SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1486

SPONSOR: Judiciary Committee, Senators Carlton and Posey

SUBJECT: Assets Held in Benefit Plans

DATE: March 4, 2004 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Matthews	Lang	JU	Fav/CS
2.			BI	
3.				
4.				
5.				
6.				

I. Summary:

This CS expands upon existing provisions governing assets held in benefit plans to reflect recent tax changes in the Internal Revenue Code that have resulted in expanded tax exemptions and tax exclusion benefits. Specifically, the CS does the following:

- Revises the law on exemption from legal process to exempt all assets paid into or out of qualified tuition programs and education savings accounts, regardless in which state they are established, and to exempt all assets paid in and out of medical savings accounts as authorized by the Internal Revenue Code

- Amends the Florida Uniform Minors Act to expand the scope of authority to manage or transfer monies for or on behalf of a minor by expanding the category of plan proceeds that may be made payable to a trust to include stock ownership plans, individual retirement accounts and other options, to expand the authority of a custodian to transfer part or all of custodial account funds into a s. 2503(c) Qualified Minor's Trust, to allow for the nomination of a custodian in any benefit plan as redefined in the Act, and to increase from $10,000 to $15,000 that may be transferred under specified circumstances, directly to a family member or trust company.

- Amends the Probate Code to add to the categories of plans or policies from which death benefit proceeds may be payable to a trust to recognize that these proceeds may be payable from any type of benefit plan as is newly redefined in the Florida Uniform Transfer to Minor's Act.

- Amends the Florida Guardianship Law to conform with changes to the Florida Uniform Transfers to Minors Act by expanding a natural guardian's authority to receive and manage a minor's proceeds from a benefit's plan without a court order on legal monetary matters.

This bill substantially amends the following sections of the Florida Statutes: 222.22, 710.102, 710.104, 710.108, 710.116, 733.808, and 744.301.

II. Present Situation:

Assets Exempted from Legal Process

Under the federal Bankruptcy Code, the debtor has the option of claiming exemptions for certain enumerated property listed under one of two mutually exclusive sets of property eligible for federal exemption. *See* 11 U.S.C. s. 522(b)-(d). However, in order for the debtor to claim the federal exemption, the state must recognize the federal exemptions under its own state law. Florida, as many other states, has opted out of basing its exemptions entirely on federal law. *See* s. 222.20, F.S. Therefore, the Florida law on exemptions from creditor's actions applies and operates independently of the federal Bankruptcy Code. However, a state that has opted out is not precluded from exempting property that is exempt under federal law.

Chapter 222, F.S., currently exempts, without limitation, from garnishment, attachment, and other legal process by creditors the following:[1]

- Certain disposable earnings of a head of family (s. 222.11, F.S.).
- The proceeds of a life insurance policy (s. 222.13, F.S.).
- The cash surrender value of a life insurance policy and the proceeds of an annuity contract (s. 222.14, F.S.).
- Disability benefits payable from any insurance (s. 222.18, F.S.).
- Pension, retirement, or profit sharing benefits (s. 222.21, F.S.).
- Prepaid College Trust Fund moneys and Medical Savings Account funds (s. 222.22, F.S.).
- A debtor's interest in a motor vehicle, up to $1,000 in value (s. 222.25, F.S.).
- The debtor's interest in any professionally prescribed health aids (s. 222.25, F.S.).
- Social security benefits, unemployment compensation or public assistance benefits (e.g., AFDC, WIC, and food stamps); veterans' benefits; disability, illness or unemployment benefits; alimony, support or separate maintenance; and stock or pension plans under specified circumstances (s. 222.201, F.S., recognizing a subclass of property for federal exemptions under 11 U.S.C. s. 5222(d)(10)).

Fraudulent transfers, conveyances, or other fraudulent asset conversions are not exempt from legal process under s. 222.29 and s. 222.30, F.S.

[1] *See* s. 222.01 through s. 222.05, F.S., exemption of homestead from legal process; s. 222.061, F.S., exemption of certain personal property; s. 222.11, F.S., exemption of wages from garnishment; s. 222.13 through s. 222.14, F.S., exemption of life insurance policy proceeds; s. 222.18, F.S., exemption of disability income payments; s. 222.21, F.S., exemption of pension money, retirement and profit-sharing benefits; s. 222.25, F.S., exemption of up to a certain value in a motor vehicle, prescribed health aids, or I.R.S. refunds.

Assets In Qualified Tuition Programs and Education Savings Accounts
For purposes of promoting educational opportunities at postsecondary institutions, the Legislature established its own prepaid qualified tuition program (also known as the Florida Prepaid College Program) in 1987[2] and the Florida College Savings Program in 1999[3]. Under Florida's qualified tuition program, a purchaser or a person who agrees to make or who is obligated to advance registration or dormitory housing payments enters into an advance payment contract with the Florida Prepaid College Board ("Board"). Under the Florida College Savings Program, a benefactor enters into a participation agreement for a savings program for a designated beneficiary.

The Legislature specifically exempted these programs from legal process under s. 222.22, F.S., and from claims of probate creditors under s. 732.402, F.S. Since the creation of those two programs, Congress has expanded the tax benefits under the Internal Revenue Code to allow for the creation of other education savings accounts such as the Coverdell Education Savings Account[4] and qualified prepaid education programs. [5] A Coverdell Education Account, formerly known as an education individual retirement account (IRA), is an established account to which a maximum of $2000 may be contributed annually for the funding of education expenses of a designated beneficiary through subsequent tax-free earnings.[6] The benefit applies to elementary, secondary, and higher education expenses. Effective beginning in the tax year 2004[7], any state or eligible education institution can establish and maintain qualified tuition programs to which a person can prepay or contribute for purposes of a qualified student's education. An eligible education institution includes a college, university, vocational school, or other postsecondary institution eligible to participate in a student aid program administered by the Department of Education. This also includes all accredited public, nonprofit, and proprietary (private profit-making) post secondary schools.

Assets in Medical Savings Accounts
Federal law allows a taxable income deduction for an aggregate amount that a person may pay into an Archer Medical Savings Account during the taxable year.[8] The term "Archer MSA" is defined as a trust created or organized in the United States as a medical savings account exclusively for the purpose of paying the qualified medical expenses of the account holder, but only if the written governing instrument creating the trust meets certain criteria. Only self-employed persons or employers with less than 50 employees could contribute to these accounts. Florida law currently exempts from legal process moneys paid into a Medical Savings Account. *See* s. 222.22, F.S.

Assets Derived from Death Benefit Proceeds

---

[2] *See* ch. 87-132, L.O.F.; s. 240.551, F.S. (now s. 1009.98, F.S.)
[3] *See* ch. 99-220, L.O.F.; s. 240.553, F.S. (now s. 1009.981, F.S.)
[4] *See* s. 530, Internal Revenue Code of 1986, as amended.
[5] *See* s. 529, Internal Revenue Code of 1986, as amended.
[6] *See* Tax Benefits for Education, ch. 7, Pub 970, Department of Treasury (2003).
[7] *See* Tax Benefits for Education, ch. 8, Pub 970, Department of Treasury (2003).
[8] *See* s. 220, I.R.C. 1986, as amended

Current law provides that death benefits are payable to a trustee of a trust created either before the death of the decedent, or by the decedent's will. s. 733.808, F.S. If the trustee does not claim the death benefits within 6 months after the decedent's death, then the insurance company or obligor must pay the benefits to the personal representative of the estate unless otherwise provided by agreement with the insurer. Such death benefits are not a part of the probate estate. Thus, they are not subject to taxes, debts or other creditor claims nor are they used to compute the commission to a personal representative or the fees owed to the personal representative's attorney. Death benefits are also exempt from liability for the payment of expenses of administration, obligations of the estate or contributions required under s. 733.607(2), F.S., (right of an estate to demand the costs of administration from a revocable trust established by the decedent).

Assets From Settlement of Claims or Causes of Action on Behalf of a Minor.
Under specified circumstances, a *natural guardian*[9] can settle a minor's claims or a cause of action for personal injury, property damage, or wrongful death. [10] The statutory scheme establishes a three-tiered scheme based on threshold settlement amounts which determine if and when a guardian ad litem may or needs to be appointed by the court. If the gross settlement amount is $15,000 or less, a natural guardian can settle the minor's claim without a court order or a bond.[11] If the gross settlement amount exceeds $15,000[12], the court *may* appoint a guardian ad litem to represent the minor's interests. If the gross settlement amount equals or exceeds $25,000, the court *must* appoint a guardian ad litem. However, if a *legal guardian* has already been appointed and no potential adverse interest exists, the court does not have to appoint a guardian ad litem unless it is necessary. Similarly, under specified circumstances, a *legal guardian*[13]*,* can settle a minor's claim if the net settlement amount does not exceed $15,000.

Assets Transferred to a Minor
The Florida Uniform Transfers to Minor Act under chapter 710, Florida Statutes, provides for the nomination of or transfer to a custodian on behalf of a minor for the proceeds of any benefit plan. Under the law, an adult "custodian" can hold property in a custodial account for the benefit of a child. The custodian can invest and distribute the property to or for the benefit of the child as the custodian deems advisable. The custodian must act in the best interests of the child. The property belongs to the child. All of the income from the account is taxed to the child and if the child is under 14 years of age, it is taxed at the child's parents' tax bracket. The balance of the custodial account must be distributed to the child once he or she reaches 21 years of age. If the donor is also the custodian and the donor dies while the account is still in existence, the UTMA account is included in the donor's estate for estate tax purposes.

Assets in Qualified Minor's Trusts

[9] A natural guardian is the mother and father of biological or adopted children. See s. 744.301(1), F.S.
[10] *See also* s. 744.387, F.S. which is similar to s. 744.301, F.S., but pertains to the appointment of a guardian ad litem in lieu of the appointment of a legal guardian.
[11] See s. 744.387, F.S.
[12] In 2002, for the first time since 1979, the Legislature increased the maximum threshold amount from $5,000 to $15,000 that could be settled on behalf of a minor without a court order. *See* ch. 2002-195, Laws of Florida; s. 744.301 and s. 744.387, F.S.
[13] A guardian is a person who has been court-appointed to represent a minor or the minor's property or both. See s. 744.102(8), F.S.

Another mechanism for building savings to fund a child's education is the qualified minor's trust. Under s. 2503(c) of the Internal Revenue Code of 1986, as amended, a donor whether that be a parent, grandparent, or any other person can create a trust for a child and place a gift in the trust in lieu of making a gift directly to a minor or to a custodian for the minor's benefit. The law recognizes a $11,000 annual gift tax exclusion for the minor provided the balance of all income or principal *must* be offered to the child for distribution once the child reaches 21 years of age regardless of the child's maturity level. The child could decide not to exercise that option and if the trust provides limit distribution until a later date. Unlike a custodial account, the trust is actually a separate taxpayer so the income of the trust is taxed. As a separate taxpayer annual tax returns must be filed. However, if income is distributed to the child, the child is taxed.

III. Effect of Proposed Changes:

This CS makes specific statutory changes to laws governing the management and transfer of assets for or on behalf of minors in order to reflect recent federal changes to the Internal Revenue Code that have resulted in expanded tax exclusions and tax exemption benefits.

Section 1 of the CS amends s. 222.22, F.S., to revise the current exemption from legal process as follows:

- Exempts medical savings accounts established pursuant to s. 220 of the Internal Revenue Code of 1986, as amended which now authorizes moneys from the Archer Medical Savings accounts to be deducted from taxable income. Medical savings accounts established pursuant s. 220 of the I.R.C. are known as Archer Medical Savings Accounts. However, the Archer Medical Savings program was scheduled to expire after the 2003 tax year except for those persons who were active participants prior to January 1, 2004, or who are participants after December 31, 2003, by virtue of being concurrently covered by a high deductible health plan of an Archer MSA participating employer.[14]

- Exempts assets from legal process that are paid into or out of any instate or out-of-state qualified tuition program (QTP), and Coverdell education savings accounts. This change reflects the increasingly tax-favored savings plan recognized in federal law. Specifically, this provision will allow anyone to contribute to these programs or educational savings accounts no matter where they are established and to protect these assets from legal process.

- Broadens the exemptions from legal process to prohibit both creditors and claimants from effectuating legal process against these educational or medical savings accounts and protects a program participant, purchaser, owner, contributor, or beneficiary. This reflects a change from the prior version of the exemption which stated the exemption from legal process existed against any *creditor of the purchaser or beneficiary*.

- Adds "levy" to the categories of legal process that may be effectuated.

---

[14] *See* Highlights of 2003 Tax Changes, ch. 1, p. 6, Pub 553, Department of Treasury (2003).

Sections 2, 3, and 4 of the CS amend s. 710.102, s. 710.104, 710.108, and s. 710.116, F.S., respectively, of the Florida Uniform Transfer to Minors Act, to broaden the definition of benefit plan and to change the scope of permissible management and transfers of property on behalf of a minor child. Specifically, the CS redefines “benefit plan” as expressly meaning any retirement plan including a pension, profit-sharing, stock-bonus, or stock-ownership plan or individual retirement account such that a minor’s rights to a benefit plan are expanded and the custodian has greater authority to transfer assets to and from such benefit plans for or on behalf of a minor. Arguably with the exception of the IRAs, the term “benefit plan” was already understood to cover any contract, plan, system, account or trust such as a pension plan, retirement plan, death benefit plan, deferred compensation plan, employment agency arrangement or, stock bonus, option or profit sharing plan. The CS amends s. 710.108, F.S., to increase the amount from $10,000 to $15,000 that may be transferred to an adult family member or a trust company in the event of no custodian is nominated, the custodian dies or the custodian is unable to serve. The CS also amends s. 710.116, F.S., to allow a custodian, without a court order, to divert all or part of the custodial funds to a qualified minor’s trust but if it is, then the custodian’s authority over the transferred funds is terminated. This is a departure from the current law which states that custodial funds may only be expended for the benefit of the child.

Section 6 of the CS amends s. 733.808, F.S. of the Probate Code, to add to the categories of plans or policies from which death benefit proceeds may be payable to a trust to recognize that death benefit proceeds may be payable from any type of benefit plan as is newly redefined by the CS in s. 710.102, F.S., of the Florida Uniform Transfer to Minor’s Act.

Section 7 of the CS amends s. 744.301(2), F.S., of the Florida Guardianship Law, to expand a natural guardian’s authority to act without a court order on legal monetary matters relating to a minor. The CS allows a natural guardian to handle and manage proceeds from any benefit plan including an individual retirement account created *for minors* or those made payable to minors as beneficiaries up to the statutory threshold of $15,000 without a court order.

Section 8 of the CS provides that the bill will take effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

A fiscal impact statement is not yet available from the Department of Revenue.

B. Private Sector Impact:

This CS may increase the participation level of the public in college savings programs and increase the contributions to educational savings accounts and medical savings accounts since it will be protected in the event of bankruptcy proceedings or other legal process. However, the CS does not change current law regarding exemption from probate claims from creditors under s. 732.402, F.S., which does not exempt contributions or savings into QTPs and other educational savings accounts other than the Florida Prepaid College Program contracts and savings agreements under Part IV of ch. 1009, F.S.

C. Government Sector Impact:

See above.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The CS does not revise s. 77.041, F.S., which includes a statutory form for notice to individuals who want to claim an exemption from garnishment of his or her wages. The statutory form for claiming exemptions from garnishment under s. 77.041, F.S., contains a checklist of major categories of exemptions under law. One category includes the qualified tuition program and education savings program administered by the Florida Prepaid College Trust Fund under ch. 1009, F.S. Since the bill will now be exempting from legal process in general other qualified tuition programs and educational savings accounts, it may be advisable in the future to revise the statutory form to reflect the this broader category of exemptions. However, even if this form were not amended, a person is not precluded from listing a QTP or educational savings account as a legally recognized exemption by simply writing this in on the form under the “Other” category.

The CS does not address or otherwise extend the exemption from legal process to the new category of medical savings accounts to be known as “health savings accounts” recently created in the Medicare Prescription Drug, Improvement, and Modernization Act of 2003.
In 2003, Congress amended the tax law to allow for the creation of health savings accounts as the next generation of tax-exempt medical savings accounts. *See* Section 1201 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173.[15] Beginning in 2004, any employee and employer will be able to contribute to a health savings

[15] *See* s. 223 I.R.C. of 1986, as amended.

account (HSAs).[16] A HSA is a tax-exempt trust or custodial account set up with a bank or insurance company which allows someone to pay or be reimbursed for certain medical expenses. HSAs are established to receive tax-favored contributions by or on behalf of eligible individuals, and amounts in an HSA may be accumulated over the years or distributed on a tax-free basis to pay or reimburse qualified medical expenses.

VIII. Amendments:

None.

[16] *See* IRS Bulletin 2004-02. According to the IRS, a number of the rules that apply to HSAs are similar to rules that apply to Individual Retirement Accounts (IRAs) under s. 219, 408 and s. 408A, and to Archer Medical Savings Accounts (Archer MSAs) under section 220. For example, like an Archer MSA, an HSA is established for the benefit of an individual, is owned by that individual, and is portable. Thus, if the individual is an employee who later changes employers or leaves the work force, the HSA does not stay behind with the former employer, but goes with the individual.