

Tax and Estate Planning Issues for Clients Relocating to Florida

Christopher W. Boyett
Chair, Private Wealth Services – South Florida

Nichole D. Scott

Holland & Knight

Tax and Estate Planning for Clients Relocating to Florida

I. Introduction.

The lure of sun, sand and beach can simply be too much for some of our Northern friends to resist as they struggle to make it through one more winter. Some submitting to the urge head South until they stop in sunny Florida. But before making the move to Florida, has the person fully considered the consequences of such a move from an estate planning, tax law and property law perspective? Florida has the good fortune to be free of any state individual income tax, as a large portion of the state's revenues received from individuals are collected through sales taxes and real property taxes. These taxes and certain property laws of Florida are discussed below.

II. Steps to Establish a Florida Domicile.

A. List of Steps to be Taken. To establish domicile in Florida an individual should accomplish as many of the tasks listed below as are possible:

1. File a Florida Declaration of Domicile, pursuant to Section 222.17, Florida Statutes (see below);
2. File an application for homestead exemption on Florida residence;
3. Register to vote, and vote, in Florida;
4. Obtain a driver's license in Florida and relinquish driver's license in former state of residence;
5. Transfer title to automobiles to Florida and obtain Florida license plates;

6. Execute new wills (and trusts) in Florida and reflect Florida as the place of residence;
7. File federal income tax return showing Florida address with Internal Revenue Service Center in Atlanta;
8. File non-resident income tax returns in the former state of residence;
9. Open Florida bank and financial accounts and close other accounts;
10. Register a change of address with creditors;
11. Change passport address to reflect Florida residence;
12. Affiliate with church or temple in Florida;
13. Affiliate with social and fraternal organizations in Florida;
14. Transfer tangible personalty to Florida;
15. Consider selling real property interests in other jurisdictions;
16. Consider selling business interests in other jurisdictions; and
17. Acquire cemetery plots in Florida.

B. Intent is the True Measure. The above tasks are an example of the steps necessary to support a change of domicile to Florida. This list is not exhaustive. The real measure is the intent of the person. This list is nothing more than an attempt to define certain acts that would support a person's intent to change their residence to Florida.

C. Florida Declaration of Domicile. Any person who has established a domicile in the State of Florida, irrespective of whether such person maintains another place of abode, may manifest and evidence his or her domicile in the State of Florida by filing in the office of the clerk of

the circuit court for the county in which the said person resides, a sworn statement that his or her place of abode in Florida constitutes his or her permanent home or predominant and principal home that he or she intends to continue permanently.¹ In contrast, any person who is domiciled in a State other than the State of Florida but who may be considered to be domiciled in the State of Florida may manifest and evidence his or her permanent domicile in a State other than the State of Florida by filing a sworn statement in any county in the State of Florida in which the person may have a place of abode or in which the person may have done or performed such acts which may indicate that he or she was domiciled in the State of Florida that the person's domicile is in such State other than the State of Florida.² The sworn statement that declares one's domicile must be signed under oath before an official authorized to take affidavits.³ A sample Declaration of Domicile is attached as Exhibit "A".

D. Florida's Estate Tax Provision. For purposes of the Florida estate tax, the State of Florida has a strict domicile rule. Section 198.015, Florida Statutes, provides as follows:

- (1) For the purposes of this chapter, every person shall be presumed to have died a resident and not a nonresident of the state:
 - (a) If such person has dwelt or lodged in the state during and for the greater part of any period of 12 consecutive months in the 24 months next preceding death, notwithstanding the fact that from time to time during such 24 months such person may have sojourned outside of this state, and without regard to whether or not such person may

¹ Section 222.17(1) and (2), Florida Statutes (2004).

² Section 222.17(4), Florida Statutes.

³ Section 222.17(5), Florida Statutes.

have voted, may have been entitled to vote, or may have been assessed for taxes in this state; or

(b) If such person has been a resident of Florida, sojourning outside of this state.

(2) The burden of proof in an estate tax proceeding shall be upon any person claiming exemption by reason of alleged nonresidency. Domicile shall be determined exclusively in the proceedings provided in this chapter, and orders relating to domicile previously entered in the probate proceedings shall not be conclusive for the purposes of this chapter.

III. Homestead Law.

A. Introduction. Florida's homestead law can be both a blessing and a curse. A blessing in that there are significant benefits provided to a debtor and a curse in that there are limitations on one's ability to devise or alienate the homestead.

B. Impact of Owning Homestead Property. The Constitution of Florida imposes certain limitations on homestead property: (i) the exemption from claims of creditors; and (ii) the limitation on devise and the restriction on alienation.⁴ In addition, the Constitution of Florida allows an annual homestead property tax exemption and limits the increase in annual property tax assessments for homestead property.⁵

C. Homestead Defined. To determine the impact of the Florida homestead laws upon one's property, one must first determine whether the residence is the person's homestead.

1. Article X, Section 4(a), Florida Constitution. Article X, section (4)(a), Florida Constitution, provides, in part:

⁴ Article X, section 4, Florida Constitution.

⁵ Article VII, sections 4 and 6, Florida Constitution; *see also* Section 193.155, Florida Statutes.

“(a) There shall be exempt from forced sale under the process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:

(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner’s consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner’s family;”

2. Application. Thus, if the residence is located outside of a municipality, it may be up to 160 acres of contiguous land and improvements,⁶ and if the residence is located inside of a municipality, it is limited to a one-half acre of contiguous land.⁷

In either case, the residence must be the primary residence of the owner or his or her family.

D. Exemption from Claims of Creditors. Florida’s homestead law provides that the homestead shall be exempt from forced sale and that no judgment shall be a lien against the homestead, except for the payment of taxes and assessments, purchase obligations, improvement or repair of the homestead or other obligations from the realty.⁸

1. Constitution’s Provision Regarding Spouse and Heirs.

Article X, section 4(b), Florida Constitution, provides:

⁶ Article X, section 4(a), Florida Constitution.

⁷ *Id.*

⁸ *Id.*

“(b) These exemptions [homestead real property and \$1,000 of personal property] shall inure to the surviving spouse or heirs of the owner.”

2. Inures to Spouse and Heirs. As set forth in the Constitution, the homestead exemption from creditors inures to the surviving spouse or the heirs of the owner.

3. Broad Definition of Heirs. For purposes of determining whether the homestead exemption inures to an heir, Florida case law has broadened the definition of heirs to include any family member within the class of persons categorized in the Florida intestacy statute.⁹

4. Example. So, for example, if the decedent leaves the homestead to his grandson instead of to his son, the property passes to the grandson exempt from the claims of the decedent’s creditors, as the grandson is within the class of persons defined as heirs under the Florida intestacy statute.¹⁰

E. Limitation on Devise and Restriction on Alienation. The State of Florida imposes a strict rule that the homestead residence is not subject to devise if the owner is survived by a spouse or a minor child.¹¹

1. Constitutional and Statutory Provisions. Article X, section 4(c), Florida Constitution, provides, in part:

“(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the

⁹ *Snyder v. Davis*, 699 So.2d 999, 1005 (Fla. 1997).

¹⁰ *See Traeger v. Credit First National Association, Etc.*, 864 So.2d 1188 (Fla. 5th DCA 2004).

¹¹ Article X, section 4(c), Florida Constitution; *see also* Section 732.4015, Florida Statutes.

homestead may be devised to the owner's spouse if there be no minor child.”

Section 732.4015(1), Florida Statutes, provides:

“(1) [a]s provided by the Florida Constitution, the homestead shall not be subject to devise if the owner is survived by a spouse or minor child, except that the homestead may be devised to the owner's spouse if there is no minor child.”

Section 732.401, Florida Statutes, provides:

“(1) If not devised as permitted by law and the Florida Constitution, the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and the lineal descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the lineal descendants in being at the time of the decedent's death per stirpes.

(2) Subsection (1) shall not apply to property that the decedent and the surviving spouse owned as tenants by the entirety.”

2. No Minor Child. If the owner has no minor child, then the owner may devise the homestead to the owner's spouse.¹² The owner can devise no less than his entire interest in the homestead to his spouse in fee simple absolute or the devise is invalid.¹³

3. Improper Devise of Homestead. If the homestead is improperly devised, the homestead passes in the same manner as other intestacy property;¹⁴ provided, however, that if the decedent is survived by a spouse and lineal descendants, the spouse is

¹² *Id.*

¹³ *See Estate of Finch*, 401 So.2d 1308 (Fla. 1981)

¹⁴ *See* Section 732.101, *et seq.*, Florida Statutes (describing intestate succession).

entitled to a life estate in the homestead and the lineal descendants then in being are entitled to a vested remainder in the life estate.¹⁵

4. Example. Assume, for example, that a New Yorker buys a vacation residence in Miami, Florida in his individual name and ultimately moves to Miami on a permanent basis. If the owner has a minor child or spouse, the owner may not devise the property. If the owner dies, the spouse would be entitled to receive a life estate and the owner's children would receive a vested remainder interest. This result could be unworkable for certain families as it places the spouse and the children in a situation where all of them must agree in order to sell or encumber the property.

F. Waiver. Importantly, a person may waive his or her homestead rights.¹⁶ Thus, if the owner of a homestead in Florida wants to leave the homestead to charity, for example, the owner could enter into a nuptial agreement wherein the spouse would waive his or her homestead rights.

1. Florida Statutes Permit Waiver of Spousal Rights.

Section 732.702(1), Florida Statutes, provides, in part:

“(1) The rights of a surviving spouse to an elective share, intestate share, pretermitted share, *homestead*, exempt property, family allowance, and preference in appointment as personal representative of an intestate estate or any of those rights, may be waived, wholly or partly, before or after marriage, by a written contract, agreement,

¹⁵ Section 732.401, Florida Statutes.

¹⁶ See Section 732.702, Florida Statutes. Notably, if the waiver is executed after the marriage occurs, each spouse is required to make full disclosure to the other spouse of his or her assets. *Id.*

or waiver, signed by the waiving party in the presence of two subscribing witnesses.”

(emphasis added)

2. Disclosure. The statute further provides that both spouses must make fair disclosure if the waiver is executed after marriage but requires no disclosure if the waiver is executed before marriage.¹⁷

3. Consideration. Other than the execution of the waiver, no additional consideration is required whether the waiver is executed before or after marriage.¹⁸

G. Property Tax on Homestead. The Constitution of Florida provides that “[e]very person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon, except assessments for special benefits, up to the assessed valuation of five thousand dollars, upon establishment of right thereto in the manner prescribed by law.”¹⁹

1. Limit in the Increase in Assessed Value. Further, the Constitution of Florida provides that any change in the assessed value of the homestead cannot exceed the lower of: (i) three

¹⁷ See Section 732.702(2), Florida Statutes.

¹⁸ See Section 732.702(3), Florida Statutes.

¹⁹ Article VII, section 6, Florida Constitution. Article VII, subsection 6(d), Florida Constitution, authorizes an increase of the homestead exemption to \$50,000 for 1982 and subsequent years.

percent of the assessed value of the property for the prior year; or
(ii) the percentage change in the consumer price index.²⁰

2. Limit Beneficial When Significant Increases in Value.

Historically, the real estate market had home values increasing at double digit percentage levels, and as such this limitation was valuable to the client who migrated to Florida.

3. Example. The out-of-state client who owned a waterfront home during this period and had not declared it to be his or her homestead found the assessed value to have increased during that time. Of course, this increase in assessment resulted in a corresponding increase in real property taxes. In fact, this very issue made some out-of-state residents reassess their situation and decide to permanently relocate to Florida so that future increases in assessment would be limited by the lesser of the consumer price index increase or 3%.

H. Portability. Owner of a Florida homestead may transfer up to \$500,000 of tax basis to a new homestead property. If the market value of the new homestead is greater than the old homestead then they can transfer all of the difference up to \$500,000.

IV. Spousal Rights.

A. Elective Share. The surviving spouse of a decedent who dies domiciled in Florida has the right to a share of the elective estate of the decedent, known as the elective share.²¹

²⁰ Article VII, subsection 4(c), Florida Constitution; *see also* Section 193.155, Florida Statutes.

1. 30% of Elective Estate. The elective share consists of thirty percent of the “elective estate”.²²

2. Definition of Elective Estate. Generally, the elective estate includes all property that is owned by the predeceasing spouse at his or her death, whether individually or beneficially.²³

Specifically, the elective estate consists of the following assets, including:

- a.** Property that is part of the decedent’s probate estate;
- b.** The decedent’s ownership interest in property which passes pursuant to a “pay on death”, “transfer on death” or “in trust for” designation (The decedent’s ownership interest means one-half of the value of tenancy by the entirety accounts and for all other cases, that portion of the account which the decedent had, immediately before death, the right to withdraw without a duty to account);
- c.** The decedent’s fractional interest in property passing by right of survivorship (The decedent’s fractional interest means the value of the property divided by the number of tenants; thus, if there are 3 co-owners, then 1/3 of the value of the property is includable);
- d.** Property held in a revocable trust or a discretionary trust for the decedent's benefit;
- e.** The net cash surrender value of insurance policies on the decedent's life;
- f.** Death benefits payable under certain qualified and nonqualified retirement plans;

²¹ Section 732.201, *et seq.*, Florida Statutes.

²² Section 732.2065, Florida Statutes.

²³ *See* Section 732.2035, Florida Statutes (describing the property interests of which the elective estate consists).

- g.** Certain transfers within one year of the decedent's death; and
- h.** Transfers in satisfaction of the elective share.²⁴

3. Who May Exercise the Election. The elective share election may be made by the surviving spouse or, if court approval is obtained, by an attorney in fact or guardian of the property of the surviving spouse.²⁵

4. Timing of the Election. Unless the court grants an extension of time, the elective share election must be filed within the earlier of six (6) months of the date of service of a copy of the notice of administration on the surviving spouse, or an attorney in fact or guardian of the property of the surviving spouse, or 2 years after the date of the decedent's death.²⁶ The surviving spouse or her designated representative may withdraw an elective share election any time within eight (8) months of the decedent's death and before the court's order of contribution.²⁷

5. Elective Share Additional. The elective share is in addition to the surviving spouse's right to homestead, exempt property and family allowance.²⁸

B. Exempt Property. Under Florida law, there are two exemptions for personal property – a constitutional exemption and a statutory exemption. Any type of personal property may be exempt.

²⁴ Section 732.2035, Florida Statutes.

²⁵ Section 732.2125, Florida Statutes.

²⁶ Section 732.2135, Florida Statutes.

²⁷ *Id.*

²⁸ Section 732.2105, Florida Statutes.

1. Constitutional Exemption. The Constitution of the State of Florida states that a decedent's personal property up to a value of One Thousand Dollars (\$1,000) is exempt from forced sale; i.e., such property cannot be used to satisfy funeral expenses and/or claims of creditors.²⁹ This exemption inures to the surviving spouse or the heirs of the decedent.³⁰

2. Statutory Exemption. Under the Florida Statutes, the surviving spouse or, if there is no surviving spouse, the children of a decedent who was domiciled in Florida at the time of his death, shall receive "exempt property" consisting of:

a. Furniture and Furnishings. Household furniture, furnishings, and appliances in the decedent's usual place of abode up to the value of \$10,000 as of the date of death;

b. Automobiles. All automobiles held in the decedent's name and regularly used by the decedent or members of the decedent's immediate family as their personal automobiles (with no limitation on the value);

c. Prepaid College Funds. Funds held in the Florida Prepaid College Program; and

d. Death Benefits Payable to Educator. All death benefits payable to the beneficiary designated by a teacher or school administrator who is killed or injured and dies as

²⁹ Art. X, section 4(a)(2), Florida Constitution.

³⁰ Art. X, section 4(b), Florida Constitution.

a result of an unlawful and intentional act inflicted upon such teacher or administrator while he or she is engaged in the performance of his or her duties as an educator.³¹

3. Devised Property Not Exempt Property. Property that is specifically or demonstratively devised by the decedent's will to any devisee is not included in exempt property.³²

4. Timing of Obtaining Exempt Property. Persons entitled to receive exempt property are deemed to have waived their rights to take exempt property unless a petition for determination of exempt property is filed by or on behalf of such persons within four (4) months of the date of service of the notice of administration or within forty (40) days from the date of termination of any proceeding involving the construction, admission to probate, or validity of the will.³³

C. Family Allowance. If a decedent was domiciled in Florida at the time of death, the surviving spouse and the lineal heirs whom the decedent was obligated to support are entitled to a reasonable allowance in money out of the estate during administration.³⁴ A court may order this allowance as a lump sum or as periodic payments, but the sum cannot exceed Eighteen Thousand Dollars (\$18,000).³⁵ If a lineal heir is not living with the surviving spouse, the allowance may be made in part to the

³¹ Section 732.402(2)(a)-(d), Florida Statutes; *see also* Section 112.1915, Florida Statutes.

³² Section 732.402(5), Florida Statutes.

³³ Section 732.402(6), Florida Statutes.

³⁴ Section 732.403, Florida Statutes.

³⁵ *Id.*

lineal descendant or his guardian and in part to the surviving spouse, based upon the needs of the dependent heir and the surviving spouse.³⁶ If the surviving spouse is not living, the family allowance is to be paid to the lineal heirs or to the persons having their care and custody.³⁷

V. Intangible Personal Property Tax.

A. Introduction. Prior to becoming a Florida resident, a client previously considered the potential impact of the Florida intangible personal property tax. Effective January 1, 2007, the tax has been repealed. FS;199.052.

VI. Income Tax.

A. No individual Income Tax. In Florida, there is no individual income tax.³⁸

B. Corporate Income Tax. The State of Florida imposes an income tax on the net income of all Florida corporations at a rate of 5.5%.³⁹ Net income is determined based upon the corporation's adjusted federal income for the taxable year.⁴⁰

VII. Wealth Transfer Taxes.

A. Gift Tax. The State of Florida does not impose a gift tax on the *inter vivos* transfer of property.

B. Estate Tax. The State of Florida imposes an estate tax on the estate of every decedent who dies a resident of Florida or dies owning

³⁶ *Id.*

³⁷ *Id.*

³⁸ Article VII, section 5(a), Florida Constitution.

³⁹ Section 220.11(2), Florida Statutes.

⁴⁰ *See* Section 220.12, Florida Statutes.

property having a situs in the State of Florida;⁴¹ however, the Florida estate tax was effectively eliminated for decedent's dying on or after January 1, 2005. The Florida estate tax is based upon the credit allowable under the Internal Revenue Code of 1986, as amended (the "Code") for any estate, inheritance, legacy or succession taxes actually paid to a State or the District of Columbia.⁴² Effective January 1, 2005, the federal government no longer permitted a credit for state death taxes.⁴³ As such, the Florida estate tax no longer exists.

C. Generation Skipping Transfer Tax. The State of Florida imposes a generation skipping transfer ("GST") tax on every GST in which the transferor is a resident of the State of Florida or in which the property transferred includes real or personal property located in the State of Florida.⁴⁴ As with the Florida estate tax, the Florida GST tax is based upon the credit allowable for state legacy taxes under the Code. Effective January 1, 2005, a credit is no longer allowable under Section 2604 of the Code;⁴⁵ As such, the Florida GST tax was eliminated as of January 1, 2005.

VIII. Other Taxes.

A. Documentary Stamp Tax. The transfer of various documents, including, bonds, debentures or certificates of stock and indebtedness, is

⁴¹ See Section 198.02, Florida Statutes (for resident decedents); Section 198.03, Florida Statutes (for nonresident decedents); Section 198.04, Florida Statutes (for alien decedents).

⁴² *Id.*

⁴³ Section 2011(f) of the Internal Revenue Code of 1986, as amended.

⁴⁴ See Section 198.021, Florida Statutes (for residents); Section 198.031, Florida Statutes (for nonresidents).

⁴⁵ Section 2604(c) of the Code.

subject to a documentary stamp tax.⁴⁶ The tax rate for documents that transfer an interest in real property is \$0.70 per \$100 (or portion thereof) of the total consideration paid, or to be paid, for the transfer,⁴⁷ except in Miami-Dade County where the rate is \$0.60 per \$100 (or portion thereof) when the property is a single-family residence.⁴⁸

IX. Testamentary Instruments.

A. Wills.

1. Formalities of Execution. A will must be executed in accordance with the following formalities in order to be valid in the State of Florida.

a. Testator's Signature. The testator must sign the will at the end; or the testator's name must be subscribed at the end of the will by some other person in the testator's presence and by the testator's direction.⁴⁹

b. Two Witnesses. The testator's signing or acknowledgement that he previously signed the will or that another person subscribed his name to it must be in the presence of **two witnesses**.⁵⁰ Notably, any person who is competent may act as a witness to a will.⁵¹ A will is not

⁴⁶ Section 201.01, *et seq.*, Florida Statutes.

⁴⁷ Section 201.02(1), Florida Statutes.

⁴⁸ *See* Section 201.0205, Florida Statutes.

⁴⁹ Section 732.502(1)(a), Florida Statutes.

⁵⁰ Section 732.502(1)(b), Florida Statutes.

⁵¹ Section 732.504(1), Florida Statutes.

invalid because the will was signed by an interested witness.⁵²

c. Witnesses' Signatures. The attesting witnesses must sign the will in the presence of the testator and in the presence of each other.⁵³

2. Nonresident Execution. A will other than a holographic or nuncupative will, executed by a nonresident of Florida, is valid in the State of Florida if it was valid under the laws of the State or Country where it was executed.⁵⁴

3. Will Can Be Self-Proving. A will may be made self-proving at the time of its execution or at any subsequent date by the acknowledgement of it by the testator and the affidavits of the witnesses.⁵⁵ A sample self-proving affidavit is attached as Exhibit "B".

4. Limitations on Identity of Personal Representative. The State of Florida imposes greater restrictions upon the identity and qualifications of a personal representative than the majority of States do.

a. Persons Not Qualified. No person who has been convicted of a felony, is mentally or physically unable to

⁵² Section 732.504(2), Florida Statutes.

⁵³ Section 732.502(1)(c), Florida Statutes.

⁵⁴ Section 732.502(2), Florida Statutes.

⁵⁵ Section 732.503(1), Florida Statutes.

perform the duties, or is under age eighteen (18) may serve as personal representative.⁵⁶

b. Nonresidents. A person who is not domiciled in the State of Florida cannot qualify as personal representative unless the person is (i) a legally adopted child or adoptive parent of the decedent; (ii) related by lineal consanguinity to the decedent; (iii) a spouse or a brother, sister, uncle, aunt, nephew, or niece of the decedent, or someone related by lineal consanguinity to any such person; or (iv) the spouse of a person described above.⁵⁷

c. Example of Persons Not Qualified. Assume there is a husband and wife who would like to name the husband's brother or, in the alternative, the wife of the husband's brother to serve as the personal representative of each of their estates. Assume that neither the husband's brother nor the wife of the husband's brother lives in the State of Florida. While either the husband's brother or the wife of the husband's brother could serve as the personal representative of the husband's estate, neither the husband's brother nor the wife of the husband's brother

⁵⁶ Section 733.303, Florida Statutes.

⁵⁷ Section 733.304, Florida Statutes.

could serve as personal representative of the wife's estate.
Clearly, this is an odd.

5. Fees of Personal Representative and Attorney for Personal Representative. The State of Florida has established a statute that enables an individual to determine a “presumed” reasonable fee for a personal representative and for the attorney for the personal representative.

a. Fees of Personal Representative. A personal representative is entitled to a commission payable from the estate assets without court order as compensation for ordinary services.⁵⁸

i) **Ordinary Services.** In the State of Florida, a commission paid to a personal representative for ordinary services based upon the compensable value of the estate is presumed to be reasonable if it is within the following guidelines:

- § at the rate of 3% for the first \$1 million;
- § at the rate of 2.5% for all above \$1 million and less than \$5 million;
- § at the rate of 2% for all above \$5 million and less than \$10 million; and
- § at the rate of 1.5% for all above \$10 million.⁵⁹

⁵⁸ Section 733.617(1), Florida Statutes.

⁵⁹ Section 733.617(2), Florida Statutes.

ii) **Extraordinary Services.** A personal representative is entitled to additional compensation for the performance of extraordinary services.⁶⁰

iii) **Two or More Personal Representatives.**

If the value of the probate estate exceeds \$100,000 and there are two personal representatives, each personal representative is entitled to a full commission.⁶¹ If there are three or more personal representatives, the compensation to which two personal representatives would be entitled is apportioned among all of the personal representatives, with one full commission being apportioned to the personal representative who has possession of and primary responsibility for administration of the assets and one full commission being apportioned among the remaining personal representatives according to the services rendered by each of them.⁶²

b. Fees of Attorney for Personal Representative.

Attorneys for personal representatives are entitled to

⁶⁰ Section 733.617(7), Florida Statutes.

⁶¹ Section 733.617(5), Florida Statutes.

⁶² *Id.*

reasonable compensation payable from the estate assets without court order.⁶³

i) **Ordinary Services.** Compensation for the ordinary services of the attorney for an estate is presumed to be reasonable if it is based upon the compensable value of the estate and it is within the following guidelines:

- § \$1,500 for estates having a value of \$40,000 or less;
- § an additional \$750 for estates having a value of more than \$40,000 and less than \$70,000;
- § an additional \$750 for estates having a value of more than \$70,000 and less than \$100,000;
- § at the rate of 3% for all above \$100,000 on the next \$900,000;
- § at the rate of 2.5% for all above \$1 million and less than \$3 million;
- § at the rate of 2% for all above \$3 million and less than \$5 million;
- § at the rate of 1.5% for all above \$5 million and less than \$10 million; and
- § at the rate of 1% for all above \$10 million.⁶⁴

ii) **Extraordinary Services.** The attorney for the personal representative is also entitled to be compensated for any extraordinary services

⁶³ Section 733.6171(1), Florida Statutes.

⁶⁴ Section 733.6171(3), Florida Statutes.

provided to the estate, including postmortem tax advice and preparation of the estate tax return.⁶⁵

B. Trusts.

1. Formalities of Execution. The testamentary aspects of a revocable trust are **invalid** unless the trust is executed by the grantor with the same formalities required to execute a will.⁶⁶ However, a trust not created by will is validly created if the creation of the trust complies with the law of the jurisdiction in which the trust instrument was executed or the law of the jurisdiction in which at the time of creation, the settlor was domiciled.⁶⁷

2. Fees of Trustee and Attorney for Trustee. While the State of Florida has established a statutory fee that is presumed to be reasonable for the attorney for the trustee, it has not done the same with respect to the trustee.

a. Trustee's Fees. Although there is no statutory presumption of a reasonable fee for a trustee, a trustee is entitled to reasonable compensation for his services as trustee.

b. Fees of Attorney for Trustee. The attorney for the trustee of a revocable trust created by a decedent during his

⁶⁵ Section 733.6171(5), Florida Statutes.

⁶⁶ Section 736.0403(1), Florida Statutes.

⁶⁷ Section 736.0403(1), Florida Statutes.

life is entitled to be paid reasonable compensation.⁶⁸ Reasonable compensation is an amount determined by the trustee and the attorney for the trustee by agreement.⁶⁹ In the absence of an agreement, presumed reasonable compensation for the attorney for the trustee is 75% of the amount that is presumed to be reasonable for the attorney for the personal representative, described above.⁷⁰ Again, the amount presumed reasonable for ordinary services can be increased to reflect extraordinary services of the attorney or decreased to reflect inadequate services of the attorney.⁷¹

3. Total Return Unitrust Conversion Allowed. A trustee may, without court approval, convert an income trust to a total return unitrust, reconvert a total return unitrust to an income trust, or change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust.⁷² The foregoing conversion to a unitrust is permitted only if the trustee (i) adopts a written statement regarding future trust distributions, (ii) determines the percentage to be used to calculate the unitrust amount and the method for determining the fair market value of the trust; (iii) sends written notice of its intention to take

⁶⁸ Section 736.1007(1), Florida Statutes.

⁶⁹ *Id.*

⁷⁰ Section 736.1007(2), Florida Statutes.

⁷¹ Section 736.1007(5), Florida Statutes.

⁷² Section 738.1041(2), Florida Statutes.

such action to the beneficiaries of the trust; and (iv) no person receiving notice objects within 60 days of receiving notice.⁷³

4. Pet Trusts Allowed. After January 1, 2003, a trust may be created to provide for the care of an animal who is alive during the settlor's lifetime.⁷⁴ The trust must terminate upon the death of the animal, or, if the trust was created to provide for the care of more than one animal, upon the death of the last animal to die who was alive during the settlor's lifetime.⁷⁵ Upon the termination of the trust, the remaining trust assets are distributed as directed by the terms of the trust.⁷⁶

X. Rule Against Perpetuities. Florida has a three hundred and sixty year rule against perpetuities, i.e., a nonvested property interest in real or personal property is invalid unless the interest either vests or terminates within 360 years after its creation.⁷⁷

XI. Ancillary Instruments.

A. Durable Power of Attorney. A resident of Florida can execute a durable power of attorney by which he designates another as his attorney in fact.⁷⁸

1. Formalities of Execution. A durable power of attorney must be in writing and executed with the same formalities required for the conveyance of real property by Florida law, i.e., it must be

⁷³ Section 738.1041(2), Florida Statutes.

⁷⁴ Section 736.0408, Florida Statutes.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Section 689.225, Florida Statutes.

⁷⁸ Section 709.08, Florida Statutes.

executed in the presence of two subscribing witnesses and a notary public.⁷⁹ In addition, in Florida the durable power of attorney must contain the words: “This durable power of attorney is not affected by subsequent incapacity of the principal except as provided in Section 709.08, Florida Statutes,” or similar words that show the principal’s intent that the authority conferred is exercisable notwithstanding the principal’s subsequent incapacity.⁸⁰

2. Who May Serve as Attorney-in-Fact. Either a natural person who is 18 years of age or older and is of sound mind or a financial institution with trust powers having a place of business in the State of Florida and authorized to do business in the State of Florida may serve as attorney-in-fact.

3. Termination of Authority. The attorney-in-fact may exercise its authority until the principal dies, revokes the power or is adjudicated totally or partially incapacitated by a court of competent jurisdiction, unless the court determines that certain authority granted by the durable power of attorney is exercisable by the attorney-in-fact.⁸¹

4. Effect of Incapacity. If a proceeding is instituted in a court of competent jurisdiction to determine the principal’s incapacity, the authority granted under the durable power of

⁷⁹ Section 709.08(1), Florida Statutes; *see also* Section 689.01, Florida Statutes (describing how real estate is conveyed); Section 689.04, Florida Statutes (describing how deeds must be executed).

⁸⁰ *Id.*

⁸¹ Section 709.08(3)(b), Florida Statutes.

attorney is suspended until the petition is dismissed or withdrawn.⁸²

5. “Durable Power of Attorney” Not Necessarily Durable.

As noted above, a durable power of attorney in the State of Florida does not withstand the incapacity of the principal if the principal is adjudicated by a court to be incapacitated and is suspended during any pending incapacity proceeding. Out-of-state practitioners should note that this is very different than in most states. In at least one recent case, the court of appeals held that the trial court was not required to appoint a guardian upon finding that the ward was incompetent where the ward had previously given certain members of her family the authority to act pursuant to a durable power of attorney;⁸³ however, out-of-state practitioners should be wary that durable powers of attorney do not necessarily withstand a court determination of incapacity.

6. Sample. A sample Durable Power of Attorney is attached as Exhibit “C”.

B. Health Care Surrogate. A resident of Florida is permitted to designate a health care surrogate to make decisions for the principal in the event that he is unable to act.⁸⁴

⁸² *Id.*

⁸³ *Smith v. Lynch*, 821 So.2d 1197 (Fla. 4th DCA 2002) (finding that the appointment of a guardian was only necessary where no other lesser intrusion on the privacy of the ward would accomplish the purpose of protecting the ward’s property).

⁸⁴ See Section 765.202, Florida Statutes.

1. Formalities of Execution. A designation of health care surrogate must be signed by the principal in the presence of two subscribing adult witnesses.⁸⁵ A principal who is unable to sign the instrument may, in the presence of witnesses, direct that another person sign the principal's name.⁸⁶ An exact copy of the instrument must be provided to the health care surrogate.⁸⁷

2. Termination. Absent a contrary direction in the document, the designation shall remain in effect until revoked by the principal.⁸⁸

3. Sample. A sample Designation of Health Care Surrogate is attached as Exhibit "D".

C. Living Will. A resident of Florida may execute a living will in accordance with Sections 765.302-765.309, Florida Statutes, known as the "Life-Prolonging Procedure Act of Florida".⁸⁹

1. Formalities of Execution. A living will must be signed by the principal in the presence of two subscribing witnesses, one of whom is neither a spouse nor a blood relative of the principal.⁹⁰

2. Sample. A sample Living Will is attached as Exhibit "E".

⁸⁵ Section 765.202(1), Florida Statutes.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Section 765.202(6), Florida Statutes.

⁸⁹ Section 765.301, Florida Statutes.

⁹⁰ Section 765.302(1), Florida Statutes.

D. Designation of Preneed Guardian. A Florida resident may name a preneed guardian to serve as his or her guardian in the event of incapacity.⁹¹

1. Formalities of Execution. The designation (i) must be in writing; (ii) must reasonably identify the declarant and the preneed guardian; and (iii) must be signed by the declarant in the presence of two witnesses present at the same time.⁹²

2. Sample. A sample Designation of Preneed Guardian is attached as Exhibit “F”.

XII. Unlicensed Practice of Law.

A. Introduction. Over the past several decades, clients have become increasingly more mobile. Whereas the majority of clients once lived, worked and had business dealings solely in one state, an increasing number of clients now have business and personal dealings that span several states and/or nations. This presents a problem for an attorney who is licensed to practice law only in one state, as most attorneys are. How should an attorney handle the situation where his client asks him, for example, to draft a will to be governed by Florida law even though that attorney is not licensed in the State of Florida? The decision that the attorney makes may mean that he is engaged in the unlicensed practice of law (“UPL”) in the State of Florida.

⁹¹ Section 744.3045(1), Florida Statutes. In addition, the parents, natural or adoptive, if living, or the surviving parent, may nominate a preneed guardian of the person or property or both of the parent’s minor child by making a written declaration. *See* Section 744.3046, Florida Statutes.

⁹² Section 744.3045(2), Florida Statutes.

B. Criminal Conduct. The unlicensed practice of law is a crime in the State of Florida, as it is in most states.

1. Was a Misdemeanor. Prior to 2004, the unlicensed practice of law in the State of Florida was a misdemeanor of the first degree.⁹³

2. Now a Felony. In 2004, the legislature of Florida made the unlicensed practice of law in the State of Florida a felony of the third degree.⁹⁴

3. Impacts Out of State Attorneys. Certainly, this has sent a chill through many out-of-state attorneys who have clients that have migrated, whether full-time or on a seasonal basis, to Florida and left many out-of-state attorneys wondering how to ensure that they do not engage in the unlicensed practice of law in the State of Florida.

4. Unlicensed Practice of Law Defined. There is no one specific definition of the unlicensed practice of law in the State of Florida. The unlicensed practice of law means the practice of law, as prohibited by statute, court rule, and case law of the State of Florida.⁹⁵ A two part inquiry can be used to determine whether an activity constitutes the unlicensed practice of law: (i) whether the activity is the practice of law; and (ii) whether the activity is

⁹³ Section 454.23, Florida Statutes (2003).

⁹⁴ Section 454.23, Florida Statutes (2004).

⁹⁵ Rule 10-2.1(a), Rules Regulating the Florida Bar.

authorized.⁹⁶ Generally, a person is engaged in the practice of law if he or she gives advice and performs services that affect important rights of a person under the law and the provision of that advice requires the person to possess legal skill and a knowledge of the law greater than that possessed by the average citizen.⁹⁷ Even if an activity does constitute the practice of law, it does not rise to the unlicensed practice of law unless the person performing the services is not authorized under Florida law to provide those services.

5. Preparation of Estate Planning Documents Can Constitute the Unlicensed Practice of Law. Over 30 years ago, the Supreme Court of Florida determined that the preparation of wills and antenuptial agreements by a person not authorized to practice law in the state of Florida constituted the unlicensed practice of law.⁹⁸

a. Larkin. Notably, in *Larkin*, the Court suggested that if the out-of-state attorney had the documents reviewed and approved by a Florida lawyer, the out-of-state attorney would avoid the claim of the unlicensed practice of law.

⁹⁶ See *Florida Bar v. Moses*, 380 So.2d 412 (Fla. 1980).

⁹⁷ *Florida Bar v. Sperry*, 140 So.2d 587, 591 (Fla. 1962); see also *The Florida Bar re: Advisory Opinion Nonlawyer Preparation of Living Trusts*, 613 So.2d 426 (Fla. 1992) (holding that it constitutes the practice of law for a nonlawyer to draft a living trust and related documents for another).

⁹⁸ *Florida Bar v. Larkin*, 298 So.2d 371 (Fla. 1974).

b. Review by Florida Lawyer. In light of *Larkin*, the practice that many out-of-state attorneys have employed for many years with respect to clients who migrate to Florida is to retain a licensed Florida attorney to review any documents to be executed by a Florida resident and to advise the client on any Florida issues.

6. Florida Bar Staff Opinion. A Florida Bar Staff Opinion had suggested that Florida attorneys should not communicate with out-of-state attorneys on matters involving Florida law.⁹⁹

a. Questioned Review by Florida Lawyer. This Staff Opinion called into question the often employed practice of having a Florida attorney review the documents to be executed by the Florida resident.

b. Risk of Assisting in UPL. There was a suggestion that a Florida attorney would no longer be able to review the documents without assisting in the unauthorized practice of law.¹⁰⁰

7. Response to Staff Opinion. The Division Director for Ethics, UPL, and Professionalism for the Florida Bar has written, and subsequently published, a response which appears to have

⁹⁹ Florida Bar Staff Opinion 24894 (Sept. 3, 2003).

¹⁰⁰ The Florida bar prohibits a Florida lawyer from assisting a person who is not a member of the Florida bar in the performance of an activity that constitutes the unlicensed practice of law. Rule 4-5.5, Rules Regulating the Florida Bar.

narrowed the application of the Staff Opinion.¹⁰¹ Specifically, the Division Director noted that “Florida attorneys are often asked to review estate planning documents drafted by out-of-state attorneys. This review is not improper and is in fact encouraged.”¹⁰²

8. Conclusion. The Staff Opinion was problematic for both Florida attorneys and out-of-state attorneys. If the Staff Opinion had not been recanted, at least in part, it could have meant that a client would have to obtain separate counsel for his Florida activities and his out-of-state activities. Obviously, this would be costly, inconvenient and inefficient for the client.

a. *Larkin* should be Valid Law in Florida. In light of the fact that the Staff Opinion was subsequently recanted, it is reasonable to conclude that *Larkin* is still the law in Florida.

b. Florida’s Strict Policy Opposing UPL. However, out-of-state practitioners should be conscientious of what constitutes the unlicensed practice of law in the State of Florida and the strict policy of the State of Florida regarding the unlicensed practice of law.

XIII. Creditor Protection in Florida.

A. In General. There are a number of asset protection techniques available to Florida residents. Current Florida law exempts certain types

¹⁰¹ Letter from Mary Ellen Bateman to Louis B. Guttman III, Chair, Real Property, Probate & Trust Law Section dated May 25, 2004.

¹⁰² *Id.*

of assets from creditors' claims. To the extent that a client's assets are already titled in or are converted to exempt form, these exemptions can effectively shelter a portion of his assets from the claims of creditors.

B. Florida Law v. Federal Law – What Governs? The exemptions from creditors' claims available under Florida law are substantially broader than those available under Federal bankruptcy law.¹⁰³ Note that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 was signed into law on April 20, 2005. The Act made significant changes to federal bankruptcy law and limited the scope of state creditor laws.

C. Exemptions Under Florida Law – Generally. Under Florida law, as discussed above, homestead property is generally exempt from creditors' claims. Florida also exempts certain interests in qualified pension and profit sharing plans, wages, life insurance policies and annuities. Florida law generally provides that property owned in joint name by a husband and wife (provided it is owned as "tenants by the entireties") is exempt from creditors' claims unless a recorded judgment exists against both spouses.

D. Homestead Exemption. As discussed above, the homestead exemption is very generous in the State of Florida; however, the homestead exemption granted by Article X, section 4 of the Florida Constitution, which grants an exemption for the value of an individual's

¹⁰³ For example, a homestead of unlimited value is exempt under Florida law as compared to Federal law, which provides a homestead exemption of \$7,500. There has periodically been activity during sessions of the Florida Legislature to limit the scope of the Florida exemptions but to date none of the proposals have been enacted into law.

personal residence, does not apply to claims of the Internal Revenue Service or to holders of a mortgage or other purchase money security interest.¹⁰⁴

1. Havoco. A bankruptcy case, *Havoco*,¹⁰⁵ has interpreted the homestead protection in Florida. In *Havoco*, the Florida Supreme Court held that the homestead exemption protects a homestead purchased by a debtor using assets that were otherwise not protected from the reach of creditors with the intent to hinder, delay or defraud creditors.¹⁰⁶ Thus, the debtor was effectively allowed to “shelter” his assets by investing them in a homestead that was beyond the reach of creditors. However, the court did remark that they have invoked equitable principles in limited circumstances to reach beyond the literal language of the homestead exemption where funds obtained through fraud or egregious conduct were used to invest in, purchase or improve the homestead.¹⁰⁷ Thus, it appears that Florida law protects a homestead from the reach of creditors unless the residence was purchased with illegally obtained funds.

2. Sale and Reinvestment. If a Florida resident should sell his residence, Florida law allows a reasonable period of time to

¹⁰⁴ In fact, there are three exceptions under which a forced sale of a homestead may take place. These are (1) payment of taxes and assessments thereon; (2) obligations contracted for the purchase, improvement or repair thereon; or (3) obligations contracted for house, field or other labor performed on the property. See *Havoco of Am., Ltd. v. Hill*, 790 So. 2d 1018 (Fla. 2001).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1028.

reinvest the sales proceeds in another homestead.¹⁰⁸ In order to retain the exempt status, the sales proceeds should not be commingled with other non-homestead funds. The sales proceeds should be held in a separate account specifically labeled as being held for the sole purpose of acquiring another home.

3. What is a Reasonable Period of Time? There are no conclusive guidelines as to what constitutes a reasonable period of time for reinvestment of homestead proceeds. A determination of reasonable time must be made from the facts and circumstances of each case. The Fifth District Court of Appeal of Florida has held that 10 years is not reasonable.¹⁰⁹ Other states have enacted statutes exempting sales proceeds for a period of 6 months up to 2 years.

E. Wages Exemption. Certain earnings of a head of a family are exempt from attachment or garnishment.¹¹⁰ The term "head of family" is defined as any person who provides more than one-half of the support for a child or other dependent (e.g., a spouse).¹¹¹

1. \$500 Exempt. Up to \$500 of disposable earnings¹¹² per week are exempt from attachment or garnishment if paid to the

¹⁰⁸ See *Orange Brevard Plumbing and Heating Co. v. La Croix*, 137 So.2d 201, 206 (Fla. 1962).

¹⁰⁹ *Sun First Nat'l Bank of Orlando v. Gieger*, 402 So. 2d 428 (Fla. 5th DCA 1981).

¹¹⁰ Section 222.11, Florida Statutes.

¹¹¹ Section 222.11(1)(c), Florida Statutes.

¹¹² The term "disposable earnings" is defined as earnings remaining after the deduction of amounts required to be withheld by law. Section 222.11(1)(b), Florida Statutes.

head of family.¹¹³ Furthermore, disposable earnings paid to a head of family in an amount greater than \$500 per week may not be attached or garnished unless the head of family consents to such attachment or garnishment in writing.¹¹⁴

2. Not Permanently Exempt. Although the Statute exempts disposable earnings paid to a head of family, it no longer permanently exempts those same funds from attachment or garnishment after received by the head of family.¹¹⁵ The Statute was revised recently to shelter earnings that are exempted, as described above, from attachment or garnishment for six months after the earnings are received by a financial institution if the funds can be properly traced.¹¹⁶ The prior Statute did not have a six month limitation.

3. Definition of Earnings. The Statute defines earnings to include money paid or payable for personal services or labor.¹¹⁷ The salary of a corporate executive for the performance of purely managerial duties constitutes a sum of money due for personal labor or services.¹¹⁸ However, real estate commissions paid to an independent contractor do not fall within the protection of

¹¹³ Section 222.11(2)(a), Florida Statutes.

¹¹⁴ Section 222.11(2)(b), Florida Statutes.

¹¹⁵ Section 222.11(3), Florida Statutes.

¹¹⁶ *Id.*

¹¹⁷ Section 222.11(1)(a), Florida Statutes.

¹¹⁸ *White v. Johnson*, 59 So. 2d 532 (Fla. 1952).

Section 222.11.¹¹⁹ Likewise, retirement benefits and severance pay do not fall within the exemption.¹²⁰

4. Can be Used to Create Other Exempt Assets. Wages may also be used to create other exempt assets. The conversion of an exempt asset into another form of exempt asset generally is not a fraudulent conveyance.¹²¹ As is the case in the conversion of other exempt assets, the exemption may be lost unless the funds are directly traceable.

F. Tenancy by the Entireties Exemption. Assets held in joint name with a spouse as tenants by the entireties should be exempt from creditors if there is a judgment against only one spouse. To reach assets held as tenants by the entireties the creditor must have a claim against both spouses jointly. This form of ownership is available for all types of property, including real property, tangible personal property and intangible property such as bank accounts. To effectively create a tenancy by the entireties, “the following five unities must exist: (1) unity of possession (joint ownership and control); (2) unity of interest (the interests must be the same); (3) unity of title (the interests must originate in the same instrument); (4) unity in time (the interests must commence simultaneously); and (5) unity of marriage.”¹²²

¹¹⁹ *Matter of Moriarty*, 27 B.R. 73 (Bankr. S.D. Fla. 1983).

¹²⁰ *In re Harrington*, 70 B.R. 301 (Bankr. S.D. Fla. 1987); *In re Dannison*, 84 B.R. 846 (Bankr. S.D. Fla. 1988).

¹²¹ *Grass v. Great Am. Bank*, 414 So. 2d 561 (Fla. 3d DCA 1982).

¹²² *Westport Recovery Corp. v. Abrams*, 9 Fla. L. Weekly Supp. 740b (11th Cir. 2002).

1. Westport. In *Westport*, a 2002 case in Miami-Dade County, the court went beyond the mere titling on a bank account and examined the circumstances under which it was created in order to determine if the account was truly a tenancy by the entirety account.¹²³ In that case, the court held that the bank account was not a tenancy by the entirety account because two unities (i.e., time and title) never existed where the husband took his individual account and simply added his wife as an account owner. Care should be taken to ensure that the five unities listed above are present when creating a tenancy by the entirety so that the protection of this form of ownership would apply.

2. Limited by Marital Status. The use of a tenancy by the entireties form of ownership to shelter assets from creditors' claims is also limited by marital status. If the non-debtor spouse should predecease the debtor, the property would automatically be titled in the debtor's name alone and the judgment could be immediately executed upon. Likewise, divorce terminates a tenancy by the entireties.

3. Homestead Coupled with Tenancy by the Entireties. By coupling the homestead exemption with the protection offered by tenancy by the entirety ownership, a client may be able to exempt the entire residence from the reach of individual creditor's claims without the imposition of the size limitations (i.e., one-half acre

¹²³ *Id.*

within city limits) that would be relevant if only the homestead exemption applied. This is often the preferred solution when a client purchases a homestead that exceeds the size limits set by the Constitution.

G. Pension and Profit Sharing Plan Exemption. Florida law also exempts assets held in qualified retirement and profit sharing plans from creditors' claims. Section 222.21, Florida Statutes, exempts the interest of any participant or beneficiary in a retirement or profit sharing plan that is qualified under Sections 401(a), 403(a), 403(b), 408, 408A or 409 of the Code. Consequently, this exemption also applies to IRAs and Roth IRAs. Notably, Federal law (ERISA) may preempt Section 222.21, Florida Statutes, with respect to retirement or profit sharing plans established and administered by the debtor.¹²⁴

H. Disability Income Benefits Exemption. Disability income benefits are exempt, unless the policy or contract of insurance was effected for the benefit of the creditor.¹²⁵ Thus, any such benefits payable upon disability should pass exempt from creditors.

I. Prepaid College Trust Fund or in a Medical Savings Accounts Exemptions. Moneys paid into or out of the Florida Prepaid College Trust Fund by or on behalf of a purchaser or qualified beneficiary are exempt.¹²⁶ Likewise, moneys paid into or out of a Medical Savings

¹²⁴ See *In the Matter of Goff*, 706 F.2d 572 (5th Cir. 1983); *In re Lichstrahl*, 750 F.2d 1488 (11th Cir. 1985).

¹²⁵ Section 222.18, Florida Statutes.

¹²⁶ Section 222.22(1), Florida Statutes.

Account by or on behalf of a person depositing money into such account or a qualified beneficiary are exempt.¹²⁷

J. Life Insurance. Insurance proceeds on the life of a Florida resident are exempt from the claims of creditors of the insured.¹²⁸ Likewise, the cash surrender value of a life insurance policy is also exempt from creditors' claims.¹²⁹

K. Annuities. The proceeds of annuity contracts issued to a resident of Florida cannot be reached by any creditor of the beneficiary of the annuity.¹³⁰ Moreover, the cash surrender value of an annuity contract is also exempt from creditors' claims.¹³¹

L. Limited Partnerships and Limited Liability Companies. In addition to the above, there are two types of asset protection available in Florida by the use of a limited liability partnership ("LLP") and a limited liability company ("LLC").

1. Limited Personal Liability. The first is that the personal exposure of a limited partner and an LLC member for the debts of the entity is generally limited to that person's investment in the entity. Thus, a creditor of the entity generally cannot execute upon the personal assets of a limited partner or of an LLC member in order to satisfy the entity's debt. However, there are some exceptions. The exceptions generally deal with (i) circumstances

¹²⁷ Section 222.22(2), Florida Statutes.

¹²⁸ Section 222.13(1), Florida Statutes.

¹²⁹ Section 222.14, Florida Statutes.

¹³⁰ *Id.*

¹³¹ *See Goldenberg v. Sawczak*, Fla. L. Weekly S277 (Fla. 2001).

where the entity is not treated by its owners as “separate” from them, (ii) in the case of an LLP, where a limited partner engages in activities involving the management of the entity, or (iii) where certain entity formalities (such as holding annual meetings, keeping corporate books up to date, etc.) are not complied with.

2. Charging Orders. The other protection generally relates to the “charging order concept” available to LLCs and LLPs under Florida law. In simple terms, the charging order concept provides that a creditor of a Florida LLP partner or a Florida LLC member will not be able to satisfy the creditor's claim against the debtor partner or LLC member out of the assets of the entity since those assets are owned by the entity, **as a separate entity**, rather than by any one or more of the individual partners or LLC members.¹³² In explaining this concept, it is helpful to review the provisions of Florida law dealing with charging orders.

a. LLC Charging Orders. Section 608.433(4), Florida Statutes, deals with the charging order in the context of LLCs. It provides as follows:

“On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge the limited liability company membership interest of the member with payment of the unsatisfied amount of the judgment with interest. **To the extent so charged, the judgment creditor has only the rights of an assignee of such**

¹³² See *e.g.*, Rev. Rul. 73-24, 1973 C.B. 602 (holding that since a partnership checking account is an asset and property of the partnership and not an asset or property of the individual partner, the checking account is not subject to levy to satisfy a tax assessed against an individual partner).

interest. This chapter does not deprive any member of the benefit of any exemption laws applicable to the member's interest.”

(emphasis added).

b. LLP Charging Orders. Section 620.153, Florida Statutes, deals with the charging order concept in the context of LLPs and is almost identical to Section 608.433(4), Florida Statutes, described above. It provides as follows:

“On application to a court of competent jurisdiction by any judgment creditor of a partner, the court may charge the partnership interest of the partner with payment of the unsatisfied amount of the judgment with interest. **To the extent so charged, the judgment creditor has only the rights of an assignee of the partnership interest.** This act does not deprive any partner of the benefit of any exemption laws applicable to his or her partnership interest.”¹³³

(emphasis added).

3. Key Asset Protection Language. The sentence in boldface in each of the statutes cited about contains the key asset protection language. According to this language, the charging order does not entitle the creditor to (i) become a limited partner or a member of the LLC; (ii) vote on partnership or LLC matters; (iii) inspect or copy partnership or LLC records; or (iv) obtain

¹³³ Also note that in *In re Stocks*, 110 B.R. 65 (Bankr. N.D. Fla. 1989), the Bankruptcy Court interpreted Florida's Limited Partnership Act and held that the charging order was "the only means by which a judgment creditor can legally command payment from the debtor's partnership interest." The Court distinguished the limited partnership charging order from that provided under the Uniform Partnership Act and held that the latter permitted foreclosure of a partner's interest while the former did not contain such a remedy. *See also Givens v. Nat'l Loan Investors, L.P.*, 724 So. 2d 610 (Fla. 5th DCA 1998).

business and tax information which is usually available to limited partners and members of LLCs as a matter of law. Thus, the charging order only entitles the assignee creditor to receive any distributions to which the debtor partner or member would have been entitled.

4. Effect of Asset Protection. However, note that most partnership agreements and operating agreements provide that distributions are only to be made if, (i) in the case of a partnership, the general partner determines that a distribution should be made and (ii) in the case of an LLC, if the managing member (or manager) determines that the distribution should be made. In addition, both limited partners and members of LLCs are subject to income taxation on the net income of the entity, regardless of whether or not they receive any distributions from the entity (including distributions to pay the taxes). Thus, a creditor who obtains a charging order has the obligation to pay the taxes attributable to the entity's operations, but may never receive distributions from the entity to pay these taxes. This is obviously not a very attractive outcome to a creditor and some practitioners believe that it may be a deterrent to a creditor who may otherwise seek a charging order.

5. Subject to Fraudulent Transfer Act. The creation and funding of LLCs and LLPs are also subject to the provisions of the Florida Uniform Fraudulent Transfer Act, discussed below.

M. Florida Uniform Fraudulent Transfer Act. The Florida Uniform Fraudulent Transfer Act ("the Act")¹³⁴ restricts the ability of a person to transfer assets to avoid potential or actual liability. The Act provides as follows:

“(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(a) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

1. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

2. Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.”¹³⁵

1. Determining Actual Intent. In determining actual intent, consideration may be given to the following factors set forth in the

¹³⁴ Section 726.10(1), *et seq.*, Florida Statutes.

¹³⁵ Section 726.105(1), Florida Statutes.

Act, which will be used to determine if a party has the requisite actual intent to hinder, delay or defraud creditors:

- a. The transfer was to an insider (such as a spouse or child);
- b. The debtor retained possession or control of the property transferred after the transfer;
- c. The transfer was disclosed or concealed;
- d. Before the transfer was made, the debtor had been sued or threatened with suit;
- e. The transfer was of substantially all the debtor's assets;
- f. The debtor absconded;
- g. The debtor removed or concealed assets;
- h. The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred;
- i. The debtor was insolvent or became insolvent shortly after the transfer was made;
- j. The transfer occurred shortly before or shortly after a substantial debt was incurred;
- k. The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.¹³⁶

2. Little Court Guidance. The courts have had few opportunities to interpret the foregoing factors.

3. Fact Sensitive. In addition, the factors set forth in the Act are fact sensitive. As a result, there is little guidance as to what constitutes actual intent and the weight each of the factors listed

¹³⁶ Section 726.105(2), Florida Statutes.

above will be given by the courts in determining actual intent is unknown.

4. Conversion of Non-Exempt Assets to Exempt Assets.

There is authority for transferring non-exempt assets into exempt form under the Act in the context of estate planning. A Bankruptcy Judge for the Southern District of Florida held that the transfer of assets to an irrevocable trust converted into the form of an annuity payable to the debtor more than one year prior to a bankruptcy filing could not be reached by creditors where the transfer involved less than 10% of the debtor's net assets and the debtor's assets exceeded liabilities by more than \$4,000,000 at the time.¹³⁷ The establishment of the trust was made at the suggestion of an estate planning specialist solely as an estate planning measure with no evidence presented of any intent on the part of the debtor to defraud the creditor.¹³⁸ Apparently, the estate planning purpose and the requisite time period before bankruptcy sheltered the transfer from creditors. The same court ruled that the transfer of property by a debtor to his daughter for no consideration within a few months of creditors' state court action against him was made with the intent to hinder, delay and defraud creditors and could be reached by creditors in bankruptcy.¹³⁹

¹³⁷ *In re Mart*, 88 B.R. 436 (Bankr. S.D. Fla. 1988).

¹³⁸ *Id.*

¹³⁹ *In re Lazar*, 81 B.R. 148 (Bankr. S.D. Fla. 1988).

Exhibit A

Sample Declaration of Domicile

To the Clerk of the Circuit Court _____ County, Florida.

This is my declaration of domicile in the State of Florida, that I am filing this day in accordance and in conformity with Section 222.17, Florida Statutes.

FOR DOMICILIARIES OF THE STATE OF FLORIDA:

I hereby declare that I reside in and maintain a place of abode at _____, _____ County, Florida, which place of abode I recognize and intend to maintain as my permanent home and, if I maintain another place or places of abode in some other state or states, I hereby declare that my above-described residence and abode in the State of Florida constitutes my predominant and principal home, and I intend to continue it permanently as such. I am, at the time of making this declaration, a bona fide resident of the State of Florida residing at _____, _____ County, Florida, and the place or places where I maintain another or other place or places of abode are as follows:

(name)

Sworn to and subscribed before me this _____ day of _____, 2011.

Personally Known _____
Produced Identification _____
Type of Identification _____

Notary Public--State of Florida
Print Notary Name: _____
My Commission Number is: _____
My Commission Expires: _____

Exhibit B

Sample Self-Proving Affidavit

STATE OF _____
COUNTY OF _____

I, [testator], declare to the officer taking my acknowledgment of this instrument, and to the subscribing witnesses, that I signed this instrument as my Last Will and Testament.

[testator]

We, _____ and _____, have been sworn by the officer signing below, and declare to that officer on our oaths that the testator declared the instrument to be his Last Will and Testament and signed it in our presence, and that we each signed the instrument as a witness in the presence of the testator and of each other.

Witness

Witness

Acknowledged and subscribed before me by the testator, [testator], who is personally known to me or who has produced _____ as identification, and sworn to and subscribed before me by the witnesses, _____, who is personally known to me or who has produced _____ as identification, and by _____, who is personally known to me or who has produced _____ as identification, and subscribed by me in the presence of the testator and the subscribing witnesses, all on _____, 2011.

Notary Public, State of Florida
(Print or Stamp Name, Commission # and Expiration below)

Exhibit C

Sample Durable Power of Attorney

I, _____, as of this January 17, 2012, hereby appoint and empower my wife, _____, as my true and lawful attorney-in-fact ("my Agent"), to act for me and in my name and on my behalf to exercise the powers listed in this Durable Power of Attorney. Except as otherwise provided in the Florida Power of Attorney Act (Chapter 709 of the Florida Statutes), my Agent may exercise these powers independently and without the approval of any court. My Agent, however, shall exercise all powers in a fiduciary capacity in good faith, as a prudent person would using reasonable care, skill, and caution.

Third Parties. Any third party to whom this Durable Power of Attorney is presented may rely upon an affidavit by my Agent stating, to the best of my Agent's knowledge and belief, that this power has not been revoked, that I am then living, and that no proceedings have been initiated to determine my incapacity. No third party relying on this power and that affidavit will be liable for any losses, damages, or claims caused by compliance with the action requested by my Agent, unless that third party has actual knowledge of my death or the revocation of this power.

A THIRD PARTY WHO IMPROPERLY REFUSES TO ACCEPT THIS POWER OF ATTORNEY WILL BE LIABLE FOR DAMAGES, INCLUDING REASONABLE ATTORNEY'S FEES AND COSTS, INCURRED IN ANY ACTION OR PROCEEDING THAT CONFIRMS THE VALIDITY OF THIS POWER OF ATTORNEY.

Durable Power. This Durable Power of Attorney will not be affected by my subsequent incapacity except as provided in Chapter 709 of the Florida Statutes. It is my specific intent that the power conferred on my Agent will be exercisable from the date of this Durable Power of Attorney, notwithstanding my subsequent disability or incapacity, except as otherwise specifically provided by statute.

My Agent will have the following powers and duties:

GENERAL AUTHORITY

5. To manage all assets and properties belonging to me or in which I have any interest, and to expend whatever funds my Agent deems proper for the preservation, maintenance, or improvement of those assets or properties.
6. To exercise all powers even though my Agent may also be acting individually or on behalf of any other person or entity interested in the same matters (as more fully set forth in the Additional Provisions section).
7. To seek on my behalf the assistance of a court or other governmental agency to carry out an act authorized in this power of attorney and to enforce the exercise of these powers granted to my Agent.
8. To 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 my property and attaching it to the power of attorney.

9. To exercise any authority reasonably necessary to give effect to an express grant of specific authority in this power of attorney.
10. To the extent not limited under the law of the jurisdiction in which this power of attorney is presented, to take all other actions as may be necessary or appropriate for my personal well-being and the management of my affairs, as fully and as effectively as if made or done by me personally.

REAL PROPERTY

To manage and conserve any real property, or any interest or incidents in real property, on my behalf as stated below. Such property and incidents in property include any interest in homestead property, mineral rights, and cooperative apartments. I give my Agent the following powers:

11. To receive, buy, sell, exchange, lease, encumber, and convey such property; to impose restrictions and covenants; to grant options, releases, and easements, including for public use; to adjust boundaries; and to partition or consent to partitioning, subdivide, apply for zoning or other governmental permits, plat or consent to platting, and engage in development activities for such property.
12. To pay or contest any taxes due on such property, and to receive refunds.
13. To engage in any form of litigation regarding the possession, ownership or liability involving such property, including foreclosure on a mortgage, or enforcement of a contract for sale (including specific performance).
14. To create or receive a security interest in such property, and to satisfy a mortgage.
15. To lease or sublease such property; any such lease will be valid and binding for its full term even if it extends beyond the duration of this power of attorney.
16. To insure the property against liability or casualty or other loss, and to maintain, repair or alter such property, including removing or erecting structures on the property.
17. If not prohibited in this Durable Power of Attorney, to change the form of title of such property, including contribution into a business entity in exchange for an interest in that entity.
18. To join with other persons with whom I own property as joint tenants with right of survivorship or as tenants by the entireties in any transaction regarding that property.
19. With respect to income-producing real property, my Agent will have the powers:
 - a. To retain and operate the property for as long as advisable;

- b.** To control, direct, and manage the property, determining the manner and extent of my Agent's active participation in these operations, and to hire one or more supervisors for the property;
- c.** To hire and discharge employees, fix their compensation, and define their duties;
- d.** To invest funds in other land holdings and to use those funds for all improvements, operations, or similar purposes;
- e.** To retain any of the net earnings for working capital and other purposes as advisable in conformity with sound and efficient management; and
- f.** To purchase and sell machinery, equipment, and supplies of all kinds as needed for the operation and maintenance of the property.

TANGIBLE PERSONAL PROPERTY

To manage and conserve any tangible personal property, or any interest in tangible personal property, including exempt property, on my behalf, as follows:

- 20.** To receive, buy, sell, exchange, or otherwise dispose of such property, even if without consideration.
- 21.** To pay or contest any taxes due on such property, and to receive refunds.
- 22.** To engage in any form of litigation regarding the possession, ownership or liability involving such property.
- 23.** To create or receive a security interest in or grant options regarding such property.
- 24.** To lease or sublease such property; any such lease will be valid and binding for its full term even if it extends beyond the duration of this power of attorney.
- 25.** To insure, store, move, maintain, repair or alter such property.
- 26.** If not prohibited in this instrument, to change the form of title of such property, including contribution into a business entity in exchange for an interest in that entity.
- 27.** To surrender possession of such property to me or to members of my family without liability for wear, tear, and obsolescence of the property.

INVESTMENTS

- 28.** To invest in assets, securities, or interests in securities of any nature, whether domestic or foreign markets, including (without limit) stocks, bonds, mutual funds, index funds, or investment funds, including common trust funds, provided such securities are traded on a regulated exchange.

29. To establish or maintain and to trade in credit or margin accounts (whether secured or unsecured), and to pledge assets for that purpose.
30. To hold funds uninvested for such periods as the Agent deems prudent.
31. To employ a custodian or agent (the "Custodian") located anywhere within the United States, at my expense, whether or not such Custodian is an affiliate of an Agent; to register securities in the name of the Custodian or a nominee thereof without designation of fiduciary capacity; and to appoint the Custodian to perform such other ministerial functions as the Agent may direct, all as permitted in Chapter 709 of the Florida Statutes. While such securities are in the custody of the Custodian, the Agent will be under no obligation to inspect or verify such securities, nor will the Agent be responsible for any loss by the Custodian.
32. To employ any investment management service, financial institution, or similar organization to advise the Agent; to handle investment of my assets; and to render all accountings of funds held on my behalf under custodial, agency, or other agreements. If the Agent is an individual, these costs may be paid from my assets in addition to compensation payable to the Agent.
33. To receive and hold certificates and other evidences of ownership with respect to stocks and bonds, or to hold such securities in street certificates or in a book entry system.
34. To exercise voting rights with respect to stocks and bonds in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote.
35. To the extent not limited in the Special Transactions section, to apply for, fund, modify, withdraw from, or terminate a qualified tuition plan authorized under 26 USC §529, or its successor provisions, for any of my descendants, including the right to combine accounts, to transfer an account from one state to another, to redirect the investment of the account (to the extent permitted by law), or to change the designated beneficiary of the plan.
36. To conduct investment transactions as provided in Section 709.2208(2) of the Florida Statutes.

FINANCIAL MATTERS

37. To collect, receive, and receipt for any and all sums of money or payments due or to become due to me.
38. To continue, establish, modify, or terminate an account, credit or debit card, electronic transfer authorization, or other banking arrangement with a bank, trust company, savings and loan association, credit union, thrift company, brokerage firm, insurance company, or other financial institution selected by the Agent.
39. To make, assign, draw, endorse, discount, guarantee, and negotiate promissory notes, checks, drafts, and other negotiable or nonnegotiable paper.

40. To deposit to or withdraw from, by check, order, electronic funds transfer, wire transfer, or otherwise, money or property of mine held by a financial institution.
41. To receive statements of account, notices, and similar documents from a financial institution and act with respect to them; to contract with a financial institution for services, including renting a safe deposit box or space in a vault.
42. To enter any safe deposit box or vault on which I am a signer and withdraw or add to the contents.
43. To adjust, renew or extend the time of payment of commercial paper, a debt owed to me, a debt I owe, or a debt guaranteed by me, or any other financial transaction.
44. To borrow money on my behalf and pledge as security my personal property; to apply for, receive, and use letters of credit from a financial institution, and give an indemnity or other agreement in connection with them.
45. To conduct banking transactions as provided in Section 709.2208(1) of the Florida Statutes.

BUSINESSES AND CONTRACTS

46. To act for me in any business or enterprise, including sole proprietorships, general or limited partnerships, joint ventures, business trusts, land trusts, limited liability companies, and other domestic and foreign forms of organizations (each referred to as an "Entity"), in which I am now or have been engaged or interested.
47. To change the form of organization or governing jurisdiction under which an Entity is operated, or its name, or any of the above, and to continue any unincorporated business that the Agent determines is not advisable to incorporate.
48. To buy, sell, enlarge or reduce my ownership interest in any Entity, and to contribute additional capital into an Entity in which I have an interest.
49. To enter into an ownership agreement with other persons to take over all or part of the operation of an Entity.
50. To establish the value of an Entity under a buy-sell agreement to which I am a party, and to enforce the terms of any agreement relating to ownership (or sale) of an interest in an Entity.
51. To participate in any type of liquidation or reorganization of any enterprise.
52. To vote and exercise all rights and options, or empower another to vote and exercise those rights and options as permitted by law, concerning any interests in an Entity, in securities, or in other assets; to enter into or approve agreements for merger, reorganization, conversion, domestication or equivalent transactions with respect to any Entity; and to enter into voting trusts and other agreements or subscriptions.

- 53. To exercise in person or by proxy, or enforce by litigation or otherwise, a right, power, privilege, or option I have as the holder of stocks and bonds.
- 54. To compromise, arbitrate, or otherwise adjust claims in favor of or against any Entity in which I have an interest.
- 55. Except as otherwise provided under Chapter 709 of the Florida Statutes relating to contracts for personal services, to contract with any person or Entity for any purpose, and to perform that contract; to agree to any termination, release, rescission or modification of any contract or agreement.

INSURANCE, ANNUITIES, AND RETIREMENT FUNDS

For purposes of this section, a "Contract" means a contract of insurance on my life, a contract of insurance regarding my disability or long term care, or an annuity (however denominated). A "Plan" means a retirement plan or account created by an employer, by me, or by another person to provide retirement benefits or deferred compensation for me as a participant, beneficiary, or owner, including a plan or account under the following sections of the Internal Revenue Code (as amended from time to time): an individual retirement account under §§408, 408A, or 408(q); an annuity or mutual fund custodial account under §403(b); a pension, profit-sharing, stock bonus, or other retirement plan qualified under §401(a); a plan under §457(b), and a nonqualified deferred compensation plan under §409A. To the extent not limited in the Special Transactions section, I give my Agent the following powers:

- 56. To continue, pay the premium or make a contribution on, modify, exchange, rescind, release, or terminate a Contract, whether or not I am a beneficiary under the contract, and whether owned by me or obtained by my Agent.
- 57. To procure new Contracts for me and any member of my family.
- 58. To exercise the following rights for Contracts:
 - a. To obtain a loan secured by a Contract or to borrow against its value;
 - b. To surrender a Contract and receive its cash surrender value;
 - c. To exercise any election available under that Contract;
 - d. To exercise investment powers, if applicable;
 - e. To change the manner of paying premiums and to select the form and timing of the payment of proceeds;
 - f. To change or convert the Contract to another type; and
 - g. To sell, assign, or otherwise transfer the Contract.
- 59. To obtain property, casualty, liability or any other insurance for me and my property.
- 60. With respect to a Plan, I give my Agent the following powers:

- a. To select the form and timing of payments and withdraw benefits from the Plan;
- b. To make rollovers, including a direct trustee-to-trustee rollover, of benefits from one Plan to another;
- c. To establish a Plan in my name;
- d. To make contributions to a Plan;
- e. To exercise investment powers, if applicable; and
- f. To borrow from, sell assets to, or purchase assets from a Plan.

ESTATES, TRUSTS, AND OTHER BENEFICIAL INTERESTS

To the extent not limited in the Special Transactions section, to act for me regarding any trust, probate estate, guardianship, conservatorship, escrow, custodianship or fund in which I may have a right or beneficial interest, including:

- 61. To make an election on my behalf for me to receive an elective share of my wife's estate, if any, as provided by Florida law from time to time.
- 62. To exercise for my benefit a presently exercisable general power of appointment.
- 63. To transfer property to the trustee of a trust created by me or for my benefit.
- 64. To accept, receipt for, sell, assign, pledge, or exchange my interest; to reject or disclaim, or consent to a modification of, my interest.
- 65. To initiate and pursue litigation, including settlement, compromise, or alternative dispute resolution, regarding my interest, including a determination of the meaning, validity, or effect of a deed, Will, declaration of trust, or other instrument or transaction affecting my interest, or to remove, substitute, or surcharge a fiduciary.

CLAIMS AND LITIGATION

- 66. To sue in my name and behalf for the recovery of any and all sums of money or other things of value, payments due or to become due to me, or damages I have sustained or will sustain; to 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; and to collect, hold and disburse any property received in satisfaction of judgments.
- 67. To initiate or participate in adjustments of claims, either by me or against me, including submission to alternative dispute resolution, and to settle or compromise such claims.
- 68. To participate and bind me in any litigation, including: to waive or accept service of process on my behalf; to appear for me; to agree to stipulations or admission of facts on my behalf (other than a representation as to my personal knowledge); to verify pleadings,

seek appellate review, procure and give surety and indemnity bonds, authorize and pay for records and briefs; to receive, execute, and file a consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement, or other instrument; and to make or accept a tender or offer of judgment.

69. To pay any and all bills, accounts, claims, and demands now or hereafter payable by me, including a judgment, award, order or settlement made in connection with a claim or litigation.
70. To assert and maintain before a court or administrative agency a claim for relief or cause of action, or to seek an injunction, specific performance, or other relief.
71. To act for me with respect to any bankruptcy or insolvency concerning me or some other person, or with respect to a reorganization or receivership which affects my interest in any property.

PERSONAL AND FAMILY MATTERS

72. To demand, obtain, review, and release to others medical records, documents, or communications protected by the patient-physician privilege, attorney-client privilege, or any similar privilege, including all records subject to, and protected by, the Health Insurance Portability and Accountability Act of 1996, as amended ("HIPAA"). I designate my Agent as my personal representative under HIPAA. My Agent may also enforce any or all of the privileges listed above.
73. To nominate on my behalf a person (including my Agent) or entity to be appointed by a court of appropriate jurisdiction as guardian of my person or property, or both, or as custodian for my property during the pendency of any proceedings to determine my legal capacity.
74. To receive and open my mail, change my mailing address, and otherwise represent me in any matter concerning the U.S. Postal Service.
75. To access communications intended for me, and communicate on my behalf, whether by mail, electronic transmission, telephone, or other means.
76. To access my accounts involving web-based communications, such as email, memberships in organizations or commercial enterprises, and social media, all of which require a user name and password for access, even to the extent of compelling the provider to reset my information to data of my Agent's choosing.
77. To the extent not limited in the Special Transactions section, to continue or discontinue my membership in any club, religious institution, society, order, or other organization (whether individual or family) and to continue or discontinue payment of dues, fees, or contributions to those organizations.
78. Accept or resign on my behalf from any offices or positions which I may hold, including any fiduciary positions.

- 79.** To hire and compensate attorneys, accountants, advisors, financial consultants, managers, agents, and assistants (including any individual or entity who provides investment advisory or management services, or who furnishes professional assistance in making investments) without liability for any act of those persons, if they are selected and retained with reasonable care. An Agent may serve in one or more of these capacities and be compensated separately for the services in each.
- 80.** To discharge (with or without cause) any person hired by me (or on my behalf), by the Agent, or by any prior Agent, including but not limited to, the categories of persons named above, and physicians, nurses, care-givers, and domestics.
- 81.** To make periodic payments of child support and other family maintenance required by a court or governmental agency or an agreement to which I am a party.

GOVERNMENT BENEFITS AND ACTIONS

This section deals with benefits or actions from or relating to any branch or department of the United States government, any state government, or any foreign government, whether or not recognized by the United States, including without limitation, the Social Security Administration, the Department of Veterans Affairs, the Internal Revenue Service, Medicare or Medicaid, and any government department providing payments or grants. I give my Agent the following powers:

- 82.** To file or process claims, and receive payment for any amounts due me under any such government program or as payments for retirement from any governmental entity, agency, or program, including without limit any program or plan administered or sponsored by the United States, any state (or a subdivision of a state) of the United States, or any branch of the military.
- 83.** To enroll in, apply for, select, reject, change, amend, or discontinue, on my behalf, a benefit or program, and to receive and endorse for deposit in any account any payments that I receive from a governmental source.
- 84.** To file or process claims, and receive payment for medical bills with all insurance companies through which I have coverage, including but not limited to Medicare and Medicaid, and to receive from Blue Cross/Blue Shield, Humana, United Health Care, CHAMPUS, or any other insurer information obtained in the adjudication of any claim in regard to services furnished to me under Title 18 of the Social Security Act.
- 85.** To prepare, execute, and file a record, report, or other document to safeguard or promote my interest under a federal or state statute or regulation; to communicate with any representative or employee of a government or governmental subdivision, agency, or instrumentality, on my behalf.
- 86.** To create, fund, and maintain an Income Trust pursuant to 42 USC §1396(d)(4)(B) in order to qualify me or retain my eligibility for Medicaid or any other public assistance benefits.

TAXES

- 87. To represent me before any office of the Internal Revenue Service or any state agency, to receive confidential information regarding all tax matters for all periods, whether before or after the execution of this Durable Power of Attorney, and to make any tax elections on my behalf.
- 88. To prepare, sign and file any tax return on my behalf including income, gift, payroll, property, Federal Insurance Contributions Act, claims for refund and other tax returns or other tax-related documents, including receipts, offers, waivers, consents, and agreements.
- 89. To pay taxes due, collect refunds, post bonds, receive confidential information, and contest assessments, deficiencies, fines, or penalties determined by the Internal Revenue Service or any other taxing authority.
- 90. To execute on my behalf 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.

SPECIAL TRANSACTIONS

Certain transactions under this power of attorney may profoundly affect my existing estate plan and therefore require a separate authorization for my Agent to engage in them. By initialing next to any items within the respective numbered paragraphs in this Special Transactions section, I grant my Agent the authority stated in that paragraph with respect to the item initialed. If I have not initialed an item, my Agent is not authorized to take that action.

- 91. Gifts. I authorize my Agent to make gifts of my property outright to, or for the benefit of, the persons specified below, including by the exercise of any presently exercisable general power of appointment which I hold or acquire. For these purposes, a gift "for the benefit of" a person includes a gift to a trust in which that person is a beneficiary, to a custodial account under a state version of the Uniform Transfers (or Gifts) to Minors Act, and to a tuition savings account or prepaid tuition plan as defined under Internal Revenue Code §529. Unless I have provided otherwise in this instrument, gifts made to different donees need not be equal in amount, character or timing. Gifts may be made only to:

- _____ my wife, my ancestors, and my descendants
- _____ other members of my family, other than those listed above
- _____ my Agent, despite any limitation under Section 709.2202(2) of the Florida Statutes
- _____ any organization qualifying for a gift tax charitable deduction which I have supported or which my Agent, in her discretion, believes I would support, including outright gifts or qualifying split-interest gifts
- _____ **all of the above in this paragraph**

The gifts to the persons I have specified above, if any, may be made in the following amounts:

_____ in an amount not to exceed \$ _____ per donee each calendar year

_____ in an amount per donee each calendar year not to exceed the annual dollar limits of the federal gift tax exclusion under Internal Revenue Code §2503(b) (annual exclusion)

_____ if my wife agrees to consent to a split gift pursuant to Internal Revenue Code §2513, in an amount per donee not to exceed the aggregate annual gift tax exclusions for that donee each calendar year for both my wife and me

_____ any amounts qualifying for federal gift tax exclusion under Internal Revenue Code §2503(e) (medical and educational exclusions)

_____ in an aggregate amount not to exceed my Applicable Exclusion Amount as provided in Internal Revenue Code §2010(c)

_____ if my wife agrees to consent to a split gift pursuant to Internal Revenue Code §2513, in an amount per donee not to exceed the aggregate Applicable Exclusion Amounts for both my wife and me

_____ **for estate planning purposes, in unlimited amounts, including the gifts listed above**

_____ my Agent may NOT make any gifts of my property or exercise any powers of appointment I may hold. (I understand this limitation may have unintended or undesirable effects, but I choose it anyway.)

92. Trusts. I authorize my Agent to deal with trusts created by me, for me, on my behalf, or in connection with gifts from me to others as provided in the paragraph above authorizing gifts, as follows:

_____ To create an inter vivos trust, whether revocable or irrevocable, in which I am a beneficiary

_____ To the extent permitted in the trust agreement, to amend, revoke, or terminate a trust of which I am a beneficiary, or transfer the assets of such a trust into another trust under which I am a beneficiary

_____ To create, amend, or revoke trusts for the benefit of others

_____ To participate in either judicial or nonjudicial modification of a trust as permitted in Chapter 736 of the Florida Statutes

93. Survivorship and Other Designations. My Agent may create or alter the nature of accounts in which I have an interest, as follows:

_____ To create or change rights of survivorship in accounts or other assets in which I have an interest

_____ To change a beneficiary designation for any accounts or financial instruments, including life insurance policies, annuities, or retirement accounts of any nature

_____ To waive my right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan of any nature

94. Disclaimers. My Agent may disclaim interests in property on my behalf as follows:

_____ Disclaim any interest in property I might otherwise receive, either outright or in trust

_____ Disclaim any powers I have over property or as a beneficiary of any trusts (excluding any powers I possess in a fiduciary capacity)

_____ Disclaim any powers of appointment I have or may acquire, excluding any testamentary power of appointment that I currently exercise in my Last Will and Testament

ADDITIONAL PROVISIONS

Successors. If at any time my Agent named above fails or ceases to serve as my attorney-in-fact, I appoint my son, _____, as my attorney-in-fact in her place. If my son, _____, fails or ceases to serve as my attorney-in-fact, I appoint my daughter, _____, as my attorney-in-fact in his place. All successor Agents will have the rights, powers, privileges and discretions specified in this Durable Power of Attorney while they are serving as my attorney-in-fact.

Protection for Agent. I understand, acknowledge and anticipate that many of my Agent's actions taken pursuant to specific grants of authority in this instrument could involve him or her in conflicts of interest (created either by me or by my Agent), or call into question my Agent's apparent loyalty to me, or both. This might result from the totality of the circumstances facing the Agent at that time, or by virtue of the Agent's specific actions that might create the conflict of interest. I want my Agent to be free to act in my interest without concern over questionable lawsuits. Therefore, so long as my Agent acts in good faith, he or she will be protected as follows.

a. My Agent does not have an affirmative duty to act under this power of attorney and will not be liable for any claim or demand arising out of his or her good faith acts or omissions, except for actions or omissions resulting from my Agent's dishonesty, improper motive, or reckless indifference to the purposes of this power of attorney.

b. My Agent may have competing interests for himself or herself or his or her affiliates, and I waive any express duty of loyalty imposed under Section 709.2114(2) of the Florida Statutes.

c. My Agent may have a conflict of interest as provided in Section 709.2116 of the Florida Statutes. Despite that section, my Agent may undertake a transaction on my behalf even if another party to that transaction is: (i) a business or trust controlled by my Agent, or of which

an Agent, or any director, officer, or employee of a Corporate Agent, is also a director, officer, or employee; (ii) an affiliate or business associate of my Agent; or (iii) an Agent acting individually. This exception also extends to any relative of such a party.

d. I fully indemnify my Agent out of my assets and my estate for any actions brought against him or her, and damages he or she sustains, including attorneys' fees and costs, that have as a basis my Agent's actions or inactions resulting in both a claim for breach of fiduciary duty and actual damages to me or my estate, but this protection does not extend to actions or omissions resulting from my Agent's dishonesty, improper motive, or reckless indifference to the purposes of this power of attorney.

e. My Agent will not be liable for any actions by a predecessor agent if the Agent does not participate in or conceal the action. An Agent is not required to review the actions of a predecessor agent, absent actual knowledge by the Agent of wrongdoing.

Compensation and Expenses. My Agent will be entitled to reasonable compensation and reimbursement for all expenses reasonably incurred by him or her on my behalf.

Foreign Accounts. Despite any power granted to the Agent in this instrument or under law, my Agent may not exercise any power over, or transact any business with respect to, an account in a foreign country, as defined in 31 CFR 1010.350(c) and 1010.350(d), unless the Agent expressly and specifically accepts such authority in writing.

Delegation of Powers. My Agent may not delegate the powers given to him or her as my attorney-in-fact, except as follows:

a. To grant a transfer agent or similar person the authority to register securities in my name or the name of a nominee.

b. For investment management purposes as provided in Section 518.112 of the Florida Statutes.

c. To any other person, as may be permitted under the law of another jurisdiction in which this instrument is presented.

Suspension of Rights and Duties. All powers granted to my Agent will be suspended immediately if he or she becomes disabled, i.e., unable to carry out his or her duties under this Durable Power of Attorney because of a mental or physical impairment (whether temporary or permanent in nature). For these purposes, that disability is determined as follows:

a. my Agent's capacity or disability can be determined by a court having jurisdiction, which will supersede any other determination under this section.

b. In the absence of a judicial determination, if my son, _____, (or if my son, _____, is then serving as my Agent, my daughter, _____) reasonably believes that my Agent is suffering from any mental or physical incapacity that would affect his or her ability to manage my affairs, and if that person obtains written confirmation of that opinion from my Agent's physician, that person shall give the Agent written notice to that effect. Upon delivery to the Agent of that written notice, all powers of that Agent as my attorney-in-fact will be suspended until his or her legal

capacity is determined by a court, until his or her physician determines the Agent is no longer disabled, or until the person entitled to give such written notice rescinds it.

c. If my Agent fails to sign a release of relevant medical information necessary to determine his or her capacity, that Agent will be suspended for thirty (30) days after the request for such a release is delivered to him or her by the person described above. If the Agent consents to the release of relevant medical information, and is determined not to be disabled, he or she may elect to resume service as Agent by giving written notice to me and to the person named above.

Use of Copies. As provided in Section 709.2106 of the Florida Statutes, a photocopy or electronic copy of this power is sufficient for its exercise.

Partial Invalidity. If any part of this power of attorney is declared invalid or unenforceable, that decision will not affect the validity of the remaining parts.

Limitation on actions of Agent. No Agent may participate in an action to the extent that a payment or distribution pursuant to that action would discharge a legal support obligation of that Agent. No Agent who is the insured of any insurance policy that I own may exercise any rights or have any incidents of ownership with respect to the policy, including the power to change the beneficiary, to surrender or cancel the policy, to assign the policy, to revoke any assignment, to pledge the policy for a loan, or to obtain from the insurer a loan against the surrender value of the policy. All such power is to be exercised solely by another Agent, if any.

In witness whereof, I have executed this Durable Power of Attorney as of the date first written above.

Signed in the presence of:

Print Name: _____

(NAME)

Print Name: _____

Two witnesses as to

STATE OF FLORIDA
COUNTY OF MIAMI-DADE

The foregoing instrument was acknowledged before me on January____, 2012, by
_____.

Personally Known _____

Produced Identification _____

Type of Identification _____

Notary Public--State of Florida
Print Notary Name:
My Commission Number is:
My Commission Expires:

INSTRUCTIONS TO AGENT

Thank you for serving as my Agent under this power of attorney. You will be considered to have accepted the role when you perform an act that is consistent with the powers given in this document. I appreciate your service.

If you choose to undertake to serve, here are the things the law says you must do:

- Act within the scope of the authority granted in the power of attorney, but in a manner not contrary to my reasonable expectations (to the extent you actually know them);
- Act in good faith and in a manner not contrary to my best interest;
- Attempt to preserve my estate plan, to the extent you know what it is, assuming that preserving the plan is consistent with my best interests;
- Act personally, i.e., you may not delegate your power to others (in general);
- Keep adequate records of all transactions made on my behalf; and
- Maintain an accurate inventory of my safe deposit box each time you access it.

You will also be expected to act with care, competence, and diligence (and if you have special skills or expertise, to use them); to act loyally for my benefit; and not to create a conflict of interest impairing your ability to do so. If you were not tasked with making my Health Care decisions, you will also need to cooperate with the person who has the authority to make those decisions.

Even as my attorney-in-fact, there are some things you cannot do. You may not:

- Perform duties under a contract requiring my personal services;
- Make an affidavit as to my personal knowledge;
- Vote on my behalf in a public election;
- Execute or revoke my Will or Codicil; or
- Exercise powers or authority I hold in a fiduciary capacity (e.g., as a Trustee).

You may have been given some authority to make gifts of my property. In deciding whether or not to make such gifts, you should take into account my objectives and my best interest based on all relevant factors, including:

- (1) the value and nature of my property;
- (2) my foreseeable obligations and need for maintenance;
- (3) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes;

(4) eligibility for a benefit, a program, or assistance under a statute or regulation, either for me or for the donee; and

(5) my personal history of making or joining in gifts.

In exercising this power of attorney, you may need to present an affidavit regarding certain facts. A sample of that form is attached for your convenience.

If you have any questions concerning my intent, my estate plan, or my desires, you should ask me. If I am unable to answer you, you may wish to contact the attorney who drafted this instrument, who is listed below.

Christopher W. Boyett
Holland & Knight LLP
701 Brickell Avenue, Suite 3000
Miami, Florida 33131
(305) 374-8500
christopher.boyett@hklaw.com

AFFIDAVIT BY ATTORNEY-IN-FACT (SAMPLE)

Before me, the undersigned authority, personally appeared _____ ("Affiant"), who swore or affirmed that:

- 1. Affiant is the attorney-in-fact named in the Durable Power of Attorney executed by _____ (the "Principal") on January 17, 2012.
- 2. This Durable Power of Attorney is currently exercisable by Affiant. The Principal is domiciled in Florida.
- 3. To the best of Affiant's knowledge after diligent search and inquiry:
 - a. The Principal is not deceased; and
 - b. The Durable Power of Attorney has not been revoked; partially or completely terminated by adjudication of incapacity of the Principal or by the occurrence of an event referred to in the Durable Power of Attorney; or suspended by initiation of proceedings to determine the incapacity of the Principal.
- 4. Affiant is acting within the scope of authority granted in the Power of Attorney.
- 5. Affiant agrees not to exercise any powers granted by the Durable Power of Attorney if Affiant learns that any averment in Section 3a or 3b is no longer accurate.

(NAME)

STATE OF FLORIDA
COUNTY OF MIAMI-DADE

The foregoing instrument was acknowledged before me on January____, 2012, by _____.

Notary Public--State of Florida

Personally Known _____

 Produced Identification _____

 Type of Identification _____

Print Notary Name:
 My Commission Number is:
 My Commission Expires:

Exhibit D

Sample Designation of Health Care Surrogate

If I am at any time incapable of making health care decisions for myself, and it is determined pursuant to Section 765.204, Florida Statutes, that I lack the capacity to make care decisions for myself or to provide informed consent, I designate my wife _____, whose address is _____ and whose telephone number is _____, to serve as my health care surrogate to make all health care decisions for me, subject to the restrictions, if any, set forth herein and the statutory restrictions on a health care surrogate's powers, until such time as I regain the capacity to make such decisions or provide informed consent myself. I designate my health care surrogate as my personal representative under 45 CFR § 164.502(g), a portion of the regulations implementing the Health Insurance Portability and Accountability Act of 1996, as amended ("HIPAA"), for all health care-related decisions. By way of example and not in limitation, my health care surrogate may:

- act for me and make all health care decisions for me in matters during my incapacity, as she deems to be in my best interest;
- consult expeditiously with any health care providers to provide informed consent in my best interest, and make health care decisions which she believes I would have made under the circumstances if I were capable of making such decisions;
- provide written consent using an appropriate form provided by any health care provider, including a physician's order not to resuscitate;
- request, receive and review any information concerning my mental and physical health, including but not limited to medical and hospital records and other protected health information as defined by HIPAA;
- apply for public and veterans' benefits, such as Medicare and Medicaid, for me and have access to information regarding my income and assets and banking and financial records to the extent required to make application;
- authorize the release of the records and information described above to appropriate persons as necessary to ensure the continuity of my health care;
- authorize my admission to or transfer from a licensed health care facility; and
- carry out the terms of any living will or declaration made by me.

For purposes of this instrument, "informed consent" means consent voluntarily given, after sufficient explanation and disclosure of the subject matter involved to enable the recipient to have a general understanding of the procedure and the available medically acceptable alternative procedures to make a knowing health care decision without duress or coercion. The term "health care decision" means informed consent, refusal of consent, or withdrawal of consent to health care, and includes the decision to apply for public benefits to defray the cost of health care.

I will furnish an exact copy of this designation to my health care surrogate.

I affirm that this designation is not being made as a condition of treatment or admission to a health care facility.

This designation of health care surrogate is executed by me on _____, 2011.

This designation of health care surrogate is witnessed by us in the presence of the declarant.

Witness

Witness

Address

Address

Telephone

Telephone

Note: The person designated as the health care surrogate cannot act as a witness to the execution of this designation. At least one witness must be a person who is neither the spouse nor a blood relative of the person making the designation.

STATE OF _____
COUNTY OF _____

The foregoing instrument was acknowledged before me on _____,
2011, by _____.

Notary Public--State of Florida

Personally Known _____
Produced Identification _____
Type of Identification _____

Print Notary Name: _____
My Commission Number is: _____
My Commission Expires: _____

Exhibit E

Sample Living Will

I, _____, willfully and voluntarily make this declaration on _____, 2011. I recognize that death is natural and is but a phase in the cycle of life. I do not fear death as much as I fear the indignity and futility of deterioration, dependence, and hopeless pain. If there is no reasonable medical expectation of my recovery from a physical or mental disability, I do not wish to be kept alive by artificial means or heroic measures.

Therefore, if my attending or treating physician and another consulting physician determine that there is no reasonable medical probability of my recovery from any of the following conditions, I direct that life-prolonging procedures be withheld or withdrawn when the application of those procedures would serve only to prolong artificially the process of dying, and that I be permitted to die naturally with only the administration of medication or the performance of any medical procedure deemed necessary to provide me with comfort care or to alleviate pain, even if that hastens my death:

- I have a terminal condition caused by injury, disease, or illness from which there is no reasonable medical probability of recovery and which can be expected to cause my death if not treated.
- I am in an irreversible end-stage condition that is caused by injury, disease, or illness that has resulted in severe and permanent deterioration, indicated by my incapacity and complete physical dependency, for which treatment would be medically ineffective to a reasonable degree of medical certainty.
- I am in a persistent vegetative state characterized by permanent and irreversible unconsciousness in which there is an absence of voluntary action or cognitive behavior of any kind by me, with an inability to communicate or interact purposefully with others in the environment around me.

In any of the situations described above, I direct that the following medical interventions that I have initialed be considered life-prolonging procedures.

- _____ Placement on ventilator or other mechanical devices
- _____ Surgical procedures and blood transfusion, except as needed to prevent or alleviate suffering
- _____ Placement in an intensive care unit except as an absolute necessity to relieve suffering

- _____ Chemotherapy or radiation therapy, unless there is a substantial medical probability my condition will materially improve
- _____ Resuscitation efforts in the event of arrest of my heart or breathing
- _____ Active treatment of a new reversible condition such as newly-discovered cancer, heart attack, or pneumonia
- _____ Artificial nutrition and hydration (providing food and water through tubes)

I intend that this declaration be honored by my family and my physicians as the final expression of my legal right to refuse medical or surgical treatment and to accept the consequences for such refusal. I understand that my wishes may place a heavy burden upon others, and so I make this declaration to assume sole responsibility for my decision and to mitigate any feelings of guilt that my wishes may cause.

I am emotionally and mentally competent to make this declaration, and I understand its importance.

This declaration is witnessed by us in the presence of the declarant.

_____ Witness

_____ Witness

_____ Address

_____ Address

_____ Telephone

_____ Telephone

STATE OF _____
COUNTY OF _____

The foregoing instrument was acknowledged before me on _____
_____, 2011, by _____.

Notary Public--State of Florida

Personally Known _____
Produced Identification _____
Type of Identification _____

Print Notary Name: _____
My Commission Number is: _____
My Commission Expires: _____

Exhibit F

Sample Designation of Preneed Guardian

I, _____, whose social security number is ____-__-____, presently residing at _____, Florida _____, hereby make the following declaration naming preneed guardians to serve in the event of my future incapacity:

If I am at any time determined to be an incapacitated person, as that term is defined in the Florida Guardianship Law as it now exists or may hereafter be amended, I declare that _____, whose present address is _____, is to serve as plenary guardian of my person and property, to exercise all delegable legal rights and powers and to perform all tasks necessary to care for me and my property or estate.

[I further declare that if _____ is unable or unwilling to serve as my guardian, my children, _____ and _____, or the survivor(s) of them, are to serve as plenary guardian of my person and property, to exercise all delegable legal rights and powers and to perform all the tasks necessary to care for me and my property or estate.]

I further declare that it is my intent and desire that the above-named persons be appointed by the Court having jurisdiction to serve without bond.

Signed on _____, 2011.

This declaration was signed by the above-named declarant in our joint presence, and at the declarant's request we have signed our names as attesting witnesses in the declarant's presence and in the presence of each other on _____, 2011.

Witness

Witness

Address

Address