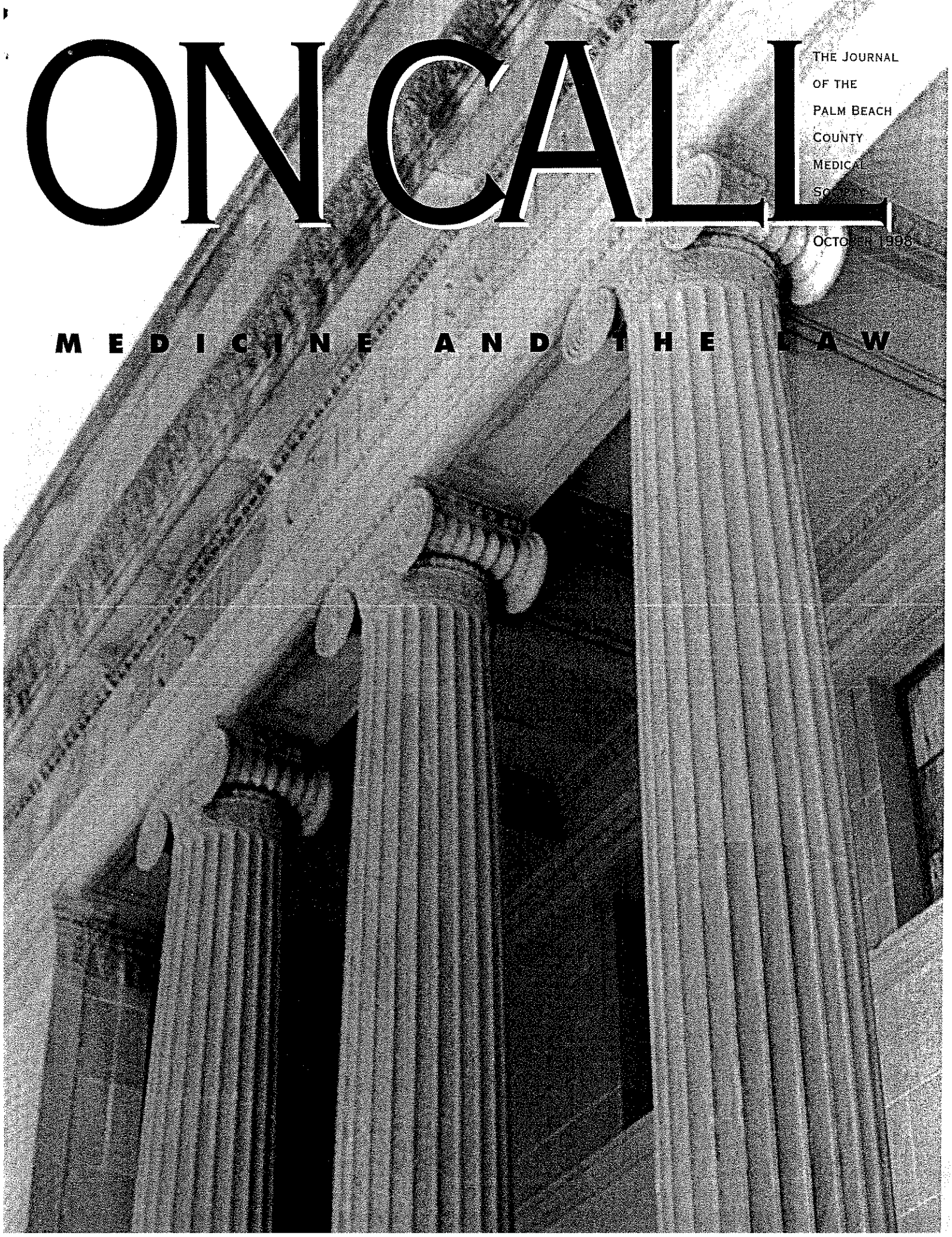


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Asset Protection Strategies

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Financial planning is a concept that tells us to try to plan for our future. We are implored to maximize wealth and minimize risk. Prudent tax planning teaches us to engage professionals to help us utilize every legal tax planning mechanism to either eliminate or defer tax. Our goal is to find ways to legally maximize personal wealth and minimize the ability of third parties (i.e. in tax planning, the IRS) to reduce our wealth and financial security.

a level playing field. Instead, the physician who is accused of malpractice never has a determination made by a jury of his or her peers (other doctors) and is often subjected to a judgment which may be both wrong as a matter of fact and law and offensive as to amount. Asset protection planning, attempts to utilize all of the legal mechanisms available to the physician to provide checks and balances against a system that will never be fair in evaluating the physician's performance.

sued on a "bad" case) and undertakes asset protection planning probably has no real fear of the fraudulent transfer laws. Contrast the former physician with the physician who has already had suit filed or a notice of a suit filed against him. The physician who undertakes planning to avoid a known or actual creditor is walking a very precarious line as well as is his attorney, who must be careful to only advise his client, assist in document preparation but not to aid and abet the commission of a fraud. Most clients fall in between the two extremes and in the "grey" area.

The Florida Statutes set forth six statutory exemptions against forced sale under F.S. §§222 et. seq. Further, a caselaw exemption exists for property held as Tenants by the Entirety, as well as a general exemption for limited partnerships interests, held, for example, in Florida Family Limited Partnerships. Other more creative planning devices are available as well, such as offshore planning in favorable jurisdictions, those presently including the Cook Islands, Nevis, Nassau and Belize.

The first exemption from forced sale is the homestead. Florida law allows its residents to exempt a homestead of any value which is no more than one-half acre inside a city or municipality and no more than one hundred sixty acres outside. The oldest and most sacred of the exemptions, a few recent cases have held that even where there was evidence of a fraud, that the homestead was still impervious to creditor attack.

The second exemption applies to "wages" which are paid to a head of a household (i.e. there can be only one). Caselaw further dictates that those treated as independent contractors (classically insurance and real estate brokers and self employed persons) cannot receive a "wage"

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Asset protection planning is virtually identical to tax planning. State (and in some instances Federal) law allows its residents to enjoy ownership of certain types of assets and, subject to a general exception for utilization of those exemptions by certain types of statutory "fraud", tells its residents that ownership of "exempt" assets will be impervious to the attacks of most creditors. However, "asset protection planning" to some, seems to connote a surreptitious plan of deception. Realistically, asset protection is simply an alternative form of financial planning.

"High-risk" individuals are most often interested in asset protection planning. A high-risk individual is someone who is at an increased risk of creditor attack. A fair statement would also be that for physicians, asset protection planning does not begin on

In evaluating the proper asset protection plan, careful consideration must be given to the plight of the physician in light of Florida's fraudulent transfer and asset conversion laws. Florida law states, generally, that it is a fraud to transfer property to another, or convert non-exempt property to exempt property, if the purpose of the transfer is to hinder, delay or defraud an actual, known or future creditor. The remedy for such "fraud" is that the judge has the right to set aside the transfer.

From the outset, the proposition that one may defraud a future, unknown creditor seems preposterous. In fact, no Florida case exists supporting this "bizarre" theory of law. Thus, the physician who consults his planner before any suit or notice of suit is filed (or before such time that a physician, for example, knows he or she is likely to be



and do not qualify for the exemption. However, even in the small or sole shareholder medical corporation, protection of the wages is fairly well assured with a properly worded annual employment agreement. Failure to maintain such an employment agreement will almost assure that the sole or small corporation practitioner will be unable to utilize the wage exemption. The exemption is further extended to a clearly identified wage account for a period not to exceed six months. An exception to this exemption exists if the debtor has given a consensual lien on wages, which happens routinely in loan documents. Deletion of this provision is desirable in almost any transaction.

As noted at the beginning of this article, a couple of other exemptions exist as well. The first is a caselaw exemption for property held by husband and wife as Tenants by the Entirety. This form of ownership must be specific and use the words "Tenants (or Tenancy) by the Entirety". This ownership form applies only to husband and wife and states that each spouse owns one-hundred percent of the subject asset (creating a legal fiction yielding two hundred percent ownership) and that a creditor of only one spouse should not be allowed to invade assets owned entirely by both spouses. This exemption does not apply to "joint" debt. Further, the recent case in this Southern District entitled *in re*

the underlying interests are "offshore" and the creditor must go re-prove its case that the debtor engaged in fraud in establishing a structure or effecting a transfer in that offshore jurisdiction (usually within two years or less of the alleged act) and have the offshore jurisdiction order the debtor turn over funds to the creditor. Because of the very short time frame (two years or less) and the very difficult standards for proving fraud and the expense of doing so, many offshore structures appear virtually impervious to attack. Practitioners must always be careful to not advise clients on offshore planning if there is any allegation that the funds subject of the transfer were obtained by commission of acts in violation of federal laws (or else be potentially subject to IRS, RICOH and other personal liability).

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The third and fourth exemptions pertain to life insurance and annuities. Both the proceeds and the cash value of these types of assets are exempt from creditor attachment and are highly desirable tools in estate and income tax planning.

The fifth exemption is granted for Individual Retirement Accounts. You may also note that the new "Roth IRA" has been added to the exempt list by act during this year's legislative session.

The sixth exemption is for funds held in qualified retirement plans. Generally speaking, if your balance is held in a plan which benefits at least one non-owner employee and is in compliance with the applicable provisions of the Internal Revenue Code, then your plan balance is exempt both under Federal and State law. If your plan balance fails to meet the preceding sentence, then further investigation is warranted. For a much more thorough discussion of the ever-evolving law regarding exemption of plan assets, see the three part article written by this author in the last three semi-monthly 1997 editions of the *Journal of Asset Protection* entitled "Are Qualified Plans Protected in Bankruptcy; Patterson and its Aftermath."

Planas poses additional problems for husband and wife who have any joint debt outside the debt on their homestead.

Florida, like many other states has also adopted the Uniform Limited Partnership Act. From this act, evolved a very advanced estate planning tool known as the Family Limited Partnership. In fact, the estate tax planning advantages of these entities are so favorable, that they are very often used without consideration of asset protection issues at all. Further, the statute dictates that if a creditor gets a judgment, such creditor's right as to the limited partnership interest held by the debtor is limited to a charging order against the limited partnership share when the general partner declares a partnership distribution. One would hesitate to find a situation where a general partner would mandate a distribution when the result of such decision would be to enrich the creditor.

Finally, more exotic asset protection tools exist in the form of offshore planning. The essence of offshore planning is by using an offshore jurisdiction (most often in conjunction with domestic planning such as a family limited partnership) that even if a court penetrates the domestic structure,

In sum, there are many avenues available for effective asset protection planning. The key is to plan early. Most of the exemptions discussed above will allow physicians to comfortably protect their assets. Further, mechanisms exist for protecting the most vital day to day asset, being the practice's accounts receivable. Early planning will allow most physicians to comfortably use the Florida exemptions and not concern themselves with more "advanced" planning (such as offshore planning). Further, even if there has been a lawsuit, careful planning may insure you against future lawsuits. Asset protection planning for the physician is just as critical as any type of financial planning. While the stock market can diminish assets hurriedly, a bad lawsuit and no planning can wipe out your balance sheet overnight.

This article only discusses general principles. The facts of each situation are different and the applicability of any exemption to a given situation certainly varies on a case by case basis. Consultation of an expert in the field of asset protection is certainly recommended.

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