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ActionLine

A PUBLICATION OF THE FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW SECTION

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INSIDE:

The Truth About Self-Directed IRAs and Real Estate: Inherently Incompatible or Just Misunderstood?

By Kristen M. Lynch, Esq., Elk, Bankier, Christu & Bakst LLP, Boca Raton, Florida

Investment of Individual Retirement Accounts ("IRAs") in non-traditional assets such as real estate, limited liability companies, limited partnerships mortgage receivables, etc. has become a new media darling. Although these types of investments have recently gained newfound popularity, they have, in fact, been around for decades. The most popular of these asset types by far is real estate. The purpose of this article is to clarify tax law as it currently exists and Florida law as it currently exists, and in particular, to clarify the law with respect to real estate investments within IRAs. Additionally, this article will address proposed legislation that aims to clear up an ambiguity within Florida law.

The Current State of Affairs

The Employee Benefit Research Institute currently estimates that there is somewhere in excess of $12 billion in retirement assets currently in this country. Individual Retirement Accounts and other qualified plans are the second most popular type of account per household, second only to the family checking account. With this in mind, and in light of the fact that Florida is one of the top retirement states in the country, it is safe to assume that Florida is home to a significant percentage of that $12 billion. Normally, IRAs and qualified plans are mostly a creature of the Internal Revenue Code, and as such, are governed primarily by federal law and are only affected by state law within a limited scope. The interplay between federal governance of IRAs and qualified plans and state real property laws creates an issue that falls within such a limited scope.

See "Self-Directed IRAs" page 15

Message from the Chair:

An Active and Growing Section

By Julius J. Zschau, Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., Chair

The largest and most active Section continues to move forward as we approach the end of the 2005-2006 Bar Year. The achievements of our Section continue to mount thanks to the hard work of our Executive Council and Section members. Participation of our substantive and general standing committees continues to grow along with membership in the Section. We have reached a total of 9,250 members with 467 new members in the fourth quarter of 2005 alone. A preliminary estimate for the month of January indicates a continued increase in that month.

George Meyer, Mike Swaine, Steve Hearn and the Circuit Representatives are doing a great job in encouraging membership. I would like to ask all of the members of our Section to encourage your colleagues in the Real Property or Trust and Estate practices to join the Section. The greater our membership; the greater our effectiveness.

See "Message From the Chair," page 3

Message From the Chair

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Attendance at our Executive Council meetings is breaking records as is the attendance at our continuing legal education programs. Tapes and materials are selling at record levels. We will soon be able to sell CD's in addition to tapes. Our thanks to the Continuing Legal Education Committee and the Chair Lee Weintraub and Vice-Chairs Peggy Rolando and Mike Dribin on this front.

The Legislative Committee, under the very able leadership of Chairman Brian Felcoski and Vice Chairs Burt Bruton and Charlie Nash with our lobbyists' Pete Dunbar, Martha Edenfield and Marc Dunbar, combine our efforts with the legislature to complete the enactment of our legislative initiatives, especially the Trust Code and the Land Trust Act. The work of this committee is very difficult and the assistance of Laird Lile, Sandy Diamond with respect to the Trust Code and Burt Bruton, Rob Stern and Drew O'Malley on the Land Trust Act, all deserve our thanks.

Another important area in which the Section is involved is the filing of Amicus Briefs in situations where important legal concepts are involved. In that regard, the superb handling of the Amicus Brief in the Warburton Case and the continuing work on the Rayborn Case by Past Chair Bob Goldman and John Little is another example of the outstanding service to the Section by the Amicus Brief Committee.

Our Executive Committee meetings continue to be well attended and produce great results. Terry Hill, our Program Administrator, has been outstanding in coordinating our meetings, seminars, committee activities, publications and tape sales. The final two Executive Council Meetings will take place on April 19-23, 2006 in Barcelona, Spain, and our Section Convention on May 25-26, 2006 at the Hilton in the Walt Disney World Resort. All of our Section members are encouraged to attend the Section Convention. It is a great opportunity to meet your Executive Council, to pick up some very valuable CLE credits in the ethics area, and to participate in, or become involved with, one or more of our substantive or general standing committees.

For a list of the committees, check the section internet site at www.flabarrpptl.org. If you want to participate in a committee or committees, e-mail the committee chair or vice chair. They will be happy to give you information on the committee and if it is a good fit, appoint you. If you join a committee, please participate in person or by conference phone at committee meetings. We need and want your participation.

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The Foreigner, FIRPTA and Section 1031

By Stephen A. Wayner, Esq., C.E.S., Bayview Financial Exchange Services, LLC

Recently the Internal Revenue Service released a warning (FS-2005-16) on abusive real estate transactions currently being handled by many real estate/tax professionals with the misplaced intent of avoiding the Foreign Investment in Real Property Tax Act (FIRPTA) requirements. The release, in effect, echoes the IRS' long standing position rather than creating a new one, and it is part of an ongoing campaign by the IRS to identify patterns of noncompliance or abusive transactions involving foreign investment in the U.S. real estate market and to warn taxpayers and real estate professionals about such issues. Two major issues were discussed: (1) The sale or disposition of a U.S. real property interest by a foreigner, and (2) The transfer by a foreign corporation to its foreign shareholder with a subsequent sale of the U.S. property interest to the intended purchaser (transferee). First, this article will provide a brief history lesson on both FIRPTA and on Code Section 1031.

Prior to the enactment of FIRPTA, numerous foreigners would sell their U.S. real estate, taking their proceeds out of the U.S., and, unfortunately for the IRS, "disappear", thereby not paying any tax on their gains. Obviously, this was a clever strategy for the foreigner, but not very advantageous for the U.S. economy or fair to the U.S. Taxpayer, who had to pay their tax on the sale of their U.S. real estate. Many U.S. citizens also felt that it was unfair for the foreign investor to be able to "out-compete" the U.S. resident in the bidding process by being able to offer a higher price to the seller as a result of the foreign investor's avoidance of federal and state tax liabilities.

As a result, FIRPTA was passed, with the main purpose of insuring that foreigners would pay tax when they sell their U.S. real property. FIRPTA states that any person (transferee) who acquires U.S. real property from a foreign person or foreign corporation after January 1, 1985 must deduct and withhold a tax in an amount equal to 10% of the amount realized (sales price). A foreign person is defined as: "…a nonresident alien *individual, or* a foreign *corporation* that has not made an election under Section 897 (i) of the Internal Revenue Code to be treated as a domestic corporation, foreign partnership, foreign trust, or foreign estate. It does not include a resident alien individual." The transferee (purchaser) may be held liable for the payment of this tax and any penalties and interest associated thereto if they failed to deduct and withhold the 10%.

Certain exemptions were made part of the act. The most widely used exemption is the $300,000 "personal residence exemption".

This exemption states that no withholding is required if the individual transferee is acquiring from the foreigner the U.S. real property for use as the transferee's (purchaser's) personal residence and the amount realized (sales price) on the transaction is $300,000 or less. Additionally, the IRS holds the purchaser (transferee) responsible for determining whether the seller is a foreigner and whether the required 10% of gross sales price should be withheld. The withholding of 10% of the amount realized can create a problem under a Section 1031 tax deferred exchange.

Internal Revenue Code Section 1031 permits the deferral of capital gains taxes on the sale of property held for investment or productive use in a trade or a business. The most common type of Section 1031 exchange is a forward exchange, where the proceeds from the property sold (Relinquished Property) are placed with an independent Qualified Intermediary (QI) and are then used to purchase the

continued, next page

Section 1031

from page 1

Replacement Property. The Replacement Property must be of equal or more value than the Relinquished Property and must be "like kind" to the Relinquished Property. The good news is that any type of real property is "like kind" to any other type of real property. If handled correctly, the taxpayer is permitted to defer the payment of all federal capital gains taxes (presently at 15%), all depreciation recapture taxes (25%), and state taxes (generally 8% to 10% where applicable).

The IRS contends in FS-2005-16:

1. Many foreigners have acquired contracts to purchase or options to purchase U.S. real property. The foreigner then sells or assigns their contract to purchase/option, prior to the final purchase occurring. As a result, the final purchaser fails to withhold the 10% of the amount realized (sales price), as required under FIRPTA.
2. Numerous foreign corporations contract to sell their U.S. real property interests. Prior to that sale, the foreign corporation transfers its interest in the U.S. real property, usually by Quit Claim Deed, to their foreign individual shareholder (their beneficial owner). The foreign individual shareholder then sells the U.S. real property interest to the purchaser who originally contracted to buy the property. The foreign individual shareholder then takes the position that the tax should be at the maximum capital gains rate of 15% rather than being subject to the federal corporate income tax rate of up to 35% and/or additional state taxes. The IRS states this is an incorrect position "as the foreign corporation is taxed on all of the gain inherent in the U.S. real property interest…either because the corporation is making a distribution to the foreign shareholder of the U.S. real property interest (which would constitute a deemed sale of such interest at the corporate level) or because the corporation is viewed as selling the entire U.S. real property interest directly to the buyer."

As a Qualified Intermediary, the author realizes that there is an additional problem that needs to be addressed. What happens when a foreign investor signs a contract to sell its U.S. real property interest and prior to closing, the real estate/tax professional and or the foreign investor have not addressed the 10% withholding requirement as delineated in FIRPTA? The escrow agent must hold 10% of the gross sales price if a non-tax determination letter is not received by the closing date.

Should the IRS determine that a tax is due, within 20 days following the Service's final decision on the foreign investor's application for a non-tax determination letter, the escrow agent must then send the 10% withholding to the IRS. A problem arises if the foreign taxpayer decides to transact a Section 1031 tax deferred exchange because the escrow agent now has or has held the 10% funds in its hands. As the escrow agent (closing agent) is not deemed to be independent, the taxpayer becomes immediately subject to being taxed on the 10% withheld funds. This will result in the foreign taxpayer not being able to conclude a Section 1031 tax deferred exchange on the 10% withheld funds. Obviously, this is not a beneficial position for the foreign taxpayer. But there is a solution to this problem.

Either have the foreign taxpayer obtain a tax determination letter from the IRS prior to closing or have the foreign taxpayer place with the escrow agent an additional sum equal to 10% of the withheld funds. The foreign taxpayer will not be taxed on the Section 1031 exchange as the escrow agent transfers 100% of the funds received from the closing to the Qualified Intermediary. At this point in time, the closing agent will still be holding the additional 10% of the sales price paid by the foreign taxpayer which the closing agent will either transfer to IRS or back to foreign taxpayer should the tax determination letter arrive within FIRPTA's specified time limits.

If the funds were delivered to the IRS, the foreign taxpayer, upon proper proof given to IRS that they are transacting a Section 1031 exchange, will have the 10% withholding transferred back to them from IRS. In either case, the foreign taxpayer should still be able to qualify for a Section 1031 tax deferred exchange.

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CFO Gallagher Implements Mediation Program for Storm Damaged Condominiums

By Pete Dunbar, Esq., Pennington, Moore, Wilkinson, Bell, et al., Tallahassee, FL

In early December 2005, Florida's Chief Financial Officer Tom Gallagher rolled out a new mediation program sponsored by the Department of Financial Services to help storm damaged condominium communities resolve insurance claims. The program is patterned after the Department's residential mediation program that has experience a success rate of more than 90% following the 2004 storm events. The new program is being implemented in cooperation with Governor Bush's Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes.

The mediation program offers an alternative dispute resolution process for condominium associations and other commercial-residential properties to resolve hurricane insurance claims prior to pursuing other formal options in the court system. The program is free of charge to the association and using the program does not preclude an association's right to take the dispute to court or to invoke the insurance policy's appraisal clause. The new program was authorized by the 2005 Legislature, but Tom Gallagher's department has extended the program to include unresolved insurance claims from the 2004 storm events.

Mediation proceedings involving condominium property are more complex than those for individual homeowners. The board of directors in its fiduciary capacity serves as the representative for all of the unit owners. To insure that the mediation process is productive and meaningful, the Department of Financial Services and the Division of Land Sales, Condominiums and Mobile Homes have developed a list of requirements for access to the program.

To insure that association is prepared and authorized to mediate the community's claim, the board of directors must approve a certificate of authority designating the individuals who are authorized to represent the condominium association and make decisions on the association's behalf. The certificate must state the name of the condominium, the name of the condominium association, date of the meeting of the board of directors where the designation was made, identify the names of the designated individuals and the authority granted to such individuals. The board must also make the following preparations and assemble the following information for the mediation:

(a) Identify the professional advisor, if any, who will accompany the designated representatives to the mediation conference, together with the address and telephone number of the professional advisor.

(b) Identify the declaration of condominium, or applicable provisions of the declaration, relating to (i) the insurance responsibilities of the association and (ii) the responsibilities of the condominium association and unit owners for maintaining and repairing the condominium property.

(c) Provide an appropriate written, expert analysis of the damage to the condominium property consistent with the fiduciary standards required by the Condominium Act.

(d) Provide an appropriate written analysis of the damage to the condominium property that allocates the estimated damages between the units, the common elements, and the association property in a manner consistent with the community's declaration of condominium.

Condominium mediation meetings will be facilitated by Supreme Court-certified mediators provided through the Collins Center for Public Policy. To learn more about the DFS condominium mediation services, you may call the Department's hurricane hotline at 1-800-22-STORM or visit the DFS website (www.fldfs.com) and click on Condo Mediation button.

ActionLine Publication Schedule

Publication deadlines for upcoming issues of *ActionLine*:

***ACTIONLINE* ISSUE**	**PUBLICATION DEADLINE**
Summer 2006	April 30, 2006
Fall 2006	July 31, 2006
Winter 2006	October 31, 2006

ActionLine is in constant need of brief, newsworthy articles, and readers are invited to submit material for publication. Please forward any proposed articles concerning **real estate, estate planning, probate, guardianship, or articles of general interest** to Dresden Brunner at dresden@comcast.net. The article shold be in Word format. Please do NOT include graphics in the article, unless they are illustrative charts or graphs. Prospective authors may call Dresden Brunner at (239) 580-8104 to obtain additional publication guidelines.

Persons with comments or suggestions for improvement of *ActionLine* may e-mail them to the above address.

Notice 2006-15

Part III – Administrative, Procedural, and Miscellaneous
Extension of June 28, 2005, Safe Harbor Date

Please note that the IRS has released Notice 2006-15 which puts Rev. Proc. 2005-24 on hold. The RPPTL Section's Estate and Trust Tax Committee should be congratulated for their efforts in addressing this issue. A copy of IRS Notice 2006-15 follows.

Sandra Fascell Diamond, Esq.
Williamson, Diamond & Caton, P.A.
Seminole, Florida

The purpose of this notice is to extend the June 28, 2005, grandfather date in Rev. Proc. 2005-24, 2005-16, I.R.B. 909, until further guidance is issued by the Internal Revenue Service.

Rev. Proc. 2005-24 applies to any charitable remainder annuity trust (CRAT) or charitable remainder unitrust (CRUT) that is created by the grantor, *G*, if, under applicable state law, *G*'s surviving spouse, *S*, has a right of election exercisable on *G*'s death to receive an elective, statutory share of *G*'s estate, and such share could be satisfied in whole or in part from the assets of the CRAT or CRUT in violation of § 664(d)(1)(B) or (d)(2)(B) of the Internal Revenue Code.

Rev. Proc. 2005-24 provides a safe harbor procedure under which the Service will disregard the right of election for purposes of determining whether the CRAT or CRUT meets the requirements of § 664(d)(1)(B) or (d)(2)(B) continuously since its creation, if *S* irrevocably waives the right of election in the manner prescribed in the revenue procedure. For trusts created before June 28, 2005, the Service will disregard the right of election, even without a waiver, but only if *S* does not exercise the right of election.

Commentators have asserted that Rev. Proc. 2005-24 places an undue burden on taxpayers and trustees seeking to comply with the safe harbor rule. Some commentators have recommended that the Service withdraw the revenue procedure. Other commentators have suggested alternative safe harbor rules.

The Service and Treasury are reconsidering the approach of Rev. Proc. 2005-24, including the safe harbor rule. The Service and Treasury are also considering alternative safe harbor rules. Consequently, the Service is extending the June 28, 2005, grandfather date. Until further guidance is published regarding the effect of a spousal right of election on a trust's qualification as a CRAT or CRUT, the Service will disregard the existence of such a right of election, even without a waiver as described in Rev. Proc. 2005-24, but only if the surviving spouse does not exercise the right of election.

The principal author of this notice is Susan H. Levy of the Office of Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this notice contact Susan H. Levy at (202) 622-3090 (not a toll-free call).

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- Or visit www.flabarfndn.org/KidsDeserveJustice

This newsletter is prepared and published by the Real Property, Probate & Trust Law Section of The Florida Bar as a SERVICE to the membership.

The Section Council Sees Sarasota

Executive Council Meeting, Sarasota, Florida, November 17 – 20, 2005

By S. Dresden Brunner, Esq., Naples, FL

The Executive Council and Section committees convened in Sarasota for meetings at The Ritz Carlton from November 17 through 19, 2005. Given the numerous Section committees, meetings began as early as 8:00 a.m. on Thursday, November 17 and committees met throughout the day. The evening was concluded with a Welcome Reception at the Mote Aquarium.

Friday, November 18, the committee meetings continued and some committee chairs had sponsors present and introduced them and gave the sponsors a chance to tell a bit about themselves. Numerous areas of the law were addressed through committees such as Advanced Directives, Bankruptcy, Real Property Forms, Guardianship Law and Procedure, Estate and Trust Tax Planning, Title Insurance and Property Rights.

For example, the Estate and Trust Tax Planning Committee, welcoming two sponsors, discussed a statutory fix to Revenue Ruling 2004-64 regarding when an intentionally defective grantor trust provides the trustee with discretion to reimburse the settlor for income tax paid attributable to the trust's income. Such Committee also discussed Florida's current insurable interest statute, Section 627.404, and compared it with other states' statutes.

On Friday, the spouse / guest outing was to Selby Botanical Gardens. The group was given a tour and a class featuring orchids. In the afternoon, the group could enjoy the Ritz-Carlton's High Tea. That evening, cocktails and dinner were served on the outside veranda of The Ringling Museum of Art.

Saturday, November 19 began with the Roundtable Breakfasts for Probate and Real Estate, at which the division reports were presented. Upon adjournment, the Executive Council met. There were many action items addressed through the Probate and Trust Division. The Council approved a proposed section (90.5021) to provide that there is no fiduciary exception to the attorney-client privilege; approved the Guardianship Task Force Omnibus Revisions to Chapter 744; ratified the extension of the contract with Professor David Powell for services as scrivener and consultant for the Ad Hoc Trust Code Revision Committee; ratified the Section's position amending certain sections of the Florida Trust Code; ratified the Section submitting supplemental comments concerning Rev. Proc. 2005-24 to the IRS; and approved proposed section (737.402(5)) to maintain the status quo by providing that such a trust is not subject to claims of the settlor's creditors solely because of the existence of a trustee's discretionary power to reimburse income taxes paid by the settlor on trust income not actually received by the settlor.

Concerning the Real Property Division, the Council approved amendments to Uniform Title Standards, Chapter 8, concerning construction law; approved amendments to the Florida Land Trust Act; and approved real estate forms to be published by FLSSI.

Concerning General Standing Committee, the Council approved the contract with The Remington Agency for maintaining the Section's website and list serves.

Saturday evening featured a barbecue at the Sarasota Sailing Squadron. The traditional Farwell Breakfast was held Sunday morning, November 20.

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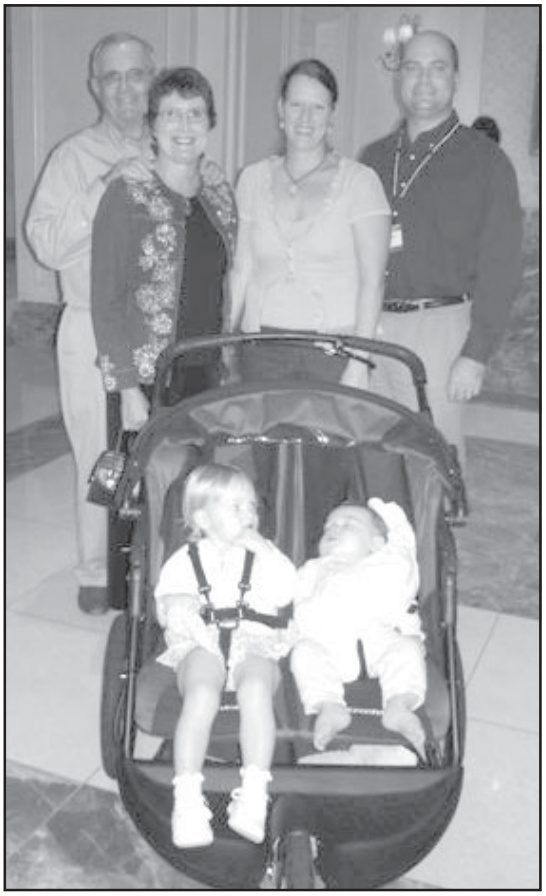
RPPTL Executive Council in Sarasota

The Real Property Roundtable Breakfast on Saturday morning.



Three Generations of Swaines in Sarasota.

The Executive Council meeting.

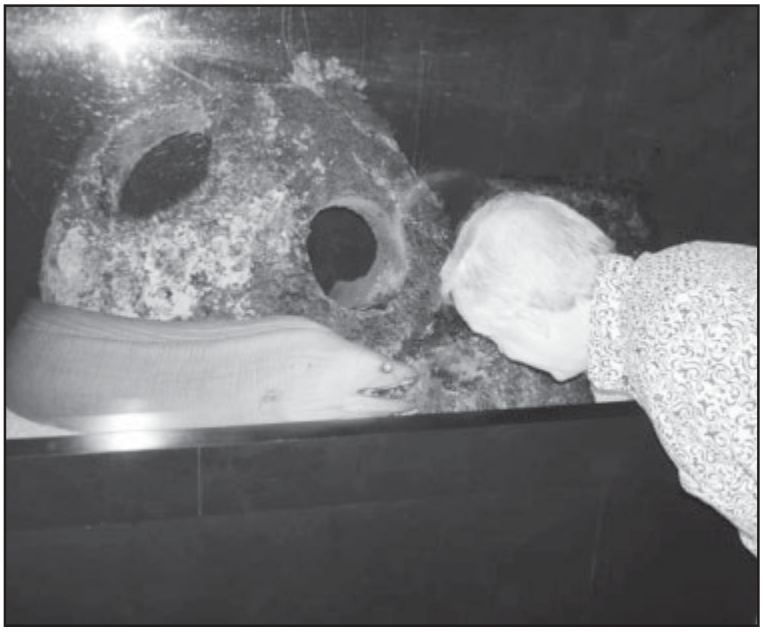
Rob and Sheri Freedman and Leila and Jay Zschau at the beautiful Ritz-Carlton.

At the Ritz-Carlton's High Tea on Friday.

Photos courtesy of John Neukamm and Michael Gelfand

RPPTL Executive Council in Sarasota

Leila Zschau at the Selby Botanical Gardens.



At the Mote Acquarium.

*("When you look in the eye... of an eel swimmming by... that's **A Moray**!')*

There were a lot of interesting creatures to see at the Mote Marine Laboratory and Acquarium during the Thursday Welcome Reception.

Howard and Bendy Payne at the Saturday dinner at the Sarasota Sailing Squadron.

Guy and Suzanne Norris at the Friday dinner at the Ringling Museum of Art.

Self-Directed IRA's

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Whether or not investing an IRA in real estate is prudent, it is nonetheless legal pursuant to the federal tax code. Many practitioners think that this is a new trend when, in fact, it is a technique that has been around for quite some time. In the early days of IRAs, the only place that an IRA owner could go to invest an IRA in real estate or another type of alternative investment was a traditional trust company. If you could meet the minimum account size, which used to be at least $300,000 of investable assets, then the bank might be willing to accommodate the IRA owner's investment preferences. Furthermore, many times real estate was owned within a qualified plan and then rolled into an IRA, once again to be managed by a traditional trust company.

Now, there is a proliferation of IRA providers who specialize in nothing but self-directed IRAs. Many of these providers have minimum account sizes that are as low as the annual IRA contribution limits. These have become available to the average investor, and, as such, they are gaining a lot of attention. There have always been rules to be followed and pitfalls for the unwary. A discussion of such rules and pitfalls follows.

The Rules for IRAs

IRAs are created under Section 408 and 408A of the Internal Revenue Code of 1986, as amended (the "Code"). IRAs can be created by contribution subject to annual dollar limits or by rollover from a qualified plan. Section 408 of the Code requires a written agreement containing certain provisions. The IRS has issued forms 5305 and 5305A as Model IRA Agreements. Form 5305A makes it clear that despite the fact that the IRA owner may direct investments and retain most "traditional" powers that might otherwise create a passive trust, such direction by the IRA owner will not cause the assets of the IRA to be treated as owned by the IRA owner. Many IRA custodians or trustees use these forms as is, but many others choose to modify the sections of the agreement that are allowed to be customized.

IRA Agreements other than Forms 5305 and 5305A must be submitted by the IRA custodian or trustee for approval by the Internal Revenue Service prior to use. All IRAs are required to be held by a trustee or custodian approved by the IRS to hold IRA assets. The IRA owner cannot normally take out distributions prior to age 59 ½ without a penalty, and except in the case of a Roth IRA, must start taking distributions out by April 1st of the year after the year in which the IRA owner turns 70 ½.

No one has any rights in an IRA during the lifetime of the IRA owner except the IRA owner. There is no such thing as an irrevocable beneficiary designation during lifetime because the IRA must always belong to the individual it was established for during the lifetime of that individual. There are no automatic spousal rights in IRAs under federal law as they are not subject to ERISA.

Qualified plans have rules that are basically the same as those for IRAs. There are penalties for withdrawal before the appropriate age, and in some cases, withdrawals are prohibited until retirement or separation from service. All plans will have a written agreement, a trustee and a

continued, next page

plan administrator; but it is important to note that some plans allow the participant to direct investments within their account.

The Prohibited Transaction Rules

There are some additional rules for alternative investing with IRAs. Section 4975 of the Code addresses prohibited transactions. The main focus of this section is self-dealing. If a transaction within an IRA is deemed to be prohibited, it can result in the disqualification of the entire account as of the first day of the tax year within the year that the transaction occurred. This can result in unexpected income tax liability, as well as penalties for early distribution if the IRA owner is under 59 ½.

Although there is no place in the Code that defines permissible investments, Section 4975 of the Code addresses what is prohibited, subject to the following exceptions:

(a) the sale, exchange, or leasing of any property between an IRA and any Disqualified Person;

(b) the lending of money or other extensions of credit between an IRA and any Disqualified Person;

(c) the furnishing of goods, services, or facilities between any Disqualified Person and an IRA;

(d) the transfer to any Disqualified Person or use by any Disqualified Person (or for the Disqualified Person's benefit) of the income or assets of an IRA; or

(e) the receipt by any Disqualified Person of any consideration in connection with a transaction involving my IRA.

A "Disqualified Person," as defined under Section 4975 of the Code, includes, but is not limited to, the following:

(a) the IRA owner;

(b) the IRA owner's spouse;

(c) the IRA beneficiary;

(d) the IRA owner's ancestors and lineal descendants;

(e) spouses of the IRA owner's lineal descendants;

(f) anyone providing services to the IRA, including the IRA Custodian and any investment managers or advisors;

(g) any corporation, partnership, trust or estate in which the IRA owner individually has a 50% or greater interest.

Provided that an IRA does not engage in a prohibited transaction, it is clear from Private Letter Rulings, Department of Labor Rulings and Tax Court Opinions that mere investment in real estate, closely held business interests or other alternative types of investments will not disqualify the account and will allow the IRA owner to enjoy tax-deferred growth.

Unrelated Business Taxable Income and Unrelated Debt-Financed Income

An additional pitfall for the unwary involves possible Unrelated Business Taxable Income ("UBTI"). Retirement plan income that is generated from a trade or business regularly carried on by such account that is not substantially related to its tax-exempt purpose could be subject to UBTI, which is ordinary income at the trust tax rate, payable by the IRA account. Additionally, leveraging of real estate can create Unrelated Debt-Financed Income ("UDFI"). There are numerous exceptions carved out within UBTI and UDFI, but each transaction must be reviewed on a case and fact-specific basis.

Firewalling an IRA

The prohibited transaction rules contemplate a transaction within a particular IRA. As stated previously, if a transaction within an IRA is deemed to be prohibited, it can result in the disqualification of the entire account as of the first day of the tax year within the year that the transaction occurred. One way to protect an IRA owner with substantial IRA assets from such a tax disaster is to segregate any investments that may fall into a "gray area" or that might appear subject to scrutiny into a separate IRA account. By doing so, the IRA owner is only putting that IRA at risk so long as the prohibited transaction is not so egregious as to generate additional penalties beyond the IRA itself. This is one way to, in essence, firewall the IRA so that in the event that a prohibited transaction occurs, it does not disqualify any other retirement assets held by the client.

The Philosophical Debate

Many practitioners believe that investment in such assets as real estate or closely held business entities within an IRA is foolhardy, as the IRA owner is merely trading ordinary capital gains for income tax. The money within an IRA needs to be invested in some balance between equity and income within the IRA investment portfolio. Tax-deferred investments, such as municipal bonds and other tax-free bonds, offer no benefit within an IRA account because there is no tax saving to justify a lower return. As such, IRAs are most commonly geared more for growth because any taxes on such growth are deferred. Growth means equity, and equity in most cases means stock or real estate.

In the case of a stock portfolio, the gain on the stock, were it not in an IRA, would be subject to capital gains tax. Because it is held within an IRA, it is not subject to any current tax at all. At the point that those funds are withdrawn from the IRA, the proceeds from the sale of the stock, including any gains, would be subject to ordinary income tax to the IRA owner, assuming it is a regular taxable distribution. A similar investment in real estate would be treated in the same manner. There are certain losses and other deductions that a non-IRA investment in real estate would provide to the owner, but in terms of the income versus capital gains argument, all equity investments are treated equally. Additionally, there are many IRA owners, such as realtors, real estate attorneys, etc. who may feel more comfortable within the realm of real estate than within the world of Wall Street.

The Trust Issue and the Statute of Uses

Under common law, an IRA meets the simplest definition of a trust, insofar as it is required that one person hold property for the benefit of another. The trustee or custo-

dian must generally be a financial institution unless the trustee can demonstrate to the IRS that it is capable of administering an IRA. Although the IRS considers all IRA custodians to be trustees as well, most IRA agreements offer a choice of some sort of institutionally managed product ("bank-managed") or what is referred to as a "self-directed" account.

In the bank-managed product, the IRA owner is asked to select an investment objective and then to allow the institution to make investment decisions and trade on the account based upon the investment objective established by the IRA owner. In contrast, a self-directed account will have all of the investments chosen by the IRA owner. Sometimes self-directed IRA accounts will be invested in traditional stocks and bonds because the IRA owner has the skill and experience to pick and choose the investments of the account. In other situations, these accounts are invested in alternative types of investments, such as LLCs, limited partnerships, mortgage receivables, promissory notes or real property. On rare occasions, it is possible to find an alternative investment within a bank-managed IRA because the IRA owner has instructed the trustee or custodian to purchase and/or retain the asset, but it is important to note that alternative investments are not products traditionally sold to IRA owners within the context of a bank-managed IRA relationship.

Section 408(h) of the Code expressly states that IRA custodial accounts are treated as IRA trusts so long as the assets of the account are held by a bank, trust company or other specified entity, and that an IRA custodian is treated as a trustee for all Code purposes. In the event that federal taxes (UBIT or UDFI) are imposed on an IRA, the IRA is taxed at the trust tax rate. IRAs are a creature created under federal law, and as such, although federal law may not control state law in regard to real estate, weight should be given to the intent within the tax code.

As previously stated, an IRA would appear to meet the definition of a trust under common law, and Florida has adopted common law. However, there are several ambiguities within the Florida Statutes regarding trusts and the treatment of IRAs which offer conflicting interpretations. The issue that needs clarification is how title to real property is to be taken with respect to self-directed IRAs.

Several title companies have taken the position that if the IRA has a custodian as opposed to a trustee, the IRA is no more than a passive trust under the Statute of Uses, and therefore title to real property cannot vest in the custodian or the account and would vest in the IRA owner. This could be a disastrous result from an income tax standpoint if such a position ever became part of a court decision. In a time when there is great concern over the protection of retirement assets in bankruptcy and other creditor situations, this would certainly seem to open the door for an aggressive creditor to try and attack real property owned by an IRA, and if deemed owned by the owner, attach such real property.

On the surface one would assume that qualified plans would not be potentially impacted by this interpretation because they require a trust agreement. However, depending upon the document, if the plan allows the participant to direct the investments, there is the potential that a similar result might occur under current state law within a plan context.

Currently, the only exception to the Statute of Uses that

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2006 - 2007 Executive Council Meetings

Dates & Reservation Information:

April 19 – 23, 2006
Barcelona, Spain
Artz Hotel (a Ritz property)
(For individual reservations,
please fax +34 932213045)
and reference "Florida Bar 2006 Meeting".
Room Rate $282 USD
Cut-off date: 03/20/2006.

May 25-29, 2006
Section Convention
Hilton Walt Disney World Resort
800-445-8667, Room Rate $165
Cut-off date: 04/23/2006

June 15 – June 18, 2006
Attorney / Trust Officer Liaison Conference
(No Executive Council Meeting)
The Ritz-Carlton Golf Resort, Naples
800-241-3333, Room Rate $163.00
Cut-off date: 05/14/2006

August 10 – August 13, 2006
Executive Council Meeting &
Legislative Update Seminar
The Breakers, Palm Beach
561-655-6611,
Room Rate $160.00 (Superior King)
$175.00 (Deluxe Double)
Cut-off date: 07/19/2006

September 28 - October 1, 2006
Executive Council Meeting
Gaylord Palms, Kissimmee, FL

November 30 - December 3, 2006
Out-of-State Executive Council Meeting
Gaylord Grand Ole Opry,
Nashville, TN

February 22 - 25, 2007
Executive Council Meeting
Vinoy, St. Petersburg, FL

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Additionally, FLSSI is now licensing software vendors to use the official Section forms, which license mandates that the software will prohibit any changes to the text of the form using our font. This gives Probate Judges confidence in the integrity of the forms.

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Respectfully submitted,
Roger O. Isphording,
President

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allows a custodian to take title is found in the Florida Uniform Gift to Minors Act (Section 710.111(1)(e), Florida Statutes). There has never been a proper method for taking title to real estate in IRAs or qualified plans prescribed in the Florida Statutes, and similarly there is not currently an exception for same under the Statute of Uses. One temporary solution, until such time as legislation is passed to rectify this disparity, is to form an LLC to be owned by the IRA. The LLC can then take title to the real estate without the Statute of Uses issue. Be aware, though, that most standard LLC language might not be appropriate for use within an IRA because of default provisions and so special care is needed in drafting.

The Proposed Legislation

An Ad Hoc committee of the Real Property, Probate and Trust Law Section of The Florida Bar (the RPPTL Section), composed of members of the IRA & Employee Benefits Committee and the Title Insurance Committee, has recently proposed a new section, Section 689.072, Florida Statutes, that would carve out an exception for IRAs and Qualified Plans. This proposed statute prescribes the correct manner in which title should be taken to real property purchased within these accounts. This proposed statute is not determinative as to whether an IRA is considered a trust under state law, but rather provides a manner for taking title by creating an exception to the Statute of Uses. This proposed legislation has been approved by the Executive Council of the RPPTL Section as well as The Florida Bar Board of Governors. It is currently pending before the Florida Legislature.

The proposed legislation is designed to provide clarification on this issue of taking title to real property in IRAs and qualified plans. It covers all title taken in a manner consistent with the statute, whether previously recorded or not; sets forth a template for vesting title to IRA custodians and trustees as well as Qualified Plan custodians and trustees; grants powers to the custodian or trustee; and allows further disposition of the property by the custodian or trustee without the joinder of the beneficiary, except in the case of a revocation or termination. This presumes that the custodian or trustee will obtain whatever type of authorization they need from the IRA owner or qualified plan participant subject to the terms of the contractual agreement between the parties.

The proposed legislation further allows third parties to rely on the powers of the custodian or trustee regardless of whether the powers clause is recorded on the deed. Third parties shall have no duty to inquire as to the qualifications of the trustee or custodian. Title conveyed under this section by a custodian or trustee shall be taken free and clear of the claims of the IRA owner, plan participant or beneficiary. It also provides that if notice of revocation or termination of an IRA or qualified plan is recorded, any disposition or encumbrance of such property shall be executed by the custodian or trustee and shall require the joinder of the IRA owner or plan participant.

The proposed statute further provides that the standard of care for a custodian or trustee shall be that observed by a prudent person dealing with property of another. It does not impose fiduciary duties on a custodian that they would not otherwise bear. Finally, notwithstanding the remedial nature of the statute, it will not relieve a custodian or trustee for breach of a contractual agreement with the IRA owner or plan participant.

The proposed legislation also provides that when a provision is recorded that declares the interest to be personal property, that provision shall be controlling for state law purposes. The proposed legislation also defines IRAs and qualified plans pursuant to the Code, and it defines beneficiaries only to be applicable when the IRA owner or qualified plan participant is deceased. Finally, the proposed legislation also specifically excludes transfers under this proposed legislation from the Statute of Uses and states that this proposed legislation shall be remedial in nature and shall be given liberal interpretation.

Conclusion

By submitting this legislation, it was not the intent of the RPPTL Section to speak to whether the investment of real estate in IRAs or qualified plans is an appropriate investment or even a suitable one. Rather, the limited purpose of the proposed legislation was to address a legal disparity that currently exists. Because investment in real estate is a legal investment permissible within the Code, the Section believes that Florida law should clearly delineate how trustees or custodians of IRAs or qualified plans may take title to real estate. The proposed legislation will resolve an apparent disconnect between the Code and the Statute of Uses.

Because these types of investments are gaining popularity and are gaining attention in national media outlets such as *Kiplingers*, the *Wall Street Journal*, and *Power Lunch* on MSNBC, it is imperative that practitioners are aware of the prohibited transaction rules as well as state law issues. Such awareness will allow practitioners to assist clients in complying with the rules, and it will also allow practitioners to provide guidance to clients who wish to engage those transactions that make sense. It will also allow practitioners to steer clients clear of situations that could jeopardize their hard-earned retirement money. If estate planning attorneys and real estate attorneys do not become informed in this area, their clients may seek advice from other legal and financial sources that may not be reputable or may not be as informed on these issues.

NOTICE

To: All members of the Real Property, Probate and Trust Law Section of The Florida Bar.

Pursuant to Article IV, Section 3 of the Bylaws of the Real Property, Probate and Trust Law Section of The Florida Bar, the Long Range Planning Committee met on March 14, 2006 in Tampa, Florida. Present were:

Rohan Kelley, chair	David Brennan
Steve Hearn	Louie Adcock
Ruth Kinsolving	Roger Isphording
William Sherman	Michael Swaine
Louis Guttmann	Robert Goldman
Bruce Stone	Bruce Marger
Laird Lile	Jerry Aron
Edward Koren	J. A. Jones
Chip Waller	Julie Ann Williamson
Wilson Smith	

The following persons were nominated for election as officers of the Section, as Circuit Representatives and Out of State Representatives to the Executive Council:

Chair Elect	Melissa J. Murphy
Real Property Division Director	John Neukamm
Probate Division Director	Sandra Fascell Diamond
Treasurer	W. Fletcher Belcher
Secretary	George J. Meyer
Circuit Representative Director	Margaret Ann Rolando

Circuit Representatives:

Name	Circuit
Bookman, Alan B.	01
Coffield Sachs, Colleen	01
Dudley,Frederick Raymond	02
Dunbar, Peter M.	02
Huszagh, Victor Lee	02
Norris, Guy W.	03
Schnitker,Clay Alan	03
Blackard, Wm. Raymond Jr.	04
Bonnette, Jr.; Harris L.	04
Buzby, Anne Knickerbocker	04
Fisher, Michael W.	04
Flood, Kevin P.	04
Friedrich, Johnnye	05
Potter, Del G.	05
Dickinson, III; Robert C.	06
Fleece, Joseph W. III	06
Fleece, Joseph W. Jr.	06
Peyton, Donald R.	06
Willis, Robert	06
Chiumento, Jr.; Michael	07
Coolidge, Edwin Channing, Jr.	07
Roscow IV, John F.	08
White, Jr.; Richard J.	08
Akins, David J.	09
Scaletta, Anthony J.	09
Schwartz, Randy James	09
Wilder,Charles D.	09
Wohlust, G. Charles	09
Deal, Gregory R.	10
Macbeth, J. Ross	10
Mundy, Craig A.	10
Sheets, Sandra Graham	10
Swaine, Robert S.	10
Batlle, Carlos Alberto	11
Karr, Thomas M.	11
Keshen, Nelson Clive	11
Madorsky, Marsha G.	11
McCaughan, William P.	11
Muir, William Torbert	11
Nostro, Jr., Louis	11
Zeydel, Diana	11
Foreman, Michael L.	12
Payne, L. Howard	12
Schofield, Percy Allen	12
Silberstein, David M.	12
Arnold, Lynwood F. Jr.	13
Henderson, Thomas N.	13
Kightlinger, Wilhelmina F.	13
Platt, William R.	13
Porter, Sandra	13
Young, Gwynne Alice	13
Leebrick, Brian	14
Armstrong, David G.	15
Mussman, Jay	15
Schwartz, Robert M.	15
Kelley, Sean	16
Adams, Daniel Lee	17
Judd, Robert Brian	17
Kelley, Shane	17
Landau, Barbara	17
Rieman, Alexandra	17
Allender, Jerry W.	18
Allender, Steven C.	18
Carroll, Lawrence W. Jr.	18
Heuston, Stephen P.	18
Wattwood, Robert William	18
Thurlow, III; Thomas Henry	19
Gehrke, Charles R.	20
Gravina, Peter	20
Lange, George	20
White, Dennis R.	20

Out of State Representatives to the Executive Council:

John E. Fitzgerald
Michael Stafford
Pamela B. Stuart

This slate of nominees will be voted on by the Section Members at the Election Meeting on Friday evening, May 26, 2006, at the Section's Convention to be held May 25 – 29, 2006 in Orlando, Florida at the Hilton Walt Disney World Resort.

Real Property Case Summaries

By Stephen Edward Silkowski, Esquire, Jacksonville, Florida

Homestead Protections May Be Waived In Contract. *DeMayo v. Chames*, Case No. 3D04-117 (Fla. 3rd DCA Nov. 30, 2005).

DeMayo retained Chames to represent him in a post-dissolution proceeding to modify his child support and alimony obligations. The retainer agreement included the following clause: "The client hereby knowingly, voluntarily and intelligently waives his rights to assert his homestead exemption in the event a charging lien is obtained to secure the balance of attorney's fees and costs". The trial court granted Chames' request to withdraw from representing DeMayo and shortly thereafter entered a final judgment in the sum of $33,207.76 in favor of the law firm. The court expressly enforced the waiver provision of the retainer agreement. The Third District Court of Appeal reviewed this decision of the trial court de novo.

The Florida Constitution exempts homestead property owned by a "natural person" from a forced sale or attachment of a judgment lien, except for judgments for taxes and assessments or obligations incurred directly from the property, such as a mortgage or judgment, to recover the costs of repair of the property. The Florida Constitution provision excepting homesteads from the claims of most creditors has existed in the Constitution in remarkably the same form as the current version for more than 100 years. It is also well established that the homestead statutes are broadly and liberally construed in favor of exemption. The purpose of the homestead exemption is to promote the stability and welfare of the state by securing to the householder a home, so that the homeowner and his heirs may live beyond the reach of financial misfortune and the demands of creditors who have given credit under such law.

Applying this principle of liberal construction, the Florida Supreme Court has construed the prohibition in Article X, section 4 against the divestment of homestead property via a forced sale to include both civil and criminal forfeitures. More recently, the court concluded that Florida's homestead law shields a homestead acquired by a debtor using nonexempt assets, even if done with the intent to hinder, delay, or defraud creditors. In each of these cases, however, the court was careful not to transgress beyond the plain meaning of Article X, section 4 in reaching its result.

Applying this same construct to this case, the District Court of Appeal saw no reason why an owner of homestead property should not be able to waive this constitutional right if he so desired. As the Florida Supreme Court stated, "the homestead exemption . . . was intended simply to guarantee that the homestead would be preserved against any involuntary divestiture [underlining in original] by the courts . . . ." Absent a plain and unambiguous statement in the Florida Constitution to the contrary, the DCA declined to imply a prohibition against a voluntary divestiture of one's constitutional right to homestead protection.

The court was guided to this conclusion by three considerations. First, Article X, section 4 by its terms applies only to "forced sale[s]." The instant case did not concern a forced sale, but rather an arm's-length transaction between adult contracting parties. Although the court was required to liberally construe Article X, section 4 to achieve the purposes for which it was created, it was also bound by the plain language of the provision as adopted by the people of the State of Florida. In this case, the plain language is intended to prohibit "forced sale[s]. There is nothing on the face of the constitutional provision as it presently exists to lead the court to believe that the people of this state intended to prohibit a homeowner from waiving this constitutional right.

Second, an implied prohibition would likely conflict with several express provisions of the Florida Constitution that have long been construed to provide all citizens of this state with both the right to contract and the right to own, use and dispose of one's real property as one deems fit. Third, as a practical matter, DeMayo and many others in his circumstance could achieve the same result by simply exercising the right to mortgage his homestead for the benefit of a creditor. The court believed that the right to waive is one of the "sticks in the bundle of rights" commonly referred to as property, not different in kind from the "right to exclude" or "right to convey" or "right to mortgage." The court was unable to find anywhere in the language of Article X, section 4 an express or implied intent by the state to prohibit the deployment of this stick. These considerations reinforced the court's belief that absent such direction, the residents of this state should be free to order their private world as they see fit.

The court found that older cases holding otherwise were not apposite to the construction of Article X, section 4 as it was reconstituted by the people of this state in the general election of November, 1984, for one important reason. From the date of the adoption of the original homestead law in the Constitution of 1868 through its most recent amendment in November, 1984, one had to be "the head of a family" to claim the exemption. At the general election of 1984, the people of this state dramatically expanded the class of persons who could take advantage of Florida's homestead law by substituting the qualifying phrase "a natural person" for "the head of a family" qualifier in the constitutional provision. For the first time, any resident of the state, whether single, divorced, or widowed, had the legal capacity to assert the exemption if otherwise qualified.

With the effective date of the 1984 amendment on January 1, 1985, the character and purpose of the exemption

continued, next page

completely changed. Although the feature in the law beneficial to those with a legal duty to support remained intact, the provision was transmographied into an entitlement available to all comers in our state should the occasion present itself, without regard to familial or any other value-laden bona fides for which the state might seek to claim a heightened duty to protect. This truth is well illustrated by the decisions of the Florida Supreme Court construing the post-1984 homestead provision.

These post-1984 authorities represent a vastly different vantage by our supreme court of the purpose of our homestead law as it now exists from that earlier yet not so distant time when "homestead was not something to toy with and use as a `city of refuge' from the laws exactions, but rather was . . . a place . . . where integrity, patriotism, and respect for civil and moral values is generated." The present court felt honor bound to follow these more recent authorities.

The court was well aware that it was not its place to overrule a decision of the Florida Supreme Court, nor did it mean to suggest that the wisdom and judgments of its predecessors in the judiciary should not be followed based merely upon the age of a case. However, in this case the court considered, based upon the 1984 amendment to Article X, section 4 and the recent pronouncements of our high court, that prior holdings were not a viable guide to interpreting Article X, section 4 as it presently is constituted.

For the foregoing reasons, the court concluded that DeMayo validly waived his right to the protection of Article X, section 4 in the retainer contract he executed with his counsel, and, accordingly, his homestead property was subject to the lien of the Chames judgment.

A dissent was filed.

Editor's note: I always thought that the foreclosure sale pursuant to a judgment lien is a "forced sale".

Non-exempt assets may be converted into an exempt homestead by being used to pay off a homestead mortgage, even if done with an actual intent to hinder, delay, or defraud creditors.

Willis v. Red Reef, Inc., 2006 Fla. App. LEXIS 751 (Fla. 4th DCA 2006).

The trial court had entered a final judgment determining that Red Reef was entitled to recover from the Willises for fraudulent transfers. The issue on appeal was whether the Willises lost the homestead protection afforded by Article X, section 4(a)(1) of the Florida Constitution by paying off their mortgage with the fraud proceeds. The plain language of the Florida Constitution indicates that homesteads in Florida may not be used to satisfy court judgments except in three specifically enumerated instances: (1) unpaid property taxes for the homestead itself; (2) mortgages for the purchase or improvement of the homestead itself; or (3) mechanics' liens for work performed on the homestead.

The crux of Red Reef's position with respect to the trial court imposing an equitable lien/constructive trust on the Willises' homestead property rested on its interpretation of *Havoco of America, Ltd. v. Hill*, 790 So. 2d 1018 (Fla. 2001). Red Reef argued that the funds used to pay off the mortgage were clearly traceable as being the funds the Willises directly received from their fraudulent conduct. The analysis of this issue, however, is not determined by Red Reef's ability to trace funds to the fraud. The Florida Supreme Court in *Havoco* ruled that Article X, section 4 exempts a Florida homestead, even where the debtor acquired the homestead using non-exempt funds with the specific intent of hindering, delaying, or defrauding creditors. The imposition of equitable liens on homesteads is limited to cases in which the homesteads were purchased with the fruits of fraudulent activity.

In *Havoco*, the funds used to purchase the homestead were not obtained through fraud. The Willises' fraudulently diverting the proceeds of the sale of other property to their own personal accounts is not the "fraud or egregious conduct" that the supreme court indicated could give rise to an equitable lien on homestead property. Red Reef did not provide the Willises with the funds that were used to pay off the mortgage on their homestead.

Red Reef's claim instead arose on a breach of lease action against Ocean One that resulted in a damages award over three years after the fraudulent transfer. The Willises did not fraudulently obtain funds from Red Reef to extinguish the mortgage on their homestead. In essence, non-exempt assets may be converted into an exempt homestead even if this is done with an actual intent to hinder, delay, or defraud creditors. Therefore, the trial court erred in imposing an equitable lien/constructive trust on the Willises' homestead property.

Mortgagor may assign right of redemption to third party who redeems with fourth party's funds dedicated to that purpose.
VOSR Industries, Inc., v. Martin Properties, Inc., 2005 Fla. App. LEXIS 20273 (Fla. 4th DCA 2005).

The mortgagor's privilege to redeem the property before a foreclosure sale becomes final is an old common law right. The Florida Legislature has enacted two statutes touching on this right of redemption. Section 45.031, Florida Statutes, provides generally for judicial sales in foreclosure actions and states that the issuance of the certificate of title confirms the sale. Section 45.0315, Florida Statutes, enforces a statutory right of redemption, but it does not clearly state that it is intended to replace the common law. Neither statute purports to establish or change any law governing whether or how a mortgagor may transfer the right of redemption.

Florida has a strong public policy favoring the free right of transfer of interests in real property. The right of redemption is an innate feature of every mortgage. Equally important, Florida law recognizes the general right to assign common law and statutory rights, unless there is an express prohibition in a statute, or a showing that an assignment would clearly offend an identifiable public policy. There is no statutory prohibition against an assignment of the right of redemption. Moreover, under the common law anyone claiming under the mortgagor could exercise such a right. In this case, VOSR claimed the right of redemption by assignment from the mortgagor.

The buyer at the sale did not show any good reason why the appellate court should refuse to recognize the mortgagor's assignment of the right of redemption in this case. Nor did it show any good reason why the assignee may not exercise that right through funds coming from still another party. As long as the funds are tendered on behalf of the assignee of the right of redemption, as here, and thereby placed unconditionally at the disposition of the Clerk of Court, there is no good reason not to honor the redemption. The buyer argued that allowing redemption under the facts of this case threatened to diminish the pool of those interested in bidding at Clerk's sales, but the very persistence of the buyer in this much prolonged case demonstrated the failing in this argument.

The court concluded that VOSR properly exercised this right of redemption by causing cleared funds to be tendered in its name to the Clerk of Court. For the tender to be effective, VOSR was not required to tender a check from its own account or drawn in its own name. The record established that the funds had been tendered with the consent of the mortgagor and VOSR. There was no reason for the trial court to deny the effect of the redemption.

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FRIDAY, April 7, 2006

8:00 a.m. – 8:25 a.m. **Late Registration**

8:25 a.m. – 8:30 a.m.
Introduction
James A. Herb, Boca Raton - Program Chair
Marilyn M. Polson, St. Petersburg - Program Vice-Chair

8:30 a.m. – 9:20 a.m.
Homestead: Limitations of Devise and Descent, and Unique Issues in Estate Planning Context
Charles Ian Nash, Melbourne

9:20 a.m. – 10:05 a.m.
Disclaimers - What's New in Chapter 739? Everything
Richard Gans, Sarasota

10:05 a.m. – 10:20 a.m. **Break**

10:20 a.m. – 11:15 a.m.
Probate Code Overview
Professor Jani E. Maurer, Boca Raton

11:15 a.m. – 12:30 p.m.
Taxes, Part 1
Professor David F. Powell, Tallahassee

12:30 p.m. – 1:30 p.m. **Lunch (included in registration fee)**

1:30 p.m. – 4:30 p.m.
Taxes, Part 1 (continued)
Professor David F. Powell, Tallahassee

SATURDAY, April 8, 2006

8:30 a.m. – 12:30 p.m.
Taxes, Part 2
Professor David F. Powell, Tallahassee

12:30 p.m. – 1:30 p.m. **Lunch (on your own)**

1:30 p.m. – 2:20 p.m.
Trust Administration
Tami Conetta, Sarasota

2:20 p.m. – 3:10 p.m.
Probate and Trust Litigation
Steve Hearn, Tampa

3:10 p.m. – 3:25 p.m. **Break**

3:25 p.m. – 4:10 p.m.
Elective Share and Other Spousal Entitlements
Linda Griffin, Clearwater

4:10 p.m. – 5:00 p.m.
Certification Committee Member - Exam Preparation
Nancy Freeman, Winter Park

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Seminar credit may be applied to satisfy both CLER and Board Certification requirements in the amounts specified above, not to exceed the maximum credit. Refer to Chapter 6, Rules Regulating The Florida Bar, for more information about the CLER and Certification Requirements.

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REFUND POLICY: Requests for refund or credit toward the purchase of the course book/tapes of this program **must be in writing and postmarked** no later than two business days following the course presentation. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid. A $25 service fee applies to refund requests. Registrants who do not notify The Florida Bar by 5:00 p.m., March 31, 2006 that they will be unable to attend the seminar, will have an additional $30 retained. Persons attending under the policy of fee waivers will be required to pay $30.

HOTEL RESERVATIONS: A block of rooms has been reserved at the Hyatt Regency Orlando International Airport, at the rate of $159 single/double occupancy. To make reservations, call the Hyatt Regency Orlando International Airport direct at (407) 825-1234. Reservations must be made by 3/17/06 to assure the group rate and availability. After that date, the group rate will be granted on a "space available" basis.

Register me for the "2006 Wills, Trusts and Estates Certification Review Course" Seminar

ONE LOCATION: (234) HYATT REGENCY ORLAND INTERNATIONAL AIRPORT (APRIL 7-8, 2006)

TO REGISTER OR ORDER COURSE BOOK/TAPES, BY MAIL, SEND THIS FORM TO: The Florida Bar, CLE Programs, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831. ON-SITE REGISTRATION, ADD $25.00. **On-site registration is by check only.**

Name _____ Florida Bar # _____

Address _____

City/State/Zip _____ Phone # _____

TLH: Course No. 0271R

REGISTRATION FEE (CHECK ONE):

- ❑ Member of the Real Property, Probate and Trust Law Section: $310
- ❑ Non-section member: $335
- ❑ Full-time law college faculty or full-time law student: $182.50
- ❑ Persons attending under the policy of fee waivers: $30
  Includes Supreme Court, DCA, Circuit and County Judges, Magistrates, Judges of Compensation Claims, Administrative Law Judges, and full-time legal aid attorneys if directly related to their client practice. (We reserve the right to verify employment.)

❑ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

METHOD OF PAYMENT (CHECK ONE):

- ❑ Check enclosed made payable to The Florida Bar
- ❑ Credit Card (Advance registration only. Fax to 850/561-5816.) ☐ MASTERCARD ☐ VISA

Signature: _____ Exp. Date: _____/_____ (MO./YR.)

Name on Card: _____ Card No. _____

❑ Enclosed is my separate check in the amount of $50 to join the Real Property, Probate and Trust Law Section. Membership expires June 30, 2006.

COURSE BOOK — AUDIOTAPES — PUBLICATIONS

Private taping of this program is not permitted. **Delivery time is 4 to 6 weeks after April 21, 2006. TO ORDER AUDIOTAPES OR COURSE BOOKS,** fill out the order form above, including a street address for delivery. **Please add sales tax to the price of tapes or books. Tax exempt entities must pay the non-section member price.**

_____ COURSE BOOK ONLY: Cost $35 plus tax TOTAL $ _____

_____ AUDIOTAPES (includes course book)
Cost: $280 plus tax (section member), $305 plus tax (non-section member) TOTAL $ _____

Related Florida Bar Publications can be found at http://bookstore.lexis.com/bookstore/catalog.
Click on "Jurisdictions," then "Florida" for titles.

Certification/CLER credit is not awarded for the purchase of the course book only.

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the course book/tapes must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

THE FLORIDA BAR CLE

The Florida Bar Continuing Legal Education Committee and the Real Property, Probate and Trust Law Section present

2006 Real Estate Certification Review Course

COURSE CLASSIFICATION: ADVANCED LEVEL

One Location: April 7-8, 2006
Hyatt Regency International Airport • 9300 Airport Boulevard • Orlando 32827
407-825-1234

Course No. 0270R

The Real Estate Certification Review Course is intended to provide an update on real estate law, and it may help candidates prepare for a certification examination. Those who have developed the program, however, have had no communication with the certification committee that prepares and grades the examination and they have no information regarding the examination content or format other than the information contained in the exam specifications which are also provided to each examinee. Candidates for certification who take this course should not assume that the course material will cover all topics on the examination or that the examination will cover all topics in the course material. If you have any questions about certification please contact Carol Vaught at 850-561-5738.

FRIDAY, April 7, 2006

8:00 a.m. – 8:25 a.m.
Late Registration

8:25 a.m. – 8:30 a.m.
Introduction
Homer Duvall, St. Petersburg, Program Chair
Robert G. Stern, Tampa, Program Vice-Chair

8:30 a.m. – 9:05 a.m.
FAR/BAR Contract
James R. Mitchell, Orlando

9:05 a.m. – 9:45 a.m.
Case Law and Statutory Update
Eugene E. Shuey, West Palm Beach

9:45 a.m. – 10:20 a.m.
Construction Liens
Charles Cacciabeve, Orlando

10:20 a.m. – 10:35 a.m. **Break**

10:35 a.m. – 11:10 a.m.
Environmental Issues
Roger Schwenke, Tampa

11:10 a.m. – 11:45 a.m.
Title Insurance—Affirmative Coverages
Alan K. McCall, Winter Park

11:45 a.m. – 1:00 p.m.
Lunch (included in registration)

12:30 p.m. – 1:00 p.m.
Real Property Ethical Considerations
Homer Duvall, St. Petersburg

1:00 p.m. – 1:30 p.m.
Commercial and Residential Landlord/ Tenant Issues
David Weisman, Hollywood

1:30 p.m. – 2:00 p.m.
Public Lands and Water Boundary Issues
Alan B. Fields, Naples

2:00 p.m. – 2:30 p.m.
Marketable Record Title Act
Melissa Scaletta, Orlando

2:30 p.m. – 3:00 p.m.
Foreclosures
Alfred LaSorte, West Palm Beach

3:00 p.m. – 3:15 p.m. **Break**

3:15 p.m. – 3:45 p.m.
Florida Homestead
Wilhelmina F. Kightlinger, Tampa

3:45 p.m. – 4:25 p.m.
Condominiums and Condominium Associations
William P. Sklar, West Palm Beach

4:25 p.m. – 5:00 p.m.
Homeowners Associations
Michael J. Gelfand, West Palm Beach

SATURDAY, April 8, 2006

8:25 a.m. – 8:30 a.m.
Opening Remarks

8:30 a.m. – 9:00 a.m.
Documentary Stamp Taxes
E. Burt Bruton, Jr., Miami

9:00 a.m. – 9:30 a.m.
Surveys and Legal Descriptions
Edward Hamann, Orlando

9:30 a.m. – 10:00 a.m.
Tenancies and Conveyancing Issues
Robert M. Schwartz, Boca Raton

10:00 a.m. – 10:15 a.m. **Break**

10:15 a.m. – 10:40 a.m.
HUD-1 Settlement Statement
Roland D. Waller, New Port Richey

10:40 a.m. – 11:05 a.m.
Business Entities
Barry B. Ansbacher, Jacksonville

11:05 a.m. – 11:30 a.m.
Zoning and Permitting
Richard Davis, Tampa

11:30 a.m. – 12:00 p.m.
Bankruptcy Issues
Marsha Rydberg, Tampa

12:00 p.m. – 1:00 p.m.
Lunch (on your own)

1:00 p.m. – 1:30 p.m.
Tax Liens and Tax Titles
Robert Stern, Tampa

1:30 p.m. – 2:10 p.m.
Real Estate Finance Notes & Mortgages—Rent Assignments & Receivership
David R. Brittain, Tampa

2:10 p.m. – 2:45 p.m.
Real Estate Opinion Letters
Roger A. Larson, Clearwater

2:45 p.m. – 3:00 p.m. **Break**

3:00 p.m. – 3:30 p.m.
Land Trusts
Andrew M. O'Malley, Tampa

3:30 p.m. – 4:00 p.m.
Judgments & Judgment Liens
Patricia J. Hancock, Maitland

CLE CREDITS

CLER PROGRAM
(Max. Credit: 16.0 hours)
General: 16.0 hours
Ethics: 0.0 hours

CERTIFICATION PROGRAM
(Max. Credit: 16.0 hours)
City, County & Local Gov't.: 16.0 hours
Construction Law: 16.0 hours
Real Estate Law: 16.0 hours

How to register:	ON-LINE: www.FLORIDABAR.org * NEW * SECURE * FASTER *	MAIL: Completed form w/check.	FAX: 850/561-5816 Form with credit card information.

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HOTEL RESERVATIONS: A block of rooms has been reserved at the Hyatt Regency Orlando International Airport , at the rate of $159 single/double occupancy. To make reservations, call the Hyatt Regency Orlando International Airport direct at (407) 825-1234. Reservations must be made by 3/17/06 to assure the group rate and availability. After that date, the group rate will be granted on a "space available" basis.

Register me for the "2006 Real Estate Certification Review Course" Seminar

ONE LOCATION: (234) HYATT REGENCY ORLANDO INTERNATIONAL AIRPORT (APRIL 7-8, 2006)

TO REGISTER OR ORDER COURSE BOOK/TAPES, BY MAIL, SEND THIS FORM TO: The Florida Bar, CLE Programs, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831. ON-SITE REGISTRATION, ADD $25.00. **On-site registration is by check only.**

Name _____ Florida Bar # _____

Address _____

City/State/Zip _____ Phone # _____

TLH: Course No. 0270R

REGISTRATION FEE (CHECK ONE):

- ❑ Member of the Real Property, Probate and Trust Law Section: $340
- ❑ Non-section member: $365
- ❑ Full-time law college faculty or full-time law student: $197.50
- ❑ Persons attending under the policy of fee waivers: $30
  Includes Supreme Court, DCA, Circuit and County Judges, Magistrates, Judges of Compensation Claims, Administrative Law Judges, and full-time legal aid attorneys if directly related to their client practice. (We reserve the right to verify employment.)

METHOD OF PAYMENT (CHECK ONE):

- ❑ Check enclosed made payable to The Florida Bar
- ❑ Credit Card (Advance registration only. Fax to 850/561-5816.) ☐ MASTERCARD ☐ VISA

Signature: _____ Exp. Date: _____/_____ (MO./YR.)

Name on Card: _____ Card No. _____

❑ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

❑ Enclosed is my separate check in the amount of $50 to join the Real Property, Probate and Trust Law Section. Membership expires June 30, 2006.

COURSE BOOK — AUDIOTAPES — PUBLICATIONS

Private taping of this program is not permitted. **Delivery time is 4 to 6 weeks after April 21, 2006. TO ORDER AUDIOTAPES OR COURSE BOOKS,** fill out the order form above, including a street address for delivery. **Please add sales tax to the price of tapes or books. Tax exempt entities must pay the non-section member price.**

_____ COURSE BOOK ONLY: Cost $35 plus tax TOTAL $ _____

_____ AUDIOTAPES (includes course book)
Cost: $310 plus tax (section member), $335 plus tax (non-section member) TOTAL $ _____

Related Florida Bar Publications can be found at http://bookstore.lexis.com/bookstore/catalog.
Click on "Jurisdictions," then "Florida" for titles.

Certification/CLER credit is not awarded for the purchase of the course book only.

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the course book/tapes must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

THE FLORIDA BAR CLE

The Florida Bar Continuing Legal Education Committee and the Real Property, Probate and Trust Law Section present

Wealth Protection & Counseling in the New Age

COURSE CLASSIFICATION: ADVANCED LEVEL

One Location: April 28, 2006
Tampa Airport Marriott • Tampa International Airport • Tampa, FL 33607
800-564-3440

Course No. 0371R

8:00 a.m. – 8:30 a.m.
Late Registration

8:30 a.m. – 8:45 a.m.
Introduction
Jerome Wolf, Program Chair, Boca Raton

8:45 a.m. – 9:30 a.m.
Current Topics
Michael Singer, Palm Beach Gardens
Barry Nelson, North Miami Beach

9:30 a.m. – 10:15 a.m.
Relationship Dissolution Planning
Elaine Bucher, Boca Raton

10:15 a.m. – 10:30 a.m
Break

10:30 a.m. – 11:15 a.m.
Demystifying and Drafting the Offshore Asset Protection Trust (OAPT)
Alexander Bove, Jr., Boston, MA

11:15 a.m. – 12:00 noon
Planning Under Domestic Asset Protection Trusts (DAPT's)
Richard Popper, Wilmington, DE

12:00 noon – 1:15 p.m.
Lunch (on your own)

1:15 p.m. – 2:00 p.m.
Personal Risk Management
Melinda Barham, Palm Beach

2:00 p.m. – 2:45 p.m.
Surviving the Collision of Asset Protection Planning and Bankruptcy
Paul Avron, Miami

2:45 p.m. – 3:00 p.m.
Break

3:00 p.m. – 4:30 p.m.
Case Study
Barry Nelson, North Miami Beach
Charles Nash, Melbourne
Jerome Wolf, Boca Raton
Honorable Arthur Spector, Fort Lauderdale

CLE CREDITS

CLER PROGRAM
(Max. Credit: 7.0 hours)
General: 7.0 hours Ethics: 0.0 hours

CERTIFICATION PROGRAM
(Max. Credit: 5.5 hours)
Marital & Family Law: 1.0 hours
Wills, Trusts & Estates: 5.5 hours
Tax Law: 5.0 hours

Seminar credit may be applied to satisfy both CLER and Board Certification requirements in the amounts specified above, not to exceed the maximum credit. Refer to Chapter 6, Rules Regulating The Florida Bar, for more information about the CLER and Certification Requirements.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar News) you will be sent a Reporting Affidavit or a Notice of Compliance. The Reporting Affidavit must be returned by your CLER reporting date. The Notice of Compliance confirms your completion of the requirement according to Bar records and therefore does not need to be returned. You are encouraged to maintain records of your CLE hours.

How to register:	ON-LINE: www.FLORIDABAR.org * NEW * SECURE * FASTER *	MAIL: Completed form w/check.	FAX: 850/561-5816 Form with credit card information.

REFUND POLICY: Requests for refund or credit toward the purchase of the course books of this program **must be in writing and postmarked** no later than two business days following the course presentation. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid. A $25 service fee applies to refund requests.

Register me for the "Wealth Protection & Counseling in the New Age" Seminar

ONE LOCATION: (049) TAMPA AIRPORT MARRIOT, TAMPA (APRIL 28, 2006)

TO REGISTER OR ORDER COURSE BOOK/TAPES, BY MAIL, SEND THIS FORM TO: The Florida Bar, CLE Programs, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831. ON-SITE REGISTRATION, ADD $25.00. **On-site registration is by check only.**

Name _____ Florida Bar # _____

Address _____

City/State/Zip _____ Phone # _____

TLH: Course No. 0371R

REGISTRATION FEE (CHECK ONE):

- ❑ Member of the Real Property, Probate and Trust Law Section: $175
- ❑ Non-section member: $200
- ❑ Full-time law college faculty or full-time law student: $100
- ❑ Persons attending under the policy of fee waivers: $0
  Includes Supreme Court, DCA, Circuit and County Judges, Magistrates, Judges of Compensation Claims, Administrative Law Judges, and full-time legal aid attorneys if directly related to their client practice. (We reserve the right to verify employment.)

METHOD OF PAYMENT (CHECK ONE):

- ❑ Check enclosed made payable to The Florida Bar
- ❑ Credit Card (Advance registration only. Fax to 850/561-5816.) ☐ MASTERCARD ☐ VISA

Signature: _____ Exp. Date: _____/_____ (MO./YR.)

Name on Card: _____ Card No. _____

❑ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

❑ Enclosed is my separate check in the amount of $50 to join the Real Property, Probate and Trust Law Section. Membership expires June 30, 2006.

COURSE BOOK — AUDIOTAPES — PUBLICATIONS

Private taping of this program is not permitted. **Delivery time is 4 to 6 weeks after May 12, 2006. TO ORDER AUDIOTAPES OR COURSE BOOKS,** fill out the order form above, including a street address for delivery. **Please add sales tax to the price of tapes or books. Tax exempt entities must pay the non-section member price.**

_____ COURSE BOOK ONLY: Cost $35 plus tax TOTAL $ _____

_____ AUDIOTAPES (includes course book)
Cost: $175 plus tax (section member), $200 plus tax (non-section member) TOTAL $ _____

Related Florida Bar Publications can be found at http://bookstore.lexis.com/bookstore/catalog.
Click on "Jurisdictions," then "Florida" for titles.

Certification/CLER credit is not awarded for the purchase of the course book only.

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the course book/tapes must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

Be Part of the Process!

Join the

RPPTL POLITICAL ACTION COMMITTEE

RPPTL-PAC

Members of the Real Property Probate and Trust Law Section of The Florida Bar and other interested parties have created a Committee of Continuous Existence (RPPTL-PAC) to participate financially in the State elections process. Burt Burton (Chairman), Louis Guttmann (Vice Chairman), Sandra Diamond (Treasurer), Peter Dunbar (Secretary), Steve Hearn, Chip Waller, Jay Zschau, Robert Goldman, Bruce Stone, Melissa Murphy, Charlie Nash and Tom Smith are the current members of the PAC's Board of Directors. RPPTL-PAC is not formally associated with the Section, but the PAC membership believes the interests of the PAC are consistent with the goals and interests of the Section and the PAC officers and members encourage other Section members to join and participate.

RPPTL-PAC intends to meet quarterly in conjunction with meetings of the Section's Executive Council to review pending elections for state officials and members of the Florida Legislature. The PAC also intends to act on recommendations for support of candidates and to make contributions to candidates who support and understand the issues of the Section and its members.

Membership is extended to all who contribute to RPPTL-PAC consistent with the dues schedule listed below.

Each member is entitled to full participation regardless of the amount of the member's contribution. Contributions are not limited to individual checks, and firm and corporate contributions are acceptable. Once the annual contribution is received, the contribution is acknowledged, the contributor is added to the membership roster, and the member will receive all notices and other written communications for the PAC. **Checks should be made payable to "RPPTL-PAC"** and can be mailed or delivered to the PAC advisor, Marc Dunbar, at the following address:

Marc W. Dunbar, Pennington Law Firm, Post Office Box 10095, Tallahassee, Florida 32302-2095, Telephone: (850) 222-3533

Member's Name: _____

Firm Name: _____

Address: _____

City _____ State _____ Zip Code: _____

Phone: (_____) _____ Fax: (_____) _____

DUES SCHEDULE:

(Check your preference)

❑	Regular Member	$50
❑	Century Member	$100
❑	Silver Member	$250
❑	Executive Member	$500
❑	Millennium Member	$1,000
❑	Gold Member	$2,000
❑	Platinum Member	$5,000
❑	Double Platinum	$10,000

Check out *YOUR* RPPTL Section website:

www.flabarrpptl.org

ACTIONLINE BULLETIN BOARD

SPONSORS FOR COMMITTEE MEETINGS

Sponsorships are available for the numerous committees of the RPPTL Section. Sponsors are highlighted during the committee meetings. For more information, contact Charlie Nash (321-984-2440) or Laura Sundberg (407-419-8525), Co-Chairs of the Sponsorship Committee.

SELF-DIRECTED IRAs

For more information about the prohibited transaction rules mentioned in Kristen Lynch's article in this issue, listen to Natalie Choate's speech given at the 40th Annual Heckerling Institute on Estate Planning (2006) about new developments and self-directed IRA investments in real estate.
—Dresden Brunner

RPPTL Convention

May 25 - 29, 2006
Hilton Walt Disney Resort
Orlando, FL
Register Early!
800-342-8060, ext. 5619

Send in Bulletin Board items you can share with others.

(Submission information, right)

This space is dedicated to providing space and opportunity to readers to share practice tips and brief items of general interest to the RPPTL reader. Contributions may be submitted to Jo Claire Spear by fax or email: Fax: (727) 327-8338; email: Joclairespearpa@aol.com. *Each item should be limited to 100 words or less and should contain your name.*

The Florida Bar
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Tallahassee, FL 32399-2300

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