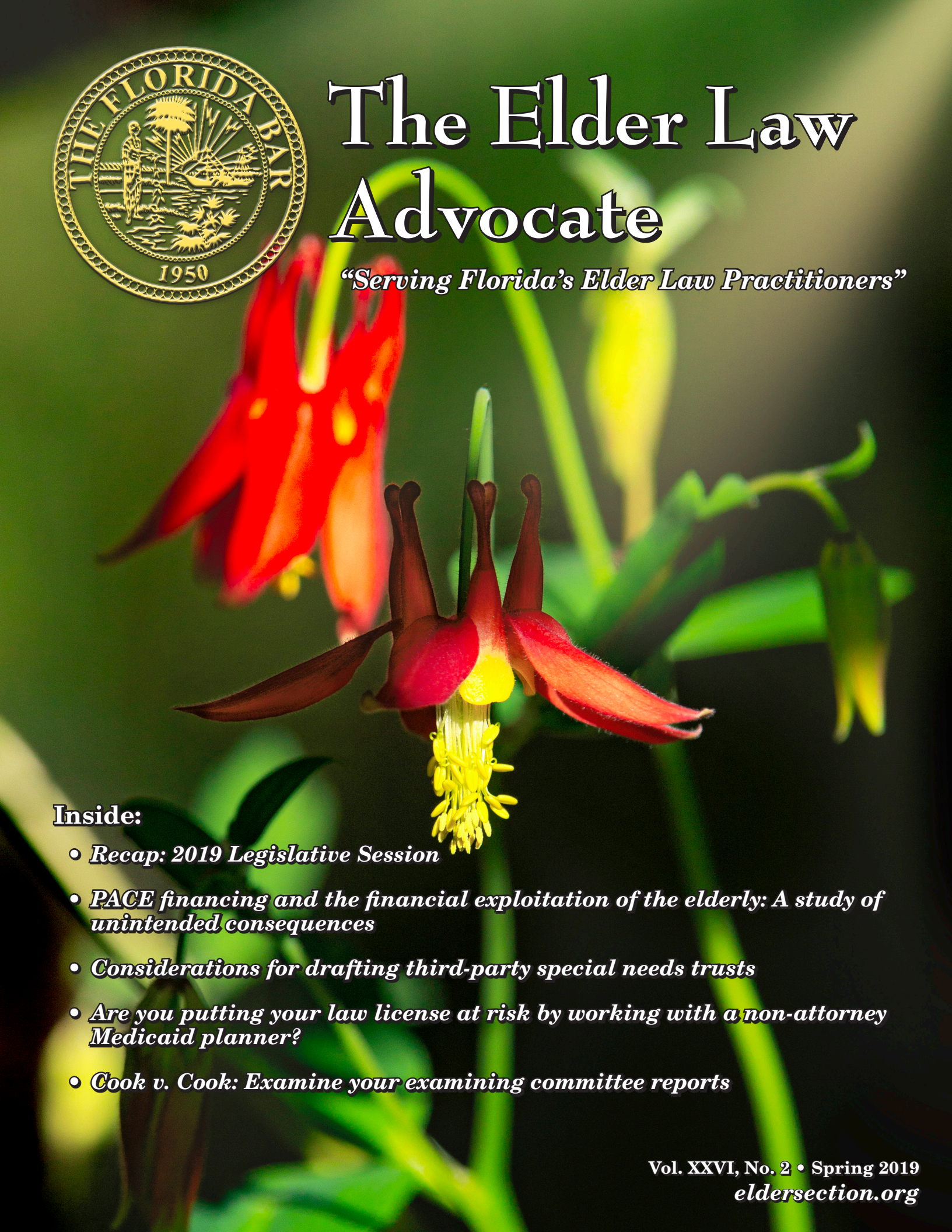
# The Elder Law Advocate

*"Serving Florida's Elder Law Practitioners"*



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# The Elder Law Advocate

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**COVER ART**

*Columbine Flower*
*Randy Traynor Photography*

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**The deadline for the FALL 2019 EDITION: July 1, 2019.** Articles on any topic of interest to the practice of elder law should be submitted via email as an attachment in MS Word format to Heather B. Samuels at *hsamuels@solkoff.com* or to Genny Bernstein at *gbernstein@jonesfoster.com*, or call Leslie Reithmiller at 850/561-5625 for additional information.

Jason A. Waddell

Message from the Chair

# Reasons you should volunteer your time with the Elder Law Section

*If you're not in the arena also getting your ass kicked, I'm not interested in your feedback. – Brené Brown*

I never understood why professional offices are called practices until I worked in one. While most may not admit it, attorneys are like ducks on a pond—all smooth above water and systematically paddling for their lives beneath the water. My year as chair of the Elder Law Section is coming to an end. When I think back over the past five or six years working to this spot, I can't help thinking of that duck analogy. Prior to taking a leadership role within the Elder Law Section, I would show up for a conference and just expect to be wowed. And for many years, that is what occurred. Then one day I made a comment, which led to a challenge to fix the matter I made a comment about. At that point I was able to look behind the curtain, and what I saw was a lot of people systematically working as volunteers to make Florida a better place to raise a family and retire.

Volunteering isn't a risk-free proposal. People are depending on you even though there is no pay for your service. So, why would anyone ever volunteer? This question was asked during the section's recent planning meeting. With less than three minutes of time to give an answer, reasons flowed in from those attending. Here are the top 10 reasons participants gave for volunteering your time with the section:

1. Be a part of the brain trust
2. Substantive knowledge
3. Reshape the law
4. Be on the cutting edge
5. Perceived as an expert on the subject
6. Being around really smart people makes you smarter
7. Access to resources and people
8. Networking with leaders, both substantive and administrative
9. Self-actualization
10. Being able to influence

After more than a decade and a half of being on one committee or another, I can tell you these reasons are all accurate. The only one I find missing is friendship. It is one thing to have friends you want to hang out with and talk about common hobbies, sports, child rearing, and books, but there is something altogether different about having professional friends. They are the ones who appreciate the stress you face as an attorney while paddling like crazy trying to hold it together in front of the world.

Lawyers are 3.6 times more likely to suffer from depression than non-lawyers, according to the American Psychological Association. Such a troubling number is likely one of the reasons mental health is a major focus of Florida Bar President Michelle R. Suskauer this year. Dealing with stress and frustration in our career can be difficult. On the one hand, we are expected to have all the answers, and on the other, we are supposed to be objective, knowing we run a practice (as opposed to a solution center).

Finding balance between the need to have all the answers and knowing that is impossible has not always come easy to me. One way I have found to deal with this imbalance is to be surrounded by like-minded people who appreciate the madness our career can bring. When my elder law peeps ask how I am doing, I know they are asking having been through many of the same struggles. This type of friendship doesn't mean I talk to them weekly on a personal level. To be honest, most come from such a different background that I wonder if they even understand half of what comes out of my southern, sarcastic mouth. Still, they understand that we live in a world of people second-guessing everything we do and that we all need support. They bring a professional friendship I believe is important.

This brings me to the quote at the top of my column. Brené Brown is a social work research professor and a TED Talk celebrity of sorts. She talks about vulnerability and shame. If you haven't watched her talks, I strongly encourage you to take a lunch break and watch. Recently she reminded me of a Theodore Roosevelt quote I

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**Chair's message. . .**
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leaned upon several years ago when I had some people second-guessing my work. The quote goes:

> It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes short again and again, because there is no effort without error and shortcoming; but who does actually strive to do the deeds; who knows great enthusiasms, the great devotions; who spends himself in a worthy cause; who at the best knows in the end the triumph of high achievement, and who at the worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who neither know victory nor defeat.

As I sit here today reading this quote, I can't help but think about the women and men who make up the Elder Law Section's leadership team. This year 42 people put their necks on the line. They stood up on topics like Medicaid retroactive coverage and e-will/notary legislation, drafted legislation on uniform guardianship jurisdiction, dealt with huge changes to the VA rules, helped organize pro bono law school events, created free CLE training events for our new injunctive relief for vulnerable adults, and so much more.

Yet at the same time, this quote also applies to the nearly 1,700 elder law attorneys in this state. We fight in the arena few want to see. It is easy to believe that other attorneys are able to mail a demand letter and get a new car while we have every minute of our billable life second-guessed by the court or a client. We attempt to help the elderly who could have planned ahead but waited till the last minute, yet still expect us to make it all better like a mother fixing a small cut on a child's knee. We help families struggling to provide care to a child with special needs, families that have nothing left in them but the skill of a strong advocate, which they use against us to talk us off a fee that barely covers the cost of staff and an office. We work in a field called a practice, but know people are ready to sue us if our practice goes bad. It is stressful to say the least.

So, what can you do about it? Be prepared. Join something that will help bring professional friends into your life who will understand what you are going through and help you find some balance. People who will help you become a better attorney. People who remind you that while it is difficult at times to practice elder law, it provides help to the people in the world who need help the most. Your practice provides help to that senior who is struggling, advice to the caregiver who is burned out and making risky decisions, and answers for the parent who has a child with special needs. Take care of yourself and realize that as motivational speaker Les Brown says, "No one is going to take better care of you than you."

As for me, I am like Winnie the Pooh in thinking "how lucky I am to have something that makes saying goodbye so hard." Thank you for allowing me to serve as chair of the Elder Law Section.

Capitol Update

by Brian Jogerst

# Recap: 2019 Legislative Session

The 2019 Legislative Session ended on Friday, May 3, and health care issues received a great deal of attention—including the repeal of certificate of need for acute care hospitals effective July 1, 2019, permitting overnight stays in ambulatory surgical centers, and the importation of prescription drugs from Canada and other counties.

As noted in previous articles, more than 3,000 bills are filed each session, and this past session was no exception. Specifically:

- Total number of bills filed: 3,571
- Total number of amendments filed: 2,997
- Total bills that passed *both* the House and the Senate: 196

Thank you to Lobby Tools, a legislative tracking system, for the above facts.

Elder law attorneys and the Legislative Committee reviewed more than 50 bills and amendments this past year, and the following is an overview of key issues.

**Florida Guardianship & Protective Proceedings Jurisdiction Act**

Recognizing that Florida is one of only four states *not* to adopt a version of the Uniform Adult Guardianship Jurisdiction Act, Senator Joe Gruters (R-Sarasota) filed Senate Bill 1168 and Representative Wyman Duggan (R-Jacksonville) filed House Bill 677. These bills offered a *tailored* version of the Uniform Act, but were also designed to recognize Florida's guardianship laws. Florida is widely recognized as a leader in adopting laws to prevent exploitation and to protect Florida's vulnerable adults, yet those protections are eroded when people cross the state line.

According to the American Bar Association's Commission on Law and Aging report entitled State Adult Guardianship Legislation: Directions of Reform – 2014:

> In our increasingly mobile society, adult guardianships often involve more than one state, raising complex jurisdictional issues. For example, many older people own property in different states. Family members may be scattered across the country. Frail, at-risk individuals may need to be moved for medical or financial reasons. Thus, judges, guardians, and lawyers frequently are faced with problems about which state should have initial jurisdiction, how to transfer a guardianship to another state, and whether a guardianship in one state will be recognized in another.
>
> *Such jurisdictional quandaries can take up vast amounts of time for courts and lawyers, cause cumbersome delays and financial burdens for family members, and exacerbate family conflict—aggravating sibling rivalry as each side must hire lawyers to battle over which state will hear a case and where a final order will be lodged. Moreover, lack of clear jurisdictional guideposts can facilitate "granny snatching" and other abusive actions.*(emphasis added)

Under the bill suggested by the Elder Law Section and the Academy of Florida Elder Law Attorneys, the provisions:

- Adopt uniform provisions for communication and cooperation between Florida courts and the courts of another state regarding a Florida resident who is temporarily within the borders of another state.
- Define when a person has significant connections to Florida such that the court of another state where the Uniform Act has been adopted will honor the orders of the Florida court regarding the rights of the Florida resident.
- Permit a Florida court to decline to exercise jurisdiction when the basis for jurisdiction would be based on the bad conduct of a person seeking the Florida court's jurisdiction.
- Outline a procedure when two states are attempting to exercise concurrent jurisdiction.
- Establish procedures for Florida to accept a guardianship from another state, and the procedure to transfer a guardianship established in Florida to another state.

Sadly, ELS and AFELA have seen the financial and emotional strain on families when family members are caught up in a guardianship dispute between two states. By joining the Uniform Act while not diluting Florida's guardianship laws, Florida can protect vulnerable Florida residents when they are removed to another state.

Unfortunately, we were not able to get traction on the bill this year, given concerns from other sections of the Bar, but we will work on this issue over the summer and fall for next session.

We are grateful to Senator Gruters and Representative Duggan for their support.

**Electronic notaries/electronic wills**

Senator Jeff Brandes (R-St. Petersburg) filed Senate Bill 548 and Representative Danny Perez (R-Miami) filed House Bill 409 dealing with electronic

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notaries and electronic wills. During the 2017 and 2018 sessions, elder law opposed the bills due to concerns with the lack of protection for exploited and vulnerable adults. Prior to the 2020 Session, working closely with the sponsors and the proponents of the bill, the following issues were resolved:

- Clerks of court must be added as qualified custodians of electronic wills.
- Production of a complete, uninterrupted, and unedited video and if the video cannot be produced, the burden of proving the documents shifts to the proponent of the document.
- Removing super powers from remotely witnessed durable powers of attorneys.
- Vulnerable adults are not eligible to execute powers of attorney or electronic wills.
- Witnesses of electronic documents are required to submit to Florida court jurisdiction.

In addition to the above, additional questions were successfully secured that must be asked to provide further safeguards for all individuals.

In the end, elder law supported the bill adopted by the Legislature and has encouraged Governor DeSantis to sign the bill.

**Vulnerable adults/security dealers**

Senator Audrey Gibson (D-Jacksonville) filed Senate Bill 1466 and Representative Byron Donalds (R-Naples) filed House Bill 143 designed to give security dealers the ability to place a temporary hold on transactions if they suspect exploitation. This is the second session for this bill, and just like last session, the overarching goal to protect vulnerable investors/adults was a praiseworthy and supported goal. Concerns remained, however, with other provisions in the bill. For example, a security dealer who placed a freeze on an account would receive a "safe harbor" protection. Elder law was concerned about security dealers who might place a freeze on an account to prevent the funds from being transferred to a new security dealer, not because of exploitation concerns. In this instance, the security dealer should not receive the safe harbor benefits. Working with the sponsors and proponents of the bill throughout session, no acceptable solution was reached. House Bill 143 passed the House of Representatives, but the Legislature adjourned before the Senate could take up the bill. This issue will return for the 2020 Legislative Session.

**Surviving successors/bankers**

Other legislation elder law worked on for a second consecutive session was Senate Bill 1184 by Senator Dennis Baxley (R-Ocala) and House Bill 837 by Representative Colleen Burton (R-Lakeland). The intent of this legislation was to permit a decedent's survivors access to funds in the decedent's account up to $10,000 per institution. Under the terms of the bills, no dispersal could happen for up to two years; however, elder law was concerned that the provisions of the bill applied to people who pass away *with or without a will*, which could ignore someone's directives on disposal of their assets. The House bill was amended to send the money to unclaimed property after 25 months, and the Senate bill maintained the original provisions. While House Bill 837 passed the House of Representatives, the Senate did not consider the bill prior to adjournment. This issue also will return for the 2020 Legislative Session.

**Medicaid retroactive eligibility**

Prior to the 2018 Legislative Session, Medicaid recipients had three months to submit their applications and supporting documentation to secure Medicaid eligibility and benefits. During the 2018 Legislative Session, the Legislature reduced Medicaid retroactive eligibility. Initially the discussion centered on reducing the time from 90 days to 30 days, but the final budget agreement reduced retroactive eligibility from 90 days to the beginning of the month of application. Federal CMS approved Florida's change for one fiscal year, and the Legislature extended the policy for one additional year—with a study to be conducted with provider groups before next session.

**Looking ahead: 2020 Legislative Session**

While this past session started in March and ended in May, with committee hearings in January and February, the 2020 Legislative Session will begin in January and end in March, with committee meetings held September through December 2019. As noted above, vulnerable investors, surviving successors, and uniform guardianship will return, and RPPTL has proposed a complete rewrite of the guardianship laws, which elder law is actively reviewing in addition to other legislative proposals for next session. Clearly, an active and aggressive session is on the horizon for 2020, and the Legislative Committee and the substantive committees could use additional help.

**Legislative Committee**

The Legislative Committee meets *every other* Friday prior to session and then *every* Friday during session. If you want to participate on a substantive committee and also review/comment on the bills that are filed, please contact the co-chairs of the ELS Legislative Committee:

Bill Johnson

*wjohnson@floridaelderlaw.net*

Shannon Miller

*shannon@millderelderlaw.com*

We have enjoyed success on legislative issues by working with legislators and providing feedback to them, as well as by testifying at committee hearings. We are grateful for the grass-roots support we have received and for the difference it makes when working with legislators.

You can help by working with your local legislators and being a local resource to them. If you do not know your legislator, we remain willing to help facilitate an introduction with the legislator and his or her staff.

***Brian Jogerst** is the president of BH & Associates, a Tallahassee-based governmental consulting firm under contract with the Academy of Florida Elder Law Attorneys and the Elder Law Section of The Florida Bar for lobbying and governmental relations services in the State Capitol.*

# PACE financing and financial exploitation of the elderly: A study of unintended consequences

**by Ellen Cheek**

The client, an 86-year-old disabled man, and his wife owned their 1,000 sq. ft. Miami home free and clear until Dec. 7, 2018. On that day, two salespersons knocked on the door. The salespersons told the client that the government wanted him to have an energy-efficient air conditioner and that the salespersons had one they could install. The salespersons explained, "The government taxes will take care of the cost." The salespersons did not tell the client that *he* would have to pay the "government taxes"—as an additional non-ad valorem tax assessment on his property tax bill, which could be for years to come. Nor did they tell him that if he could not pay those taxes, which was very likely because his total household income was $1,200 a month, that his homestead would be vulnerable to a tax deed sale.

If it seems incredible that the homestead of a vulnerable adult, with extremely limited income, could be saddled with a first-priority lien for longer than he is likely to live, it is even more incredible to learn that this predatory opportunity was created by a 2010 statute, HB 7179, Florida's version of Property Assessed Clean Energy (PACE). Proponents of the statute heralded it as an innovative way to incentivize energy-efficient and wind-resistant home improvements. Supporters of HB 7179 extolled the virtues of allowing homeowners "to voluntarily finance such improvements with local government assistance,"[1] and permitting homeowners to realize savings in utility and homeowner's insurance bills. They also claimed that the statute would promote the state's energy and hurricane mitigation policies and that local economies would benefit from additional work for contractors.

How did an initiative about energy-efficient and wind-resistant home improvements become a homestead-threatening trap for unwary seniors? We find the answer in a study of the

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PACE program and its unintended consequences.

**PACE basics**

Though the program is rather complicated, the basic outline is simple. Section 163.08 of the Florida Statutes provides that local governments[2] may create a PACE fund/finance program, which they can administer or which can be administered by a third party (either for profit or not for profit). Through the program, the local government *funds* qualifying home improvements by paying the home improvement contractor. The homeowner then *finances* the improvement by agreeing to *a non-ad valorem property tax assessment*. The homeowner records the financing agreement, providing a lien of equal dignity to county taxes and assessments—a "super lien," in effect.

**The issues**

Perhaps PACE is an innovative way to incentivize green improvements for the benefit of all concerned. It appears, however, that PACE has facilitated aggressive and sometimes unscrupulous contractors who prey on homeowners in the name of energy efficiency and hurricane risk mitigation by not accurately disclosing the risks involved. For many reasons, including that PACE is a property assessment and not a loan, the program operates without typical consumer-protection constraints. Most disturbing, there is evidence that Florida's elderly, low-income homeowners are targets of the most predatory of the home solicitors. This could be because senior citizens are home, they tend to have significant equity, and they often welcome the opportunity to talk to a visitor. Nevertheless, while vulnerable adults are easy targets for any scam artist, certain aspects of Florida PACE, in its current form, seem to facilitate the victimization of low-income seniors. For example:

- Section 163.08, F.S., contains no requirement for any inquiry into *the homeowner's ability to pay* an increased property tax assessment or an increased mortgage payment to accommodate the assessment. The statute's underwriting instructions concern *the property's status* only.[3]
- There are no required disclosures *to the homeowner* regarding the risk of a super lien on the homestead, nor of the fact that the lien may affect the ability to sell or mortgage the property in the future. The only required disclosures are to the mortgagee[4] and to any prospective purchaser with a PACE lien.[5]
- There is no provision in § 163.08 for regulation of the local programs or the participating contractors.

**Actions needed**

- An ability-to-repay requirement is critical to the protection of vulnerable senior homeowners. A 2018 amendment to the Truth-In-Lending Act (TILA) requires new regulations, which extend TILA's ability-to-repay requirements to PACE financing and to apply TILA's general civil liability provisions to violations of the ability-to-repay provisions in PACE-financed transactions. Florida's statutes should impose parallel regulations and consumer protections.
- Include clear disclosures about the special assessment and about the effect of a PACE lien on any future sale or refinance of the property.
- Impose guidelines and standards for PACE administrators and participating contractors.
- Enforce Florida's Home Solicitation Act,[6] which includes a requirement that *every employee* engaged in home solicitation sales must have a permit and which prohibits misrepresentation of the terms or conditions of sale and the reasons for soliciting the sale.[7]

The unintended consequences of Florida's PACE program require immediate attention through amendments/regulation and through enforcement of the consumer protections already provided by existing law. Time is of the essence; vulnerable senior homeowners who cannot afford an increased tax assessment have a lot to lose.

***Ellen Cheek*** *has been a full-time attorney with the Florida Senior Legal Helpline at Bay Area Legal Services since 2006. In addition to her current role as staff attorney and assistant manager of the Florida Senior Legal Helpline, she serves as co-chair of the Abuse, Neglect and Exploitation Committee of the Elder Law Section of The Florida Bar and is the Florida elder justice coordinator. She graduated from Mount Holyoke College and the University of Santa Clara School of Law.*

**Endnotes**

1 § 163.08(1)(b), Fla. Stat.

2 Local governments include a county, a municipality, a dependent special district, or a separate legal entity. § 163.08(2)(a), Fla. Stat.

3 § 163.08(9), Fla. Stat.

4 § 163.08(13), Fla. Stat.

5 § 163.08 (14), Fla. Stat.

6 § 501.021 et seq., Fla. Stat.

7 § 501.047, Fla. Stat.

# Considerations for drafting third-party special needs trusts

**by Amy J. Fanzlaw**

When drafting third-party special needs trusts, it is easy to default to a standard form or template. The language is familiar, and using forms is quicker than specialized drafting—why invent the wheel, right?

In actuality, many preliminary choices must be made before drafting a third-party special needs trust. First, consider whether the trust should be established and funded only at the settlor's death or established and funded at least minimally during the settlor's lifetime. If the trust is to be established and funded during the settlor's lifetime, the next consideration is whether the trust should be revocable or irrevocable. Determining the most appropriate choice would, of course, involve discussion with the settlor, but the following points should guide this discussion.

**Trusts established upon death versus during lifetime**

Third-party special needs trusts are most commonly testamentary, that is, established by will or living trust after the death of the settlor. One reason for this may be because parents of a disabled child are the most common settlors of third-party special needs trusts, and so long as parents are alive, parents generally prefer to provide personally for their disabled child rather than delegate that role to someone else. Segregating assets for the benefit of a disabled child may be impractical, particularly because the assets may be needed for other purposes while the parents are alive. Parents also frequently opt to leverage assets to fund a special needs trust with life insurance policies insuring one or both parents' lives. Waiting until the death of both parents to fund a special needs trust works so long as the parents have capacity to manage their child's care. But if there is a risk that one or both parents may lose capacity or that the parents will divorce, it may be more desirable to establish and fund a special needs trust during the parents' lifetime.

When a third-party special needs trust is established during the settlor's lifetime, it provides a central depository for gifts for the benefit of the disabled beneficiary. Other family members and friends may designate gifts for the disabled beneficiary to the special needs trust without jeopardizing eligibility for needs-based benefits and without having to establish a separate special needs trust for the beneficiary's benefit. Of course, since ABLE accounts[1] have been instituted, funding third-party special needs trusts is not the only way to make eligibility-preserving gifts to a disabled beneficiary; making contributions to the individual's ABLE account is also an option. However, since ABLE accounts are subject to annual contribution limits and have payback provisions, they are not always appropriate or suitable replacements for inter vivos third-party special needs trusts.

Inter vivos third-party special needs trusts also retain independence from court oversight, unless the court's jurisdiction is affirmatively sought through an action pursuant to the Florida Trust Code.[2] The same is not necessarily true of trusts that are established after death, or at least those that are established through last wills and testaments. Even if not specifically part of a probate administration, testamentary special needs trusts are generally established contemporaneously with a probate administration, which involves at least some court oversight in ensuring that the trust is properly funded. For a settlor who desires the trust administration to be as free from judicial involvement as possible, an inter vivos third-party special needs trust may be a great option.

**Revocable trusts versus irrevocable trusts**

Settlors who choose testamentary third-party special needs trusts are deciding that the trust will always be irrevocable. After all, after the death of the settlor, no one is alive to amend or revoke the trust.[3]

The same is not true, however, for settlors who choose to proceed with an inter vivos third-party special needs trust. Settlors who choose an inter vivos trust must also decide whether the trust should be revocable or irrevocable.

Where a settlor retains the right to revoke an inter vivos third-party special needs trust, the trust will be subject to the creditors of the settlor during lifetime and after death.[4] Revocable trusts may also be liable to pay the expenses and obligations of the settlor's administration under Section 733.707(3) of the Florida Statutes.[5]

Revocable trusts are by definition grantor trusts for income tax purposes under Internal Revenue Code § 676, so the settlor's Social Security number is used as the taxpayer identification number for the trust and the income generated by the trust corpus is reported on the settlor's U.S. Form 1040 Individual Income Tax Return. Generally, this produces the best income tax result, as the income tax bracket for trusts is rather compressed compared to the income tax bracket for individuals. However, revocable trusts are still included in the settlor's gross estate for federal estate tax purposes under I.R.C. § 2038, so if a settlor wants to reduce

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his or her gross estate for federal estate tax purposes, a revocable trust may not be the best option.[6]

Further, as a practical matter, if it is intended that other family members and friends will contribute to the special needs trust, then the settlor's retention of a right of revocation will likely concern prospective donors because there is no guarantee that the trust will not be revoked or amended, thereby diverting gifts that were intended for a special needs beneficiary elsewhere. In essence, gifts to a revocable inter vivos special needs trust should be viewed as gifts to the settlor, not as gifts to the special needs beneficiary.

For these reasons, most inter vivosthird-party special needs trusts are (and probably should be) established as irrevocable trusts. With proper spendthrift provisions, and provided that a trust is not funded with the intent to defraud creditors, irrevocable inter vivos third-party special needs trusts offer better creditor protection than their revocable counterparts for both the settlor and the special needs beneficiary. Of course, to the degree a settlor retains an interest in the trust corpus, creditor protection is not available.

Structured properly, irrevocable trusts can also help settlors who would benefit from estate tax planning achieve their objectives by removing the assets of the trust from their gross estate. In order to achieve this, however, the settlor cannot retain an interest in the trust. If the settlor retains an interest in the trust, then the trust is includible in the settlor's gross estate for federal estate tax purposes under I.R.C. § 2036.

Drafters should be mindful that the annual gift tax exclusion is not available to cover contributions to an irrevocable trust unless *Crummey* withdrawal powers are included in the trust in order to transform the gift into a present gift.[7] Of course, giving *Crummey* powers to a special needs beneficiary will adversely impact the beneficiary's eligibility for needs-based public benefits by impacting both the income and resource determinations for benefits. This may be avoided by providing other eligible beneficiaries with *Crummey* withdrawal powers[8] and "hanging" powers, but doing so runs the risk that those other beneficiaries may actually exercise the *Crummey* withdrawal powers and divert the assets from the intended primary beneficiary, the special needs beneficiary. If this risk is not acceptable and *Crummey* powers are not used, then contributions to an irrevocable third-party special needs trust would be considered taxable gifts, resulting in donors utilizing their available lifetime gift tax exemption amount, or if no exemption is available, paying gift tax on the transaction.

Irrevocable third-party special needs trusts generally require a separate taxpayer identification number under which income generated by the trust is reported. A U.S. Form 1041 Income Tax Return for Estates and Trusts must also be filed annually, assuming the income filing threshold is reached, which will almost always be the case because the filing threshold for irrevocable trusts is reached much more quickly than the filing threshold for individuals. The exception is where certain powers with respect to the property transferred to the trust are retained by the settlor such that the trust will not be deemed a separate taxpayer for income tax (but not necessarily transfer tax) purposes, but instead will be deemed a grantor trust pursuant to the provisions of

## Call for papers – *Florida Bar Journal*

Jason A. Waddell is the contact person for publications for the Executive Council of the Elder Law Section. Please email Jason at *jason@ourfamilyattorney.com* for information on submitting elder law articles to The Florida Bar Journal for 2018-2019.

A summary of the requirements follows:

- Articles submitted for possible publication should be MS Word documents formatted for 8½ x 11 inch paper, double-spaced with one-inch margins. Only completed articles will be considered (no outlines or abstracts).
- Citations should be consistent with the Uniform System of Citation. Endnotes must be concise and placed at the end of the article. Excessive endnotes are discouraged.
- Lead articles may not be longer than 12 pages, including endnotes.

Review is usually completed in six weeks.

I.R.C. § 671-679, thereby allowing the settlor to report items of income, deduction, and credit associated with the trust property on the settlor's individual income tax return.

Assuming, however, that an irrevocable trust is not a grantor trust for income tax purposes, the trustee should consider distributing all net income to or for the benefit of the beneficiaries. When this is done, the trust will not pay income tax, but instead a Schedule K-1 will issue to the beneficiaries, who will report their share of the trust's income on their individual income tax returns. The tax bracket for most individual beneficiaries is often lower than a non-grantor trust's income tax bracket, and individuals are not subject to net investment income tax like trusts are. Therefore, by distributing income and issuing Schedule K-1s to the beneficiaries, the overall income tax liability will often be significantly reduced. This is particularly true for special needs trust beneficiaries, who may not be high wage earners (and thus are in one of the lower income tax brackets) and who usually have deductions available to offset the income, like medical expenses, that trusts do not have. Eligibility for needs-based benefits need not be impacted by distributions because the distributions need not be paid directly to the beneficiary in order to distribute income; rather, distributions made to a third-party for the benefit of the beneficiary will also distribute trust income while not necessarily impacting eligibility. Further, distributions for the benefit of beneficiaries allow trust beneficiaries to enjoy the benefit of the trust's assets rather than assets being used to pay the trust's income tax liability.

Of course, one major drawback of irrevocable trusts is that they are not easily changed. While modification techniques and decanting may be available, any time a special needs trust changes and the Social Security Administration has an opportunity to review the trust, there is the risk that the beneficiary's eligibility for needs-based public benefits may be affected. While a settlor may address this by drafting provisions that allow limited changes to the trust, such as changing the remainder beneficiaries or changing the trustees, reservation of this type of control by the settlor may impact some of the tax objectives that the settlor might have sought to achieve. Giving the power to shift beneficial interests to someone other than the settlor, like a trustee or other third party, may not be much better, as that could result in tax consequences for the individual exercising these powers if they are not very carefully tailored. At the least, however, there should be some mechanism in the trust to allow changes to the provisions of the trust in order to maintain the special needs trust's status as an exempt resource for needs-based benefits purposes.

## Conclusion

Third-party special needs trusts can make a world of difference for disabled beneficiaries and their families. This article can only begin to explore some of the preliminary considerations for drafting these trusts and the consequences that result from the drafting choices that are made. For more in-depth treatment of this subject, as well as how special needs trusts impact (and are impacted by) eligibility requirements for public benefits, see chapter 17 entitled "Special Needs Trusts" in *Administration of Trusts in Florida* published by The Florida Bar (copyright 2019), which is authored by David J. Lillesand, Marjorie E. Wolasky, and Amy J. Fanzlaw, from which this article was adapted, with permission (all rights reserved).

***Amy J. Fanzlaw*** *is board certified by The Florida Bar in wills, trusts, and estates and in elder law. Her practice focuses on special needs trust planning, estate and trust planning and administration, and long-term care planning. Besides testifying as an expert witness on the subject of special needs trusts, she often lectures and writes on the subjects of decanting and modifying trusts. Outside of the practice of law, she is an artist, bourbon enthusiast, and avid Gators fan.*

## Endnotes

1 ABLE accounts, which are tax-advantaged savings accounts created for individuals with disabilities, were created as result of the Stephen Beck, Jr. Achieving a Better Life Experience Act of 2014, or "the ABLE Act."

2 *See* Chapter 736, Fla. Stat.

3 This does not mean that an irrevocable third-party special needs trust cannot be effectively modified or terminated. Modification, termination, and decanting of irrevocable trusts are possible through a variety of common law and statutory techniques. For a more in-depth discussion on this, see David J. Lillesand, Marjorie E. Wolasky, and Amy J. Fanzlaw, *Administration of Trust in Florida* Ch. 17 (2019) (discussing modification and decanting of special needs trusts).

4 *See* § 736.0505(1)(a), Fla. Stat.

5 *See* § 736.05053, Fla. Stat.

6 Note that if the settlor wishes to keep the trust as a grantor trust for federal income tax purposes but exclude it from the settlor's gross estate for federal estate tax purposes, the third-party special needs trust could be drafted as an intentionally defective grantor trust, as discussed later.

7 *See Crummey v. Commissioner*, 397 F.2d 82 (9th Cir. 1968).

8 *See, e.g., Estate of Maria Cristofani v. Commissioner*, 97 T.C. 74 (1991).

# Suspended Florida attorney also under investigation by The Florida Bar for business dealings with a non-attorney Medicaid planning company: Are you putting your law license at risk by working with a non-attorney Medicaid planner?

**by John R. Frazier and Leonard E. Mondschein**

A Florida attorney, who was suspended by The Florida Bar in December 2018 regarding his business dealings with a non-attorney company that provides estate planning services to seniors, is also under investigation by The Florida Bar for his business dealings with a non-attorney Medicaid planner. Regarding the case involving the non-attorney Medicaid planner, The Florida Bar alleges that the attorney violated the following Florida Bar rules: Rule 4-1.1 (Competence); Rule 4-1.4 (Communication); Rule 4-5.3 (Responsibilities Regarding Non-Lawyer Assistants); Rule 4-5.4 (Professional Independence of a Lawyer); Rule 4-5.5 (Unlicensed Practice of Law); and Rule 4-5.7 (Services by Non-Legal Entity).

Since the Elder Law Section Unlicensed Practice of Law (UPL) committee was formed, it has received numerous allegations of misconduct by non-attorney Medicaid planners, as well as allegations regarding attorneys working with those non-attorney groups. Some of the most common allegations are that the non-attorney Medicaid planner effectively does all of the Medicaid planning legal work, and the non-attorney then directs

the attorney as to which legal documents are needed for the Medicaid case. In this type of arrangement, the non-attorney typically receives a larger portion of the fee, and the attorney receives a smaller portion of the fee. In many cases, the attorney receives a much smaller portion of the fee charged by the non-attorney Medicaid planner.

The Florida Supreme Court UPL advisory opinion, which the Court approved on Jan. 15, 2015, outlines what a non-attorney can and cannot do. The advisory opinion also outlines the responsibilities and duties of attorneys who choose to work with non-attorney Medicaid planners. Very frequently, it appears that a non-attorney provides legal advice to the client, and the non-attorney directs the attorney as to what documents are to be prepared. This may be because the non-attorney generates the case and then refers the case to the attorney for only the legal documents that are needed. It has been reported to the UPL committee that there may now be hundreds of non-attorney Medicaid planning companies in Florida. Accordingly, there may now also be hundreds of Florida attorneys working with these companies.

After the effective date of the Florida Supreme Court advisory opinion, it appears that most non-attorney Medicaid planning companies are now affiliated with a Florida licensed attorney in some way. Additionally, after the effective date of the advisory opinion, the only way that a non-attorney Medicaid planner can provide many of the services that they still provide is by affiliating with an attorney. This affiliation in many cases is to defend themselves from UPL complaints by showing they are affiliated with an attorney, and therefore not practicing law. In reality, they likely are practicing law.

But as we know, The Florida Bar primarily regulates attorneys. If Bar rules are broken, who is the party in jeopardy? Clearly, the attorney is the one with the most to lose. The non-attorney has no law license to put in jeopardy.

Accordingly, each attorney who decides to work with a non-attorney Medicaid planner must ask him or herself the following questions:

1. Am I enabling UPL by working with a non-attorney Medicaid planner?
2. Am I potentially endangering the public by facilitating UPL by a non-attorney Medicaid planner?
3. Is my law license worth the risk of working with a non-attorney Medicaid planner?
4. If the answers to the above questions three questions are yes, then why would any elder law attorney be involved with a non-attorney Medicaid planner?

***Leonard E. Mondschein, JD, LLM, CELA, CAP**, is a shareholder in The Elder Law Center of Mondschein and Mondschein PA, with offices in Miami and Aventura, Florida. He is certified by The Florida Bar in elder law and in wills, trusts, and estates law, and is nationally certified as an elder law attorney (CELA) by the National Elder Law Foundation, the sole certifying organization recognized by the ABA. He is past chair of The Elder Law Section of The Florida Bar and past president of the Academy of Florida Elder Law Attorneys.*

***John R. Frazier, JD, LLM**, is licensed to practice law in both Florida and Georgia, but practices only in Florida, primarily in the fields of elder law, Medicaid planning, veterans benefits law, estate planning, asset protection, taxation, and business organizations. He is admitted to practice before the United States Court of Appeals for Veterans Claims and is a member of the National Organization of Veterans Advocates. Mr. Frazier is also a member of the National Academy of Elder Law Attorneys, the Academy of Florida Elder Law Attorneys, and The Florida Bar Elder Law Section.*

# *Cook v. Cook*: Examine your examining committee reports

**by Lawrence Levy**

On Sept. 20, 2018, the Fourth District Court of Appeal for the State of Florida issued an opinion that reversed and remanded the finding of the trial court that James Cook, the ward, was totally incapacitated. The 4th DCA opined that the trial court had made its determination of incapacity in the absence of the statutorily required comprehensive examination of the alleged incapacitated person. *See Cook v. Cook*, 2018 WL 4520379 (Fla. 4th DCA Sept. 20, 2018, rehearing granted Nov. 28, 2018).

The issue raised by the 4th DCA's opinion has created cause for concern for practitioners who are prosecuting or defending a petition for determination of incapacity.

Pursuant to Section 744.331(3), Florida Statutes, within five days after the filing of the petition for determination of incapacity, the court shall appoint an examining committee consisting of three members, with one member being a psychiatrist or other physician and the other members being a psychologist, a gerontologist, another psychiatrist or other physician, a registered nurse, a nurse practitioner, a licensed social worker, a person with an advanced degree in gerontology … or other person who by knowledge, skill, experience, training, or education may, in the court's discretion, advise the court in the form of an expert opinion.

In the *Cook* case, the trial court appointed the examining committee, presumably within the time set forth in the statute. The committee comprised a medical doctor, a licensed psychologist, and a layperson qualified to render an expert opinion on the issue of the ward's capacity. The members of the examining committee submitted their reports timely, each recommending a plenary guardianship for the ward. The reports were placed into evidence without objection, and each member of the committee was called to testify.

So far, so good.

The statute goes on to state that *each member* of the examining committee shall examine the alleged incapacitated person and that this examination must include a comprehensive examination, if indicated, including: 1) a physical examination; 2) a mental health examination; and 3) a functional assessment. The statute goes on to state that if any one of the three aspects of the examination is not indicated or cannot be accomplished for any reason, the written report must explain the reasons for the omission of that examination or assessment.

This is where the issue arises.

One of the members, the medical doctor, testified that he did not perform either a physical or a mental health examination, but he did not state in his report why he did not perform such examinations.

The second member of the committee, the layperson (presumably due to her lack of training) did not attempt a physical or a mental health examination. She, too, did not state in her report why she did not perform the required examinations.

The third member, the psychologist, also failed to conduct a physical examination or a comprehensive mental health examination. He also did not state in his report why he did not perform the required examinations, although he did testify that further neurological and neuropsychological examinations were necessary.

In its opinion, the 4th DCA stated that the trial court ruled in error by finding the ward incapacitated in the absence of a comprehensive examination.

The lesson to be learned is, as practitioners, we must review the examining committee members' reports carefully prior to the hearing. Do not assume that the committee members have performed the required examinations or assessments, or in the absence of the required examinations, that they have stated the reason for not doing so.

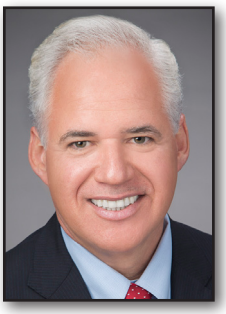
***Lawrence Levy, Esq.**, is a Florida board certified elder law attorney and a certified Florida circuit civil court mediator specializing in estate planning, probate, guardianship, and elder law issues. Mr. Levy also serves as an adjunct professor of wills and trusts for Miami-Dade College. His office is centrally located in Davie, and he handles cases in Miami-Dade, Broward, and Palm Beach counties. He can be reached at **larry@lawrencelevypa.com**.*

MEMBER NEWS

# The Elder Law Certification Committee of The Florida Bar recognizes members for service

The Elder Law Certification Committee of The Florida Bar recently awarded Edwin M. Boyer and Alex Cuello with plaques recognizing their service on the Elder Law Certification Committee.

**Edwin M. Boyer**, a board certified specialist in elder law, was one of the original members of the Elder Law Certification Committee, starting in 1997. He served as vice chair from 2000 to 2001 and chair from 2002 to 2003 before terming off in 2005. He rejoined the committee from 2013 to 2019 and served as vice chair from 2015 to 2016. He is a partner with Boyer & Boyer PA, with offices in Sarasota and St. Petersburg, Florida. Mr. Boyer practices in the area of elder law, with an emphasis on guardianship, estate planning and administration, advance directives, end of life issues, nursing home residents' rights, and elder exploitation.



**Alex Cuello**, a board certified specialist in elder law, served as chair of the Elder Law Certification Committee from 2015 to 2016 and as a member of the committee from 2013 to 2019. He is the principal shareholder of the Law Office of Alex Cuello PA in Miami, Florida. His practice focuses on elder law, with an emphasis in the areas of probate administration and litigation, guardianship administration and litigation, estate planning, Medicaid planning, and Social Security Disability claims.

MEMBER NEWS

# Two elder attorneys receive The Florida Bar President's Pro Bono Service Award

**Every year, The Florida Bar recognizes the pro bono service of extraordinary Florida Bar lawyers with The Florida Bar President's Pro Bono Service Awards. This year, two of the Elder Law Section's amazing members received the pro bono service award for their judicial circuit.**

*The ceremony honoring the awardees of The Florida Bar President's Pro Bono Service Awards was held at the Florida Supreme Court on Feb. 7, 2019. Pictured here are Neil T. Lyons and Kelly L. Fayer with Florida Bar President Michelle R. Suskauer.*

## Neil T. Lyons

*12th Judicial Circuit (DeSoto, Manatee, and Sarasota counties)*

Neil T. Lyons didn't wait to become a lawyer before diving into pro bono legal service. At the Stetson University College of Law, where Lyons received his JD in 2011, he was the recipient of the William F. Blews Pro Bono Service Award, given to students who perform outstanding pro bono service beyond that required for graduation.

Lyons began taking pro bono cases from Legal Aid of Manasota in 2015. In less than four years, he has donated almost 500 pro bono hours. Many of the cases he has taken are complex guardianship and guardian advocate cases, though he also has handled several probate matters. Lyons also has volunteered many hours of service to the clients of the Comprehensive Treatment Court. That program, within the 12th Judicial Circuit's Mental Health Court, is designed for people who are charged with a qualifying offense, suffer from a serious mental illness that likely led to the criminal charge, and are unable to meet their basic needs.

Lyons has been with Boyer & Boyer PA in Sarasota since 2014.

## Kelly L. Fayer

*20th Judicial Circuit (Charlotte, Collier, Glades, Hendry, and Lee counties)*

Kelly L. Fayer's first case with Florida Rural Legal Services shows the depth of her commitment to pro bono legal services. The case involved the guardianship of an adult with cerebral palsy and severe mental disabilities. Fayer noticed that the woman recognized and enjoyed the scent of a certain expensive lotion. So Fayer would periodically send some to the woman's mother/guardian until the death of the mother. When Florida Rural Legal Services couldn't grant pro bono status to the next relative who took over as guardian, Fayer took the case on her own, at a discount, because Fayer knew that this had been the wish of the mother.

As president of the Lee County Bar Association in 2017-2018, Fayer launched a pro bono challenge, and the number of attorneys accepting cases through Florida Rural Legal Services increased from 38 to 53. Fayer also has begun a project called #KindLee to showcase the prevalence of everyday good throughout Southwest Florida.

Fayer earned her JD from the Washington and Lee University School of Law. She is a solo practitioner at Kelly Fayer PA in Fort Myers.

SECTION NEWS

# Mark your calendar!

**June 26-29, 2019**
**Annual Florida Bar Convention**
Boca Raton Resort & Club
Boca Raton, Florida

***Elder Law Section Events at Convention***

**Elder Law Guardianship Seminar (2952R)**
Friday, June 28, 8 a.m. – 12 noon

**Elder Law Section Executive Council Meeting**
Friday, June 28, 2:30 p.m. – 4 p.m.

**Protecting Consumers Who Have unCONVENTIONAl Needs With CONVENTIONAl Strategies: Making Florida Safe for Military and Elderly Consumers (3200R)**
Saturday, June 29, 8:45 a.m. – 3:45 p.m.

**September 6, 2019**
**Elder Concert**
**A Multidisciplinary Elder Care Conference**
Fort Lauderdale Marriott North
Fort Lauderdale, Florida

**October 3, 2019**
**Elder Law Section Annual Retreat**
Sonoma Valley, California

SECTION NEWS

# Committees keep you current on practice issues

***Contact the committee chairs to join one (or more) today!***

## ADMINISTRATIVE DIVISION

### BUDGET

Chair
**Victoria Heuler**
Heuler-Wakeman Law Group PL
677 Mahan Center Blvd.
Tallahassee, FL 32308-5454
850/421-2400
850/421-2403 (fax)
victoria@hwelderlaw.com

### CONTINUING LEGAL EDUCATION

**Co-Chairs**
**Danielle Faller**
Law Office of Emma Hemness PA
309 N. Parsons Ave.
Brandon, FL 33510-4533
813/661-5297 (office)
813/661-5297 (cell)
813/689-8725 (fax)
danielle@hemnesslaw.com

**Marjorie Wolasky**
9400 S. Dadeland Blvd., PH 4
Miami, FL 33156
305/670-7005
mwolasky@wolasky.com

### MEMBERSHIP

**Co-Chairs**
**Donna R. McMillan**
McCarthy Summers et. al.
2400 SE Federal Hwy., Floor 4
Stuart, FL 34994-4556
772/286-1700
drm@mccarthysummers.com

**Scott Selis**
Selis Elder Law of Florida
1024 N. U.S. Hwy. 1
Ormond Beach, FL 32174
877/977-3533
386/527-4109 (cell)
844/422-1012 (fax)
scott.selis@elderlawfirmfla.com

### MENTORING

**Chair**
**Stephanie M. Villavicencio**
Zamora, Hillman & Villavicencio
3006 Aviation Ave., Ste. 4C
Coconut Grove, FL 33133-3866
305/285-0285
305/285-3285 (fax)
svillavicencio@zhlaw.net

### PUBLICATIONS

**Co-Chairs**
**Heather B. Samuels**
Solkoff Legal PA
2605 W. Atlantic Ave., Ste. A103
Delray Beach, FL 33445-4416
561/733-4242
hsamuels@solkoff.com

**Genny Bernstein**
Jones, Foster, Johnston & Stubbs PA
Flagler Center Tower
505 S. Flagler Dr., Ste. 1100
West Palm Beach, FL 33401
561/659-3000
gbernstein@jonesfoster.com

## SUBSTANTIVE DIVISION

### ABUSE, NEGLECT, & EXPLOITATION

**Co-Chairs**
**David A. Weintraub**
7805 SW 6th Ct.
Plantation, FL 33324-3203
954/693-7577
954/693-7578 (fax)
daw@stockbrokerlitigation.com

**Ellen L. Cheek**
Bay Area Legal Services Inc.
1302 N. 19th St.
Tampa, FL 33605-5230
813/232-1343, ext. 121
813/248-9922 (fax)
echeek@bals.org

### ESTATE PLANNING & ADVANCE DIRECTIVES, PROBATE

**Co-Chairs**
**Horacio Sosa**
2924 Davie Rd., Ste. 102
Davie, FL 33314
954/532-9447
954/337-3819 (fax)
hsosa@sosalegal.com

**Amy M. Collins**
1709 Hermitage Blvd., Ste. 102
Tallahassee FL, 32308
850/385-1246
850/681-7074 (fax)
amy@mclawgroup.com

## ETHICS

**Chair**

**Steven E. Hitchcock**
Hitchcock Law Group
635 Court St., Ste. 202
Clearwater, FL 33756
727/223-3644
727/223-3479 (fax)
hitchcocklawyer@gmail.com

## GUARDIANSHIP

**Co-Chairs**
**Debra Slater**
5411 N. University Dr., Ste. 201
Coral Springs, FL 33067
954/753-4388
954/753-4399 (fax)
dslater@slaterlawfl.com

**Twyla L. Sketchley**
The Sketchley Law Firm PA
3689 Coolidge Court, Unit 8
Tallahassee, FL 32311-7912
850/894-0152
850/894-0634 (fax)
service@sketchleylaw.com

## LEGISLATIVE

**Co-Chairs**
**William A. Johnson**
William A. Johnson PA
140 Interlachen Rd., Ste. B
Melbourne, FL 32940-1995
321/253-1667
321/242-8417 (fax)
wjohnson@floridaelderlaw.net

**Shannon M. Miller**
The Miller Elder Law Firm
6224 NW 43rd St., Ste. B
Gainesville, FL 32653-8874
352/379-1900
352/379-3926 (fax)
shannon@millerelderlawfirm.com

## MEDICAID/GOVERNMENT BENEFITS

**Co-Chairs**
**John S. Clardy III**
Clardy Law Firm PA
243 NE 7th St.
Crystal River, FL 34428-3517
352/795-2946
352/795-2821 (fax)
clardy@tampabay.rr.com

**Heidi M. Brown**
Osterhout & McKinney PA
3783 Seago Lane
Fort Myers, FL 33901-8113
239/939-4888
239/277-0601 (fax)
heidib@omplaw.com

## SPECIAL NEEDS TRUST

**Co-Chairs**
**Travis D. Finchum**
Special Needs Lawyers PA
901 Chestnut St., Ste. C
Clearwater, FL 33756-5618
727/443-7898
727/631-9070 (fax)
travis@specialneedslawyers.com

**Howard S. Krooks**
Elder Law Associates PA
7284 W. Palmetto Park Rd., Ste. 101
Boca Raton, FL 33433-3406
561/750-3850
561/750-4069 (fax)
hkrooks@elderlawassociates.com

## VETERANS BENEFITS

**Co-Chairs**
**Javier Andres Centonzio**
Weylie Centonzio PLLC
5029 Central Ave.
St. Petersburg, FL 33710
727/490-8712
727/490-8712 (fax)
jac@wclawfl.com

**Jodi E. Murphy**
Murphy & Berglund PLLC
1101 Douglas Ave., Ste. B
Altamonte Springs, FL 32714-2033
407/865-9553
407/865-9553 (cell, no text)
407/965-5742 (fax)
jodi@murphyberglund.com

# SPECIAL COMMITTEES

## LITIGATION

**Chair**
**Ellen Morris**
Elder Law Associates PA
7284 W. Palmetto Park Rd., Ste. 101
Boca Raton, FL 33433-3406
561/750-3850
561/750-4069 (fax)
emorris@elderlawassociates.com

## DISABILITY LAW

**Co-Chairs**
**Steven E. Hitchcock**
Hitchcock Law Group
635 Court St., Ste. 202
Clearwater, FL 33756
727/223-3644
727/223-3479 (fax)
hitchcocklawyer@gmail.com

**Tamara (Tammy) Schweinsberg**
Christopher B. Young PA
2255 5th Ave. North
St. Petersburg, FL 33713-7003
727/322-1612
727/328-0852
tlschweinsberg@tampabay.rr.com

## CERTIFICATION

(Appointed through The Florida Bar)

**Co-Chairs**
**John S. Clardy III**
Clardy Law Firm PA
243 NE 7th St.
Crystal River, FL 34428-3517
352/795-2946
352/795-2821 (fax)
clardy@tampabay.rr.com

**Amy Fanzlaw**
Osborne & Osborne PA
PO Box 40
Boca Raton, FL 33429-0040
561/395-1000
561/368-6930 (fax)
ajf@osbornepa.com

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**Committees . . .**
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## LAW SCHOOL LIAISON

**Co-Chairs**
**Enrique Zamora**
Zamora, Hillman & Villavicencio
3006 Aviation Ave., Ste. 4C
Coconut Grove, FL 33133-3866
305/285-0285
305/285-3285 (fax)
ezamora@zhlaw.net

**Max Solomon**
Heuler-Wakeman Law Group PL
1677 Mahan Center Blvd.
Tallahassee, FL 32308-5454
850/421-2400
954/292-2468 (cell)
850/421-2403 (fax)
max@hwelderlaw.com

## SPONSORSHIP

**Chair**
**Jill R. Ginsberg**
Ginsberg Shulman PL
401 E. Las Olas Blvd., Ste. 1400
Fort Lauderdale, FL 33301-2218
954/332-2310
954/827-0440 (fax)
jill@ginsbergshulman.com

## UNLICENSED PRACTICE OF LAW

**Co-Chairs**
**John Frazier**
John R. Frazier JD, LLM, PLC/Jos. Pippen PL
10225 Ulmerton Rd., Ste. 11
Largo, FL 33771-3538
727/586-3306, ext. 104
727/586-6276 (fax)
john@attypip.com

**Leonard E. Mondschein**
The Elder Law Center of Mondschein
10691 N. Kendall Dr., Ste. 205
Miami, FL 33176-1595
305/274-0955
305/596-0832 (fax)
lenlaw1@aol.com

## TECHNOLOGY

**Co-Chairs**
**Lawrence (Larry) Levy**
Law Office of Lawrence Levy PA
12525 Orange Dr., Ste. 703
Davie, FL 33330
954/634-3343
954/634-3344 (fax)
larry@lawrencelevypa.com

**Alison E. Hickman**
Grady H. Williams, Jr., LLM
Attorneys at Law PA
1543 Kingsley Ave., Ste. 5
Orange Park, FL 32073-4583
904/264-8800
904/264-0155 (fax)
alison@floridaelder.com

## STRATEGIC PLANNING

**Co-Chairs**
**David Hook**
The Hook Law Group
4918 Floramar Terrace
New Port Richey, FL 34652-3300
727/842-1001
727/848-0602 (fax)
courtservice@elderlawcenter.com

**Jill R. Ginsberg**
Ginsberg Shulman PL
401 E. Las Olas Blvd., Ste. 1400
Fort Lauderdale, FL 33301-2218
954/332-2310
954/827-0440 (fax)
jill@ginsbergshulman.com

SECTION NEWS

2019 ANNUAL unCONVENTIONal THE FLORIDA BAR

# Don't miss these CLE hours and ELS events at the Annual Florida Bar Convention!

**Elder Law Guardianship Seminar (2952R)**
**Friday, June 28, 2019 | 8 a.m. – 12 noon**

Join us for 4 hours of CLE (including one hour of ethics) credit as we cover the following topics:

- Guardianship vs. Guardian Advocacy
- Exploitation Injunctions in Guardianship
- Guardianship Jurisdictional Issues and Guardianship Law Update
- Ethics in Guardianship

Won't be able to attend in person? Visit *tfb.inreachce.com* and search for Course Number 2952. You'll have 90 days of access after the course date.

**Elder Law Section Executive Council Meeting**
**Friday, June 28, 2019 | 2:30 p.m. – 4 p.m.**

Attend the meeting of the Executive Council to stay abreast of the Elder Law Section's current issues and activities. Chair Jason Waddell will recognize the Elder Law Section's 2018-2019 award recipients and will pass the gavel of leadership to Chair-Elect Randy Bryan for the 2019-2020 year.

**Protecting Consumers Who Have unCONVENTIONAl Needs With CONVENTIONAl Strategies: Making Florida Safe for Military and Elderly Consumers (3200R)**
**Saturday, June 29, 2019 | 8:45 a.m. – 3:45 p.m.**

*Co-sponsored with The Florida Bar Consumer Protection Law Committee*

Florida is home to more than 21 military bases. Senior citizens make up more than 19 percent of the state's population. Too often Florida's senior citizens as well as service members and veterans are targeted by consumer swindles and predatory business and investment scams. With veterans' court judges, attorneys who work with seniors, and others who investigate fraudulent practices, this seminar, co-presented by a Bar committee dedicated to advancing consumer protection law and a section focused on helping senior citizens, will assist practitioners on the front lines of serving and protecting these vulnerable populations.

PRACTICE MANAGEMENT

# Best practice tips for law firm mobile security Part 1: iPhone security

**by Audrey Ehrhardt**

Research tells us the average person spends over four hours on the phone every day. When it comes to using a smartphone, many of our clients let us know that they have serious concerns about security. Therefore, we would ask, how long do you spend on your phone? More importantly, if you are spending most of your time on your iPhone, how secure is it?

Do you have the new iPhone X? Have you installed the iOS 11 update? We encourage you to consider making security a priority. You may want to take a few minutes today to go through your security settings to ensure your device is as safe as you can make it.

Ready to learn more about security on this device? Check out our seven tips to maximize the privacy on your iPhone today!

**1. Update your apps.** Many of us tend to ignore the number at the top right of our App Store app. This is a notification to let you know it is time to update your phone! Take a minute to update all of your apps that have alerts. These updates can fix any bugs within the apps, as well as update any security settings.

**2. Take advantage of the privacy feature.** Whether you have an iPhone X or only the iOS 11 update, you have access to a privacy tab that shows you what permission you have given to each one of the apps on your phone. As you go through your privacy settings, be sure to ask yourself which apps should have access to what. Considerations can include access to things such as your location, photos, microphone, and more.

Further, look for the analytics and advertising tab located at the bottom of your privacy settings screen. Within the analytics tab you can decide if you would like to allow Apple to gather your data. Turning off this feature means you may no longer receive targeted ads that follow your interests.

**3. Unlock your phone the hard way.** While using facial ID and thumbprint can make unlocking your iPhone a lot easier, it is not your safest option. Your safest option may be to have a passcode on your phone and use only the passcode to unlock your device. You may disable your fingerprint and face ID in your phone's settings.

**4. Take advantage of your emergency lock.** If you find yourself in a situation where you do not want someone to have access to your phone or someone attempts to take it, tap your power button to lock your phone. Your phone should be locked until you enter your passcode.

**5. Turn on your emergency SOS features.** Go into settings and select emergency SOS. You can add emergency contacts to be contacted in an emergency. You can also turn on the auto call feature, which will dial 911 upon using the SOS feature.

To use the SOS feature, press the sleep button five times rapidly. This will trigger the emergency SOS feature, which sends a message and reaches out to your emergency contacts, as well as 911 if you have auto call turned on.

**6. Turn off your messaging previews.** You can go into your notification settings and turn off your iMessage preview to ensure that your messages are kept private. You can also set an expiration for when you would like your messages to be deleted rather than saving all of your messages in your phone forever (unless you want to).

**7. Take advantage of Safari's safety features.** The browser Safari gives you different options to help boost your privacy on your phone. Go into Safari and access these settings, which include blocking cookies, fraudulent website warnings, and more! Next time you are in your Safari app, take a second to clear your website data and history.

By investing a few minutes into organizing your data and privacy on your iPhone, you can improve your safety within your device. Consider making these changes sooner rather than later. Does this article raise more questions than it answers? Do not wait to ask me your questions!

***Audrey J. Ehrhardt, Esq., CBC**, builds successful law firms and corporations across the country. A former Florida elder law attorney, she is the founder of Practice42 LLC, a strategic development firm for attorneys. She focuses her time creating solutions in the four major areas of practice development: business strategy, marketing today, building team, and the administrative ecosystem. Join the conversation at www.practice42.com.*

## Endnote

1 *See* https://www.inc.com/melanie-curtin/are-you-on-your-phone-too-much-average-person-spends-this-many-hours-on-it-every-day.html

Tips & Tales

by Kara Evans

# Uncooperative parties: beneficiaries

**The tale:** You represent the personal representative of an estate. One of the beneficiaries refuses to pick up any mail connected to estate matters and has refused to cash the distribution check. The personal representative is very angry and wants to know why the judge "can't just make him." She looks at you like you are crazy when you use the words *in rem* and *in personam*.

**The tip:** Beneficiaries can be uncooperative in a number of ways. They can refuse certified letters or refuse to sign waivers, joinders, or cash distribution checks. The problem is that beneficiaries are entitled to notice. Before the probate can move forward or be closed, the personal representative must prove to the court that this notice has been accomplished.

A probate proceeding is an in rem proceeding (§ 731.105, Fla. Stat.) in that the court has jurisdiction over the property and can decide the rights of individuals to that property. The individuals certainly are entitled to reasonable notice and possibly a hearing, but the court has the authority over the property and not the person.

Personal jurisdiction (in personam jurisdiction) is the court's power over the person and is generally obtained by service of process. Typically, jurisdiction over a nonresident is through Florida's long arm statute, which basically states that if you do any of the acts enumerated in the statute in the state, then you submit to the jurisdiction of the courts of that state for any cause of action arising from those acts (§ 48.193, Fla. Stat.).

A court cannot "just make him" do anything because the court will not have in personam jurisdiction over the beneficiary; however, there are ways to ensure that the probate progresses in spite of an uncooperative beneficiary.

Under these circumstances, Florida Probate Rule 5.041 requires that all pleadings and motions for orders determining rights of an interested person be served on those interested persons as provided in Florida Judicial Administration Rule 2.516 *unless the Probate Code directs otherwise*. Service under Rule 2.516 can be accomplished by mailing the pleading to the party at the party's last known address, handing it to the party, leaving it at the party's office with a person in charge (or leaving it in a conspicuous place inside the office), leaving it at the party's usual place of abode with the person or with a family member over 15 years of age and telling that person about the contents, or faxing the documents with a cover sheet that lists certain information. This is a fairly simple process. But the probate code is full of items that are required to be served by formal notice or in the manner of formal notice.

Florida Probate Rule 5.040 defines formal notice. Basically, a pleading sent by formal notice must be sent by mail or by any commercial delivery service requiring a signed receipt. It is easy to ignore a notice from the post office that you have a certified letter, or to refuse to sign for a UPS or FedEx delivery. But note that Rule 5.040(3)(B) allows formal notice to be made as provided in the Florida Rules of Civil Procedure for service of process. Service of process may be made by an officer authorized by law to serve process, but the court may appoint any competent person not interested in the action to serve the process. It becomes a bit harder to avoid notice when it is served in this manner.

In this author's experience, a recorded deed or a cancelled check can be filed with the court in lieu of a signed receipt from the beneficiary. Still, a very angry beneficiary may refuse to cash a check or sign a receipt. You still have an option. Pursuant to Section 733.816 of the Florida Statutes, you can petition the court to deposit the uncooperative beneficiary's funds in the registry of the court. The registry holds funds by the authority of the Florida Statutes or by order of the court, pending further action by the court. A signed court order is required before funds can be deposited into or withdrawn from the court registry. In this manner you can obtain a receipt and move forward with closing the estate.

***Kara Evans, Esq.**, is a sole practitioner with offices located in Tampa, Lutz, and Spring Hill, Florida. She is board certified in elder law and concentrates her practice in elder law, wills, trusts, and estates.*

TAX TIPS

by Michael A. Lampert

# My client is about to die: immediate pre-mortem tax planning

With a significant increase in the estate tax exemption amount, it is worth reviewing some of the tax aspects of immediate pre-mortem planning. While estate taxes are still a concern for some clients, for most clients, the main issue is the basis of the estate's assets, as it has been for many years. Tax planning as part of estate planning is basis planning. For many, it is all about the basis.

To begin, do not forget to advise the client/client's fiduciaries about non-tax related planning. Make sure assets are properly titled and health care directives are in place, and even advise the fiduciaries (often family members) how to properly sign as power of attorney so as to minimize personal liability, etc.

But what about tax planning?

**Death bed gifts**

**Appreciated assets:** Clients love to avoid probate; however, if an appreciated asset is gifted immediately prior to death, the asset will not receive the basis step-up at death under Internal Revenue Code § 1014. The income tax consequences to the beneficiary can be significant.

Assume the client purchased stock for $2. At the time of death, the stock was worth $10. A beneficiary received this stock as a gift prior to death and the stock is later sold by the beneficiary for $12. The taxable gain to the beneficiary is $10 ($12 - $2). The beneficiary receives a carryover basis only. If the same beneficiary receives the shares after the client's death, the basis becomes the fair market value at death. The gain on the stock is $2 ($12 - $10 fair market value at death).

**Depreciated assets:** What is often forgotten about the basis step-up at death rule is that it works in the other direction, too. The rule is really a step to fair market value at death. So, for example, if the stock was purchased for $10, is worth $2 at time of death, and is later sold by the beneficiary for $6, there is a gain of $4 ($6 - $2) *not* a $4 loss ($10 - $6). So, if otherwise appropriate, sell securities in a loss position prior to death with the hope that the client can use the loss on his or her (likely) final income tax return.

**Practice tip:** Remember that not all clients who are about to die, actually die (at least not for a while). A death bed gift not only may have adverse tax consequences, it can also interfere with Medicaid and Veterans Administration benefits.

**What if there is potential for an estate tax?**

Consider making completed gifts of the annual exclusion amount under Internal Revenue Code § 2503(b) as well as direct gifts for tuition and medical expenses under IRC § 2503(e). These gifts do not count against the lifetime exemption amount.

While it was not uncommon to see gifts that resulted in a gift tax when the exemption amount was much lower, it is less common to see that now. In any event, gifts made immediately pre-mortem, even with a gift tax due, are not likely to have a significant tax benefit if the client dies shortly after the gift is made. With that said, if the client lives, and the asset subsequently appreciates, there could be an estate tax savings because the appreciation is no longer in the client's estate. Remember, however, that typical elder law clients will not have a taxable estate.

**Practice tip:** Watch assets, such as real estate, that may be subject to another state's death tax. In addition, some states have a gift tax, or may include gifts in the death tax calculation, if made within a certain time period before death.

**Practice tip:** Care is also warranted if there is a risk your client may be deemed a resident of another state, particularly one with a death tax.

**Reminder:** Gift tax is paid by the person who made the gift. In some cases, particularly with larger estates, having a gift tax paid pre-death can reduce the estate tax.

**Note:** With the higher estate tax exemption amount, this article is not

addressing discount planning, which has always been a challenge immediately pre-mortem.

**Change of residency**

The client's family sometimes will bring the client back "up north" for their care. Often that up north state has a death tax and/or an income tax. In many cases, it is advantageous for the client to keep residency in Florida, if possible. If not possible, clearly change the client's residency and update (or have updated) the client's estate planning documents.

**Practice tip:** As with most Florida residency planning, try to continue to focus the client's life in Florida. In addition, consider obtaining (and updating) physicians' written orders/care plans addressing why the client needs to be "up north" for care.

**Charitable gifts**

Traditionally, if there was charitable intent, immediately pre-mortem charitable gifts would not only reduce the estate's taxable estate (which it would also do post-death) but also provide an income tax deduction. With estate taxes less of an issue, where can the charitable deduction be used most effectively? Will the charitable deduction help reduce the client's income tax, or would it be more income tax effective for a beneficiary to make the charitable gift? Of course, the beneficiary will need to be trusted to make the charitable gift in the client's honor.

**Practice tip:** Similarly, it is important to consider whether the post-death donation of tangible personal property (such as the furniture no one wants) should be made by the estate or instead by a beneficiary who then makes the donation and receives the income tax deduction.

**Carryforward losses**

Does the client have carryforward losses and suspended/passive losses? If so, consider using them (or have the surviving spouse consider using them in the year of death with a joint income tax return). If not used, they may be lost.

**Practice tip:** If the beneficiaries plan to cash out a retirement plan promptly after the client's death (rather than stretch the payout), consider cashing out some or the entire plan pre-death. In considering this approach, take into account the client's and beneficiaries' tax brackets and any of the client's other deductions, carryforward losses, etc. These may offset the income if taken by the client.

**Retirement plans**

Decide if the minimum distribution (or more than the minimum distribution) should be taken.

**Practice tip:** If a minimum distribution is required and has not already been taken pre-death, make sure it is timely taken post-death.

**Grantor trust transactions, credit shelter trusts, and basis**

Many clients set up irrevocable trusts when the estate tax exemption was much lower. Many of these trusts are taxed as grantor trusts with the income tax consequences passing through to the grantor client. See if the trust holds appreciated securities. If so, consider having the client purchase, for fair market value, the appreciated asset from the trust. Per Revenue Ruling 85-13, this transaction is not taxable to the grantor client (it is deemed to be a transaction by the client with the client). However, at the client's death, the swapped asset should receive a basis step-up. Similarly, planning should be considered with credit shelter trusts created after the death of the first spouse to die. In some cases, it may even be advisable to shut down the shelter trust with the assets going to a surviving spouse. These assets may then receive a basis step-up at the surviving spouse's death.

**Gift from beneficiary**

What if the spouse or other beneficiary has appreciated assets? Consider gifting these assets to the client (again, assuming the exemption amount is so high that there are no gift tax issues to the party making the gift). At death, the gifted property can go back to the beneficiary who gifted the property to the client—and do so at the stepped-up fair market value at death. Sounds too good to be true? Congress thought so, too. Section 1014(e) does not allow the basis step-up *if* the death is within one year of the gift from the beneficiary, and with the gifted asset going back to the original gifting beneficiary.

**Practice tip:** What is the tax downside of trying? None really. If the client lives more than a year, the plan worked. If not, other than the gift itself, there is no harm.

**Practice tip:** If the client is really not expected to live a full year, is the gifting beneficiary willing not to be the ultimate beneficiary? For example, is the client's spouse willing to gift appreciated securities to the client and at the client's death, have these assets go to children? This can work even if the death is sooner than a year from the original gift.

**Trap:** Make sure there are no strings or prearrangements with gift-back arrangements, as the IRS can try to reverse the gift.

***Michael A. Lampert, Esq.,*** *is a board certified tax lawyer and past chair of The Florida Bar Tax Section. He regularly handles federal and state tax controversy matters, as well as exempt organizations and estate planning and administration.*

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