



# State-to-State

Fall 2002

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## NEW YORK OUT-OF-STATE MEETING & CLE

**Dec. 13 - 14, 2002  
New York Bar  
Association**

See pages 5 & 6 for  
CLE registration  
information.

## Division Remains Active: Members in the Limelight

by E. Duffy Myrtetus, President



Since the last OOSPD *State-to-State* newsletter, a number of our division members have been recognized in *The Florida Bar News* and elsewhere, relative to division and bar related matters.

First, I had the opportunity to write and congratulate A. Thomas Levin, Esq., upon his recent election as president-elect of the New York State Bar. Mr. Levin is a Florida licensed attorney and is a member of the division. As best I

can tell, his election is unprecedented in the relatively brief history of the division. He has agreed to be the division’s special guest at a joint cocktail reception for the Bar’s Board of Governors in New York on December 13, 2002, in conjunction with the BOG’s out-of-state meeting. This is a rare opportunity to highlight for our colleagues at The Florida Bar the reach and prominence of our OOSPD membership. I look forward to reporting to you the events scheduled in New York— please remember that Richard Tanner has again worked his magic in organizing our annual

See “President’s Letter,” page 2

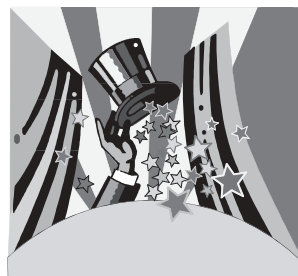
## OOSPD Takes Its CLE Back to NYC

On December 14, the division will present its annual continuing education program for the New York area. That program, “Expanding Florida Law for the Out-of-State Practitioner” will open— off Broadway, of course— at the Bar Association of the City of New York at 42 West 44th Street.

The producer, Chair Richard Tanner, promises a rollicking rendition of old favorites and new themes put together for the Metropolitan Area practitioner who has need for a working acquaintance with trendy Florida law topics.

This year’s assessment by the critics is not out yet, but since the program is a revival, we know that it is a traditional smash hit and always well received by that tough-to-please New York audience.

The performers, all long-time stage stal-



warts at their respective topics, each get a full 70 minutes to make an impression on you and save you research time by answering your questions.

You can expect updated and informative soliloquies from great names in the field, such as Tom Begley, Ian Comisky, Stuart Morris, Philip Baumann

and Ky Koch.

Expect to be entertained and challenged by the array of topics, which runs the gamut from divorce issues to Medicaid planning, from estate planning tips to protecting yourself and others under the new federal whistleblower laws.

- Collect 7.0 hours of advanced CLE credit as a bonus.
- Enjoy a buffet lunch at no extra cost to you.

See “New York,” page 9

## President's Letter

from page 1

OOSPD CLE presentation in New York, which is slated for December 14, 2002, in New York City.

I want to recognize Richard Tanner on his recent appointment to the Executive Committee of the Board of Governors. I believe that this leadership position with the Bar is also unprecedented among OOSPD members. Our OOSPD representatives on the Board of Governors continue to work hard on behalf of the division's membership in matters of Bar governance and administration. Congratulations to Richard and good luck with the new challenges of his leadership position with the BOG.

Ian Comisky contributed recently to an article in the September 15, 2002, issue of *The Florida Bar News* on the rules relating to an attorney's

ability to report past corporate misconduct by a client. Ian has worked with the Professional Ethics Committee and the Board of Governors on this issue.

In other recent Bar related news, President Tod Aronovitz has announced that he is looking for board members to serve on a special committee to review the ABA's 10-point recommendations on multi-jurisdictional practice. The committee will submit a report to the BOG and then to the Supreme Court either during the current Bar year or the following year. I have written to Mr. Aronovitz and to John Yanchunis, who was appointed to chair the committee, to volunteer the assistance of the division's resources and members. If you have any interest in participating in this effort, please contact me. I have made it clear in the past that I view this as an area where our membership has a direct interest and

should be proactive at the Bar level. The attendance at the annual meeting CLE seminar last June certainly confirms the prominence of multi-jurisdictional issues in the profession and at the Bar.

Finally, I am always looking for new resources to help with my practice in Florida from out-of-state. I noted in a recent *Florida Bar News* article that the Bar's Technology Task Force is actively pursuing a Florida Bar Web portal. Free legal research will be the centerpiece of the portal; however, numerous other services to benefit the Florida practitioner are being considered, such as e-mail, document storage, a calendar function, the ability to interface with Palm Pilots and other handheld devices, compatibility with the Microsoft Outlook program, and links to news and information services. The final service anticipates offering the ability to customize services and information sources tailored to a specific practice area or discipline. I plan to follow this initiative closely and will provide updates from time to time.

Many of you have responded to the request for comments on the division's activities, your concerns, CLE preferences, and suggestions for better serving our membership. Please continue to provide that feedback and feel free to contact me if there is anything the division or the Bar can do to be of help in your practice.



**New York CLE:**  
**"Expanding Florida Law for the  
 Out-of-State Practitioner"**  
*See pages 5 & 6.*

## Mark Your Calendar!

### December 13, 2002

OOSPD Executive Council Meeting  
 New York, NY

### December 14, 2002

OOSPD New York Seminar  
 New York, NY

### January 17, 2003

The Florida Bar Midyear Meeting  
 OOSPD meeting afternoon  
 (w/conference call)  
 Miami, FL

### June 27, 2003

The Florida Bar Annual Meeting  
 Orlando, FL

## State-to-State

The publication of the Out-of-State Practitioners Division of The Florida Bar

Edward Duffy Myrtetus, Richmond, VA .....	President
Scott E. Atwood, Atlanta, GA .....	President-elect
John C. Voorn, Orland Park, IL .....	Secretary
Dennis A. Donet, Coral Gables, FL .....	Treasurer
Arlee J. Colman, Tallahassee, FL .....	Division Administrator
Dennis A. Donet, Coral Gables, FL .....	Editor
Susan Trainor, Tallahassee, FL .....	Staff Editor
Lynn M. Brady, Tallahassee, FL .....	Layout

*State-to-State* is devoted to Florida and multi-jurisdictional legal matters. It is editorially reviewed and peer reviewed for matters concerning relevancy, content, accuracy and style. *State-to-State* is mailed to over 1,200 legal practitioners throughout the United States.

Statements or expressions of opinion or comments appearing herein are those of the contributors and not of The Florida Bar or the division.

The deadline for the Spring 2003 issue is **April 30, 2003**. Articles should be of interest to legal practitioners with multi-jurisdictional practices. Please submit articles in rich text format (rtf) via e-mail to Susan Trainor, editor@ctf.nu. Please include a brief (2-3 sentence) biography and photograph of the author. If a digital photo is not available, please mail a print to The Florida Bar, OOSPD, 650 Apalachee Parkway, Tallahassee, FL 32399-2300.



# Division News



## OOSPD Membership Increases

As of August, the OOSPD total membership increased a little more than seven percent over last year's membership roll, one of our best membership increases ever. At the end of August, our total membership listed 1,516 members—an increase of 109 new members over last year's total of 1,407. This trend reflects the continued growth of constituent Florida licensed attorneys who are located outside of Florida. Please encourage colleagues who are out-of-state Florida attorneys to join our ranks. To bring the impact of our membership into focus, the OOSPD represents roughly two percent of the Bar's total membership of 70,790.

The Executive Council is actively looking at new ways to grow the division's membership and to provide valuable information and Bar related services to our

members. Please send any suggestions or comments on membership matters to Duffy Myrtetus, [edmyrtetus@kaufcan.com](mailto:edmyrtetus@kaufcan.com), or call him at 804/771-5750.

## Notice of Executive Council Meetings

The Executive Council will meet on Friday, December 13, 2002, 4:00 - 6:00 p.m. at the Drake Hotel in New York City. This meeting will be conducted in conjunction with the Board of Governors out-of-state meeting in New York. The division meeting will precede a joint cocktail reception with the Board of Governors, sponsored by the OOSPD and the Inter-

national Law Section. A. Thomas Levin, Esq., president-elect of the New York State Bar, will be the division's special guest. Also, the division will hold its annual New York CLE on Saturday, December 14, 2002. If you would like to attend either meeting, please contact Arlee Colman, [acolman@flabar.org](mailto:acolman@flabar.org), or call 850/561-5625.

## ★ Board of Governors Update ★

## Notice of Proposed Amendments to Rule 4-8.4(i)

At the request of the Supreme Court of Florida and specifically on the referral of Justice Pariente in the case of *The Florida Bar v. John Newman Bryant*, the Disciplinary Procedure Committee (DPC) of the Board of Governors has proposed certain amendments to the rules prescribing attorney and client sexual conduct. The DPC has submitted certain proposed changes to the rule, which generally expand the scope of proscribed sexual conduct between an attorney, client or a representative of

a client. The Rules Committee of the Board of Governors has requested that the division provide comments concerning the proposed amendments. These proposed amendments to Rule 4-8.4(i) of the Rules of Professional Conduct are available for review at the Bar's website at [www.flabar.org](http://www.flabar.org). If you would like more information about these proposed rule amendments, please call Duffy Myrtetus at 804/771-5750 or contact him by e-mail at [edmyrtetus@kaufcan.com](mailto:edmyrtetus@kaufcan.com). The deadline for sub-

mitting comments is January 24, 2003.

### Call to Service

All OOSPD members are asked to consider service on one or more standing committees. In particular, please consider the open position for the Board of Legal Specialization. This year the committee preference form will only be available on our website, [www.flabar.org](http://www.flabar.org). It will be posted on December 1, with a January 10, 2003, deadline. The form can be filled out and submitted online, which will eliminate having to mail or fax it to the Bar. It is in the same format as usual and should only take a minute to complete and submit. Please remember it cannot be submitted without your attorney number. If you have any questions, please call Duffy Myrtetus, 804/771-5750.

## BOG Meeting

The Board of Governors met in Coconut Grove on October 25, 2002. This meeting marked the first time that the Bar has commenced periodic review of procedural rule amendments, which are now reviewed on a staggered two-year cycle. Additionally, the BOG considered court funding issues raised by the Criminal Law Section, relative to the constitutionally mandated deadline of July 1,

2004, for additional state funding of trial courts. The BOG also received an update from the Technology Task Force on the proposed new Bar Internet portal. This newsletter will continue to provide updates on the development and implementation of the Bar's Internet portal. Finally, the BOG created an Education Law Section, which is a new substantive law section for the Bar.

# ★ Division News ★

## THE FLORIDA BAR OUT-OF-STATE PRACTITIONERS DIVISION

### DIRECTORY QUESTIONNAIRE

We are collecting data revisions for the next membership directory publication. The address and information printed in the directory will appear unless you wish to include additional information or make changes as indicated on this form.

Is this: ☐ an UPDATE? OR ☐ a NEW LISTING?

**Please type or print all information.**

Name: \_\_\_\_\_ Florida Bar No.: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Phone: (       ) \_\_\_\_\_ FAX: (       ) \_\_\_\_\_

E-mail address: \_\_\_\_\_

Other State Bar Admissions: \_\_\_\_\_

**A change in an address, phone number, fax number or e-mail constitutes an official change to your membership record.** *(Name changes require a petition to the Supreme Court.)*

**AREA OF PRACTICE —**  
**Check appropriate code denot-**  
**ing primary area of practice for**  
**publication in the practice area**  
**listing. Please limit to two areas**  
**for space purposes.**

- (    ) 1. Financial Institutions
- (    ) 2. Bankruptcy
- (    ) 3. Business
- (    ) 4. Business Litigation
- (    ) 5. Commercial Transaction
- (    ) 6. Corporate
- (    ) 7. Criminal
- (    ) 8. Estate Planning/Probate
- (    ) 9. Family
- (    ) 10. Government
- (    ) 11. Immigration
- (    ) 12. Intellectual Property

- (    ) 13. International
- (    ) 14. Insurance Defense
- (    ) 15. Litigation, Civil
- (    ) 16. Litigation, Malpractice
- (    ) 17. Other
- (    ) 18. Professional Ethics
- (    ) 19. Real Estate
- (    ) 20. Securities
- (    ) 21. Tax
- (    ) 22. Personal Injury
- (    ) 23. Labor & Employment
- (    ) 24. Worker's Comp.
- (    ) 25. General Practice
- (    ) 26. Health
- (    ) 27. Environmental
- (    ) 28. Elder
- (    ) 29. Construction
- (    ) 30. Maritime/Aviation
- (    ) 31. Appellate

Are you certified?  
If so, in which area: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Mail to:  
**The Florida Bar**  
**Out-of-State Practitioners**  
**Division**  
**650 Apalachee Parkway**  
**Tallahassee, FL 32399**

Any changes can be made on the Florida Bar's website ([www.flabar.org](http://www.flabar.org)). or by faxing this form to 850/561-5825, c/o Arlee Colman, program administrator. **DEADLINE: December 30, 2002.**





**THE  
FLORIDA  
BAR  
CLE**

The Florida Bar Continuing Legal Education Committee and the  
Out-of-State Practitioners Division present

# Expanding Florida Law for the Out-of-State Practitioner

**COURSE CLASSIFICATION: ADVANCED LEVEL**

**ONE LOCATION:**

**December 14, 2002 • New York City Bar Association  
42 West 44th Street, New York, NY 10036**

**Course No. 5270R**

An advanced overview addressing Florida family and elder law areas (aged and cutting edge) which impact out-of-state practices regularly. The topics, ranging from divorce law to Medicaid planning, are presented by an outstanding faculty of speakers, auditioned and collected by your Florida Bar Out-of-State Practitioners Division, for their working topical knowledge and communication skills. This is a program suitable for "The Big Apple" audiences, and relying on the past reviews, one not to be missed.

8:15 a.m. - 8:45 a.m.

**Late Registration**

8:45 a.m. - 9:00 a.m.

**Introductions and Opening Remarks**

*Richard Tanner, Montclair, NJ*

9:00 a.m. - 10:10 a.m.

**Florida Divorce Law Clinicals**

*Ky M. Koch, Clearwater, FL*

10:10 a.m. - 10:20 a.m.

**Break**

10:20 a.m. - 11:30 a.m.

**The Sword of Damocles:**

**Attorney Fees under the New Section 57.105.**

*Phillip A. Baumann, Tampa, FL*

11:30 a.m. - 12:40 p.m.

**Hot New Tips in Florida Estate Planning**

*Stuart Morris, Boca Raton, FL*

12:40 p.m. - 1:30 p.m.

**Lunch** (included in registration fee)

1:30 p.m. - 2:40 p.m.

**Keeping Your Client and Yourself Out of Jail:**

**Whistleblower Implications of USA Patriot Act and Kin**

*Ian Comisky, Philadelphia, PA*

2:40 p.m. - 2:50 p.m.

**Break**

2:50 p.m. - 4:00 p.m.

**Medicaid Planning: Road Maps for Couples**

*Tom Begley, Jr., Moorestown, NJ*

## **OUT-OF-STATE PRACTITIONERS DIVISION**

Duffy Myrtetus, Virginia — President

Scott Atwood, Georgia — President-elect

Richard Tanner, New Jersey — CLE Chair

## **CLE COMMITTEE**

Gerald D. Damsky, Chair

Michael A. Tartaglia, Director, Programs Division

## **CLE CREDITS**

### **CLER PROGRAM**

(Max. Credit: 7.00 hours)

General: 7.00 hours

Ethics: 0.0 hours

### **CERTIFICATION PROGRAM**

(Max. Credit: 1.50 hours)

Business Litigation: 1.50 hours

Civil Trial: 1.50 hours


Elder Law: 1.50 hours

Marital & Family Law: 1.50 hours

Wills, Trusts & Estates: 1.50 hours

Credit may be applied to more than one of the programs above but cannot exceed the maximum for any given program. Please keep a record of credit hours earned. RETURN YOUR COMPLETED CLER AFFIDAVIT PRIOR TO CLER REPORTING DATE (see Bar News label). (Rule Regulating The Florida Bar 6-10.5).

## HOW TO REGISTER

 **MAIL**  
Completed form  
with check

 **FAX**  
With credit card info.  
to 850/561-5816

 **PHONE**  
850/561-5831  
M-F 8:00 - 5:30

 **ON-LINE**  
www.FLABAR.org

**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 \$15 service fee applies to refund requests. Registrants that do not notify The Florida Bar by 5:00 p.m., December 6, 2002, that they will be unable to attend the seminar, will have an additional \$25.00 retained. Persons attending under the policy of fee waivers will be required to pay \$25.00.



### Register me for the "Expanding Florida Law for the Out-of-State Practitioner" Seminar

**ONE LOCATION: (181) NEW YORK CITY BAR ASSOCIATION, NEW YORK, NY (DECEMBER 14, 2002)**

TO REGISTER OR ORDER COURSE BOOK/TAPES BY MAIL, SEND THIS FORM TO: The Florida Bar, CLE Programs, 650 Apalachee Parkway, 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 \$15.00. **On-site registration is by check only.**

Name \_\_\_\_\_ Florida Bar # \_\_\_\_\_

Address \_\_\_\_\_

City/State/Zip \_\_\_\_\_ Phone # \_\_\_\_\_

**AJC: Course No.5270R**

#### REGISTRATION FEE (CHECK ONE):

- ☐ Member of the Out-of-State Practitioners Division: \$135.00
- ☐ Non-section member: \$150.00
- ☐ Full-time law college faculty or full-time law student: \$87.50
- ☐ Persons attending under the policy of fee waivers: \$25.00

*Includes Supreme Court, DCA, Circuit and County Judges, General Masters, 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

Name on Card: \_\_\_\_\_

Card No. \_\_\_\_\_

Signature: \_\_\_\_\_ Exp. Date: \_\_\_\_/\_\_\_\_ (MO./YR.)



- ☐ 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 \$20 to join the Out-of-State Practitioners Division. Membership expires June 30, 2003.

## COURSE BOOK – AUDIOTAPES

Private taping of this program is not permitted.

**Delivery time is 4 to 6 weeks after December 14, 2002. TO ORDER AUDIO/VIDEO TAPES 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 \$30 plus tax TOTAL \$ \_\_\_\_\_

\_\_\_\_\_ AUDIOTAPES (includes course book)

Cost: \$135.00 plus tax (section member), \$150.00 plus tax (non-section member) TOTAL \$ \_\_\_\_\_

**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.

# Enhanced Life Estates – An Underwriting Update

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by Ted Conner, Fund Senior Underwriting Counsel

The use of an “enhanced” life estate, or “Lady Bird Deed,” has gained in popularity in recent years. Attorneys specializing in estate planning and elder law are using this tool with increasing frequency. See Solkoff, “Life estate deeds,” *Elder Law Section Newsletter*, Vol. II, No. 2 (June 1993); and “Fund Insures Enhanced Life Estates,” 31 *Fund Concept* 124 (Aug. 1999). THE FUND expresses no opinion on the efficacy of such deeds for their intended purpose; rather, the purpose of this article is to discuss the effect of such deeds on title to real property and THE FUND’s requirements relating to the instruments. Considerations relating to the advantages or disadvantages of the deeds for estate planning or other purposes are beyond the scope of this discussion.

## Background

Division of the fee interest in real property into a life estate and a remainder interest has a long history dating back to English common law. As a tool for estate planning, several drawbacks are present. The life tenant may not convey or mortgage the property without joinder of the remainderman; the property will be subject to creditors of the remainderman; and the life tenant is responsible to the remainderman for acts that would devalue the remainder interest. It is possible to address the first concern by including, at the time of creation, the authority to divest the remainder interest. Description of such enhanced life estates as “Lady Bird deeds” stems from published examples utilizing Lady Bird Johnson as a party.

Vested remainders may be divided into three categories. They may be (1) indefeasible vested remainders; (2) vested remainders subject to open, such a transfer to a class; or (3) vested remainders subject to complete defeasance. See 2 Boyer, *Florida Real Estate Transactions*, Sec. 22.04; and 1 Simes and Smith, *The Law of Future Interests* (2d ed. 2001), Sec. 113. The interest created by a Lady Bird deed would appear to be a vested re-

mainder subject to complete defeasance, also referred to as divestment.

This conclusion is supported by *Oglesby v. Lee*, 73 So. 840 (Fla. 1917). In this case, a grantor conveyed property to his daughter, retaining a life estate and the power to sell the property. The deed also stated that if the grantor/life tenant sold the property, the proceeds of “said second sale” would be given to the daughter in lieu of the remainder interest. The father sold the fee interest in the property to a third party. After the father’s death, the daughter then brought an action to have the deed to the third party declared void. The third party answered, stating that the conveyance to the daughter was either a will or a deed with a reservation or condition. The trial court held for the daughter. The Florida Supreme Court reversed the trial court and upheld the conveyance to the third party. The court relied only upon the fact that the deed was a gift from the father to the daughter, and the reservation of authority to sell was “clearly contemplated” in the deed. The court focused on the power contained in the deed and did not treat the deed as a testamentary instrument. The court’s opinion does not indicate whether the daughter received the proceeds of the sale to the third party. If she had, we may have seen an additional equitable defense that the daughter was seeking to obtain the property after receiving the proceeds of the sale.

The *Oglesby* case was cited with favor in a Kentucky case, *Ricketts v. Louisville, St. L. & Ry. Co.*, 15 S.W. 182 (Ky. 1891), where the court upheld a complete power of revocation in a deed from a mother to son. Additional Florida cases have recognized a life estate with the power to convey when created by a devise. See *Green v. Barrow*, 8 So.2d 283 (Fla. 1942); *Sanderson v. Sanderson*, 70 So.2d 364 (Fla. 1954); and TN 2.11.06.

Other states have held that the retained power to convey the fee is invalid, as it is inconsistent with the grant of the fee interest. See *Lucareli v. Lucareli*, 614 N.W.2d 60 (Wis. App.

2000), wherein the court stated, “the tax law tail does not wag the property law dog.” In Kansas, the power to completely revoke a deed was held to be against public policy, *Yordy v. Yordy*, 217 P.2d 912 (Kan. 1950). While there may be a split of authority between the states, Florida law supports the reserved authority to convey the fee.

The following addresses THE FUND’s underwriting position regarding issuing a Fund policy to a bona fide, arm’s length purchaser for value from the life tenant exercising a retained power of sale or the remainderman after the death of the life tenant. The creation of the life estate contemplated by this article, and commonly employed, will be by conveyance of a remainder interest with a retained power to convey the fee.

## Revocation

THE FUND will *not* insure a subsequent conveyance seeking to revoke the remainder interest and vest it in a different person. Such conveyances will generally be a gift, and THE FUND typically does not insure a gift of property. TN 10.03.08. It is not clear that a pure revocation of the vested remainder back to the grantor independent of a conveyance to a third party is contemplated by the typical language. The language contained in the vesting deed will likely be narrowly construed by the courts. Experience with judicial interpretation of powers of attorney teaches us that it is the factual situations involving abuse of such instruments that find their way to appellate courts. Such factual situations often result in case law that greatly restricts the use of the instruments. TN 4.02.03.

## Testamentary treatment

An obvious question is whether a deed creating an enhanced life estate is a testamentary instrument, which must be executed with the formalities of a will to effectively pass title to the remainderman after the death of the life tenant. In *Zuckerman v.*

*continued...*

## Enhanced Life Estates

from page 7

*Alter*, 615 So.2d 661 (Fla. 1993), the Florida Supreme Court held that a revocable trust is not a testamentary instrument and would not have to be executed with the formalities of a will. The court stated that if the Legislature wanted to require such formality of execution, the Legislature would have to amend the statute, which was later done for revocable trusts in Sec. 737.111, F.S. If a revocable trust, which is a "contingent equitable interest in remainder," is not a testamentary instrument, then it is unlikely that a vested remainder subject to complete defeasance, created by an enhanced life estate, would be considered a testamentary interest. Additionally, it could be observed that the difference in formality of execution of a will and a deed is only that the witnesses must sign in the presence of each other and the testator with a will. This is probably done in the vast majority of deeds as well; it just is not documented on the deed.

### Homestead

The effectiveness of an enhanced life estate deed as an estate-planning tool may be called into question when utilized with homestead property by a grantor who is survived by spouse or minor child. Art. X, Sec. 4(c), Fla. Const. 1968 (as amended), prohibits the devise of homestead property if the owner is survived by spouse or minor child. *In re Estate of Johnson*, 397 So.2d 970 (Fla. 4th DCA 1981),

expanded the application of the constitutional provision to revocable trusts. Florida courts have shown a long history of protecting homestead property and have exercised every opportunity to extend homestead protections. In the event the grantor/life tenant dies survived by a spouse or minor child, the remainderman's ownership of the property may be called into question. THE FUND will not insure a subsequent conveyance unless constitutional homestead issues are addressed.

### Creation

There is no statutory form or specific language that must be used. An example of language THE FUND would recognize would be the following provision.

SAM JONES and MELINDA JONES, his wife, Grantors, to: SAM JONES and MELINDA JONES, for a life estate, without any liability for waste, and with full power and authority in said life tenant to sell, convey, mortgage, lease or otherwise manage and dispose of the property described herein, in fee simple, with or without consideration, without joinder of the remainderman, and with full power and authority to retain any and all proceeds generated thereby, and the remainder to DOUGLAS JONES, a single man and JENNIFER JONES, a single woman, as Grantees.

### Conveyance by life tenant

If the life tenant elects to exercise the reserved authority and convey

the property, only the life tenant's name needs to appear in the "grantor" portion of the deed with a reference that the conveyance of the entire fee interest is being made pursuant to the authority in the vesting deed. An example would be: "SAM JONES and MELINDA JONES, his wife, convey the entire fee interest in the property described below."

### Judgments

Judgments against the life tenant may constitute a lien on the property and would have to be cleared by satisfaction or partial release. If the property constitutes the homestead of the life tenant, Sec. 222.01, F.S., may be available to clear the lien. Judgments against a remainderman may create a lien against the remainder interest. TN 18.03.06. Homestead status does not attach to remainder interests, even if the remainderman is residing on the property. *Aetna Ins. Co. v. LaGasse*, 223 So.2d 727 (Fla. 1969). There have not been any appellate decisions addressing the question of whether a judgment lien against a remainderman could be divested by a life tenant holding a retained power to convey. Arguably a judgment creditor would not have any greater rights than the remainderman and could thus be divested as well. THE FUND will consider the possible divestment of state judgments liens on a case-by-case basis.

### Federal tax liens

Federal tax liens against the life tenant would attach and must be addressed. There is a lack of precedent to provide a guide with respect to federal tax liens against remaindermen who may be divested by life tenants. In recent years the IRS has exercised its federally created lien rights in areas that state law has not permitted private creditors. In *Drye v. U.S.*, 120 S.Ct. 474 (1999), property was devised to the decedent's son. The IRS had previously filed a federal tax lien against the son. The son properly disclaimed the property. The court found that under state law the disavowing heir's creditors may not reach disclaimed property. The court further found that while property rights are created and defined by state law, state law is inoperative to prevent the attachment and enforcement of federal liens. It was held that 26 U.S.C., Sec.

## Author! Author!

The Out-of-State Practitioners Division offers its membership a valuable forum for the exchange of information on legal issues affecting our interstate practices. To be truly effective, it is essential for a larger cross-section of our members to contribute articles, news and announcements to this newsletter.

For those of you who would like to see your work in print, the rules for publication are simple: The article should be related to a subject of general interest to legal practitioners with multi-jurisdictional practices. Articles focused on your home state are less appealing than issues impacting a number of jurisdictions.

Please send document in rich text format (rtf) via e-mail (editor@ctf.nu).

Please help your colleagues to get to know you by including a brief (two or three sentence) biography and include a head and shoulders photograph. If you do not have a digital photograph, please mail a print to The Florida Bar, OOSPD, 650 Apalachee Parkway, Tallahassee, FL 32399-2300. Your photo and bio will be kept on file and need only be submitted once.



6334, provides an exclusive list of items that are exempt from levy and that disclaimed inheritances are not on the list. With consideration given to the fact that it was the debtor's action to disclaim the property, the court sustained the lien against the property. While it would not be the remainderman's action to divest his interest, there is no precedent to prevent the IRS's ability to levy against the vested remainder once it had attached.

More recently, the United States Supreme Court has held that a federal tax lien against one spouse attaches to that spouse's interest in entirety property. *United States v. Craft*, 122 S.Ct. 1414 (2002). Taken together, these cases indicate unwillingness by the IRS to be bound by the operation of state law to prevent a lien from attaching or to divest a lien. The fact that the property was no longer an asset in the hands of the son, and under state law was not reachable by creditors, did not prevent the government from successfully levying in the *Drye* case. In the absence of precedent, a FUND policy must include an exception for any currently enforceable federal tax liens against any remainderman, even if they have been divested, unless a release is obtained from the IRS.

### THE FUND's underwriting position

For issuing a Fund policy to an arm's length third party purchaser, THE FUND will recognize a retained power to divest the remainderman. THE FUND will insure conveyances by the life tenant without the remainderman's joinder and conveyances by the remainderman after the life tenant's death, unless the property was the life tenant's homestead and the life tenant was survived by spouse or minor child. Issues regarding judgment and tax liens against the life tenant and remainderman will need to be addressed as discussed above.

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## New York

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- Elbow with some Florida Bar and Out-of-State Practitioners Division notables and find out why they are so enthused about what they do for us.
- Meet and greet our stage manager, Arlee Colman, at the box office for a free gift.
- Tickets may be available at the

door, but the best seats usually go by advance reservation, so protect yourself by acting early.

- Doors open at 8:15 a.m.; curtain goes up at 9:00.

**If you only make one show this season, make it this one!**



## 2003 Bar Leaders Workshop

The 2003 Bar Leaders Workshop will be held July 25-26, 2003, in St. Petersburg at the Renaissance Vinoy Resort & Golf Club. The annual workshop for voluntary bar association officers and staff gives participants an opportunity to network and discuss problems faced by the attorneys who volunteer as members of the association in their local communities.

The conference, which moves around the state each year, is being co-hosted by three Southwest Florida voluntary bar associations: Clearwater, Hillsborough and St. Petersburg.

The Jacksonville Bar Association was recently host to more than 100 bar leaders who traveled to Ponte Vedra Beach in July.

## Attention Bar Leaders!

Mark your calendars by placing a large red circle around **January 16**. Or for the legal tekkies out there, punch the date into your electronic organizer for the **2003 ALL BAR CONFERENCE**.

The Florida Bar President Tod Aronovitz is requesting your participation in this special meeting to review the Dignity in Law campaign and engage in lively dialogue on the need to increase public awareness about the important role lawyers play in society.

The conference will be held in conjunction with The Florida Bar Midyear Meeting, which is scheduled for January 15-18 at the Hyatt Regency in Miami. In early November, invitations will be sent by the president to Florida Bar leaders, including The Florida Bar Board of Governors, The Florida Bar Young Lawyers Division Board, voluntary Bar leaders, section and standing committee chairs, members of the board of The Florida Bar Foundation, and members of the judiciary.

Dignity in Law is a public awareness campaign designed to promote dignity in the profession, as well as emphasize the need for a fair and impartial judiciary, by applying an intensive, consistent communications effort. The plan is designed to complement existing public relations efforts of the Bar.

For more information on this important meeting, see the November 1 issue of *The Florida Bar News*.

# Reduced Maximum Exclusion of Gain Under IRC Section 121 on Residential Sale or Exchange for Terrorist Attacks Victims

by Marc J. Soss

On September 9, 2002, the IRS released Notice 2002-60 in I.R.B. 2002-36. This notice informed taxpayers affected by the September 11, 2001, terrorist attacks of the circumstances under which they may qualify for the reduced maximum exclusion of gain on sale or exchange of a principal residence under §121(c). The notice provides that taxpayers may exclude all or a part of their home sale gain, even though they do not meet the conditions necessary to qualify for a full exclusion, or have applied IRC §121 to the sale or exchange of a principal residence in the last two years. IRC §121 requires that during the five years ending on the sale or exchange date, the individual must have owned and used it as a principal residence for periods aggregating at least two years (Code Sec. 121(a)), and that within the two-year period ending on the sale date, there was no other home sale or exchange by the taxpayer to which the exclusion applied. (Code Sec. 121(b)(3)).

The IRS has determined that taxpayers affected by the September 11, 2001, terrorist attacks are entitled to all or a reduced percentage of the maximum exclusion. An affected taxpayer may claim all or a reduced percentage of the maximum exclusion of gain on the sale or exchange of the principal residence by reason of the unforeseen circumstances if he or she sold or exchanged the residence as a result of being affected by the events in one or more of the following ways:

1. a qualified individual (defined as the taxpayer, spouse, co-owner or a co-resident) was killed;
2. the taxpayer's residence was damaged;

3. a qualified individual became unemployed and qualified for unemployment compensation under §85(b); or
4. a qualified individual experienced a change in employment or self-employment that resulted in the taxpayer's inability to pay reasonable basic living expenses for the household.

Taxpayers that qualify to claim all or a reduced percentage of the maximum exclusion under the notice and have filed their 2001 income tax returns are eligible to file amended returns to claim the exclusion. The IRS has determined the maximum homesale gain that can be excluded is equal to the full \$250,000 (\$500,000 for married couples) exclusion that would be available if all conditions had been met, times a fraction.

The numerator of the fraction is the shorter of:

1. the aggregate periods of ownership of the home by the taxpayer as a principal residence during the five years ending on the sale date;
2. the aggregate periods of use of the home by the taxpayer as a principal residence during the five years ending on the sale date; or
3. the period of time after the last sale to which the exclusion applied and before the date of the current sale.

The denominator of the fraction is two years. (Code Sec. 121(c)(2); Notice 2002-60).

However, be advised that Notice 2002-60 does not explain how closely related the conditions must be to the

terrorist attacks. For example, an individual whose place of work was in the World Trade Center (WTC) and who lost his or her job because the company went out of business is clearly "affected" by the attacks. However, whether an individual who was laid off by a business in the Northwest that suffered setbacks because the majority of its clients were located in the downtown New York area or was let go by a company that was affected by the post-9/11 economic downturn is still an open question.

**Example:** John and Sue are a married couple living in Manhattan, New York. Both of their places of business were destroyed on September 11, 2001. As a result, both are now unemployed and unable to make their mortgage payments. The couple sells their home and moves into an apartment. On the sale date, John and Sue have owned the home and used it as their principal residence for the last 18 months. Neither has ever excluded gain from another home sale. The amount of gain excluded by them cannot exceed \$375,000 (\$500,000 times 1.5 years of ownership and use divided by two years). Thus, if they realized a gain of \$300,000 on their home sale, all of it would be excludible.

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LOTS of useful information for YOU on The Florida Bar's website:

[www.FLABAR.org](http://www.FLABAR.org).

## ***End-of-life decisions:***

# **Assisted Suicide and the Slayer Statute “Take My Life Please! But Don’t Expect Anything in Return.”**

**by Arne Siegel, submitted on behalf of the Government Benefits Committee**

A discussion on end-of-life decisions would not be complete without addressing the legal implications of an individual’s invoking the aid of another person to end his or her own life. Assisted suicide presents a host of ethical and legal problems for those involved. The client must be made aware that if he or she is assisted in ending his or her life, then the assister will be subject to criminal liability and possibly the loss of inheritance and insurance proceeds.

Assisted suicide is considered active euthanasia—taking a positive act to induce or hasten one’s death. Refraining from life-sustaining treatment, on the other hand, is considered passive euthanasia. The law traditionally has made this distinction, treating acts of commission more seriously than acts of omission. Currently the Florida criminal law, in F.S. section 782.08 entitled Assisting Self-Murder, provides that every person deliberately assisting another in the commission of self-murder shall be guilty of manslaughter, a felony of the second degree. The Supreme Court of the United States has upheld the state of New York’s and the state of Washington’s statutes outlawing assisted suicide, holding that individuals do not have a liberty interest that creates a right to receive help in committing suicide. The Florida Supreme Court has ruled that section 782.08 is constitutional and, furthermore, not in violation of Florida’s constitutional right of privacy.

A legal issue arises concerning the right of an assister to inherit and to receive proceeds from insurance policies. Under the common law, a murderer is not entitled to profit by his or her wrongdoing. This maxim was codified under the Florida Slayer Statute. The Florida Probate Code, in F.S. section 732.802, essentially provides that any beneficiary who unlawfully and intentionally kills or participates

in procuring the death of the decedent is not entitled to any inheritance under a testate or intestate estate. The estate passes as if the killer predeceased the decedent. Similar provisions bar benefits to others who unlawfully and intentionally kill the decedent, including: a joint tenant or tenant by the entirety; or a named beneficiary of a bond, life insurance policy or other contractual agreement.

This issue was addressed in a Pennsylvania case, *In re Estate of Jamison, Deceased*, 13 Fed. Rptr. 2d 353 (O.C. Montg.), 130 Montg. Co. L.Rptr. 344 (1993). (The appeal was withdrawn at the Superior Court.) In the context of an active euthanasia death, a woman supplied and fed her terminally ill mother Digoxin pills, which caused her mother’s death. On the same day, she supplied additional pills to her sister and watched while her sister committed suicide. The court found that, with regard to her sister’s death, the defendant was a slayer within the meaning of the Pennsylvania Slayer Statute and, therefore, was not entitled to receive any property from her sister’s estate. In a companion case, *In re Trust Estate of Jamison, Settlor*, 636 A2d 1190 (Pa. Super. 1994), the same defendant, who pled guilty to the murder (mercy killing) of her mother, claimed that the Slayer Statute was inapplicable to an irrevocable inter vivos trust established by her mother. She further claimed that she was entitled to her share under the trust, which was conditioned upon her surviving her sister. On appeal, the court held that the Slayer Statute deprived the defendant of her interest, because she had altered the natural course of events upon which the condition of the trust rested. It would appear that this reasoning might be used to make our Florida Slayer Statute applicable as well to a revocable inter vivos trust with a testamentary disposition for

the benefit of the “slayer.” Because the act of assisting in a suicide is a crime, it is quite likely that a person who assists in a suicide could be disinherited. The Florida Slayer Statute should be re-examined in view of today’s chronic degenerative illnesses, including AIDS.

Probate law and the law of succession need not follow the criminal laws. If person A, the beneficiary under person B’s will, slays B, then A is barred from any inheritance, not because he or she has done something wrong (the criminal law takes care of that) but because B would have wanted A disinherited. The law of wills is based on intent of the testator. Although the consent of the “victim” may not be a defense to a homicide charge, it should be considered in ascertaining the testator’s intent. If the beneficiary at the testator’s request assists in the suicide, should we not presume the testator’s gratitude rather than the testator’s intent to disinherit the “slayer”?

Without physician “aid-in-dying” as a legal option, some terminally ill patients are ending their suffering with the help of friends and family who are unaware of the severe criminal and financial consequences of their actions. Whether or not assisted suicide is decriminalized, should there not be an exception to the Slayer Statute when an assisted suicide is truly motivated by compassion and performed at the request of a competent, terminally ill person to end his or her suffering? Accordingly, I recommend that we add a new provision to F.S. section 732.802 of the Probate Code, as follows:

Rights of persons who assist in a homicide as provided in section 782.08 of Title XLVI at the request of the decedent.

(a) This Section shall not apply to any person who assists in the

*continued...*

## Assisted Suicide

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homicide of the deceased if said person proves by clear and convincing evidence that (1) the homicide resulted from his or her providing assistance in the decedent's suicide at the request of the deceased; and (2) said person reasonably believed that the decedent was a competent adult at the time of the request for assistance.

(b) Subsection (a) shall not apply if the party seeking to bar the person's acquisition of property or any interest pursuant to this Section proves by clear and convincing evidence that said person, by fraud, force, or duress, intentionally caused the decedent to commit suicide.

### Conclusion

To fulfill their responsibilities to clients seeking control over their lives and deaths and disposition of their property, practitioners must be prepared to discuss all aspects of end-of-life decision making with those clients.

*Arne Siegel practices law in the states of New Jersey, New York and*

*Florida, where he is also tax certified. Mr. Siegel founded the Elder Law Section of the New Jersey State Bar Association and has lectured on assisted*

*suicide in that state.*

Reprinted from *The Elder Law Advocate*, Summer 2002.

## Attorney Not Liable for Principal's Poor Choice of Agent

An attorney was consulted by a former client about preparing estate planning documents for an elderly woman who wanted to leave property to the client and name the client as agent and personal representative. The attorney met with the elderly woman, prepared the documents and supervised the execution. The agent subsequently mishandled the elderly woman's assets, and a conservator was appointed to pursue return of assets. After the conservator successfully set aside most of the transactions, he filed suit against the attorney alleging, among other things, that (1) the attorney owed a duty to dissuade his elderly, vulnerable client from naming an allegedly "illiterate, financial incompetent" as her agent, and (2) the attorney committed legal malpractice by allowing an incompetent principal to execute a power of attorney in the first place. After the

trial court granted a motion to dismiss the complaint, the conservator appealed. The court of appeals affirmed the dismissal, finding that (1) it would be impracticable to hold attorneys to a standard by which they would be required to dissuade clients from poor choices, and (2) an "attorney of ordinary learning, judgment or skill under the circumstances using reasonable professional judgment" is not required to make absolute determinations of capacity and, in the absence of clear evidence of incapacity, need not refuse to complete the client's estate planning documents.

Full case: *Persinger v. Holst*, Mich. App., December 4, 2001.

Source: <http://www.icle.org/michlaw/oview.cfm?caseid=22463521>

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