

# Robbins, Salomon & Patt, Ltd.

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## ANNA NICOLE SMITH'S ESTATE: KEEPING UP WITH THE LATEST LEGAL DRAMA

Only a few do not know of the infamous Playboy playmate, Anna Nicole Smith. But, only a few would recognize the name J. Howard Marshall II. While performing at a strip club in Houston when she was 24, Anna Nicole Smith (then Vickie Lynn Lawrence) met the elderly Texas oil tycoon J. Howard Marshall II, 63 years her senior. Anna Nicole married J. Howard in 1994. Thirteen months later, at the ripe old age of 90, J. Howard died and left an estate valued at \$1.6 billion.

This was J. Howard's third marriage, and he had two adult children from his previous marriages. Not surprisingly, 90 year old J. Howard did not father any children with Anna Nicole. Even before J. Howard's death, a legal battle began over his estate between Anna Nicole and the younger of J. Howard's two sons, E. Pierce Marshall, who intensely despised his stepmother. The stepmother's photograph appears to the right.



*Mrs. J. Howard Marshall II*

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### The Questions (answers on page 5)

- A) Name the Governors of Illinois from 1953 to the present who were never indicted for any crime whatsoever.
- B) Then name the Governors of Illinois since 1953 who were indicted.

*Hint: five names on each list.*

Back in 1982, long before he met Anna Nicole, J. Howard had signed an estate plan with a revocable living trust owning most of his assets. The son, E. Pierce, was to be the primary beneficiary of the trust upon dad's death.

In 1994, three weeks after J. Howard married Anna Nicole, J. Howard changed the revocable trust so that it became irrevocably for the benefit of E. Pierce. Not surprisingly, E. Pierce had profoundly influenced his father to make that change so that Anna Nicole could not get J. Howard to change the trust for her own benefit. J. Howard did not include his new wife Anna Nicole in his \$1.6 billion estate plan. Instead, he gave her gifts of cash, real estate, cars and jewelry, totaling \$6 million.

While \$6 million might satisfy the average wife, this was apparently chump change compared to what Anna Nicole believed she would be entitled to receive from her husband's \$1.6 billion estate when he died. So, in 1995, approximately four months before J. Howard went to his reward, Anna Nicole filed suit against E. Pierce and others. She claimed that they were interfering with her legal right as a wife to be financially supported by her husband and that E. Pierce had breached his fiduciary duty as trustee of his father's trust and used fraud and undue influence to force his father to make the trust irrevocable.

When J. Howard died four months later, Anna Nicole challenged the trust as a product of fraud and undue influence. In 2001, the case went to trial in a Texas probate court. That court ruled that the trust was valid and that J. Howard did not intend to give anything to his beloved wife from his estate or from the trust. Anna Nicole lost, but it was just round one.

Anna Nicole ran out of money and filed for bankruptcy. Multiple legal attacks by Anna Nicole against E. Pierce then ensued in round two in the U.S. Bankruptcy Court in California, where Anna Nicole found victory. 253 B.R. 550, 275 B.R. 5. However, her victories were short-lived. E. Pierce appealed, and in round three in 2004, the U.S. Court of Appeals tossed out the Bankruptcy Court's rulings in Anna Nicole's favor. 392 F.3d 1118. The legal basis of the Court of Appeals' ruling for E. Pierce was a legal

technicality that a federal court could not hear a probate matter, that Anna Nicole's case was a probate matter in disguise and that therefore the Bankruptcy Court had no right to hear Anna Nicole's case.

Not one to give up, Anna Nicole instituted round four: she appealed to the United States Supreme Court. The Supreme Court turns down over 99% of all requests for review. The odds were overwhelmingly against Anna Nicole. Amazingly, the Supreme Court agreed to hear her case. The Court then ruled that Anna Nicole's case was not a probate matter and so should be reviewed by the Court of Appeals. Maybe, just maybe, Anna had a chance of prevailing. In 2006, the Supreme Court sent the case back to the Court of Appeals to consider the case on its merits. 547 U.S. 293.

Then in 2007, a year after her victory in the Supreme Court, Anna Nicole died under mysterious circumstances. Her estate carried on the case in the U.S. Court of Appeals for the benefit of Anna Nicole's only heir, her infant daughter, father unknown.

In March of this year came round five: the Court of Appeals ruled that the federal Bankruptcy Court was bound by the Texas probate court's prior decision in favor of E. Pierce. 600 F.3d 1037. Anna's estate lost, and E. Pierce was the victor, once again. But one fact stopped E. Pierce from enjoying his latest victory: E. Pierce had died in 2006.

Anna Nicole's estate is now running out of rounds. They can try appealing again to the U.S. Supreme Court, but the probability that lightning will strike twice for one litigant in the Supreme Court is close to the probability of winning the lottery three times. It looks like Anna Nicole will have to rest easy with the memory of the \$6 million her husband gave her, and that E. Pierce is now the richest man in the cemetery.

Incidentally, all of this litigation by Anna Nicole was conducted in her legal name, Vickie Lynn Marshall. "Anna Nicole Smith" was just a stage name.

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**COMING ATTRACTIONS IN OUR NEXT ISSUE...**

✿ *Forgiveness of a Debt Creates Income Tax Liability*



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## AGGRESSIVELY NEGOTIATING OFFICE LEASES IN A TENANT'S MARKET

As the pendulum swings in the office leasing market and building vacancies rise, tenants now have greater leverage than at any time in the last two decades. With this leverage, tenants may be able to obtain concessions from the landlord that were not available even five years ago.



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When negotiating an office lease, tenants of any size should consider the following tips:

### Free Rent

Tenants should request six months free rent, maybe more. A tenant could offer to spread the free rent over the first few years of the lease in exchange for increasing the amount of free rent.

### Security Deposit

If a security deposit is required, a tenant could request that the amount of the deposit be reduced periodically throughout the term of the lease. This will depend on the financial strength of the tenant.

### Build Out

The tenant should ask the landlord to pay for all construction of the leased space, including all new interior walls, kitchens, bathrooms, lighting, paint and carpet. Some landlords may even allow the tenant to buy furniture with funds in the tenant improvement allowance. In the alternative, the landlord could provide a specific sum, usually based on certain dollars per square foot, that could cover everything from tenant build out to relocation expenses to furniture and office equipment.

### Right to Terminate

Any business could unexpectedly fall on hard times. While an absolute right to terminate the lease may be difficult to obtain from the landlord, perhaps an agreement could be reached to cap the damages available to the landlord if the tenant cannot perform under the lease. Then the tenant will have a set amount to pay when weighing whether it should close shop and default under the lease.

### Personal Guaranty

All attempts should be made to eliminate any personal guaranty of a corporate tenant or to have the guaranty capped and reduced (a "burn off") periodically during the term of the lease. This too will depend on the financial strength of the tenant.

### Options for Space

A tenant should attempt to gain some flexibility in obtaining more or less space at a future date. By including options to expand or reduce space, a tenant's leased space could seamlessly change with the size and success of the tenant. Any option to expand should include an agreed-upon rental rate for the option to be effective.

### CAM and Tax Limitations

Most office leases are net or triple net, meaning the amount of money the landlord pays for common area maintenance (CAM) and real estate taxes is passed through to the tenant. To provide cost certainty, tenants should attempt either to require a base year from which CAM and taxes can be charged or limit the increase in those amounts paid over the previous year. In base year clauses, a year is mutually determined by the landlord and tenant. The tenant is responsible for any CAM and taxes over that base year amount. In the alternative, the landlord and tenant could agree that the tenant is not responsible for any increase in the costs of CAM and taxes over a certain percentage from the previous year.

These are mere suggestions. No two deals are the same and much depends on the motivation of the landlord, the financial strength of the tenant, size of the space, length of the lease and type of building.

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## HEALTH CARE REFORM: IT'S EVEN MORE COMPLICATED THAN YOU THOUGHT

Welcome to a small taste of the two new federal health care reform laws, officially known as the Patient Protection & Affordable Care Act and the Health Care & Education Reconciliation Act of 2010. These statutes cover more than 2,700 pages. This article summarizes some of the important new provisions in these laws that apply to employer sponsored health care plans. These provisions apply whether the plan is funded through a health insurance policy or is self funded by the employer.

The statutes group all employer sponsored health plans into two categories: those created on or before March 23, 2010 and those created after March 23, 2010.

### Plans created on or before March 23, 2010:

- **Dependent coverage to older children.** Effective January 1, 2011, plans offering coverage for dependents must make coverage available to each participant's child who is under age 26. Existing plans may continue to exclude adult children prior to January 1, 2014, but only if coverage is available through another employer-based plan.
- **No lifetime limits.** Effective January 1, 2011, no plan may impose a lifetime dollar limit on certain "essential health benefits," such as ambulatory and emergency services, hospitalization, maternity/newborn care, mental health and substance use disorder services, rehabilitative services and devices, prescription drugs, and other defined services.
- **Restrictions on annual limits.** Effective January 1, 2011, the Government will set a cap on annual limits that may be imposed by plans for certain "essential health benefits." Effective January 1, 2014, all annual limits on essential health benefits are eliminated.
- **No preexisting exclusions.** Effective January 1, 2011, no plan may impose a preexisting condition exclusion against a child under the age of 19. Effective January 1, 2014, no one can be excluded for a preexisting condition.

- **No rescission.** Effective January 1, 2011, no plan may rescind coverage of any participant, except for fraud or misrepresentation.
- **No reimbursement of over the counter medications.** Effective January 1, 2011, nonprescription medicines, except insulin, will not be eligible for reimbursement under a health flexible spending account, health savings account or health reimbursement account.
- **Limit on flexible spending accounts.** Effective January 1, 2013, an employee's election to contribute to a health flexible spending arrangement will be subject to an annual maximum of \$2,500, indexed for inflation.
- **Limited waiting periods.** Effective January 1, 2014, no plan may impose a waiting period exceeding 90 days.
- **Automatic enrollment.** Effective upon issuance of implementing regulations, employers with 200 or more full-time employees must provide for automatic enrollment of new full-time employees in a plan under the coverage option with the lowest employee premium, unless the employee opts out or selects a different option.

### Plans created after March 23, 2010:

- **No cost sharing for preventive care.** Effective January 1, 2011, plans may not impose any "cost sharing requirements," including copayments, coinsurance charges and deductibles, on certain preventive care, child preventive services and women's preventive care and screenings.
- **Nondiscrimination for eligibility based on salary or wages.** Effective January 1, 2011, fully insured plans may not limit coverage eligibility on the basis of the total hourly or annual salary of any full-time employees or otherwise establish eligibility rules that discriminate in favor of more highly paid employees.

• **Guaranteed availability and renewability; nondiscrimination based on health status.** Effective January 1, 2014, health insurance companies (but not self-funded plans) must accept every employer and individual who applies for coverage during an annual or open enrollment period and must renew or continue the insurance at the option of the plan sponsor or individual, regardless of a participant's health status or utilization of health services. Insured group and self-insured plans may not set eligibility rules based on health status, medical condition, claims experience, receipt of health care, medical history, genetic information, or evidence of insurability or disability. However, employers may continue to extend wellness incentives based on health factors. Effective as of January 1, 2014, the limits on wellness incentives will be increased.

• **Cost sharing restrictions.** Effective January 1, 2014, plan sponsors must pay at least 60% of the total cost of coverage, and annual cost sharing may not exceed \$2,000 for individual and \$4,000 for family deductible (adjusted for cost of living from 2014); and \$5,950 individual and \$11,900 family out-of-pocket limit (adjusted for cost of living from 2010).

When implementing regulations are enacted, clarity may be added to these statutory provisions. More to come when that occurs.

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## THE CONTINUING SAGA OF MORTGAGE FORECLOSURES

The mortgage foreclosure crisis continues. The cause of the problem was a combination of overly aggressive mortgage brokers, unwise lenders, unwise borrowers and reckless investors. No one is blameless.

In reaction, the pendulum swung from overly liberal to overly conservative lending policies. Today, financing and refinancing both remain difficult and are subject to some of the strictest lending requirements seen in most borrowers' lifetimes. Lenders, governmental authorities, judges, lawyers and borrowers are working their way through the financial problems that remain with us. Various methods of workouts and dispute resolution have been tried – some with success and some without.

The previously prevailing public sense of entitlement to an unaffordable standard of living seems to be changing, albeit slowly. The willingness of lenders and borrowers

to mitigate their damages seems to be improving. The judicial system, while overwhelmed with the crush of litigation brought on by unprecedented numbers of foreclosures, bankruptcies and dispute resolutions, seems to be accommodating to the current problems of a frustrated, angry and adversarial society.

The resiliency of America and its financial and legal systems is being tested as never before. On the whole, they seem to be meeting the tests. Financing remains difficult to obtain but loan defaults seem to be stabilizing. There is reason to expect a modest recovery in the real estate and other markets in the coming year, which hopefully will reward and justify the patience shown over the last two years.

✦ *Stephen P. Patt*



### The Answers (to our quiz on page 1)

A) Illinois governors since 1953 who were never indicted are: Shapiro, Ogilvie, Thompson, Edgar, Quinn.

B) Those who were indicted are: Stratton, Kerner, Walker, Ryan, Blagojevich.

*Is this a great State, or what!*



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## CONVENTIONAL WISDOM

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~ Mark Twain

GREAT URBAN LEGENDS OF THE LAW

*Fact or Fiction?*

**You can avoid paying child support by living in a different state than the child.**

A: Fiction.

A child support order can not be avoided by living in a different state. Each state is required by the Constitution to enforce every other state's judicial orders. That includes child support orders.

More importantly, a federal statute with the very apt name of the Deadbeat Parents Punishment Act says that if a non-paying parent (usually the father) owes child support for a child who lives in another state, and the arrearage is either more than one year or more than \$5,000, then by not paying what is owed the deadbeat parent has committed a federal crime punishable by up to six months imprisonment. If the arrearage is for more than two years or more than \$10,000, the punishment is up to two years imprisonment. 18 U.S.C. sec. 228.

This is serious stuff. Not only does a non-paying parent gain no advantage by living in another state, he actually subjects himself to doing federal time by not paying and living in another state. And yes, the feds do enforce this law. The U.S. Court of Appeals in Chicago recently affirmed a criminal conviction of a deadbeat father under this law. *U.S. vs. Bell*, 598 F.3d 366.

## RECENT ANNOUNCEMENTS

All the news you can use...

ACHIEVEMENTS OF NOTE

**Larry Woodard** is the general editor of the new 2010 edition of "Illinois Condominium Law," a publication of the Illinois Institute of Continuing Legal Education. This book is generally considered to be the most authoritative source for Illinois attorneys on condominium law. Larry also wrote a chapter for the book on the subject of distressed condominium developments. **Kymn Harp** authored the chapter on commercial condominiums.

**Crystal Kontny** was a speaker at the Chicago Bar Association's seminar for attorneys on residential real estate closings.

**Tracy Stevenson** spoke for the National Insurance Crime Bureau in St. Louis on fraud prevention. She also assisted the NICB in writing a publication for insurance adjusters and law enforcement officers, "Examination Under Oath and Statement Guide."

**Bill Castle** was elected to the board of governors of the Catholic Lawyers Guild of Chicago.

**Andrés Gallegos** was elected to the board of directors of Access Living of Metropolitan Chicago, a not for profit center for independent living that works toward full equality of people with disabilities.

**Jeffrey Randall** mentors underprivileged children through the Take Stock in Children program in Collier County, Florida. Jeff was also appointed to the Collier County Community Redevelopment Advisory Board.

**Richard Stavins** served as a mock judge of the U.S. Supreme Court at Northwestern University Law School's annual freshman moot court competition.

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