"Estate Planning for Landowners Post ATRA 2012 – Clarity, but Still Not Out of the Woods!"

Presented By:

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ESTATE PLANNING FOR LANDOWNERS
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I. INTRODUCTION

When performing estate planning for landowners, the primary role of the estate planning attorney is to ascertain the goals and objectives of the client and then develop a plan that can accomplish those goals and objectives at the lowest tax cost (income, gift, estate and generation-skipping taxes) and with the least administrative inconvenience and expense.

In addition, asset protection planning has taken on greater importance when conducting estate planning for landowners. Most asset protection planning can be done hand-in-hand with properly engineered estate planning. In many instances, estate planning is asset protection planning with the realization that the Internal Revenue Service may be the largest potential creditor of the estate and that the client wishes to minimize their liability exposure, to the extent legally possible, and also provide liquidity for payment of his or her creditor's claims when the time is right. A properly engineered estate plan will therefore dovetail elements of both estate planning and asset protection planning.

II. ALTERNATIVE FORMS OF OWNERSHIP

A. JOINT OWNERSHIP

1. Tenancy by the Entirety.

a. General Advantages:

Tenancy by the entirety is a special form of ownership of real or personal property. It may exist only between a husband and wife during marriage. Generally speaking, there are two basic characteristics of tenancy by the entirety property:

(i) Each spouse has a right of survivorship in the property; and
(ii) Property owned by the entirety is not subject to involuntary partition. Therefore, one spouse cannot unilaterally terminate the ownership rights of the other.

Since neither the husband nor the wife can unilaterally terminate the tenancy, husband and wife jointly have full, undivided ownership and control of the property. As a result, the courts have consistently held that tenancy by the entirety property is not subject to the claims of only one of the spouses. See e.g. Sharp v.

Hamilton, 520 So.2d 9, 10 (Fla. 1988), affirming 495 So.2d 235 (Fla. 5th DCA 1986).

b. Some Disadvantages:

Tenancy by the entirety as a form of ownership is not without some disadvantages. Some aspects to consider are as follows:

(i) A creditor can seize tenancy by the entirety property for the debt of both spouses;
(ii) Protection against creditors lasts only as long as the marriage. Death terminates the tenancy. If the non-debtor spouse dies first, then the debtor spouse will own the property outright and it will then be exposed to the claims of creditors;
(iii) Divorce will also terminate the tenancy. Unless a divorce decree states otherwise, entireties property will convert to tenancy in common between husband and wife upon dissolution of marriage. Assets held as tenants in common are subject to the claims of creditors;
(iv) Estate planning concerns also arise. If one spouse dies, probate is avoided. However, if both spouses die simultaneously, probate is not avoided and lengthy delays and costs may result. If all assets of husband and wife are held as tenancies by the entirety, then it is impossible to fund the credit shelter trust of the first spouse to die. However, they may now take advantage of portability (discussed below), but there will be other income tax issues to consider.

c. Real Property Versus Personal Property:

There is a presumption that real property owned by a husband and wife is tenancy by the entirety property. A similar presumption did not always exist with regard to personal (i.e., other than real estate) property. Prior to 2001, the law in Florida provided that without clear and convincing evidence of unity of title, personal property would be deemed to be held in joint tenancy (and not tenancy by the entirety) and hence, would be exposed to the claims of creditors of either spouse. However, the Supreme Court of Florida receded from its position with respect to personal property in Beal Bank, SSB v. Almand and Associates, 780 So.2d 45, 57 (Fla. 2001), where it concluded that "stronger policy considerations favor allowing the presumption in favor of a tenancy by the entireties when a married couple jointly owns personal property." There is also a rebuttable presumption under Florida law that any deposit or account (including CDs) made in the name of two persons who are husband and wife shall be considered a tenancy by the entirety. See Fla. Stat. § 655.79 which became effective in October 2008.

Additional direction regarding the establishment of tenancy by the entireties comes from the Supreme Court of Florida decision in First National Bank of Leesburg, 254 So.2d 777 (Fla. 1971), wherein the Court noted that a viable tenancy by the entireties, with regard to both realty and personalty, must possess always and at the same time, the following:

(i) Unity of possession (joint ownership and control);
(ii) Unity of interest (interest must be the same);
(iii) Unity of title (interest must originate in the same instrument);
(iv) Unity of time (interest must commence simultaneously); and
(v) Unity of marriage.

2. Tenants in Common.

A tenancy by two or more persons, in equal or unequal undivided shares, where each co-owner has an equal right to possess the whole property but no right of survivorship.

Tenants in common are not provided with the same protection from creditors as tenants by the entirety. A creditor of one of the individual co-tenants can reach that individual's interest in the property.

3. Joint Tenants with Right of Survivorship.

A tenancy with two or more co-owners who take identical interests simultaneously by the same instrument and with the same right of possession. A joint tenancy with right of survivorship differs from a tenancy in common because each joint tenant has a right of survivorship to the other's share.

A joint tenancy with right of survivorship shall be presumed in Florida in the case of a deposit account in the names of two or more persons. However, this presumption can be rebutted by clear and convincing proof of a contrary intent. See Fla. Stat. § 655.79.

Joint tenants with right of survivorship are also not provided with protection from creditors. During the life of the co-owners, an owner's creditors may reach his share of the property. However, upon the death of the debtor, his creditors may not reach his interest in the property because it has vested in the surviving joint tenants.

B. GIFTS TO SPOUSE OR CHILDREN

1. Transfer of Property.

A transfer of property to a spouse, children or others, outright or in trust, can be an effective means of shifting wealth and protecting assets if the transfer does not constitute a fraudulent transfer under Chapter 726 of the Florida Statutes. Property held in the client's spouse's sole name generally is not subject to the claims of the client's creditors unless the client's spouse is also liable to the creditors with respect to the debt. However, there are several potential disadvantages to such a transfer:

a. Transferring property to a spouse typically involves a loss of control over the property;

b. Transferring property to spouse or children causes a loss of the economic benefits provided by the property; and

c. In the event of divorce, transferring property to a spouse may create certain disadvantages in terms of structuring a property settlement.

2. Annual Gifting Program.

Each individual may transfer up to $14,000 to any person ($28,000 if made jointly by a married couple) annually without triggering a gift tax. This amount is indexed annually for inflation.

C. TRANSFERS TO IRREVOCABLE TRUSTS CREATED BY SETTLOR

So long as (a) the transfer of assets into the trust does not constitute a fraudulent transfer, and (b) the settlor does not retain too much control, assets placed in an irrevocable trust for others are generally beyond the reach of creditors of the settlor and are outside the settlor's estate. The disadvantage is that placing assets in a trust of this sort results in the loss of control over the assets and the loss of the economic benefits of outright ownership. Examples of irrevocable trusts that might be utilized include:

1. trusts to take advantage of the individual's unified credit;
2. trusts to take advantage of the individual's GST exemption;
3. education trusts;
4. lifetime QTIP trusts;
5. charitable remainder trusts;

6. spendthrift trusts;
7. trusts to equalize estates;
8. testamentary QTIP trusts;
9. asset protection trusts (e.g., foreign trusts); and
10. insurance trusts.

D. TRUSTS CREATED FOR SETTLOR'S BENEFIT

1. Revocable Trusts.

   There is no estate tax benefit or creditor protection for a settlor if he is the beneficiary of a revocable trust he created for his benefit. Fla. Stat. §§ 733.707(3) and 736.05053 provide that the assets of a revocable trust are subject to the expenses of administration of the estate of the settlor of the revocable trust and to the claims of the settlor's creditors to the extent that the settlor's probate assets are insufficient to satisfy such claims. There are, however, numerous other benefits such as:

   a. Avoiding delay and expense of probate;
   b. Assets immediately available for trust beneficiaries;
   c. Avoiding guardianship expense and inconvenience if incapacitated; and
   d. Privacy.

2. Irrevocable Trusts.

   If the debtor is a beneficiary of an irrevocable trust, the insulation of the trust's assets from creditors is dependent on, among other factors, who created the trust, who the trustee is and who are the beneficiaries of the trust.

   a. Theoretically, the creation of an irrevocable trust by a debtor should shield his assets from creditors just as an outright gift of the asset would. However, the assets of an irrevocable trust created by a debtor will be difficult to shield from creditors unless the trust distribution standards are very discretionary, there are other beneficiaries, the debtor is not a trustee with significant discretionary control over the trust and the trust is not funded as a result of a fraudulent transfer. The greater the dominion and control the debtor has and the more significant the debtor's interest in the trust, the greater the likelihood that a creditor will successfully have his claim satisfied out of the irrevocable trust's assets. There generally is a strong public policy argument that one should not be able to shield his assets from his creditors by merely transferring them into trust for his own benefit. Fehlhaber v. Fehlhaber, 850 F. 2d 1453 (11th Cir. 1988). Effective July 1, 2007, Fla. Stat. § 736.0505(1)(b) provides that, whether or not a trust contains a spendthrift provision, a creditor or assignee of the settlor of an irrevocable trust may reach the maximum amount that can be distributed to or for the settlor's benefit.

b. An irrevocable spendthrift trust created by another for the debtor's benefit is likely to be shielded from a debtor's creditors. However, the Florida Supreme Court has ruled that disbursements from spendthrift trusts can be garnished for child support, Bacardi v. White, 463 So.2d 218 (Fla. 1985), as well as alimony.

c. If the debtor is a trustee or sole trustee with too much discretionary power over the trust, a creditor may reach the debtor's interest.

E. FOREIGN TRUSTS

Recently, there has been heightened interest in achieving estate planning and asset protection by creating a trust with sufficient connections with a foreign jurisdiction to result in the trust being governed by the law of the foreign jurisdiction. However, there are many traps for the unaware that should be considered before implementing such a strategy.

III. CHOICE OF ENTITY/BUSINESS PLANNING

As part of any estate planning dealing with family businesses, consideration must be given to the choice of entity used to own and carry on the family business. When considering the appropriate choice of entity, the concepts of limited liability and susceptibility to the claims of creditors of the owners are primary considerations in choosing the appropriate entity. The following is a list of the most generally utilized entities in Florida and some comments regarding their appropriateness for estate planning/asset protection:

A. SOLE PROPRIETORSHIP.

1. Unlimited liability;
2. Limited life; and
3. Unlimited exposure to the debts of the owner.

B. GENERAL PARTNERSHIP.

1. Joint and several liability;
2. Limited life;
3. Limited liability to the debts of the partner (charging order);
4. Pass through entity for tax purposes; and
5. Fla. Stat. § 620.8306(3) now allows limited liability protection for those partnerships registered as an LLP.

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C. CORPORATION.

1. Limited liability;
2. Unlimited life;
3. Stock exposed to debts of shareholder (but limited rights if a minority shareholder); and
4. Double taxation and Florida corporate income tax (unless S corporation).

D. LIMITED LIABILITY COMPANY.

1. Limited liability;
2. Potentially unlimited life (Fla. Stat. § 608.441(1)(a));
3. Limited exposure to claims of members' creditors (charging order protection - Fla. Stat. § 608.433(4) amended by Florida Legislature to "fix" Supreme Court of Florida's decision in Olmstead v. Federal Trade Commission, 44 So.3d 76 (Fla. 2010)); and
4. Pass through entity for tax purposes if qualified as a sole proprietorship or partnership for federal tax purposes. Florida has eliminated the double tax impact of Florida corporate income tax on limited liability companies.

E. LIMITED PARTNERSHIP.

1. Limited liability;
2. Limited life;
3. Limited exposure to claims of partners' creditors (charging order Fla. Stat. § 620.1703);
4. Pass through entity for tax purposes; and
5. Fla. Stat. § 620.1404(3) now allows limited liability protection for general partners if partnership registered as a LLLP.

Of the entities described above, the preferred entities for estate planning, as well as for asset protection planning, are the limited liability company and a form of the limited partnership. These entities also lend themselves well to interlineation of a freezing technique with multiple ownership interests in compliance with Chapter 14 of the Internal Revenue Code of 1986.

IV. WHY A FAMILY LIMITED LIABILITY ENTITY?

A. CONTINUITY OF MANAGEMENT.

If the taxpayer and/or members of the taxpayer's family own a large parcel of real estate, proper management of the real estate investment becomes increasingly difficult as ownership becomes diffused among multiple family members. Ownership of undivided interests requires everyone to act in tandem in order to (for example) sell, mortgage or lease the property. Management problems will be compounded geometrically if the property is retained into further generations and ownership is spread among an even greater number of individuals. If the property is placed in a family limited liability entity (either a limited partnership or limited liability company) with management by selected general partners or managers, ownership can be safely spread among family members through transfers of limited liability entity interests while at the same time maintaining centralized management in one or more general partners or managers. Family limited liability entities are also useful to consolidate the management of other family assets. For example, various trusts and other family entities may have been created over the years which hold assets (real or personal property) that could be more effectively managed by consolidating them into one entity. These entities may join together (perhaps with one or more family members) and form a new family entity for this purpose.

B. ASSET PROTECTION.

The creation of a family limited liability entity may also provide at least limited protection of each family member's interest in the event of divorce, attachment by creditors, bankruptcy and similar involuntary transfers. This protection is available because any creditor who attempts to seize an owner's interest in the entity will normally be entitled to a "charging order" under the partnership and LLC statutes of most states. The "charging order" provides the creditor with a right to receive distributions of cash from the entity as and when they are made, but will not entitle the creditor to be substituted as a full owner in the entity unless approved by the remaining owners. See Fla. Stat. §§ 620.8504, 620.1703, and 608.433(4). Thus, the judgment creditor will not ordinarily have a voice in management, cannot force a partition of properties within the entity and, for the most part, cannot interfere with the ongoing management of the entity properties.

1. Will the judgment creditor (or its assignee) be treated as an owner for tax purposes?

If the judgment creditor or its assignee is treated as the "owner" of the partnership or LLC interest for federal income tax purposes, it will be taxed on its full allocable share of entity income, whether or not distributed. See Rev.Rul. 77-137, 1977-1 C.B. 178; cf. Jackson v. Commissioner, 42 T.C.M. 1413 (1981). If taxable income exceeds cash distributions, the entity interest may become more of a liability than an asset to the judgment creditor. However, the debtor-owner may be taxed on the income attributable to the seized interest under the theory that this is economically identical to a garnishment and that the income is satisfying the obligations of the debtor-owner.

2. Fraudulent Transfers.

If property is transferred to a family entity to avoid existing or pending claims, the transfer into the entity (or the transfer of an entity interest) may be set aside by a court.

C. TAX ADVANTAGES.

1. Income Shifting.

Historically, the opportunity to shift income from high bracket taxpayers to their lower bracket children was the primary impetus for most family entities. However, changes wrought by the Tax Reform Act of 1986 ("TRA '86"), the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA '01"), the Jobs and Growth Tax Relief Reconciliation Act of 2003 ("JGTRRA '03"), the Tax Increase Prevention and Reconciliation Act of 2005 ("TIPRA '05"), the Small Business and Work Opportunity Act of 2007, the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 ("TRA '10"), the Patient Protection and Affordable Care Act of 2010 ("PPACA '10") and the American Taxpayer Relief Act of 2012 ("ATRA '12") have substantially diminished this advantage.

a. Compression of tax rates.

b. Unearned income of children under age 18 now taxed at parents' top marginal tax rates.

c. The top income tax rate increases from 35% to 39.6% for taxable income over $400,000 (single) or $450,000 (joint), and $11,950 for estates and trusts.

d. The tax rate on qualified dividends and capital gains increases from 15% to 20% for taxable income over $400,000 (single) or $450,000 (joint), and $11,950 for estates and trusts.

e. In addition, a 3.8% Net Investment Tax (new I.R.C §1411 added by PPACA) on the lesser of net investment income or modified adjusted gross income above $200,000 (single) or $250,000 (joint), or $11,950 for estates and trusts.

Recently proposed regulations concerning I.R.C. §1411 were issued. These regulations identify the activities subject to the Net Investment Tax. One area of concern is that the certain types of income may be tax differently depending on the type of business entity used.

2. Other Income Tax Advantages.

A family limited liability entity is usually a "passthrough entity" for federal income tax purposes which is not subject to an entity-level tax.

a. Items of income, deduction and credit may be specially allocated (i.e., other than in proportion to capital) among the owners provided that such allocations meet the "substantial economic effect" rules of I.R.C. §704(b) and the regulations thereunder, and provided that any such allocations do not violate any of the prohibitions of I.R.C. §704(e)(2).

b. Upon the death of a family owner, the deceased owner's estate or other successor-in-interest will take a new (hopefully, "stepped-up") basis in the decedent's entity interest under □I.R.C. §1014. If the entity timely files an election under □I.R.C. §754, or has previously filed such an election, the estate or other successor will also be entitled to step-up its basis in its proportionate share of the entity's assets under I.R.C. §743(b).

c. The entity can ordinarily be liquidated and dissolved without tax cost to the owners.

3. Estate and Gift Tax Savings.

The family limited liability entity will often serve as a compliment to the traditional estate plan which generally is structured to fully utilize available unified credits, the unlimited marital deduction, lifetime giving which fully utilizes all available annual exclusions, and structuring ownership of life insurance to minimize or avoid estate and gift taxes. Interests in limited liability entities may be ideal subjects of lifetime or testamentary transfers to facilitate these traditional objectives with the following additional transfer tax minimization advantages:

a. Valuation discounts.

Fractionalization of ownership through the creation of a family limited liability entity and the use of lifetime transfers of ownership interests therein will, if properly structured, significantly minimize the transfer tax cost of these gifts due to minority and marketability discounts.

Use of a Qualified Terminable Interest Property ("QTIP") Trust may be a viable option to hold an undivided interest in a family entity (or other property) and still preserve fractional interest discounts. See Bonner v. United States, 84 F.3d 196 (5th Cir 1996). However, to preserve the discounts, it may be necessary to avoid control (i.e. general power of appointment) over the ultimate disposition of assets so that if a decedent owns an interest in his or her own name, and the value of a QTIP trust is included in the decedent's estate, the IRS does not take the position that the two merge together to form a majority interest.

b. Future Appreciation.

Shift future appreciation out of taxpayer's estate either through transfer of a "vertical slice" of the entity (i.e., straight percentage capital interest), or through freeze technique.

D. CAVEATS.

1. Deathbed Transfers.

There has been recent IRS scrutiny of so-called deathbed formation of limited liability entities. This situation typically occurs when the entity is formed by a terminally ill or elderly individual who is not reasonably expected to outlive the entity. It is unclear whether the IRS will allow such a formation so that an estate may claim that a gift was made which can be discounted for lack of control or lack of marketability. Special care should be given when considering the formation of a deathbed entity. See e.g. Estate of Thompson v. Commissioner, T.C. Memo 2002-246; Kimbell v.,U.S., 371 F. 3d 257 (5th Cir. 2004); and Technical Advice Memorandum 9736004.

2. New Entity Ignored.

The IRS has also brought its attention to limited liability entities whose owners ignore the economic and legal realities of the entity. A family limited liability entity is a separate and distinct entity from its owners. The owners must exercise due care to ensure that the entity is respected by the IRS and the courts. In recent cases, the IRS has successfully defeated the estate tax planning objectives of the entity where owners: (1) co-mingle personal assets with those of the entity; (2) directly receive income from assets contributed to and owned by the entity; and (3) continue to manage the assets in the same manner after contribution to the entity. See e.g. Estate of Thompson v. Commissioner; Kimbell v.,U.S.; and Estate of Harper v. Commissioner, T.C. Memo 2002-121.

V. IRREVOCABLE INSURANCE TRUSTS.

This is a widely utilized method to provide liquidity to an estate which is subject to the imposition of estate taxes but the insurance proceeds are not included in the decedent's gross estate for estate tax purposes. The transfer of existing life insurance policies into an irrevocable insurance trust triggers the three year rule. Alternatively, it is generally better to purchase a new life insurance policy to fund the irrevocable trust. A settlor is permitted to initially fund the trust with sufficient funds for the trustee (can not be the settlor) to purchase a policy in the name of the insurance trust. The settlor retains no control or power over the trust, including the power to reassign the beneficiary of the insurance policy.

In order to utilize the annual gift tax exclusion of $28,000 per donee (between a married couple), the trust generally names one or more persons as beneficiaries with Crummey powers [i.e. right to withdrawal share of contributions to trust]. In the event the beneficiaries do not exercise their right of withdrawal, the trustee would then use the contribution to pay the policy premiums.

VI. GRANTOR RETAINED ANNUITY TRUSTS.

Grantor Retained Annuity Trusts are a common estate planning technique whereby a grantor transfers assets to an irrevocable trust for the benefit of one or more non-charitable beneficiaries and retains an annuity interest in the trust for a term of years. For transfer tax valuation purposes, the amount of the taxable gift is the fair market value of the transferred property less the value of the grantor's retained annuity interest. When the term ends, the assets remaining in the GRAT either pass outright to the remainder beneficiaries of the GRAT or remain in trust for their benefit. If the grantor dies during the term, the value of the remainder interest in the GRAT is included in the grantor's taxable estate. The IRS assumes that the trust assets will produce a return equal to the I.R.C. § 7520 rate applicable to the month of transfer. Thus, if the GRAT assets produce a return in excess of the I.R.C. § 7520 rate, the increase in value above that rate is passed to the beneficiaries free of gift tax. GRATs are commonly structured with short terms (e.g., 2 years) and little, if any, taxable gift at funding. The idea is to fund the GRAT with assets expected to increase significantly in value in the near future, so as to pass assets to the remainder beneficiaries with little or no taxable gift. Many of the advantageous of GRATs can also be obtained through the use of Charitable Lead Annuity Trusts.

VII. QUALIFIED CHARITABLE REMAINDER TRUSTS.

Qualified Charitable Remainder Trusts can provide an immediate income, gift, or estate tax charitable deduction for the present value of the remainder interest. The trust can be either inter vivos or testamentary and, provided not too much control and discretion is retained, the settlor can also be the trustee. The trust must make annual distributions to two or more named persons (one of which must be a non-charitable person), the term "person" including individuals, trusts, estates, associations, companies, corporations, and partnerships, and has also been held to include the settlor as an income beneficiary. Individual beneficiaries must be living at the time of the creation of the trust. In certain limited situations, the settlor can provide for successor beneficiaries. The duration of the trust can be for the lives of the individual beneficiaries or for a period of years, not to exceed twenty (20) years. Depending on the type of Charitable Remainder Trust, the distribution can take various forms.

A. CHARITABLE REMAINDER ANNUITY TRUST ("CRAT").

The CRAT is defined in I.R.C. §664(d)(1) and provides for an annual distribution which can be either a fixed percentage or a sum certain, but must constitute at least five (5%) percent of the initial net fair market value of the trust (valued as of the date transferred into the trust). Pursuant to the 1997 Taxpayer's Relief Act, a trust will not qualify as a CRAT if the annual annuity payout exceeds 50% of the initial net fair market value of the trust's assets. Additionally, a trust will not qualify as a CRAT unless the value of the charitable remainder interest is at least 10% of the initial net fair market value of all property transferred to the trust.

B. CHARITABLE REMAINDER UNITRUST ("CRUT").

The CRUT is defined in I.R.C. §664(d)(2) and provides for an annual distribution to beneficiaries of a fixed percentage of the net fair market value of the assets in the trust, as valued annually, which percentage must constitute at least five (5%) percent of the annually determined fair market value. In addition, a CRUT may also provide for distributions of net income only. Pursuant to the 1997 Taxpayer's Relief Act, a trust will not qualify as a CRUT unless the value of the charitable remainder interest is at least 10% of the initial net fair market value of all property transferred to the trust. Additionally, a trust will not qualify as a CRUT if the annual distribution exceeds 50% of the current fair market value of the trust's assets.

VIII. ESTATE TAX SAVINGS PROVISIONS.

A. SUMMARY OF ESTATE, GIFT & GENERATION-SKIPPING TRANSFER (GST) TAX EXEMPTIONS, RATES AND EFFECTIVE DATES.

Effective Date	**Estate Tax Exemption / Rate**	**Gift Tax Exemption / Rate**	**GST Exemption / Rate**
1/1/2010*	$5,000,000 / 35%	$1,000,000 / 35%	$5,000,000 / 0%
1/1/2011	$5,000,000 / 35%	$5,000,000 / 35%	$5,000,000 / 35%
1/1/2012	$5,120,000 / 35%	$5,120,000 / 35%	$5,120,000 / 35%
1/1/2013	$5,250,000 / 40%	$5,250,000 / 40%	$5,250,000 / 40%

* Subject to election to be exempt from estate tax with modified carryover basis for income tax purposes.

Every individual is entitled to a lifetime gift tax credit (for 2013 the credit is the equivalent of $5,250,000 in property transferred during life). This credit is applied to offset gift taxes assessed against a person for gifts made during their lifetime. Every individual is also entitled to an estate tax credit at their death (for 2013 the credit is the equivalent of $5,250,000 in property transferred at death). This credit is applied to offset estate tax assessed against property transferred at death. However, the amount of an individual's estate tax credit is reduced by gift tax credit used during life, with the effect that an individual may only transfer in the aggregate (during life and at death) property worth $5,250,000 without being subject to federal gift or estate tax.

Tax Planning Note: When used in conjunction with the unlimited marital deduction, estate planning documents can be structured to produce significant tax savings. In 2013, a married couple will be able to transfer up to $10,500,000 out of their joint estate, tax free. ATRA '12 has provided "permanency" to the transfer tax laws by instituting fixed exemption amounts (indexed for inflation) and tax rates on gratuitous transfers (at least until Congress decides to change them).

B. ALTERNATE VALUATION

For estate tax purposes, the value of a decedent's gross estate is usually determined on the date of death. However, I.R.C. § 2032 allows the executor of an estate to choose to value the assets of the gross estate at a date six months after the decedent's date of death, provided the assets are not otherwise sold, distributed or disposed of within those six months. If the assets are sold, distributed or disposed of within those six months, then the value is determined at the date of the sale, distribution or disposition. The executor can only elect to use the alternate valuation date if it will lower both (a) the value of the gross estate and (b) the sum of the estate tax and GST tax after application of all allowable credits against these taxes. Estates that owe no federal estate tax or GST tax may not use the alternate valuation date.

C. <u>SPECIAL USE VALUATION FOR FARMING OR CLOSELY OWNED SMALL BUSINESS</u>.

I.R.C. § 2032A provides a special valuation option (i.e. other than highest and best use valuation) for farming operations or closely owned small businesses. Provided that a farming operation or closely held small business meets the threshold tests, meets the material participation and qualified use requirements, and provides supporting appraisals, the Internal Revenue Code allows for an up to $750,000 (inflation indexed) reduction in the valuation of the decedent's gross estate. This amount is $1,070,000 for 2013. As an added benefit, this deduction is taken against the fair market value of the property after considering any applicable valuation discounts. <u>See</u> <u>Estate of Hoover v. Comm'r</u>, 69 F. 3d 1044 (10th Cir. 1995) and Private Letter Ruling 200448006. The qualified use must continue for a ten year period following death, or the qualified heir will be subject to a recapture tax.

D. DEFERRAL OF ESTATE TAXES FOR FARMS OR CLOSELY OWNED BUSINESSES.

In an effort to preserve family farms and other closely held business interests, I.R.C. §6166 currently permits estates owning qualified interests to defer payment of estate taxes attributable to the closely held business interest over two or more annual installments. The interest rate applicable to the deferred payments is lower than borrowing rates from private lenders.

There is no allowable estate tax administration expense deduction for interest payable on the deferred portion of the estate tax, nor is there any allowable income tax deduction for interest payable on the deferred portion of the estate tax.

E. PORTABILITY

1. In General - ATRA '12 makes portability (a concept originally adopted under TRA '10) permanent for any unused applicable exclusion amount for a surviving spouse of a decedent who dies after 2010 if the decedent's executor makes an appropriate election on a timely filed estate tax return that computes the deceased spouse's unused exclusion amount (the "DSUE Amount"). The surviving spouse can use the DSUE Amount either to make gifts during life or for transfers at the death of the surviving spouse.

2. DSUE Amount - The DSUE Amount is the lesser of (1) the basic exclusion amount that applied at the predeceasing spouse's death or (2) the predeceased spouse's basic exclusion amount less the combined amount of the taxable estate plus adjusted taxable gifts of the predeceased spouse.

3. Statute of Limitations – Notwithstanding the usual 3-year statute of limitations, the IRS may examine the estate tax return of a predeceased spouse at any time for purposes of determining the DSUE Amount available for use by the surviving spouse. Thus, the IRS may adjust or eliminate the DSUE Amount based on such an examination, but it may not assess additional tax against a prior deceased's spouse's return if the applicable period of limitations on assessment is already closed.

4. Timely Election – The executor of the first spouse's estate must timely file an estate tax return and make an election to allow the surviving spouse to use the deceased spouse's unused exemption. Consequently, even small estates of married persons must consider whether to file an estate tax return for the first deceased spouse's estate. However, new Treasury Regulations simplify some of the information that must be included in such a return.

5. Relaxed Requirements for Return – There are relaxed requirements for reporting values of certain assets if the estate is not otherwise required to file an estate tax return (e.g., gross estate under $5,250,000 for 2013 decedent). For assets that qualify for a marital or charitable deduction, the return does not have to report the values of such assets, but only the description and beneficiary of the property together with information establishing the right to the deduction. Further, the executor must exercise "due diligence" in estimating the fair market value of the gross estate and identifying the range of values within which the gross estate falls. The required due diligence is believed to be something less than obtaining formal appraisals, but the executor will still need to obtain valuation information sufficient to support any claimed basis step-up.

6. Advantages of Portability – Leaving everything to the surviving spouse and relying on portability may offer the advantages of simplicity, a greater sense of security to the surviving spouse, and a stepped-up basis at the surviving spouse's death.

7. Reasons to Not Rely on Portability – There are several reasons to continue using bypass trusts and not rely on portability, including: (a) the DSUE Amount is not indexed for inflation, but appreciation in the assets is included in the gross estate of the surviving spouse, unlike the growth in a bypass trust, which is excluded; (b) the unused exclusion amount from a particular predeceased spouse will be lost if the surviving spouse remarries and survives his or her next spouse; (c) there is no portability of the GST exemption; (d) beneficiaries other than just the surviving spouse can use the assets left to a bypass trust; (e) the usual benefits of trusts, including asset protection, asset management, and restricting transfers of assets by the surviving spouse; and (f) a state with a state estate tax may not have comparable portability concept, which could result in additional state estate tax being owed.

8. Correction of Portability "Glitch" – The Joint Committee on Taxation issued an ERRATA document on March 23, 2011 suggesting a technical correction to replace the reference to "basic exclusion amount" with "applicable exclusion amount" to adopt the position taken in Example 3 of the Committee Explanation of the TRA '10 and make it clear that there is no privity requirement under the Treasure Regulations.

Example 3. Assume H1 dies leaving a DSUE Amount of $2 million. Then assume W remarries to H2 and later dies with a taxable estate of $3 million. W's applicable exclusion amount is $7 million (her $5 million basic exclusion amount plus the $2 million DSUE Amount from H1). An election is made on W's estate tax return to permit H2 to use W's DSUE Amount, which is $4 million (W's $7 million applicable exclusion amount less her $3 million taxable estate). Pursuant to the technical correction, H2's applicable exclusion amount is increased by $4 million (the amount of W's DSUE Amount).

9. Gifts by Surviving Spouse – A very taxpayer favorable position in the portability regulations allow the use of DSUE amounts from multiple spouses. The regulations include an ordering rule that requires a surviving spouse to use DSUE Amount first when making taxable gifts before using the surviving spouse's own basic exclusion amount. This rule allows an individual to take advantage of DSUE amounts from multiple spouses, so long as the individual makes a taxable gift to utilize the DSUE Amount from a particular deceased spouse before the individual is predeceased by a subsequent spouse.

F. CHARITABLE CONTRIBUTION OF CONSERVATION EASEMENT

Conservation easements are defined in Fla. Stat. § 704.06 to include "a right or interest in real property which is appropriate to retaining land or water areas predominantly in their natural, scenic, open, agricultural, or wooded condition; retaining such areas as suitable habitat for fish, plants, or wildlife; retaining the structural integrity or physical appearance of sites or properties of historical, architectural, archaeological, or cultural significance; or maintaining existing land uses and which prohibits or limits" certain specified activities. Basically, conservation easements are perpetual, undivided interests in real property that are created in the form of a restriction, easement, covenant or condition in a deed, will or other appropriate document. Conservation easements may be acquired by any governmental body or agency or by a charitable corporation or trust. Conservation easements run with the land and are binding on all subsequent owners of the property.

A charitable conservation easement occurs when a landowner grants a conservation easement (for no consideration) to an appropriate governmental or charitable recipient and permits such recipient to enforce restrictions on the landowner's property. If structured properly, a charitable conservation easement can provide income, estate and gift tax benefits to the landowner.

For income tax purposes, charitable contribution deductions are allowed for "Qualified Conservation Contributions," which are specifically defined to include perpetual restrictions on the use of property (e.g., conservation easements). The conservation easement must also be for a specific conservation purpose (e.g., preservation of land for recreation or education of general public, protection of natural habitat, preservation of open space, preservation of historic land, etc.). The amount of the deduction is equal to the fair market value of the contribution, not its adjusted basis. The valuation and documentation of the deduction are critical.

For estate and gift tax purposes, the fair market value of the property will be discounted due to the restrictions resulting from the conservation easement. If the easement is a "qualified conservation easement" (essentially a Qualified Conservation Contribution with some exceptions), then an additional exclusion of up to $500,000 is available from a decedent's taxable estate. The exclusion is equal to 40% of the fair market value of the property at the date of contribution (but is capped at $500,000). Note that the § 2032A Special Use Valuation deduction is also still available.

IX. CASE STUDY.

A. FACT PATTERN.

Larry Landowner and his wife, Louise, own Florida ranch land valued at $20,000,000. They have cash of $250,000 and other assets worth $750,000. Larry and Louise have no debt, so their net worth is $21,000,000. Larry and Louise have one son who they would like to inherit the ranching business.

B. SIMPLE WILLS.

Assume all the assets are titled in Larry's name, Larry and Louise have simple wills which devise all of their property to the other, Larry dies first and they both die in 2013:

Death of Larry		Death of Louise
$21,000,000	Gross Estate	$21,000,000
($21,000,000)	Marital Deduction	($ 0)
$ 0	Tentative Estate	$21,000,000
$ 0	Tentative Estate Tax	$ 8,311,600
$ 0	Estate Tax Credit	($ 2,055,800)
$ 0	DSUE Amount	($ 2,055,800)
$ 0	**Tax Due**	**$ 4,200,000**

Even with no estate planning, Louise was able to take advantage of Larry's unused estate tax credit. However, Larry's estate was required to prepare and file an estate tax return to make the portability election.

C. BASIC ESTATE PLANNING.

Assume the same basic fact pattern, but that Larry and Louise engage in simple estate planning. They re-title their assets so that each own one-half ($10,500,000) and execute wills or revocable trusts that take advantage of their respective exclusion amounts and provide for the creation of trusts for the surviving spouse and descendants:

Suppose Larry dies first. Larry's estate planning documents provide that (i) his estate tax credit amount ($5,250,000) will pass to a Credit Shelter Trust for the benefit of Louise and their descendants and (ii) any amount over the estate tax credit amount ($5,250,000) will pass to Louise in a form that qualifies for the estate tax marital deduction (outright or QTIP):

Death of Larry		Death of Louise
$10,500,000	Gross Estate	$15,750,000
($5,250,000)	Marital Deduction	($ 0)
$5,250,000	Tentative Estate	15,750,000
$2,055,800	Tentative Estate Tax	$6,255,800
($2,055,800)	Estate Tax Credit	($2,055,800)
$ 0	DSUE Amount	$ 0
$ 0	**Tax Due**	**$4,200,000**

The portability election causes these two scenarios to reach the same ultimate tax result it this simple example. However, for the reasons discussed in Sections VIII(E)(6) and (7) above, there may be various compelling reasons for choosing one method over the other, depending on the specific facts and circumstances.

D. ADVANCED ESTATE PLANNING

Now assume the same basic fact pattern, but also that Larry and Louise engage in the following more comprehensive estate planning. First, they create a Family Limited Liability Company (FLLC) and contribute the ranch land to the FLLC in exchange for respective 50% membership interests in FLLC. Their son then acquires a 0.5% membership interest in FLLC from each of Larry and Louise.

Also assume the following reasonable valuation discounts:

- Minority = 15%
- Marketability = 30%
- Combined Discount = 40.5%

Death of Larry		Death of Louise
$ 9,900,000	Appraised Value of 49.5% of Real Property	$ 9,900,000
($ 4,009,500)	Valuation Discounts (combined 40.5%)	($ 4,009,500)
$ 5,890,500	Fair Market Value of 49.5% Interest in FLLC	$ 5,890,500
($ 1,070,000)	§2032A Deduction	($ 1,070,000)
$ 4,820,500	Taxable Value of 49.5% Interest in FLLC	$ 4,820,500
$ 500,000	Other Assets	$ 570,500
($ 70,500)	Marital Deduction	($ 0)
$ 5,250,000	Tentative Taxable Estate	$ 5,391,000
$ 2,055,800	Tentative Estate Tax	$ 2,112,200
($ 2,055,800)	Estate Tax Credit	($ 2,055,800)
$ 0	Estate Tax Due	$ 56,400
$ 0	**Estate Tax Savings**	**$ 4,143,600**

X. PROPOSED REVENUE RAISERS

The Obama Administration has announced several proposals aimed at increasing revenue by limiting or doing away with several common estate planning techniques.

A. REQUIRE A MINIMUM TERM FOR GRATs.

The Obama Administration's proposal is to require a minimum ten-year term for GRATs, which would increase the risk that the grantor would die during the term and have the value of the remainder interest included in his or her taxable estate. Interestingly, the Obama Administration's proposal actually ratifies the use of so-called "zeroed-out GRATs" (GRATs with no taxable gift at funding), provided they have a term of at least ten years. This proposal is estimated to raise $3.5 billion in revenue over ten years.

B. LIMIT DURATION OF GST TAX EXEMPTION.

The generation-skipping transfer tax (the "GST Tax") imposes a tax separate from the estate and gift tax on both outright transfers and transfers in trust to or for the benefit of persons who are more than one generation below the generation of the transferor. However, each person has a GST Tax exemption which they can choose to allocate to transfers during life or at death. That exemption is $5.25 million for 2013 and indexed for inflation. Any generation-skipping transfers in excess of this amount are subject to a flat tax rate of 40 percent.

The Obama Administration's proposal would limit the duration of the GST Tax exemption to 90 years, thus requiring the inclusion ration of a trust to reset to zero on the ninetieth anniversary of the creation of the trust. The proposal cites the repeal or limitation of the traditional Rule Against Perpetuities in many states as the impetus for this proposal. For example, the traditional Rule Against Perpetuities provided that an interest in property was invalid unless it vested not later than 21 years after some life in being which exited at the time of the creation of the interest. In 2001, Florida modified its traditional Rule Against Perpetuities to provide that the interest must vest within 360 years. This proposal to subject all trusts to tax after 90 years is estimated to have only a negligible effect on revenues over the next ten fiscal years.

C. COORDINATE TAX RULES APPLICABLE TO GRANTOR TRUSTS.

A Grantor Trust is a type of trust that violates one or more of the Grantor Trust Rules contained in I.R.C. §§ 671 – 679. Grantor Trusts are commonly used in estate planning because they allow the grantor to be treated as the owner of the Grantor Trust assets for income tax purposes, but not necessarily for gift and estate tax purposes. Thus, if structured property, the grantor can transfer assets to a Grantor Trust, with the effect that the transfer will be complete for gift and estate tax purposes, but the grantor will still be responsible for the payment of any and all income taxes incurred in relation to the Grantor Trust assets. In the common scenario, the grantor transfers assets to a Grantor Trust, pays gift tax based on the value of the assets transferred to the Grantor Trust, pays income tax on the income of the Grantor Trust for the rest or his or her life (which allows the assets in the Grantor Trust to appreciate free of income tax to the trust and its beneficiaries) and finally, when the grantor dies, the assets remaining in the Grantor Trust (which have likely significantly appreciated) are not included in the grantor's taxable estate.

The immense planning opportunities of Grantor Trusts have long been utilized as effective wealth transfer vehicles and that fact has not escaped the attention of our government. In response, the Obama Administration has issued a very broad proposal that would: (1) include the date of death value of all assets in a Grantor Trust in the grantor's gross estate for estate tax purposes; (2) subject to gift tax any distribution from the Grantor Trust to a beneficiary during the grantor's life; and (3) subject to gift tax the remaining Grantor Trust assets at any time during the grantor's life if the grantor ceases to be treated as the owner of the trust for income tax purposes. This proposal would apply to Grantor Trusts created on or after the date of enactment and to other Grantor Trusts to the extent of contributions made on or after the date of enactment. Surprisingly, this proposal is only estimated to increase revenue by $910 million over ten years.

D. MODIFICATION OF VALUATION DISCOUNT RULES.

As discussed above, valuation discounts are an integral part of estate planning for landowners and have been the subject on many proposals over the years to limit their application and usefulness. For example, I.R.C. §§ 2701 – 2704 were enacted to curb techniques designed to reduce transfer tax value but not the economic benefit to the recipient of the interest. I.R.C. § 2704(b) currently provides that certain "applicable restrictions" that would otherwise justify valuation discounts are to be ignored in intra-family transfers of interests in family controlled entities. Examples of such restrictions include (1) any restriction which effectively limits the ability of the entity to liquidate and (2) any restriction with respect to which the restriction lapses after the transfer or the transferor or a member of his family has the right after such transfer to remove the restriction.

The Obama Administration's proposal would create a broader class of "disregarded restrictions," including restrictions on liquidation, restrictions on management, restrictions on distributions, restrictions on access to information, restrictions on transferability and restrictions on a transferee's ability to be admitted as a full holder of an equity interest. This proposal would apply to both transfers during life and transfers at death subsequent to the date of enactment. This proposal is estimated to raise $18.079 billion in revenue over 10 years.

Michael D. Minton

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Michael Minton is the past president of Dean Mead and he also serves as the firm's Chair of the Agribusiness Industry Team. He represents family businesses with an emphasis on generationally-owned agricultural businesses. He assists with their organizational structure, federal income, estate and gift tax planning and business succession planning. He offers his clients extensive experience focusing on tax issues related to agri-business, as well as water resource issues and new innovative uses of land for value added propositions.

Mr. Minton's clients receive the benefit of his 30+ years of experience in Florida agri-business and interaction with agencies that regulate the utilization and optimization of their assets and business opportunities. Mr. Minton is a past Vice-Chair of the Governing Board of South Florida Water Management District (1997-2001).

Currently, Mr. Minton is Chair-Elect of the Board of Trustees for the University of Florida Law Center Association, Inc. and Vice Chair of the Harbor Branch Oceanographic Institute Foundation, Inc. He is a member of the Board of Directors of the Central Florida Partnership and is involved in water related issues for Central and South Florida.

Key Practice Areas
- Agribusiness
- Estate and Succession Planning
- Gift Tax
- Tax
- Water Resources

Primary Industries
- Agribusiness
- Healthcare and Life Sciences
- Real Estate Development

Professional and Civic Activities
- Central Florida Partnership - Board of Directors

- Florida Tax Watch – Board of Trustees

- South Florida Water Management District Governing Board
  - Past Vice Chairman, 1997 – 2001
  - Member

- Harbor Branch Oceanographic Institute (HBOI) - Vice Chair of the Foundation

- UCF College of Medicine, Co-chair of the Charter Class Scholarship Fundraising Committee

- American Bar Association, Tax Section – Member

- The Florida Bar, Tax Section
  - Member, Directors Committee
  - Past Vice Chair, Long Range Planning Committee
  - Past Chair, Agricultural Tax Law Committee
  - Chair, Specialty Tax Areas Committee

- The Florida Bar, Agricultural Law Committee - Past Chairman

- The Florida Bar Foundation, Inc. - Fellow

- Orlando Regional Chamber of Commerce - Past Board Member

- Governor's Committee for a Sustainable Treasure Coast-Member and Chair, Natural Resources Committee

- University of Florida Law Alumni Council – Member

- University of Florida College of Law Center Association, Inc. - Chair-Elect of the Board of Trustees
  - University of Florida College of Law Center - Chair of the New Member Orientation Committee

- Treasure Coast Agricultural Research Foundation, Inc. - Past Legal Advisor

- Governor's Growth Management Task Force - Past Member

- Judicial Nominating Commission for the Nineteenth Judicial Circuit - Past Member

- St. Lucie County Chamber of Commerce - Past President

- Treasure Coast University Task Force - Past Member

- U.S.D.A. Lab Site Selection Task Force - Past Chairman

- Fort Pierce Main Street - Past Board Member

Charitable and Pro Bono Service
Indian River State College Foundation, Inc. - Past Chair

Mr. Minton has been an integral leader for the firm in support of its partnership with the Indian River State College "President's Challenge to SOAR/Take Stock in Children" program. Dean Mead has awarded nearly 800 scholarships over the past 16 years to benefit eighth and ninth grade students who are mentored throughout high school and college. This dynamic program helps to break the cycle of poverty by giving at-risk children the opportunity to pursue education and the chance for a future of success.

University of Central Florida College of Medicine Endowed Scholarship

Mr. Minton is the founding member and co-chair of the UCF College of Medicine's Scholarship Committee, a group of University officials and local professionals whose mission was to raise funds for the scholarships for all 41 students in the inaugural class. Dean Mead was the first organization in central Florida to announce that it would fully fund a four-year endowed scholarship at the College. The scholarship was named for Mr. Robert Mead, one of the founding partners at the law firm, and a significant legal advisor to central Florida's medical community for more than 30 years.

Education

Master of Laws (LL.M.) in Taxation: University of Florida Levin College of Law, Gainesville, Florida, 1982

Juris Doctorate: University of Florida Levin College of Law, Gainesville, Florida, *with honors*, 1981

Bachelor of Science Degree: University of Florida, Gainesville, Florida, *with honors*, 1979

Bar Admissions

Florida

Recognition & Awards

- Awarded Special Merit Award by The Florida Bar Tax Section, 2009
- Named an Outstanding Tax Attorney in *Florida Trend* Magazine's Legal Elite, 2005 – 2008, 2011 and 2012
- Named an Outstanding Tax Attorney in *Chambers USA*, America's Leading Business Lawyers, 2006 - 2012
- Named an Outstanding Tax Lawyer in *The Best Lawyers in America*, 2007 - 2013
- Named one of Florida's Top Tax and Environmental Attorneys in *Florida Super Lawyers* Magazine, 2007 - 2009 and 2012
- Outstanding Conservationist Award, 2003
- Martin Luther King, Jr. Community Service Award, 1997
- Martindale Hubbell: AV Rating

Publications

- **Temporary Tax Relief Provides Significant Planning Opportunities for Small Business Owners**, co-authored with Richard I. Withers and Robert J. Naberhaus III, published in *Farm Credit of Central Florida*, August 2011
- **Back to the Future for Estate Tax Planning**, *Farm Credit Leader*, December, 2010

- **Legal and Tax Issues of Carbon Credit Trading**, co-authored with Christine L. Weingart, AF&PA General Counsels Committee Meeting, May 2010

- **Biofuel Tax Incentives Revisited: The Stimulus Bill Stimulating Renewable Energy,** published in *The Florida Bar Tax Section Bulletin*, August 2009

- **Biofuel Tax Incentives in Florida Agriculture: Are We Serious About Energy Independence?,** published in *The Florida Bar Tax Section Bulletin*, December 2008

- **Year End Estate and Tax Planning for Farmers**, published in the *Farm Credit Leader*, December 2007

- **The Federal Income Tax Consequences of the Receipt of Compensation for the Removal of Commercial Citrus Trees**, published in *The Florida Bar Tax Section Bulletin*, September 2006

Bradley R. Gould

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Mr. Gould practices in the area of federal income, estate, and gift tax law and business succession planning. He represents businesses and business owners in all types of business and tax matters, including choice of entity, mergers and acquisitions, reorganizations, and other general business matters. Mr. Gould represents individuals, businesses and fiduciaries before the Internal Revenue Service and also counsels clients on estate and wealth preservation planning matters. Additionally, he represents trustees, personal representatives and family members in controversies regarding wills, trusts and estates. Mr. Gould is a Certified Public Accountant.

Key Practice Areas

- Business Entities
- Estate and Succession Planning
- Tax
- Tax Controversies
- Trust and Estate Administration

Primary Industries

Healthcare and Life Sciences

Professional and Civic Activities

- Florida Bar Association
  - Tax Section
  - Real Property, Probate and Trust Law Section
- American Bar Association
  - Tax Section - Member
- American Institute of Certified Public Accountants
- Florida Institute of Certified Public Accountants (FICPA)
  - Board of Governors, 2012
  - University of Florida Annual Accounting Conference
    - Committee Member
    - Committee Chairman - 2009
  - Florida Institute on Federal Tax
    - Committee Member
  - FICPA - Sailfish Chapter
    - Assistant Treasurer, 2010 - Present
- St. Lucie County Bar Association
  - Member and Past Treasurer
- St. Lucie County Chamber of Commerce

Charitable and Pro Bono Service

- Big Brothers Big Sisters of St. Lucie, Indian River and Okeechobee Counties
  - Board Member, 2005-present
  - Past Chair, 2008
- Parent Academy of St. Lucie County
  - Chairman

Education

- Juris Doctorate: University of Florida Levin College of Law, Gainesville, Florida, *with honors*, 2001

- Master of Accounting: University of Florida, Gainesville, Florida, 1998

- Bachelor of Science in Accounting: University of Florida, Gainesville, Florida, *with honors*, 1998

Bar Admissions

- Florida
- U.S. Tax Court

Prior Business Experience

CPA, Deloitte & Touche

Recognition & Awards

Martindale Hubbell: AV Rating

Speaking Engagements

- *The End of the Perfect Storm of Estate Planning is Nearing (maybe!) – Planning for the Remainder of 2012*, Fort Pierce, Florida, November 14, 2012

- *Real Estate Professionals*, Orange County Bar Tax Section, Orlando, Florida, January, 2012

- *Asset Protection and Transfer Tax aspects from the 2010 Tax Act*, FICPA, Merritt Island, Florida, July 26, 2011

- *Federal Transfer Tax Developments and Asset Protection Planning*, FICPA Sailfish Chapter, Palm City, Florida, May 18, 2011

- *Federal Tax Update,* FICPA 25th Annual Accounting Show, Fort Lauderdale, Florida, October, 2010

- *Recent Federal Tax Updates,* FICPA 2010 Florida Accounting and Business Expo, Tampa, Florida, June 25, 2010

- *Small Business Tax Update*, BioFlorida Southeast Chapter, Torrey Pines Institute for Molecular Studies, Port St. Lucie, Florida, May 20, 2010

- *Partnership Agreements and Operating Agreements, Terms and Provisions (Related Information) Every CPA (Representing Partnerships/Limited Liability Companies or their Owners) Needs to Know)*, FICPA, Florida Institute on Federal Taxation, Orlando, Florida, November 14, 2008

- *Beneficiary Designations*, FICPA, University of Florida Accounting Conference, Gainesville, Florida, November 1, 2007

- *Federal Tax Update*, FICPA, University of Florida Accounting Conference, Gainesville, Florida, October 5, 2006

Publications

- *Introduction to Estate Planning and Charitable Giving*, co-authored with Robert J. Naberhaus III, May 20, 2011

- *Federal Transfer Tax Developments and Asset Protection Planning*, co-authored with Robert J. Naberhaus III, May 18, 2011

- *New Reporting Requirements for Foreign Financial Assets*, co-authored with Dana M. Trachtenberg, Dean Mead Newsletter, November, 2010

- *Estate Tax Planning for Personal Residences and Vacation Homes*, co-authored with Richard I. Withers, September, 2009

- *Year End Estate and Tax Planning for Ranchers, Growers and Farmers*, co-authored with Michael D. Minton, November, 2007

- *Tax Relief for Sale of Livestock Due to Drought*, October, 2007

- *Choice of Entity for Agricultural Businesses*, co-authored with Michael D. Minton, April, 2007

- *Get Green for Going Green*, December, 2006

- *Charitable Conservation Easements*, October, 2006

- *Federal Tax Consequences of Citrus Canker Payments*, co-authored with Michael D. Minton, February, 2006

Richard I. Withers

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Mr. Withers practices in the Tax and Estate & Succession Planning department. He represents businesses and entrepreneurs in all types of business and tax matters, including choice of entity, mergers and acquisitions, reorganizations, and other general business matters. He also counsels clients in the areas of estate planning, business succession planning, probate and trust administration, and wealth preservation. He earned his Master of Laws in Taxation from the University of Florida in 2007.

Key Practice Areas
- Estate and Succession Planning
- Tax
- Corporate

Primary Industries
Healthcare and Life Sciences

Professional and Civic Activities
- American Bar Association - Tax Section
- Justice Teaching Group
- St. Lucie County Bar Association – Member
- The Florida Bar – Member
  - Real Property, Probate and Trust Law Section
  - Tax Section
- Leadership Gainesville 38

Charitable and Pro Bono Service
Boys & Girls Club of Alachua County

Education
- Master of Laws (LL.M.) in Taxation: University of Florida Levin College of Law, Gainesville, Florida, 2007
- Juris Doctorate: Arizona State University Sandra Day O'Connor College of Law, Tempe, Arizona, *cum laude*, 2004
  - Arizona State Law Journal - Student Editor and Staff Writer
- B.S.B.A. in Finance: University of Florida, Gainesville, Florida, 2001

Bar Admissions
Florida

Recognition & Awards

- Graduate Assistant for Professor Dennis A. Calfee - University of Florida Levin College of Law, 2007
- Student Editor and Staff Writer for Arizona State Law Journal - Arizona State University College of Law, 2003-2004
- Pedrick Scholar - Arizona State University College of Law, Spring 2003

Speaking Engagements

- *The End of the Perfect Storm of Estate Planning is Nearing (maybe!) - Planning for the Remainder of 2012*, Gainesville, Florida, September, 2012

- *2012 Florida Legislative Update*, Gainesville, Florida, June 27, 2012

- *Charitable Trusts*, Meridian Planning Giving Seminar, Gainesville, Florida, June 9, 2011

- *Estate Tax Relief: It's Finally Here, at least for Two Years*, FICPA North Central Florida Chapter, Gainesville, Florida, June 9, 2011

Publications

- *Florida Legislature Clarifies Remedies Available to Judgment Creditors of Members of Florida Limited Liability Companies*, co-authored with Jack Bovay, published in *Forum 8*, September 2011

- "Temporary Tax Relief Provides Significant Planning Opportunities for Small Business Owners", co-authored with Michael D. Minton and Robert J. Naberhaus III, published in *Farm Credit of Central Florida*, August 2011

- "Back to the Future for Estate Tax Planning", published in *Farm Credit Leader*, December, 2010

- Mr. Withers is a frequent contributor to the firm's Estate Planning blog at www.deanmead.com.

Dean Mead's Agribusiness Industry Team

Dean Mead's Agribusiness Team has a long history of representing businesses and individuals engaged in agribusiness operations throughout the State of Florida. Our Team includes attorneys from every department and office throughout the firm so we are able to provide our clients with comprehensive legal counsel that addresses every aspect of their operations.

We actively represent agribusiness clients involved in citrus, cattle, timber, vegetables, turf, sod ornamentals and aquaculture.

Notable Work:

Citrus Canker Task Force
As a proactive response to the impact of citrus canker upon the Florida citrus industry, Dean Mead established the Citrus Canker Task Force (the "Task Force"). The Task Force devoted research and guidance to Florida citrus growers and their advisors (such as attorneys and accountants) on a variety of legal issues, including tax consequences and planning opportunities related to receipt of compensation payment under the Citrus Canker Eradication Program (CCEP); protecting property rights and preserving claims for compensation; and a variety of contract issues related to insurance claims, loan covenants, and marketing and fruit purchase agreements.

FSA Refund
Dean Mead's Agribusiness Team enlisted the assistance of the Florida delegation in Washington, D.C. to aid Florida growers facing repayment of disaster funds they received after the 2004 hurricanes. More than 3,300 letters were sent out to growers across Florida, requiring recipients of the disaster aid to prove they had crop insurance for the next year or face the repayment of all disaster assistance plus interest. There was considerable confusion about whether or not crop insurance was required to be eligible to receive assistance, resulting in almost two-thirds of the recipients failing to meet Farm Service Agency ("FSA") requirements.

Dean Mead's Agribusiness Team, with the aid of counsel in Washington, D.C. with whom we have a long-standing and successful working relationship, contacted the Florida delegation and secured a joint letter addressed to the U.S. Department of Agriculture ("USDA") on this subject. Subsequently, the USDA issued Notice DAP-262 informing Florida FSA offices to grant additional relief to the growers from the effects of the regulation.

<u>Services We Provide to the Agribusiness Industry:</u>

Emerging Market Areas

Formation and Administration of Business Entities

Tax Planning

Estate and Succession Planning for Principals of Agribusiness Entities

Real Estate Development/Transactions

Environmental

Eminent Domain, Property Rights and Real Property Valuation Disputes

Pesticide Litigation

Worker Protection and Safety

Insurance Coverage Analysis and Litigation

Emerging Market Areas

Members of our Agribusiness Team are on the cutting edge of developments within emerging market areas in Florida.

Alternative Uses

Because of emerging diseases, such as "greening", and market constraints, our clients seek our trusted assistance in converting acreage to alternative uses. These alternatives include utility formation, public private partnerships, and other creative responses to market conditions.

Biofuel

Our Team is conducting extensive research on biofuel tax incentives in Florida agriculture so that we can counsel clients on the tax consequences of converting from an existing crop to a new crop to be utilized for biofuel.

Carbon Credit Trading

Our Team is conducting extensive research on carbon credit trading in an effort to better promote our clients in this new and evolving field. The appeal of carbon credit trading is that it can provide landowners with a revenue source for activities they may already be promoting or would promote. While Florida does not have an established market for trading carbon credits at this time, that is expected to change in the foreseeable future with the introduction of a United States cap and trade program, and our Team will be in a position to counsel clients on how to utilize the program to achieve their objectives.

Formation and Administration of Business Entities

Our Team routinely assists clients in selecting the most appropriate type of entity for any given business venture, and we counsel clients on legal issues related to the formation and administration of their business once formed.

Tax Planning

Our Team assists agribusiness clients in all aspects of tax planning related to the operation of their businesses. In addition, we provide a broad array of tax services in connection with real estate transactions, including the structuring of tax-free exchanges, planning to preserve long-term capital gains in connection with dispositions of real estate and the structuring of joint venture arrangements for the acquisition and/or development of real properties. Dean Mead attorney, Charlie Egerton, is recognized as a national expert in the areas of like-kind exchanges and taxation of real estate development projects.

Estate and Succession Planning for Principals of Agribusiness Entities

Our Team includes attorneys who specialize in estate and trust administration matters, including the development of estate plans that help our clients achieve maximum savings in income, estate, gift and generation-skipping transfer taxes. We handle the traditional aspects of personal estate planning, such as the preparation of revocable trusts, wills and irrevocable trusts. We also analyze and implement the latest techniques to reduce estate and gift taxes and preserve our clients' wealth. In addition, we assist our clients with the preparation of estate and gift tax returns, audits of those returns and appeals to the IRS and courts to contest proposed tax deficiencies.

Our Team works closely with clients to plan for the succession of family businesses and transfer of wealth among generations in the most tax efficient manner possible. We have significant experience assisting land owners in multigenerational business succession planning while preserving land holdings.

Real Estate Development/Transactions

Our Team regularly assists agribusiness clients with legal issues related to development of former agricultural lands. We have extensive experience in dealing with a broad range of issues that arise in the development process, including impact fees, concurrency, endangered species, wetlands, infrastructure construction and development permitting. In addition, we assist clients with the purchase and sale of real property, including all related contract and financing issues.

Negotiation and Preparation of Leases and Contracts

Our Team represents both landlords and tenants in commercial leasing transactions. We assist our clients with preparation of lease forms, drafting and negotiation of leases and resolution of lease disputes. We also assist clients in reviewing, drafting and negotiating all types of contracts.

Secured Lending Negotiation and Documentation

Our Team has extensive experience in commercial finance and regularly represents borrowers throughout the state. We structure a variety of commercial lending transactions including agribusiness loans, real estate development loans and asset-based loans, and we handle all related negotiation and documentation.

Land Use and Zoning Representation

Our Team has significant experience in both routine as well as high-profile, leading-edge land use matters. We regularly handle obtaining local government approvals, such as comprehensive plan changes, developments of regional impact, rezonings, variances, special exceptions, conditional uses and planned developments in a variety of situations and jurisdictions.

Environmental

Our Team addresses complex environmental problems confronting our clients in areas such as hazardous waste disposal, water pollution, hazardous material transportation, and conservation easements.

Water Management District Permitting and Enforcement

Our Team works directly with water management district staffs throughout the State of Florida in an effort to achieve our clients' objectives. Team member Michael Minton is the past vice chairman of the Governing Board for the South Florida Water Management District (1997-2001). His previous service on the Governing Board gives him special insight into the District's operations.

Wetlands and Wetlands Banking

Our Team assists landowners in negotiations with local water management districts and other state and federal authorities to obtain permits to create and operate wetland and species mitigation banks. Our Team also assists mitigation banks in determining the tax treatment of creating and operating such banks, including qualifying for like-kind exchange treatment.

Eminent Domain, Property Rights and Real Property Valuation Disputes

Our Team represents property owners in matters involving governmental and quasi-governmental acquisition of private property interests and rights. We work with clients who have lost the function or use of property as a result of governmental regulations. This representation includes negotiating resolutions, administrative hearings and litigation. We also litigate many other real property disputes where the government is a potential party. In addition, we routinely handle due diligence and property valuation and represent clients in real property valuation disputes.

Pesticide Litigation

Our Team has experience assisting clients with disputes related to pesticide usage and liability.

Worker Protection and Safety

Our Team assists clients in complying with the applicable Occupational Safety or Mine Safety and Health Act regulations. We also assist in contesting citations issued by the regulatory agencies and in defending citation enforcement litigation and employee retaliation claims.

Insurance Coverage Analysis and Litigation

Our Team assists clients in evaluating insurance coverage to determine the coverage to which they are entitled and we assist clients in resolving any relevant disputes.

Tax

Dean Mead's Tax Department handles tax planning issues for businesses and individuals. The attorneys in our department have extensive experience in a full range of tax specialties and areas, including sales and purchases of businesses, mergers and acquisitions, tax planning for real estate transactions, debt restructuring, tax controversies, state and local tax issues, agribusiness, employee benefits, ESOPs, and with all types of business entities, including LLCs, S and C corporations, partnerships, charitable and other not-for-profit organizations.

Our Tax Department works closely with our real estate, litigation and health law attorneys to provide our clients with advice for structuring or planning their transactions in the most tax efficient manner possible. The expertise of our team allows us to focus on a wide array of tax issues with an unparalleled degree of depth and experience to address our clients' needs.

The majority of our tax attorneys have Master's Degrees in taxation, many are board certified in tax law by The Florida Bar, a few members hold CPA certificates, and two members are Fellows of the American College of Tax Counsel. Three members of our Tax Team have been honored as the "Outstanding Tax Lawyer of the Year" by the Tax Section of The Florida Bar. Additionally, several members of our Tax Team have been named as "Outstanding Tax Attorneys" by The *Best Lawyers in America®*, *Chambers USA*, *Legal 500*, *Florida Trend* magazine, and *Orlando Magazine*. In addition, one of the firm's founding shareholders, Charlie Egerton, is the immediate past chair of the American Bar Association (ABA) Tax Section.

Areas of Experience:

Business Entity Formation and Operation (Partnerships, LLCs, S Corporations, and C Corporations)

We assist business owners with selecting and establishing the best legal entity to conduct a business, including partnerships, LLCs, S corporations, and C corporations. Our Tax Team also assists our clients in all aspects of tax planning related to the operation of their businesses (whether a partnership, LLC, S corporation, or C corporation).

Our lawyers advise clients on the most appropriate entity to use for any given business venture. This advice includes the tax advantages of the respective entities as well as the non-tax and business issues surrounding each transaction. We continue representation of our clients on an ongoing basis and provide advice on the business issues that arise during the course of operation, including employment, tax, contracts, securities, and licensing and regulatory matters.

Mergers and Acquisitions

A large part of our tax practice involves providing tax advice to our clients in connection with the sale and purchase of businesses, including mergers and acquisitions. This work also involves other tax-free reorganizations of business entities, stock sales, purchases and redemptions, and asset sales and purchases.

Real Estate Tax

Dean Mead's Tax Department provides a broad array of tax services in connection with real estate transactions, including the structuring of tax-free exchanges (forward, reverse, and build-to-suit exchanges), planning to preserve long-term capital gains in connection with dispositions of real estate, and the structuring of joint venture arrangements for the acquisition and/or development of real properties. Team member, Charlie Egerton, is recognized as a national expert in the areas of like-kind exchanges and taxation of real estate development.

We have extensive experience negotiating and drafting RESPA Affiliated Business Arrangements for developers so that they may share in the income generated by the title policies and mortgage loans originating from their developments.

Tax-Exempt Organizations

Our Tax Department represents tax-exempt organizations with numerous organizational and operational issues. We assist clients in selecting the initial structure of the organization, such as Section 501(c)(3) charitable organizations, Section 501(c)(6) trade associations, Section 501(c)(4) social welfare organizations and a variety of other categories of tax-exempt organizations. We also assist in evaluating the tax-exempt purposes of the organization, qualifying it as tax-exempt and complying with laws governing tax-exempt organizations.

Many tax-exempt organizations wish to qualify under Section 501(c)(3) of the Internal Revenue Code because contributions to these organizations are deductible to the donors. We assist our clients in determining whether the organization qualifies as a Section 501(c)(3) organization. Each Section 501(c)(3) organization is further classified as a public charity or a private foundation and we help our clients determine which status would be more beneficial to their organization.

Our lawyers also handle tax issues that surround the qualification, operations and transactions of the tax-exempt organization. State law is an important consideration for tax-exempt organizations. We assist our tax-exempt organization clients in obtaining state law tax exemptions and complying with registration requirements for fundraising. In addition, we provide legal services to tax-exempt organizations that are operating in combination with taxable entities. For example, tax-exempt organization clients may use a taxable subsidiary to house an unrelated business.

Dean Mead has a tax blog on the firm's website. Brad Gould, attorney for the Agribusiness and Healthcare and Life Sciences Industry teams, recently wrote an article for the blog titled "American Taxpayer Relief Act of 2012: What It Means for Small Business Owners". http://www.deanmead.com/2013/01/american-taxpayer-relief-act-of-2012-what-it-means-for-small-business-owners/

Estate and Succession Planning

Dean Mead's Estate and Succession Planning Department is one of the largest and most respected groups of estate planning attorneys in Florida. We are frequently called on by accountants, other attorneys, banks, and trust companies to handle the most sophisticated estate planning, probate, and trust administration cases. The firm's high level of expertise in those areas is evidenced by the fact that our team members include:

- Chair of the Department named Orlando *Best Lawyers*® Litigation – Trusts & Estates Lawyer of the Year for 2013 and also Tax Lawyer of the Year for 2011
- A fellow in the American College of Trusts and Estates Counsel
- An adjunct professor of Estate Planning in the Graduate Tax Program at the University of Florida College of Law
- Past Chair of the American Bar Association Tax Section
- Former chair of the Tax Section of the Florida Bar
- Former chair of the Florida Bar Certification Committee for Wills, Trusts, and Estates
- The Florida Bar Tax Section's "Outstanding Tax Lawyer of the Year" (2005)
- Three attorneys who are board certified as experts in Wills, Trusts, and Estates
- Four attorneys who are board certified as experts in Tax law
- Seven attorneys who have master of laws degrees in taxation (LL.M.)
- Board member of the Central Florida Estate Planning Council
- Past President of the Indian River County Estate Planning Council
- Past President of the Martin County Estate Planning Council

Our Estate and Succession Planning Department specializes in estate and trust administration matters and the development of estate plans which help our clients achieve maximum savings in income, estate, gift, and generation-skipping transfer taxes. We handle the traditional aspects of personal estate planning, such as the preparation of revocable trusts, wills, and irrevocable trusts. In addition, we work closely with our clients to plan for the succession of family businesses and wealth among generations in a tax efficient manner. We analyze and implement the latest techniques to reduce estate and gift taxes and preserve our clients' wealth, including limited liability business entities such as family limited partnerships and limited liability companies, GRATS, and charitable remainder and lead trusts. Further, we assist our clients with the preparation of estate and gift tax returns, audits of those returns, and appeals to the IRS and courts to contest proposed tax deficiencies.

Our Estate and Succession Planning Department constantly monitors the latest developments in both tax and non-tax laws affecting our clients. We advise our clients on the income, gift, and estate tax consequences of charitable gifts and our Team has extensive experience in the establishment of private and publicly supported charitable organizations. We handle the negotiation and preparation of marital agreements and provide asset protection planning for individuals. Our Team has significant experience assisting land owners in multigenerational business succession planning while preserving land holdings. When necessary, we represent fiduciaries and beneficiaries in court and mediation to settle disputes that arise during administration of a trust or estate.

We recognize that our clients' estate planning needs frequently require expertise in other areas of the law, so we work closely with attorneys in the firm's other practice groups to provide our clients with the full service they need. We pride ourselves on utilizing the latest technology to provide exemplary service in an efficient and cost effective manner to our clients.

Areas of Experience

- Business Succession Planning
- Charitable Giving
- Estate, Gift and Generation-Skipping Tax
- Limited Liability Business Entities
- Probate and Guardianship
- Trust, Estate and Fiduciary Litigation
- Tax Controversies and Audits
- Trust Administration
- Trust and Estate Income Taxation
- Wills and Trusts
- Wealth Preservation

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