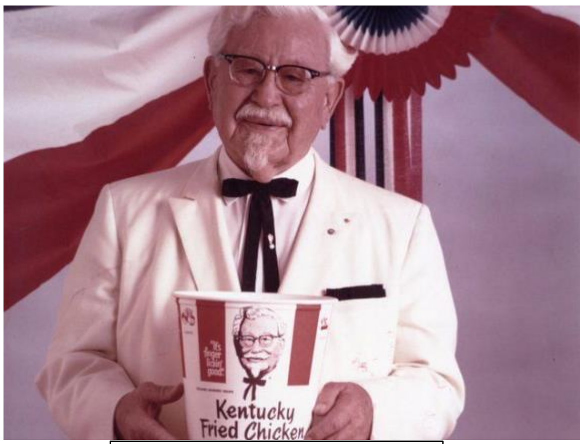
Donors do not have to die or sell their businesses to keep control and receive deductions and recognition.

A great many very charitable and successful people have businesses and also real estate investment arrangements that can be placed under a donor controlled charity to receive a tax deduction, recognition in their local community, and the ability to control, manage, and even be compensated by the business or investment entity after it has been dedicated to charity.

The great majority of tax advisors have not been aware of this opportunity. We wrote an article on this that was published on the Leimberg Information Service Network on Monday, March 11, 2019. You can email agassman@gassmanpa.com for a copy of the article and further supporting materials.

To view the complete post, please click [HERE.]()

Humor-or something similar…



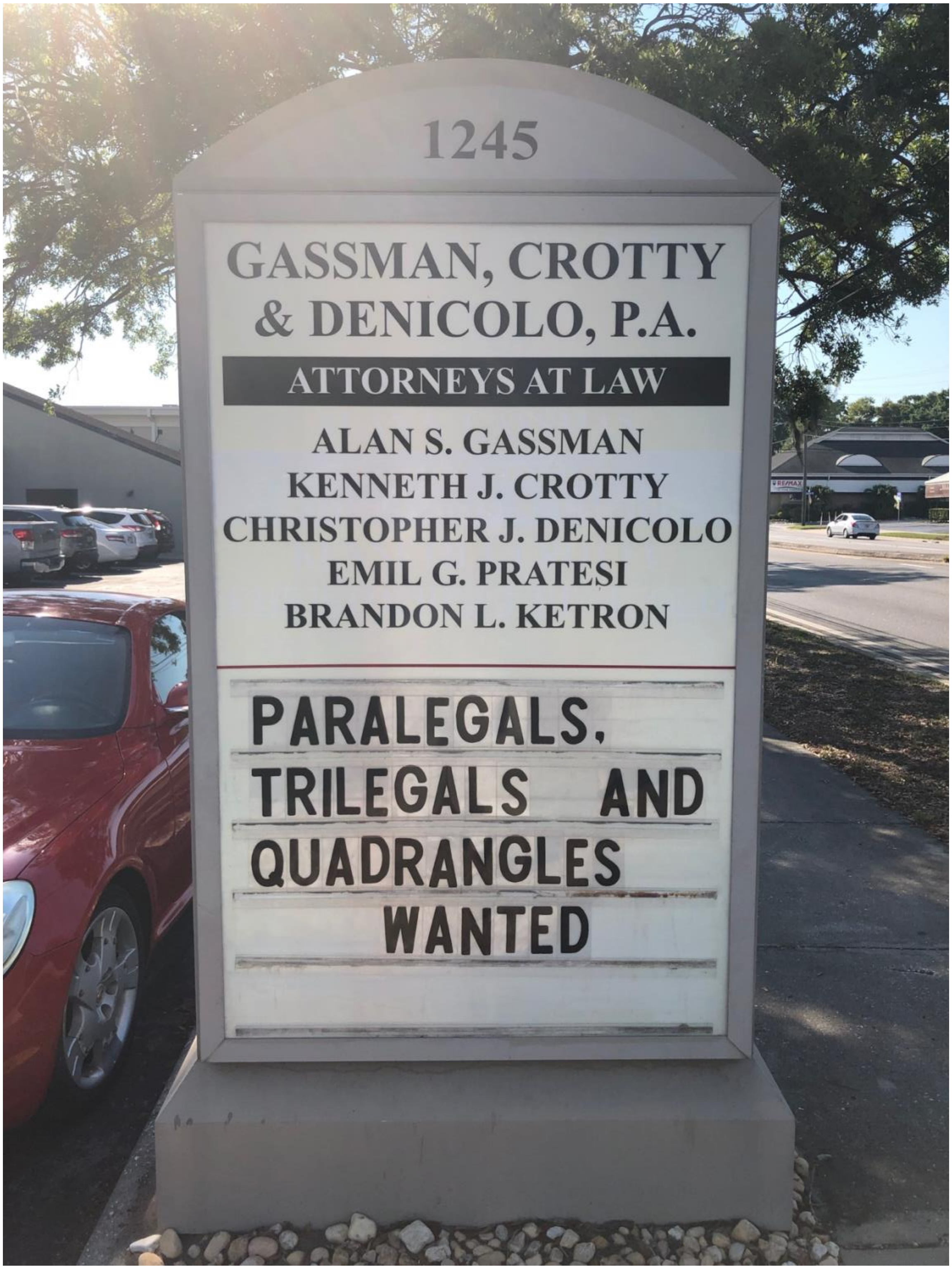
Do you think it will help my return to send the IRS some spring chicken?

Make sure you're clear it's just an extra crispy donation… they might deduct it. They'll at least be less peckish.

Jokes:

Q: Can February March?
A: No, but April May!

Q: Who invented copper wire?
A: Two tax attorneys fighting over a penny.



Spring vacation
Good vibration
Summer weather
We're back together
Here's ya money
Hey, not funny
Hey what's it to ya,
Hallelujah!

- "Spring Vacation" Beach Boys

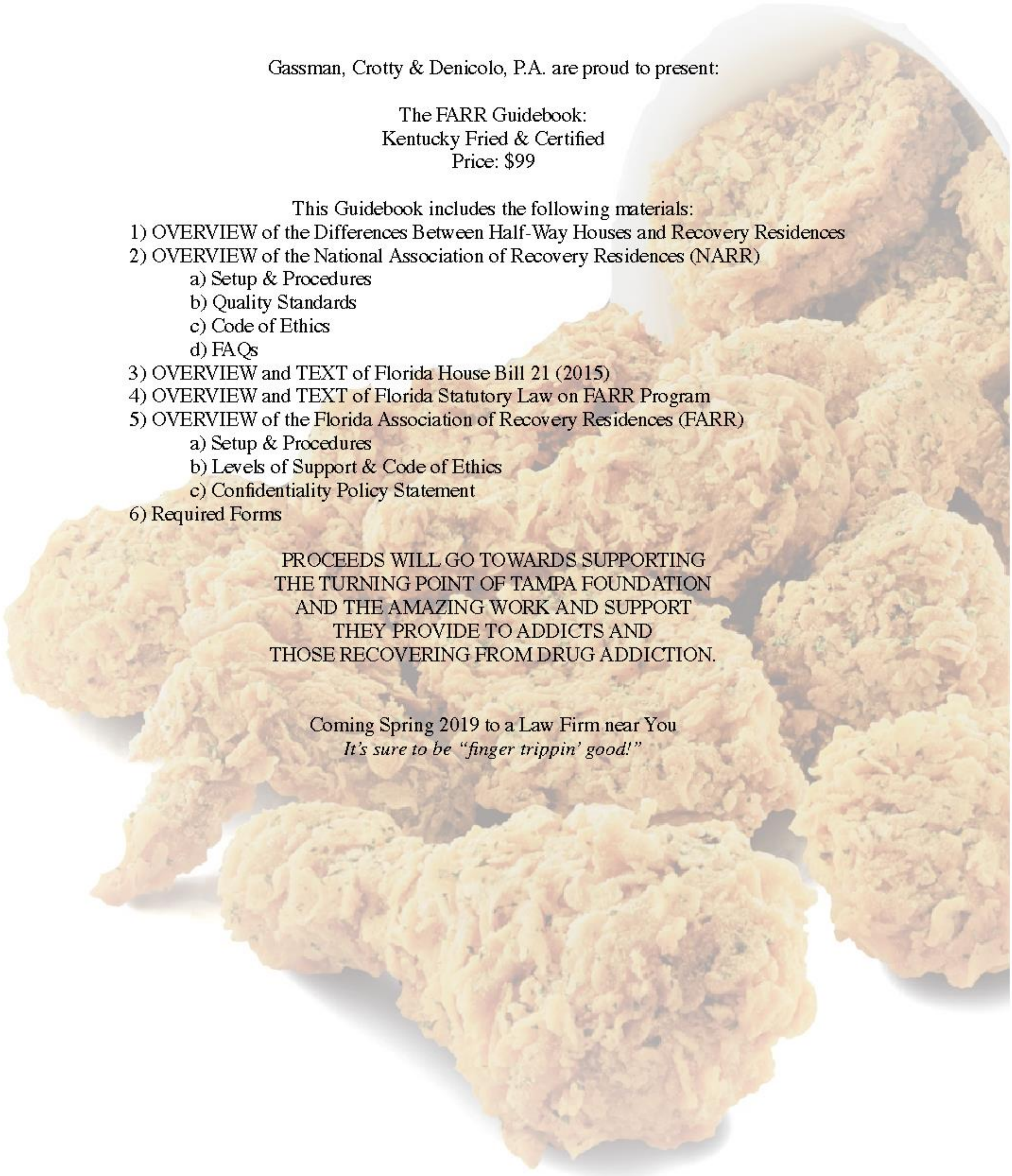
Get Your FARR Guidebook for All of Your Recovery Residence Program Needs

The Florida FARR Program allows homes to be used as Recovery Residences for recovering addicts to stay on the straight and narrow.

There are many ventures popping up in the State of Florida for these purposes, but not all, unfortunately, are abiding by the Florida Statutes rules and FARR and NARR policies and procedures.

This Guidebook seeks to remedy these issues for Recovery Residences that have been around for a while, as well as Recovery Residences seeking to start-up.

The FARR Guidebook is a labor of love and includes materials, forms, laws, and literature as a result of 40 hours of research, analyses, and organization.



Gassman, Crotty & Denicolo, P.A. are proud to present:

The FARR Guidebook:
Kentucky Fried & Certified
Price: $99

This Guidebook includes the following materials:

1) OVERVIEW of the Differences Between Half-Way Houses and Recovery Residences
2) OVERVIEW of the National Association of Recovery Residences (NARR)
   a) Setup & Procedures
   b) Quality Standards
   c) Code of Ethics
   d) FAQs
3) OVERVIEW and TEXT of Florida House Bill 21 (2015)
4) OVERVIEW and TEXT of Florida Statutory Law on FARR Program
5) OVERVIEW of the Florida Association of Recovery Residences (FARR)
   a) Setup & Procedures
   b) Levels of Support & Code of Ethics
   c) Confidentiality Policy Statement
6) Required Forms

PROCEEDS WILL GO TOWARDS SUPPORTING
THE TURNING POINT OF TAMPA FOUNDATION
AND THE AMAZING WORK AND SUPPORT
THEY PROVIDE TO ADDICTS AND
THOSE RECOVERING FROM DRUG ADDICTION.

Coming Spring 2019 to a Law Firm near You
It's sure to be "finger trippin' good!"

Be sure to hear Alan as he discusses the new 199A ramifications with Bloomberg…

To listen, click HERE

For the Tax Section of The Florida Bar: Calendar of Events

Join Alan Gassman and Leslie Share for This Florida Bar Event At Stetson University:

Creditor Protection Nuts and Bolts

Thursday, April 18, 2019, 10:00 am - 2:00 PM

Stetson-Tampa Law Center

Please join Alan and Leslie Share to present four informative and unique programs for The Florida Bar in Tampa:

Primary Florida and Federal Creditor Protection Laws

(10:10 am - 11:00 am)

A Closer Look at Florida and Federal Creditor Exemption Laws and Planning

(11:00 am - 11:50 am)

Tax and Practical Aspects of Using Limited Liability Companies, Limited Partnerships, and Domestic and Offshore Trusts and Related Planning with Leslie Share

(12:00 PM - 1:10 PM)

Putting it All Together with Alan Gassman & Leslie Share

(1:10 PM - 2:00 PM)

These programs will be sure to fill in missing knowledge or answer questions you may have in regards to the unique situations presented in Florida as well as national creditor exemption tips, tricks, language and implications, Limited Liability Companies and much more.

For information on Registration, please contact Barbie Gonzalez at Bgonzalez@CFSarasota.org

Alan Gassman

Agassman@gassmanpa.com

Leslie Share

las@pnrlaw.com

GASSMAN CROTTY & DENICOLO P.A.
ATTORNEYS AT LAW

PNR Packman Neuwahl Rosenberg

Newly announced events in RED

EVENT	DATE/TIME	DESC.	REGISTRATION
Leimberg Information Services Webinar	March 29, 2019 3:00 PM – 4:00 PM	Alan, Chris Denicolo & John Beck discuss *Creative Planning Strategies Under the New Final Regulations Under Section 199A with an Emphasis on Real Estate, Small Business and Professional Practices*	Click HERE
Leimberg Information Services Webinar	April 4, 2019 3:00 PM – 4:30 PM	Alan and Chris Denicolo will discuss "What Estate Planners Need to Know About Florida Law for Their Snowbird Clients"	Click HERE.
Leimberg Information Services Webinar	April 5, 2019 3:00 PM – 4:00 PM	Alan, Chris Denicolo and Brandon Ketron will discuss "Creative Planning Under Section 199A – Important Techniques to Help Maximize the Deduction."	Click HERE.
Presentation for the Tax Section of The **Florida Bar Association**	April 18, 2019, 10:00 am – 2:00 PM	Stetson Tampa Law Center *Primary Florida and Federal Creditor Protection Laws, A Closer Look at Florida and Federal Creditor Exemption Laws and Planning* And *Putting it All Together with Leslie Share*	Contact: Agassman@gassmanpa.com
University of North Carolina Tax Institute	April 25-26, 2019	Creative Planning with Section 199A After the New Regulations	Contact: Agassman@gassmanpa.com

Parametric Advisor Forum	Wednesday, May 1, 2019 Grand Bohemian Hotel – Orlando, 325 S Orange Ave, Orlando, FL 32801	TBD		Contact: Agassman@gassmanpa.com
FSU FICPA Accounting Conference	May 6 – 8, 2019, Tallahassee, FL	Alan will be speaking on the new 199A finalized regulations		Contact: Agassman@gassmanpa.com
FICPA Mega CPE Conference for the TCJA	June 10 – 13, 2019	Alan will be speaking on the new 199A finalized regulations		Contact: Agassman@gassmanpa.com
MER Conference Internal Medicine for Primary Care	June 13 – 16, 2019, Chicago, IL	1. Lawsuits 101 2. Ten Biggest Mistakes That Physicians Make in Their Investment and Business Planning 3. Essential Creditor Protection & Retirement Planning Considerations. 4. 50 Ways to Leave Your Overhead & Increase Personal Productivity.		Contact: Agassman@gassmanpa.com
Maui Mastermind Financial Pillar Super Course	June 22-23, 2019	Hilton-Atlanta Airport	Crucial Legal and Tax Principals for Accumulating Wealth	Please Click HERE
45th Annual Notre Dame Tax Institute	September 26-27, 2019	South Bend, Indiana	Application of 199A (Qualified Business Income Deduction) for Real Estate Investors and Developers.	Contact: Agassman@gassmanpa.com
FICPA Accounting and Tax Conference	October 24, 2019	Estero, FL	TBD	Contact: Agassman@gassmanpa.com
Special Asset Protection Presentation	Friday, October 25, 2019	University of Miami Law School	Advanced Asset Protection Workshop with Les Share	Contact: Agassman@gassmanpa.com

Maui Mastermind Wealth Summit	November 3-8, 2019	Wailea Beach Resort, Maui	Essential Aspects and Decisions for Your Remarkable Financial Future	Please Click HERE
Certified Contractors Network Presentation	January 4, 2020 - Orlando	Orlando, FL	Creditor Protection for the Intelligent Construction Family – It Wasn't Raining When Noah Built the Ark	Contact: Agassman@gassmanpa.com
Venice Estate Planning Council Presentation Hosted by Community Foundation of Sarasota County	Tuesday, January 21, 2020, Venice then Sarasota, FL	For the Venice Estate Planning Council and Sponsored by the Community Foundation of Sarasota County, Alan will be conducting a morning presentation, "Innovative Charitable Techniques, Asset Protection Strategies You Didn't Know and Creative Planning Under Section 199A" He will be answering questions (and telling many bad jokes) for VIPS at the hosted luncheon and will be the dinner speaker to finish the event off. Starting in Venice, these events will conclude in Sarasota.		Contact: Barbie Gonzalez: BGonzalez@CFSarasota.org