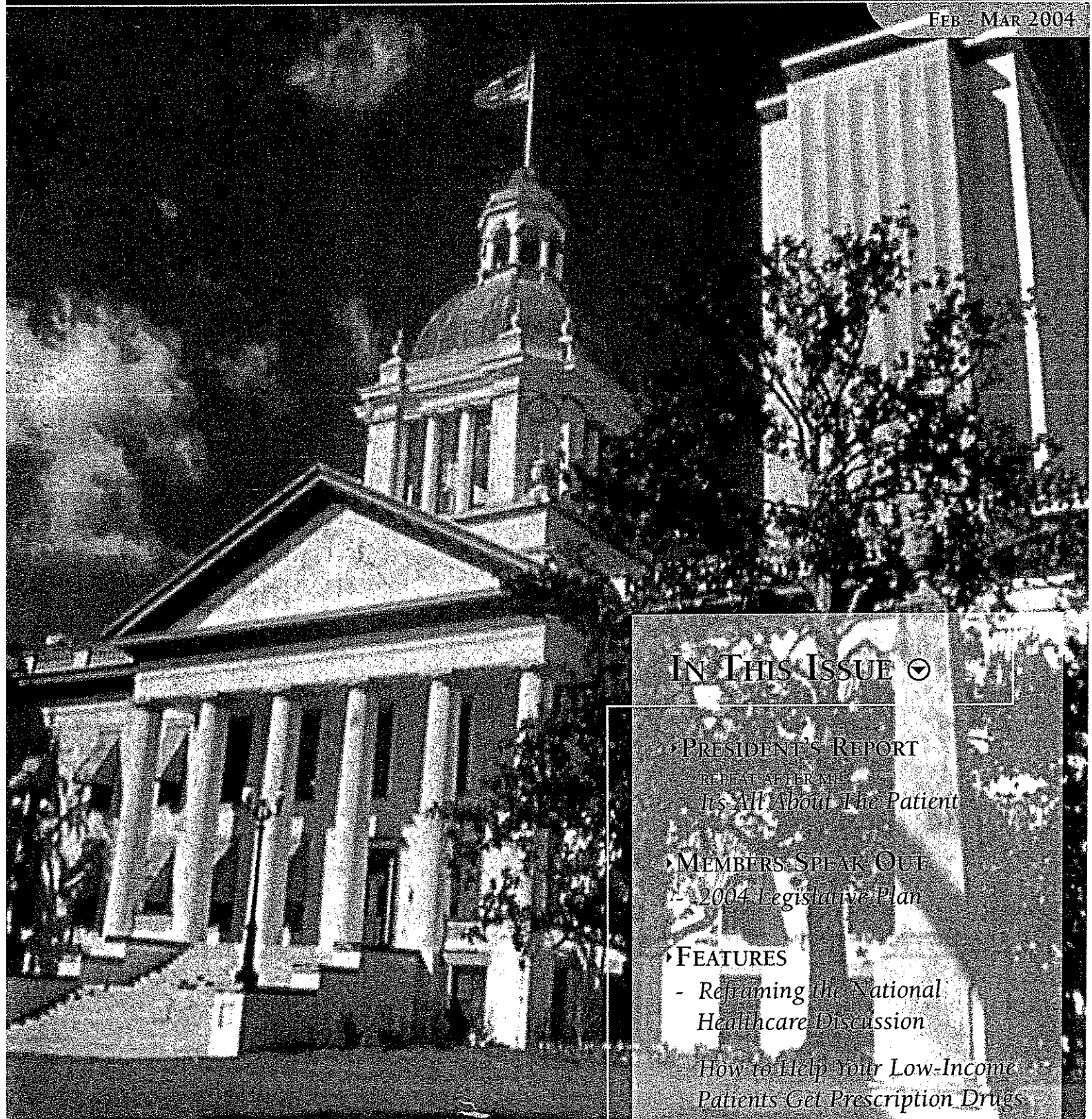


ONCALL

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IN THIS ISSUE ☉

◆ PRESIDENT'S REPORT
RENEAL AEPFER, MD
It's All About The Patient

◆ MEMBERS SPEAK OUT
2004 Legislative Plan

◆ FEATURES

- *Reframing the National
Healthcare Discussion*

*How to Help Your Low-Income
Patients Get Prescription Drugs*

The schematic of exemptions from forced sale in the State of Florida is largely statutory, meaning the exemptions are found in the Florida Statutes or the Florida Constitution. The Statutes (or Constitution) generally set forth the entitlement to the exemption as well as a creditor's potential (or lack thereof) remedy.

The most significant exemption that is not contained in Florida's statutes is the common law exemption known as a Tenancy by the Entirety (each of husband and wife is known as a "Tenant"). The Tenants by the Entirety ownership is unique as it can only be asserted by husband and wife. There are three (3) basic types of "joint" ownership. The first form, Tenants in Common,

How Safe is the Tenancy by the Entirety?

By Michael Singer



concludes that if one of the tenants passed away, his or her shares would pass to their heirs or designated beneficiaries. Second, Joint Tenants with Rights of Survivorship supposes when a tenant dies, their interest would pass to the remaining joint tenant. Tenants by the Entirety essentially works the same as Joints Tenant with Rights of Survivorship but only applies to married people, creating the legal fiction discussed below and thus, a corresponding exemption from creditor attachment.

Tenants by the Entirety presumes to create a vested one hundred percent (100%) interest in property (real or personal) in each of the spouses. Both common law and case law characterizes the ownership in terms of rights as "bundles of sticks", however, in most basic terms, the assets are deemed to be owned one hundred percent (100%) by each spouse (creating a fictitious 200% ownership stake in the same asset). If for an

example, a physician spouse has a judgment against him or her, the law states that it would be unjust to allow attachment of the assets that were owned one hundred percent (100%) by the non-physician spouse. As such, the creditor would be forbidden from attaching assets owned Tenants by the Entirety.

In Florida, there are numerous exemptions from creditor attachment. All of other exemptions (i.e., Homestead, wages, annuities, life insurance, pensions, IRAs, limited partnerships, limited liability companies, etc.) are set forth in the Florida Statutes or to the Florida Constitution. Presumably because the Tenancy by the Entirety exemption is non-statutory, it has been the most fragile exemption over the years.

An obvious exception to the prohibition against attaching Tenants by the Entirety property is, of course, is joint debt. If there is debt against both husband and wife, then Tenants by the Entirety property is not protected. This happens on occasion where physicians practice together and commit an act of malpractice on the same patient or more likely where husband and wife are financially responsible on the same indebtedness as such a promissory note.

The Tenancy by the Entirety exemption has been severely impaired in several cases over the last twenty years. For example, in *Pepepenella*, (79 B.R. 76 (M.D., Fla. 1987)) Judge Paskay held that a judgment against a husband and wife to any extent allowed invasion and seizure of all Tenants by the Entirety property. Similarly, in the 1996 Southern District Case of *Planas* (199 B.R. 211 (S.D., Fla. 1996)), Judge Cristol held that an unmatured debt (one that wasn't even in default) could subject Tenants by the Entirety property to seizure. Both of these cases (as well as the cases following their holdings) were subsequently reversed on appeal. Tenants by the Entirety is a very useful exemption because it is a titling that applies to both real and personal property. In doing asset protection planning, clients are often advised to title miscellaneous assets in Tenants by the Entirety. Further, simply retitling assets Tenants by the Entirety is a very "cheap" way to attempt to achieve asset protection. However, even before the *Craft* case discussed below, the most prudent and perhaps most skilled planners have advised clients that Tenants by the Entirety was probably the most exposed and fragile exemption of all of the Florida exemptions.

A potentially significant development occurred recently with respect to Tenants by the Entirety property. In 2002, the United States Supreme Court decided the *Craft* (122 S. Ct. 1414 (2002)) case. In *Craft*, the Internal Revenue Service for the first

(Continued on page 23)

taken from page 18

time was allowed to pierce Tenants by the Entirety property to the extent of one taxpayer spouses (but not the other who did not have a debt to the IRS) interest who owed a debt to the IRS. The case has been widely criticized and in fact, may in some specific instances work against the IRS. However, an aside, the IRS parenthetically has used the Craft case to begin seizing assets in single member limited liability companies (Chief Counsel advice 200338012 where the service has determined it can place a lien against the owner of the single member LLC, but perhaps not against the LLC assets).

The natural question following the Craft is whether a trustee in bankruptcy or outside of bankruptcy could use Craft to pierce Tenants by the Entirety property for non-tax debt. At least one article has been written to date stating that this should not be allowed to occur and frankly, this author agrees with such conclusion. However, to date there have been about half a dozen cases across the United States dealing with this issue in a non-tax setting, none of which has involved a judgment for medical malpractice (instead just regular commercial debt). There have been no cases in the State of Florida regarding same.

We believe that Craft "should" be limited to tax cases, however, until such time we have a case in the State of Florida determining whether Craft would extend to commercial debt, it is most advisable to continue to consider other options (other than Tenants by the Entirety ownership) in attempting to achieve maximum asset protection. It is likely that Craft will not extend beyond the tax arena, but the "possibility" needs to be considered before making any final decisions as to asset ownership. Further, given the historic relative fragility of the Tenancy by the Entirety form of ownership, as well as the need to do very careful estate planning with this type of property, other avenues of ownership should be seriously considered.

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