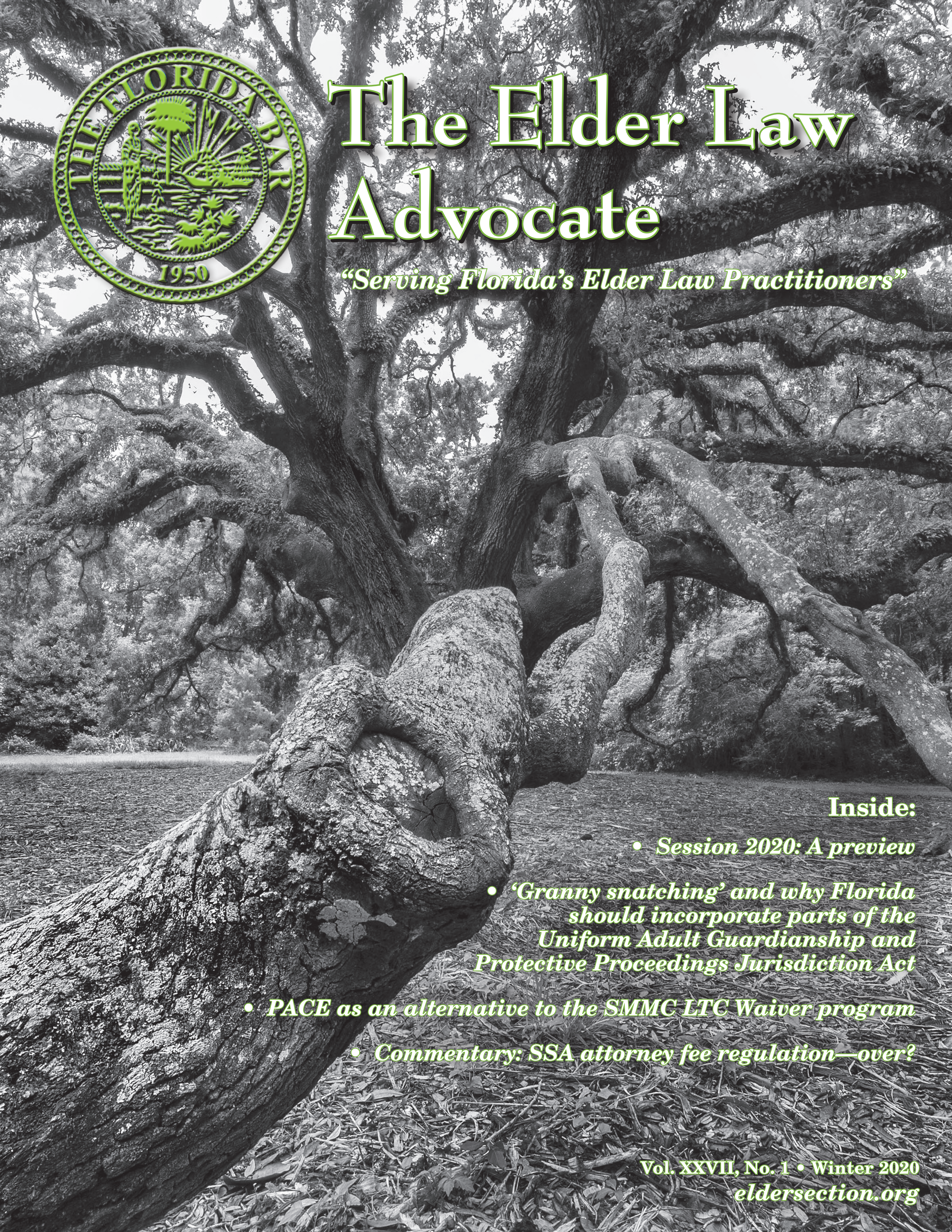

The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

Inside:

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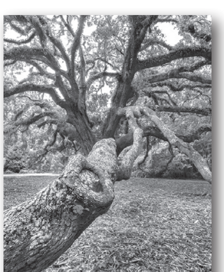
Statements or expressions of opinion or comments appearing herein are those of the contributors and not of The Florida Bar or the section.

The Elder Law Advocate will be glad to run corrections the issue following the error.



COVER ART

Southern Live Oak, Leon County
Randy Traynor Photography

1/2020

Contents

The deadline for the SPRING 2020 EDITION: MARCH 1, 2020. 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.

Randy C. Bryan

Message from the Chair

Midterm report: The Elder Law Section is actively working on behalf of Florida's seniors

It's hard to believe that as this issue of *The Advocate* goes into publication, we will be halfway through my year as chair. Our section has been very active this year, thanks in large part to my predecessors' work of establishing the Elder Law Section as the go-to section for issues affecting Florida's seniors. We started this year poised to address three specific legislative initiatives on behalf of vulnerable adults in Florida: (1) a "glitch" bill to tweak the exploitation statute we were previously instrumental in getting passed to include, among other things, a provision allowing an agent under a durable power of attorney to file a petition for an injunction to protect a vulnerable adult from exploitation; (2) the Florida Uniform Guardianship and Protective Proceedings Jurisdiction Act to bring Florida in line with 46 other states that have passed a version of the law to protect vulnerable adults who are taken from Florida to another state and then prevented from returning to Florida by the court in the other state because Florida did not adopt a version of the Uniform Act; and (3) a bill creating exploiter disinheritance provisions to create a financial disincentive for someone found guilty in a criminal court or in a civil action for exploitation of a vulnerable adult.

We were well positioned to bring each of these legislative initiatives forward in the 2020 Legislative Session until a series of investigative articles by the *Orlando Sentinel* highlighting a number of alleged improper actions by an Orlando professional guardian created a political firestorm that resulted in the sidelining of our legislative initiatives. The good news is the Elder Law Section was one of the groups Senator Kathleen Passidomo reached out to when forming a working group to discuss new potential legislative initiatives to address some of the issues identified in the Orlando guardianship.

At the time I wrote this article, our legislative committee co-chairs (Shannon Miller, Travis Finchum, and Debra Slater), Brian Jogerst, the section's legislative advisor, and Jill Burzynski, section member and immediate past president of the Academy of Florida Elder Law Attorneys, had met with Senator Passidomo as part of her working group at least three times to discuss potential legislation to address the governor's concerns. By the time this goes to press, we should have legislative language working its way through the various committees before the session formally opens in January, but we anticipate the legislation may address, among other potential issues: (1) requiring court approval for a guardian to execute a do not resuscitate order on behalf of a ward when the ward has not previously authorized such order; (2) requiring a guardian to disclose any third-party compensation arrangements; (3) requiring the guardian to disclose any conflicts of interest; and (4) prohibiting professional guardians from petitioning for their own appointment.

In addition to the vulnerable adult issues, our Legislative Committee (comprising the chairs of our section's substantive committees) continues to work through the various other legislative initiatives that may affect our clients. Although our primary legislative initiatives have been sidelined this year, we are fortunate to have a prominent seat at the legislative table as we work through these newly identified high-priority initiatives, and we hope to be able to revisit our primary initiatives in the 2021 legislative cycle.

Meanwhile, our section's substantive committees are busy working on many other projects. Here are some of the highlights reported by the committee chairs during the Annual Retreat in October:

David Weintraub and Ellen Cheek, co-chairs of the Abuse, Neglect, and Exploitation Committee, reported their committee was working on a

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Chair's message. . .
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review of two bills working their way through the legislative cycle addressing vulnerable investors and residents in assisted living facilities, in addition to creating a panel of individuals including attorneys, prosecutors, and regulators involved in the enforcement of abuse, neglect, and exploitation, who will report at the Annual Update Program in January.

Horacio Sosa and Amy Collins, co-chairs of the Estate Planning and Advance Directives, Probate Committee, reported they are working on a project to collect the local rules and regulations of the various probate courts across the state to upload onto their committee webpage so ELS members will have centralized access to local rules when filing a case outside of their home jurisdiction.

Steve Hitchcock, chair of the Ethics Committee, reported on an amendment to the Rules Regulating The Florida Bar regarding the ethics of working with a client with diminished capacity to bring it more in line with the ABA Model Rule. His committee worked closely with the RPPTL Ethics Committee on this issue, and we passed a mutual package in support of the changes.

In addition to the guardianship issues mentioned earlier in this article, Twyla Sketchley and Stephanie Villavicencio, co-chairs of the Guardianship Committee, reported on the progress of the complete rewrite of the guardianship statutes (creating a new Chapter 745 in place of the current Chapter 744). The painstaking review of comments from all stakeholders wrapped up the first week of November, and we plan to present the new bill in the 2021 legislative cycle.

John Clardy and Heidi Brown, co-chairs of the Medicaid/Government Benefits Committee, reported they are monitoring the elimination of the 90-day retroactive Medicaid benefits and encouraged members to report any adverse consequences their clients may be experiencing. In addition, a subgroup of the committee is looking into issues associated with improper denials and/or inaccurate or incomplete notices of case action issued by the Department of Children and Families in response to an application for Medicaid benefits.

Howie Krooks and Amy Fanzlaw, co-chairs of the Special Needs Trust Committee, had an active quarter including the presentation of a webinar by David Lillesand on recent changes to the Social Security POMS requiring attorneys to submit fee petitions to Social Security before accepting fees related to an individual who is or may receive SSI-related benefits. They also reported at the Retreat that Social Security later removed these changes from the POMS without comment. We have all been very appreciative of David Lillesand's frequent postings on the AFELA listserv keeping everyone up-to-date on the changes. The SNT Committee is also busy working on potential legislative changes to allow d4A trusts to be designated as a beneficiary on Florida retirement plans (similar to a recent change on the federal level affecting military and civil service pensions).

I am pleased to report that Jack Rosenkranz has agreed to co-chair the Veterans Benefits Committee with Teresa Bowman. Jack and Teresa hit the ground running with some amazing new initiatives to recruit and engage new committee members.

Our CLE Committee, chaired by Marjorie Wolasky and Danielle Faller, reported they were busy working with our chair-elect, Steve Hitchcock, on finalizing the details for the 2020 Elder Law Essentials and Annual Update Program at the Lowes Portofino Bay Hotel in Orlando, January 16-18, 2020. The registration and hotel reservation links for this program were e-blasted to all members in early November, and we look forward to seeing many of our members at our flagship program in January!

Dayami Sans and Jodi Murphy, co-chairs of the Mentoring Committee, reported they continue to host our *Tricks of the Trade* telephonic CLE every other month, with presentations planned on the topics of special needs trusts and veterans benefits.

As you can see, we are blessed with great leaders in each of our committees who are working actively to help each of our practices and the clients we serve. If you are not currently active in one or more committees, I encourage you to visit the "Committees" page on our section's website (www.eldersection.org) to learn of each committee's meeting schedule and to reach out to volunteer your time, energy, and talent to one or more of the committees to promote elder law issues across the state.

Capitol Update

by

Brian Jogerst

Session 2020: A preview

The 2020 Legislature will convene on January 14. As discussed in previous updates, during the even-numbered years, the 60-day legislative session starts in January while during the odd-numbered years, the session begins in March.

With the early start date, the House and the Senate began their legislative committee hearings in September and met in Tallahassee monthly through December.

Budget

Prior to the 2019 Legislative Session, most of the budget discussion centered on hurricane relief in the Florida Panhandle as a result of Hurricane Michael in October 2019. The Legislature appropriated significant funding for communities impacted by the hurricane, and we can anticipate that additional hurricane relief and support will be part of the 2020 budget discussions. In addition, Governor DeSantis announced his proposal to increase teacher starting pay and will also continue to support increased environmental funding during the upcoming session. Finally, according to published reports, state agencies are requesting more than $2 billion in increased funding in the budget. While the revenue forecasts are positive going forward, the ongoing hurricane needs as well as new funding requests will place constraints on the overall budget discussions and funding priorities during the 2020 Legislative Session.

Legislative issues

Each year more than 3,000 bills are filed in the House and the Senate, and the ELS Legislative Committee, along with the ELS substantive committees, has reviewed the bills affecting elder law issues, including exploitation and abuse/neglect of vulnerable adults, so we can provide feedback and comments to legislators, legislative staff, and other interested parties.

The following is a brief overview of key issues we are working on for the 2020 Legislative Session:

Guardianship

As Randy Bryan, ELS chair, noted in his article, given the concerns raised by an ongoing series of investigative reports in the *Orlando Sentinel* regarding a specific professional guardianship in Central Florida, elder law's primary focus during the 2020 session is to work with legislators to address the problem and to find workable solutions while also maintaining a safe guardianship system to protect vulnerable adults.

Elder law, along with other interested groups including RPPTL, has been actively engaged with legislators, including Senator Kathleen Passidomo and Representative Colleen Burton, who will be filing legislation to address the concerns outlined in the *Sentinel* articles. Issues under discussion include court-ordered do not resuscitate orders, disclosing third-party compensation arrangements, requiring guardians to disclose conflicts of interest, and prohibiting guardians from petitioning for their own appointment.

We can anticipate that once the bills are filed by the legislators, who at this writing are drafting the legislation, other issues from interested groups may be raised. Of course, we will be reviewing all proposed legislation to ensure that guardianship laws and protections are not negatively affected.

Because of the guardianship issue, elder law decided to postpone other proactive legislative initiatives this year, including exploiter disinheritance, exploitation injunction, and the Uniform Adult Guardianship Jurisdiction Act. We will continue to position these issues for the 2021 Legislative Session.

Vulnerable adults/security dealers

For the third consecutive session, legislation will be filed designed to protect vulnerable investors. Specifically, the legislation is designed to give security dealers the ability to place a temporary hold on transactions if they suspect exploitation. Elder law *supports* the overarching desire to protect vulnerable adults; however, concerns remain with other provisions in the bill. For example, a security dealer who places a freeze on the account receives a "safe harbor" protection. Elder law's concern remains that when a security dealer places a freeze on the account—not because of exploitation concerns but to prevent the funds from being transferred to a new security dealer—the dealer should not receive the safe harbor protection.

Surviving successors/bankers

Senator Dennis Baxley filed Senate Bill 380 and Representative Chuck Clemons filed House Bill 397. The

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Capitol Update. . .
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intent of this bill is to permit a decedent's survivors to access funds in the decedent's account. Last session, the House bill would have sent the accounts to state unclaimed property after 25 months, which would provide public access to all persons who had a claim to the funds. One significant concern with the bill for the current session permits a family member to sign a sworn affidavit for the bank to release the funds, and will not hold the bank liable if the family member fraudulently signed the affidavit. Elder law, along with RPPTL, is working with the interested parties.

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—and the Legislature will address the issue again during the 2020 session.

Assisted living facilities

Senator Gayle Harrell filed Senate Bill 402 dealing with regulation of assisted living facilities. One issue in the bill eliminated the requirement to notify AHCA of a potential adverse incident within 24 hours but maintained the 15-day notice requirement. Elder law discussed this with Senator Harrell, who is working with the interested parties, and the 24-hour provision was reinstated at the first committee hearing. We will continue to closely review and monitor this bill throughout the legislative session.

Legislative Committee

As noted above, the ELS Legislative Committee, along with the chairs of the ELS substantive committees, is actively reviewing all bills that are filed and will provide comments to the sponsors. Each session more than 3,000 bills are filed in the House and the Senate, and the Legislative Committee and substantive committees review more than 50 bills each session. 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:

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Shannon Miller
shannon@millerelderlawfirm.com

Debra Slater
dslater@slater-small.com

Finally, 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 also 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.*

'Granny snatching' and why Florida should incorporate parts of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

by Victoria E. Heuler and Debra J. Slater

Judy's mother, Thelma,[1] was the victim of what has been coined "granny snatching." Thelma suffered from the effects of Alzheimer's disease when her Tennessee daughter, Wendy, "snatched" her away from her home state of Florida and refused to allow her to return. Judy previously had filed a petition in Florida to have Thelma determined incapacitated and to be appointed Thelma's guardian. Judy called local law enforcement in Tennessee and asked them to check on Thelma. Law enforcement obliged and told Judy that Thelma was fine at Wendy's house, Wendy was the appointed emergency guardian for Thelma under Tennessee law, and Wendy would not be bringing Thelma back to Florida. Judy informed Tennessee law enforcement that Thelma had lived in Florida her entire life, 88 years, and had never expressed a desire to live in Tennessee with Wendy. Due to the Tennessee emergency guardianship, the officer was unable to force Thelma to return to Florida and told Judy to retain a lawyer in Tennessee.

Judy had an open incapacity and guardianship proceeding in Florida, which was pending final adjudication. Wendy obtained an emergency guardianship in Tennessee and refused to return Thelma to Florida. Judy had no authority to force Thelma, an incapacitated person, back to Florida. The Tennessee court assumed jurisdiction over Thelma and her person although Thelma had no prior connection with Tennessee.

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Granny snatching ...
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Thelma was now subject to remaining in Tennessee in perpetuity unless the Tennessee court decided, *in its discretion*, to return Thelma to Florida.

Had Florida (one of only four states that has not adopted UAGPPJA) adopted the core components of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA),[2] Florida, Thelma's home state, would have controlled which state had jurisdiction to determine Thelma's residence and decisions regarding her well-being. In 2019, House Bill 677[3] was filed by Representative Wyman Duggan seeking to adopt core components of the UAGPPJA to avoid jurisdictional competition, establish procedures for courts to transfer guardianships from one state to another, avoid relitigating guardianship decisions in different states, discourage use of the interstate system for controversies between states over guardianship, and provide a uniform system for enforcement of out-of-state guardianship orders.[4]

House Bill 677 included the following essential components of the uniform act:

1. Providing for courts of different states to communicate and cooperate with each other regarding a vulnerable or incapacitated adult subject to guardianship;
2. Defining a vulnerable adult's "home state" as the state where the person was physically present for at least six consecutive months immediately prior to the filing of a petition for incapacity or appointment of guardian;
3. Establishing parameters for temporary jurisdiction and ultimate and continuing jurisdiction;
4. Authorizing a foreign court to refuse to exercise jurisdiction if that court determines that the vulnerable adult's needs should be adjudicated in her or his home state; and
5. Authorizing a court of any state to refuse to exercise jurisdiction when it determines that jurisdiction would only lie due to improper conduct by the petitioner in that state.

Many of us have encountered clients faced with the issues raised here who have been virtually helpless to get a foreign court to recognize Florida as the home state and the state that should have jurisdiction over its resident. If enacted, the UAGPPJA would have enabled the two jurisdictions to communicate and determine that Florida was Thelma's home state for purposes of ongoing jurisdiction. The mutuality of UAGPPJA provides predictability and uniformity between jurisdictions and their treatment of a vulnerable adult. Without UAGPPJA, the state where a vulnerable Florida resident is found is not required to honor a Florida court's order for the return of its resident to Florida. The rules of UAGPPJA would help deter "granny snatching" and provide Florida's most vulnerable residents the protections of Florida's robust incapacity and guardianship laws.

Victoria E. Heuler *is a partner with Heuler-Wakeman Law Group PL in Tallahassee, Florida, and is a Florida Bar board certified specialist in elder law. She concentrates in incapacity issues and guardianship, vulnerable adult protective proceedings, and probate, including litigation in these areas. Victoria is a past co-chair of the Elder Law Section's Guardianship Committee and currently the substantive vice chair for the section.*

Debra J. Slater *is a partner at Slater & Small PLLC. She is a Florida Bar board certified specialist in elder law. She is a co-chair of the Elder Law Section's Legislative Committee and former co-chair of the Guardianship Committee. Her practice focuses primarily on guardianship and estate litigation.*

Endnotes

1. All names used in this article are fictitious.
2. *See* https://www.uniformlaws.org/committees/community-home?CommunityKey=0f25ccb8-43ce-4df5-a856-e6585698197a
3. The bill never received a committee hearing.
4. Florida long ago adopted the Uniform Child Custody Jurisdiction and Enforcement Act to protect children taken across state lines by warring parents. The protective goals of UAGPPJA are similar for vulnerable adults.

PACE as an alternative to the SMMC LTC Waiver program

by Jason Neufeld

As elder law attorneys, we try to be a resource for our clients. Often, when our clients desire to age at home or in an assisted living facility (ALF), we immediately begin to discuss the Statewide Medicaid Managed Care Long-Term Care (SMMC LTC) Waiver program.

But many parts of Miami-Dade, Broward, Palm Beach, Lee, Charlotte, Collier, and Pinellas counties have an alternative option for those who desire home- and community-based care services.[1] This option is known as Program of All-Inclusive Care for the Elderly or PACE.

Think of PACE as an all-in-one/one-stop shop health insurance and home- and community-based long-term care management program. PACE covers all services one ordinarily receives under Medicare and more. PACE provides both medical and long-term care services from a single source. PACE provides coordinated primary care and medical specialty care (e.g., dentists, optometrists, audiologists, podiatrists, psychiatrists, physical therapy, occupational therapy, and speech therapy) all at a PACE day health care center.

In addition to adult day care and respite care, PACE also provides durable medical equipment, Medicare Part D prescription drug coverage, and in-home/home-health/home nursing services, along with transportation to and from the day health care center and to and from doctor's appointments.

Who is eligible for the Florida PACE program?

PACE candidates must be over the age of 55, require assistance with three activities of daily living (i.e., nursing home level of care), be able to live safely in the community with the help of PACE services, and be eligible for Medicaid.

Potential enrollees must live in one of the service areas surrounding the PACE center locations.

Who are ideal PACE program candidates?

About 59% of PACE participants have a dementia diagnosis and need help coordinating their care.

A typical example of an ideal PACE participant would be one whose family works or otherwise cannot take a primary care-giving role during a significant number of hours each day. PACE can provide transportation to the PACE center, schedule and provide transportation to doctor's appointments, and provide associated home needs in order to prepare for doctor's appointments or time spent at the PACE center (e.g., provide a shower or assist with dressing, laundry, medication management, etc.).

The PACE Medical and Long-Term Care program also offers additional benefits.

No wait list and free application help

Perhaps one of the most exciting reasons to consider PACE is that there is no wait list; however, Florida PACE enrollment typically takes between one and three months to process. This is because PACE has to coordinate with the Florida Department of Children and Families and the Florida Department of Elder Affairs to confirm Medicaid eligibility. In addition, a PACE representative handles all aspects of filing the Medicaid application.

Who are *not* ideal Florida PACE candidates?

PACE will not be a perfect fit for all Floridians who need long-term care management assistance. For example, an individual who is bed-bound or who needs extensive home-health care is not likely to benefit as much from the Florida PACE model. In addition, those who are simply looking for more financial assistance to go toward their ALF bill are, similarly, not ideal PACE candidates.

The PACE model centers care around the PACE location. So, home-health aid services are based on assisting those who need help at home before heading over to the PACE center (which are still valuable services such as laundry, cleaning, medication management, and showering) but may not be best suited for the applicant who wants to spend all of his or her time at home or in the ALF. If the applicant qualifies, the Medicaid Waiver program will likely provide more home-health care hours when compared side-by-side with PACE.

Along the same lines, those simply looking for more money to be put toward their ALF bill may prefer to join a waiver wait list.

Jason Neufeld, Esq.*, is an elder law and Medicaid planning attorney with Elder Needs Law PLLC based in Aventura, Florida. He also practices personal injury (car accidents, premises liability, medical malpractice, and wrongful death matters) with Neufeld, Kleinberg & Pinkiert PA.*

Endnote

1. See http://elderaffairs.state.fl.us/doea/pace.php (accessed November 14, 2019). Note, however, that there is a small amount of coverage in Broward County accessible through the Miami-Dade program.

Commentary: SSA attorney fee regulation—over?

by David Lillesand

This is status report #3. If you are looking for status reports #1 and #2, they exist only on my computer because the whole issue of whether the Social Security Administration (SSA) has the authority to regulate our fees for drafting trusts, particularly first-party special or supplemental needs trusts (SNTs), is changing so fast I have to keep re-writing this update, discarding prior attempts.

In June 2019, the Social Security Administration promulgated POMS GN 03920.007, which required advance fee approval before collecting a fee for drafting trusts that protected SSI eligibility. SSA published a formal notice online, dated September 25, 2019, that the 007 POMS "has been archived pending clarification." SSA Transmittal GN 03920 TN 27 on the POMS "Recent Changes" webpage. As of this writing in November 2019, SSA has been withdrawn.

In discussions that same date with Stacy Cloyd, the National Organization of Social Security Representatives (NOSSCR) head of governmental affairs in Washington, D.C., Janet Walker, one of the chief administrators of the section of SSA offices responsible for the rule, advised:[1]

- The 007 POMS has been withdrawn ("archived") by SSA and can no longer be found online;
- Pending fee petitions for trust drafting will be processed "as normal";
- SSA believes that trust drafters will continue to submit new fee petitions (presumably following POMS GN 03920.005 published in 2004 and continuing in force—more below);
- SSA staff wants to use comments by attendees at Stetson's 2019 SNT Conference to generate an "agenda" for further discussions within the agency to reformulate the withdrawn preauthorization attorney fee rule and republish it; and
- SSA will consult with the NOSSCR-NAELA-ASNP-SNA "Work Group" as a proposed, reformed rule is devised.

The national office of SSA was under the erroneous belief that trust drafting attorneys understood and always followed the 2004 policy in GN 03920.005 that attorney fee

SSA attorney fee ...
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authorization is required whenever an attorney provides legal services to clients that:

- Result in a client acquiring or retaining SSI eligibility, irrespective of whether:
    - the attorney was ever recognized by SSA as the client's official SSA representative, or the attorney did not deal with or contact SSA; and
    - the fee is charged to or collected from the claimant/client or a third party.

Sitting in your office, preparing an SNT, clearly falls within that rule, and the 005 rule remains in effect even though the more descriptive and specific application to drafting trusts in 007 has been removed.

President Trump may have unwittingly ridden to our rescue in timely fashion. The White House issued two Executive Orders on October 9, 2019. The first Executive Order,[2] which if applied to the Social Security Administration, severely curtails the effect of all POMS guidance unless published pursuant to the Administrative Procedures Act, 5 U.S.C. 551 et seq. Agencies must "engage in notice-and-comment rulemaking to provide public notice of proposed regulations under [the APA and] allow interested parties an opportunity to comment, consider and respond to significant comments, and publish final regulations in the Federal Register."

Agencies in general and SSA in particular have commonly issued "guidance documents" providing direction in interpreting statutes and regulations. The POMS, upon first analysis, clearly falls into the category of guidance documents since they are not APA-issued federal regulations. Thus, the first Executive Order states that "it is the policy of the executive branch … to require that agencies treat guidance documents as non-binding both in law and in practice."

The second Executive Order[3] includes the statement that:

> No person should be subjected to a civil administrative enforcement action or adjudication absent prior public notice of both the enforcing agency's jurisdiction over particular conduct and the legal standards applicable to that conduct. Moreover, the Federal Government should, where feasible, foster greater private-sector cooperation in enforcement, promote information sharing with the private sector, and establish predictable outcomes for private conduct. Agencies shall afford regulated parties the safeguards described in this order, above and beyond those that the courts have interpreted the Due Process Clause of the Fifth Amendment to the Constitution to impose.

Accordingly, unless this Executive Order is withdrawn, amended, or somehow exempts the Social Security Administration POMS, it appears that SSA's plan to reformulate the POMS "guidance" requiring attorney fee approval is not legally enforceable against trust drafting attorneys unless SSA follows the federal Administrative Procedures Act cited above and publishes a Notice of Proposed Federal Rulemaking, and permits our opportunity to comment before SSA adopts it as a final, enforceable federal regulation.

David Lillesand, Esq.*, is a partner of Lillesand, Wolasky, Waks & Hitchcock PL with offices in Miami and Tampa Bay, Florida. He is past chair of the ELS Special Needs Trust Committee and a frequent lecturer for NOSSCR, NAELA, ASNP, and other state and national organizations on the topics of Social Security, SSI, Medicare and Medicaid, and the application of the Patient Protection and Affordable Care Act to the practice of social security and elder law. He and his partner, Marjorie Wolasky, are the authors of Chapter 17, "Special Needs Trusts," in the Florida Bar Lexis/Nexus publication* Trust Administration in Florida*, 8th edition.*

Endnotes

1. This conversation was reported in a private email to NOSSCR of which the author is a member and a recipient.
2. *See* https://www.whitehouse.gov/presidential-actions/executive-order-promoting-rule-law-improved-agency-guidance-documents/
3. *See* https://www.whitehouse.gov/presidential-actions/executive-order-promoting-rule-law-transparency-fairness-civil-administrative-enforcement-adjudication/

SECTION NEWS

Mark your calendar!

UPCOMING EVENTS

2020 Elder Law Essentials
January 16, 2020
Loews Portofino Bay Hotel
Orlando

2020 Elder Law Annual Update & Hot Topics
January 17-18, 2020
Loews Portofino Bay Hotel
Orlando

Elder Law Section Executive Council Meeting
Thursday, January 16, 2020
Loews Portofino Bay Hotel
Orlando

19th Annual Elder Concert
A Multidisciplinary Elder Care Conference
Friday, February 21, 2020
Fort Lauderdale Marriott North
Visit *elderconcert.com* for details and to register.

2020 Elder Law Annual Retreat
October 22-24, 2020
Boston, Massachusetts

2020 ELDER LAW ESSENTIALS & ANNUAL UPDATE

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SECTION NEWS

Committees keep you current on practice issues

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

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PRACTICE MANAGEMENT

Best practice tips for law firm mobile security

Part 3: Are intelligent apps really able to help you at work?

by Audrey Ehrhardt

As we quickly approach 2020, *artificial intelligence* is a term that still remains largely unfamiliar. While we have heard of it, and probably have some familiarity (think the *Terminator* movies), only a few of us have practical, working knowledge of what it is. Perhaps even more frustrating is the fact that many of us do not know how it can be implemented to help us succeed in our practices.

What exactly is artificial intelligence? Experts define it to be "intelligence exhibited by software or machines, and—through machine learning—has the capability to improve itself over time" (Fauscette, 2017). The idea that software can learn overtime may surprise you. It is something that you may not have contemplated in your practice, and you may not have considered the fact that, just as you can teach an employee, you can teach your mobile device to be able to help you in your practice. This type of software development is on the rise as "the market is experiencing growth mainly due to the increase in the need for advanced analytical tools, advancement in technology with related to new product development, and increased market for big data & analytics drive the global intelligent apps market" (Intelligent apps market to have a promising future ahead!, 2019).

As artificial intelligence continues to evolve, intelligent apps have come to life. What makes up an "intelligent app" you ask? Intelligent "apps" (short for applications) are specific to their users as they offer a personalized experience through data analytics and machine learning. As a user continues to use the application, the app will evolve to understand the user's needs.

As the market continues to grow, how can these intelligent apps help you at work? Here is one example: Intelligent apps can make your work days more effective when it comes to something as simple but important as responding to an email. How often are you working outside your email, only to learn you've received 40 emails in the last 45 minutes? While some of these emails are urgent, others may not be as important. Intelligent applications have the ability to monitor the emails coming in and know when to filter out the emails you do not need, while also learning to send you alerts when they know one requires an immediate response. Further, you can choose to train your email to prompt your response email with frequently used text responses to similar inquiries or questions.

While this is a development that continues to be exciting, we must keep cyber security and protecting our law firms at the forefront of our minds. Many intelligent apps listen and have a broad range of permissions to be able to engage with us and the entire range of data on our mobile devices. Before getting started with any of them, do your research, read the terms and conditions, and determine what access to private information you want to give.

If you're not using intelligent applications in your workplace today, you may want to consider making the change. Remember, intelligent apps can be anything from email responders to task management to personal assistants to everything in between. The idea behind intelligent apps in the workplace is to transform day-to-day tasks through personalization, in turn making you and your employees more effective. I encourage you to learn more.

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Tips & Tales

by
Kara Evans

Making countable assets disappear

The tale: Joe Client comes to you for advice. His wife, Jane, has reached the point where she must move to a nursing home. Joe's daughter is an estate planning attorney who had advised him to pay off his mortgage and make necessary home improvements. He followed her advice but still had too much money left to qualify for Medicaid. The daughter recommended he meet with an elder law attorney for further advice.

The tip: After a lengthy interview, you decide to advise Joe to convert his available assets to those considered exempt or noncountable assets for Medicaid purposes. This decision is predicated on Joe's need for a community spouse income allowance. The Department of Children and Families refuses to allow income diversion if the community spouse refuses support to a spouse applying for benefits. ESS Policy Manual at 1640.0314.01 states, "Community spouses who refuse to make their assets available to the institutionalized spouse are not entitled to a community spouse income allowance." You suggest the following options:

Annuities

Traditionally, Medicaid planners were able to use annuities to make a married couple's countable assets virtually disappear. This was accomplished by having the community spouse purchase a single premium immediate annuity (SPIA). Under this type of annuity contract, an individual gives a certain amount of money up front (a premium) to a company and in return, an income stream is generated. The contract carries no cash value, meaning that the client cannot get any cash from the annuity, only the agreed-upon income stream. Prior to the Deficit Reduction Act of 2005 (DRA) and then the 2006 amendments, there was no restriction on how these payments were structured. Many were structured as a "balloon annuity." This type of annuity paid a very small amount of income each month with a large payment at the end of the term. A community spouse could purchase a SPIA and still have income low enough to remain eligible for the spousal income allowance. The DRA of 2005 changed all this. The changes for annuity purchases made after November 1, 2007, are reflected in the ESS manual at 1640.0609.03, with new criteria to be met. Under these rules, in order to purchase an annuity and not have it considered a transfer for less than fair market compensation, the annuity must be actuarially sound, that is for a period no longer than the purchaser's lifetime based on the Social Security Administration tables; the payments must be in equal amounts consisting of both interest and principal; the state must be named as the primary beneficiary unless there is a spouse, or a minor/disabled child, and thereafter the state must be the contingent beneficiary; and the annuity must be irrevocable and non-assignable.

There are conflicting goals in using annuities: lowering assets while managing income. We can reduce income by stretching the annuity term over a longer period of time. This increases the likelihood that there will be a balance for the state to receive upon demise. Conversely, we can shorten the annuity term, making it less likely that our community spouse will receive income diversion. In our scenario, we want to keep Joe's assets low so he can receive income diversion. The more income he receives, the less income diversion he is entitled to receive. This means he will be reducing their hard-earned assets in order to use income to pay bills. When his wife passes, he could be impoverished.

Loans and promissory notes

Again, in order for the loans or promissory notes to meet Medicaid criteria, repayments must be for a period no longer than the purchaser's lifetime based on the Social Security Administration tables, payments must be made in equal amounts over the term of the loan, and debt forgiveness is no longer allowed. Loans and promissory notes present many of the same issues as annuities and present the same dilemma of balancing asset reduction with income increase. See ESS manual at 1640.0609.08.

Income-producing property

Some investments are not counted as assets for Medicaid purposes. Income-producing property, usually rental property, falls into this category. The value of the underlying property is ignored, while only the income stream from the rent less any expenses associated with the property is counted as income. Because all expenses associated with the property can be deducted before the income amount is calculated, we normally recommend that the client hire a property management company to handle all aspects of the property. This includes escrowing property taxes, making insurance payments, and paying the monthly expenses. The company will only pay the net income to the client each month. This relieves Joe of any day-to-day responsibilities of property ownership.

When using income-producing property to protect assets, it is important to address what is known as an enhanced life estate deed. This deed is not considered a transfer for Medicaid purposes; however, it does prevent the rental property from going through probate after the client's death. Assets that go through probate will be subject to estate recovery by Medicaid. Therefore, the proper titling of this property is crucial.

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Call for papers – *Florida Bar Journal*

Randy C. Bryan is the contact person for publications for the Executive Council of the Elder Law Section. Please email Randy at *randy@hoytbryan.com* for information on submitting elder law articles to The Florida Bar Journal for 2019-2020.

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.

TAX TIP$

by Michael A. Lampert

RMD and charity

Upon reaching age 70-1/2, clients must take the required minimum distribution (RMD) from their taxable IRA. Some of those same clients also make charitable contributions. With the income tax law changes over the last few years, many of these clients no longer itemize their deductions on their federal income tax return.

The result? The client reports taxable income on the IRA distribution. The client does not get the benefit of the charitable income tax deduction.

Possible solution: Qualified charitable distribution (QCD). Clients age 70-1/2 or older may make a direct gift from the IRA to charity up to $100,000 per year total.

The QCD:

- Satisfies all or part of the RMD;
- Does not count against the maximum percentage of adjusted gross income allowed for a charitable deduction (helpful for higher-income/large-donor clients); and
- Most critically, the donation from the IRA directly to the charity is not taxed. It does not even count as adjusted gross income. Yes, there is no charitable deduction, but the deduction would only, at best, reduce the taxable gross income amount. Here it is not even in the equation. And, as an added benefit, the income does not count in determining the taxability of Social Security benefits. It also reduces the adjusted gross income for determining Medicare premium as well as, for higher income clients, the net investment income tax.

Trap: The charitable donation needs to be directly from the IRA to the charity. If a client takes a distribution and then donates the distribution, this special rule does not apply.

Employer-provided disability insurance and Social Security: Does the interface make a tax difference?

As part of my tax controversy practice, I often review tax cases that arise as part of a taxpayer's fight against the IRS's attempt to collect an assessed tax. Most of these cases have little unique impact on an elder lawyer's clients. The recent case *Murphy v. Commissioner of Internal Revenue*, T.C. Summ. Op. 2019-32 (Oct. 15, 2019), is an exception. *Murphy* at 7-8 certainly addresses technical procedural tax issues, but it also addresses the basic question:

Should a portion of a taxpayer's Social Security benefits be treated as nontaxable when a portion of the employer-provided disability plan benefits are not taxable and the plan has the right to reduce the taxpayer's disability benefits by the amount of the Social Security benefits?

The court responded no.

As a reminder, Social Security is taxed depending on the taxpayer's other income. The threshold is adjusted annually, but this past tax year (2018), the threshold for single filers was "combined income" between $25,000 and $34,000, after which 50% of the Social Security benefits was taxed, and above $34,000, 85% of the Social Security benefits was taxed. For joint returns, with a combined income between $32,000 and $44,000, 50% of the Social Security benefits was taxed, and above $44,000, 85% was taxed.

Trap: If the tax filing status is married filing separately, it is very likely that all of the Social Security benefits will be taxable.

But what is "combined income"?

It is the adjusted gross income *plus* nontaxable interest income *plus* one-half of the Social Security benefits.

Tip: Roth IRA withdrawals do not count as part of the income calculation.

Tip: The client can choose to pay estimated taxes or have withholding from the client's Social Security benefits (use Form W-4V voluntary withholding request).

Trap: There are approximately 13 states that tax some portion of Social Security benefits. Be careful if the client is not a Florida resident.

There is a potential for very high marginal tax brackets. The July 2018 *Journal of Financial Planning* had an article in which the authors demonstrated how taxpayers in the 12% income tax bracket could end up paying a marginal income tax rate of 22% on a portion of their income, and taxpayers in the 22% bracket could have a marginal rate over 40%. This is because, for some middle-income taxpayers, being just over the threshold for Social Security benefits taxation causes a significant amount (50% or 85%) of the benefits to be taxed. One example, using 2018 tax rates, had a single person with income between $18,751 and $19,000 in the federal tax bracket of 12%, yet having a marginal rate (with Social Security) of 22.2%. For $34,569 to $43,786, the bracket rate of 22% jumped to a marginal rate of over 40% with Social Security. Yet from at least $43,787 to over $145,000, the federal tax bracket and marginal tax rates are almost the same (22% and 24%).

Practice tip: This bump in marginal tax rate provides another reason to delay taking Social Security. In many cases, using income from deferred accounts first, while building a higher Social Security benefit, can result in paying the lower marginal income tax rate in the earlier years. Later, with Social Security benefits at a higher amount, there may be less need to pull income from retirement accounts and, therefore, less taxed Social Security benefits. This is less of an issue for taxpayers that will be in the 85% Social Security bracket regardless (although the client could try and reduce income that determines Medicare Part B and D premiums).

But does it matter what kind of Social Security benefits are received? As the court noted, IRC § 86 for the purposes of establishing "a taxpayer's gross income, there is no distinction between Social Security retirement benefits and Social Security disability benefits, as both are included in the calculation of gross income under section 86." *Murphy* at 8.

Therefore, the court did not allow a proration of the taxability of the Social Security retirement benefits based on some (or any) percentage of the reduction of the nontaxable portion of the disability plan benefits.

Practice tip: This non-reduction of tax of Social Security benefits based on nontaxable disability insurance plan benefits can result in an unexpected tax trap. I have seen this arise in at least two contexts, as discussed below.

First, assume that a client is to receive $2,000 as a tax-free disability insurance benefit. (Remember, not all disability insurance payments are tax free.) This is $2,000 net to the client. This client also receives $2,000 Social Security benefits. If the disability plan, as many of them do, requires that Social Security disability benefits be applied for and have a partial or full benefits offset, the client may find himself with a lower nontaxable disability benefit and a taxable (based on other income) Social Security benefit. This results in the client ultimately having less net "cash in the bank" because of the income tax on the offset Social Security disability benefit.

The second context is when a Social Security disability lump sum recovery occurs a significant time after the disability benefits plan began paying the disability benefits. That lump sum paid, along with other income, may cause 85% of the lump-sum benefit to be taxed. Further, sometimes the disability plan requires repayment of some of the benefits paid while the client was waiting on a Social Security disability award. In some cases, some of the repaid disability plan benefits were already taxed, resulting in the risk of repaid benefits being double taxed. If this second scenario occurs, seek qualified tax counsel.

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Summary of selected case law

by Julianne D. Polston and Elizabeth J. Maykut

Will granting life estates controls, not homestead order finding equal shares

Mullins v. Mullins, 274 So. 3d 513 (Fla. 5th DCA 2019)

Issue: Was the homestead order finding homestead was devised in equal shares to three children sufficient to allow partition and sale even though the will granted a life estate to the decedent's sons?

Answer: No.

In this case, the Fifth DCA reiterated that an order determining homestead does not create new rights, but rather clarifies rights that exist by operation of law.

The decedent's will devised homestead to her three children subject to a life estate in Robert and Kenneth. *Id.* at 515. However, the homestead order, which was issued with the consent of the children, did not reflect life estates. *Id.* at 516. Kenneth and his sister filed a complaint to partition the homestead, alleging they all owned it in equal shares. Robert argued that the decedent's will, ***not*** the homestead order, established the siblings' interest in the homestead. *Id.*

The court held that the homestead order did not eradicate the life estates as they existed even in the absence of a court order. The consents filed did not show an agreement to reject the life estates because they did not constitute a beneficiaries' agreement under section 733.815, Florida Statutes. *Id.* at 517. Further, the homestead order did not constitute a title transaction under section 712.01(3), Florida Statutes, that would have extinguished the life estates. Therefore, pursuant to the will, Robert and Kenneth were entitled to live in the homestead as long as they desired.

Practice tip: When preparing a proposed order determining homestead, ensure it reflects any particular rights granted in the will. Use a beneficiaries' agreement under section 733.815, Florida Statutes, for beneficiaries who intend to alter their rights.

Will bearing only decedent's first name not validly executed

Bitetzakis v. Bitetzakis, 264 So.2d 297 (Fla. 2d DCA 2019)

Issue: Was the will that included a fully executed self-proving affidavit valid even though the decedent signed only his first name at the end of the will?

Answer: No.

In this case, the Second District reiterated the basic proposition that a will must be executed in accordance with the statutory formalities required by Florida law.

The decedent signed his will with two witnesses present, but only signed his first name. He stopped signing when his wife asked him to do so because she believed the will must be signed before a notary. *Id.* at 299. Later, the decedent signed a self-proving affidavit before a notary, but he did not bring the will to the notary.

The court held that the will was not validity executed in compliance with section 732.502, Florida Statutes, because evidence showed the decedent recorded something less than his full customary signature. Thus, the probate court erred in admitting the unsigned will to probate. *Id.* at 300.

Practice tip: A will must be signed in strict compliance with section 732.502, Florida Statutes, or it may be subject to attack.

Children had standing in breach of trust action because they would inherit if trust was invalidated

Cruz v. Community Bank & Trust, 44 Fla. L. Weekly D2037 (Fla. 5th DCA August 9, 2019)

Issue: Did the daughter who was devised a life estate and the son who was not a beneficiary of the decedent's trust have standing to sue the trustee for mismanagement of trust assets?

Answer: Yes.

Following their father's death, Tracy and Gregory brought an action to invalidate his 2016 trust, which left most of his assets to charity, alleging he lacked testamentary capacity. After receiving a trust accounting, Tracy and Gregory sued the bank trustee, alleging mismanagement. The bank alleged that the appellants lacked standing as they were not named beneficiaries of the trust.

The Fifth District held that Tracy and Gregory's claim that they would inherit the entire estate if they succeeded in invalidating the 2016 will and trust provided standing to sue as interested persons under section 731.201(23), Florida Statutes, as they may be reasonably expected to be affected by the outcome even though they were not named beneficiaries of the trust.

Practice tip: Trust accountings should be served on litigants who file a trust contest action even if they are not named beneficiaries under the trust.

Hearing required prior to ruling on petition for appointment of emergency temporary guardian

Covey v. Shaffer, 44 Fla. L. Weekly D1713a (Fla. 2d DCA July 3, 2019)

continued, next page

Case law ...
from page 23

Issue: Was it proper for the circuit court to grant the petition to appoint an emergency temporary guardian without a hearing?

Answer: No.

Following the circuit court's issuance of an ex parte order appointing an emergency temporary guardian (ETG), the court also appointed counsel to represent the alleged incapacitated person (AIP) and to serve as elisor. The attorney for the AIP sought to vacate the letters of guardianship and the order appointing the ETG, but such motion was denied.

Based on the reading of section 744.3031, Florida Statutes, and Florida Probate Rule 5.648, and the definite articles used therein, the Second District held that section 744.3031, Florida Statutes, requires a hearing prior to the appointment of an emergency temporary guardian.

Practice tip: Many courts are willing to appoint the ETG without a hearing based on consent of the AIP's attorney. Section 744.3031, Florida Statutes, also states that notice of filing the petition for appointment of the ETG and hearing be served on the AIP and the AIP's attorney at least 24 hours prior to the hearing *unless* the petitioner demonstrates substantial harm to the AIP would occur if the 24-hour notice was given.

Personal representative authorized to challenge amount of Medicaid lien

Al Batha v. State, 263 So.3d 817 (Fla. 1st DCA 2019)

Issue: Does a personal representative qualify as a "recipient" under section 409.910(17)(b), Florida Statutes?

Answer: Yes.

After entering into a confidential settlement for a wrongful death action, the personal representative (PR) of the decedent's estate filed a petition with the Division of Administrative Hearings to contest the amount of the Agency for Health Care Administration's (AHCA) Medicaid lien pursuant to section 409.910(17)(b), Florida Statutes. AHCA filed a motion to dismiss alleging that the PR was not a "recipient" pursuant to the statute and therefore could not challenge the lien.

The First District held that a personal representative qualifies as a "recipient" under section 409.910(17)(b) and reasoned that since a PR is the person authorized to prosecute a deceased person's claim, a PR qualifies as a "recipient" providing that the deceased person qualifies as a "recipient."

Practice tip: The holding in this case was narrow and specific to section 409.910(17)(b), Florida Statutes, regarding a Medicaid lien on recovered medical expense damages.

No recovery of attorney's fees for time spent litigating the entitlement to fees for an unsuccessful section 57.105 motion

Levine v. Stimmel, 272 So.3d 847 (Fla. 5th DCA 2019)

Issue: Can a party be awarded attorney's fees for time spent litigating an unsuccessful section 57.105 motion?

Answer: No.

The prevailing party at the trial court level moved for attorney's fees and costs pursuant to section 736.1004(1)(a), Florida Statutes, and also moved separately for attorney's fees and costs pursuant to section 57.105, Florida Statutes, claiming entitlement to fees because the other party chose to prosecute baseless claims. The section 57.105 motion for attorney's fees was denied, but the section 736.1004(1)(a) motion was granted, which included time spent litigating the entitlement to fees for the unsuccessful section 57.105 motion.

Although the trial court reduced the movant's requested attorney's fee, it failed to make clear in its order what the reduction was for. The Fifth Circuit held that the moving party may not recover the time spent litigating the entitlement to fees for the unsuccessful section 57.105 motion because section 736.1004(1)(a) does not expressly authorize recovery of attorney's fees for time spent litigating an alternative and unsuccessful ground for fees.

Practice tip: The party seeking attorney's fees has the burden to demonstrate what portion of the attorney's efforts were spent on claims for which section 736.1004, Florida Statutes, authorizes attorney's fees, and conversely, the amount of time spent on claims for which the attorney may not recover fees.

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