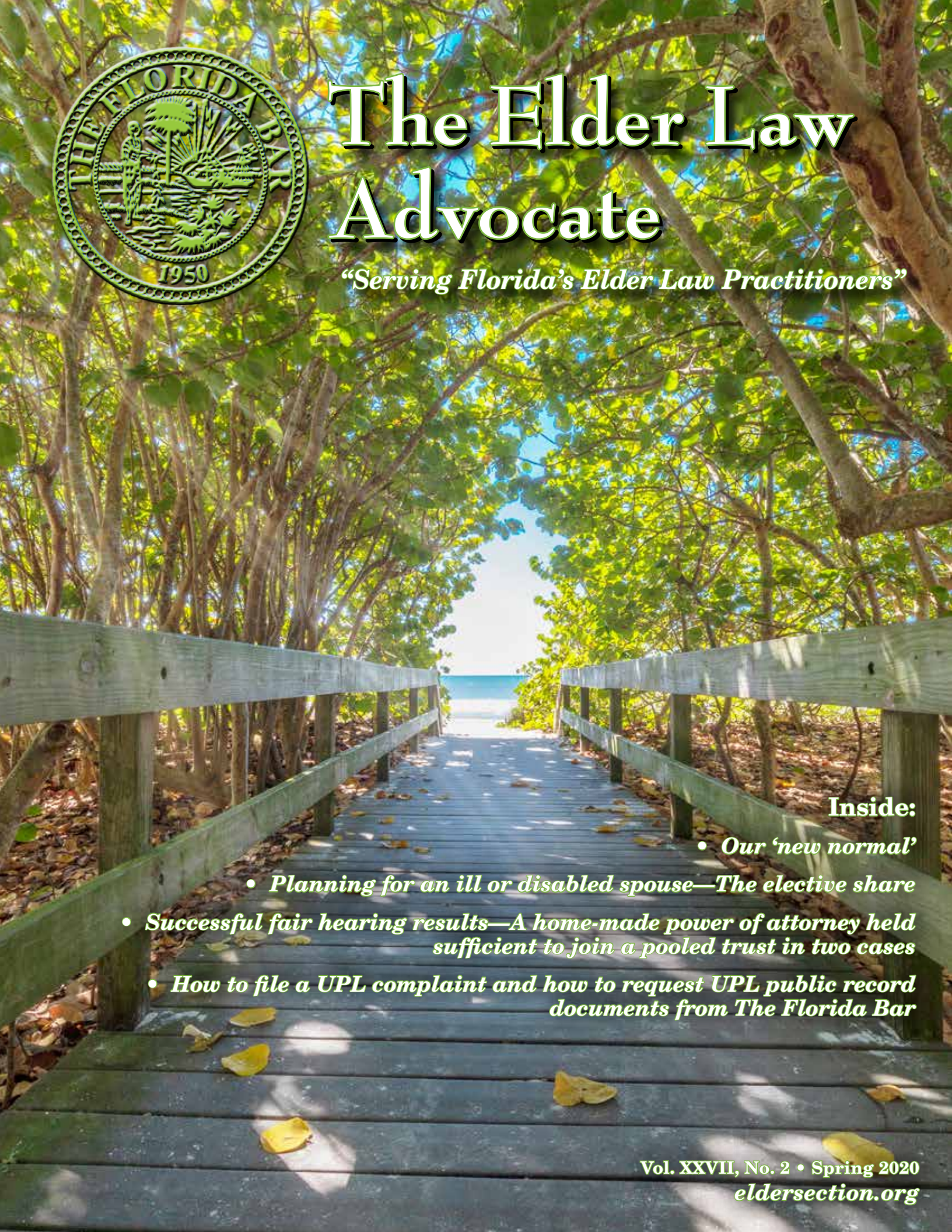

The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

Inside:

- *Our 'new normal'*
- *Planning for an ill or disabled spouse—The elective share*
- *Successful fair hearing results—A home-made power of attorney held sufficient to join a pooled trust in two cases*
- *How to file a UPL complaint and how to request UPL public record documents from The Florida Bar*

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The Elder Law Advocate

Established 1991

A publication of the Elder Law Section of The Florida Bar

ON THE COVER

Bonita Beach, Florida
Randy Traynor Photography

5/2020

Contents

The deadline for the FALL 2020 EDITION: JULY 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.

Genny Bernstein

Heather B. Samuels

Message from the Editors

Our new 'normal'

When we first began gathering the content for this edition of *The Elder Law Advocate*, no one could have predicted how much our lives were going to change. In fact, you'll notice that our message is the only mention of the COVID-19 pandemic because our authors submitted their articles and reports before our federal, state, and local stay-at-home orders and guidelines were published. All of us are being required to learn new ways of doing things while we do our best to socially distance *and* meet the needs of our elderly and/or disabled clients. We elder law attorneys are a creative and resilient group of people. We will get through this crisis, and when we do, we will have new tools in our toolboxes so we can even better serve our clients.

Randy Bryan, chair of the Elder Law Section, has been hard at work offering guidance for section members in the form of e-blasts, complimentary CLEs, and answers to commonly asked questions.

Elder law attorneys are essential

The section's leadership has been working with state and local leaders to ensure that despite ambiguities in Governor DeSantis' Executive Order, the type of legal services that we offer are indeed essential. On behalf of the section, Randy Bryan has written to Florida Division of Emergency Management Director Jared Moskowitz to request clarification for the vague and undefined language used in the Executive Order that identified legal services necessary for "legally mandated activities" as essential. Chair Bryan has also written to Florida Bar President John M. Stewart, who agreed to communicate our position to the leadership of the Florida Association of Counties and the League of Cities to help ensure local governments do not interfere with our ability to provide essential services to clients in need.

Stimulus checks and government benefits

SSI recipients are expected to automatically receive their Economic Impact Payments ($1,200) to their bank accounts through direct deposit, via Direct Express debit card, or by paper check, in the same form as they receive their SSI benefits. Such payments are expected to be received no later than early May. SSI recipients are also eligible for the additional stimulus payment of $500 per eligible child. For SSI recipients with children who did not take the additional step of entering their children's information into the IRS website by May 5, and did not file a 2018 or 2019 tax return listing each child as an eligible dependent, the additional $500 per eligible child will instead be paid in association with a return filed for tax year 2020.

Individuals receiving need-based government benefits are able to accept these payments without putting their Supplemental Security Income (SSI), Supplemental Nutrition Assistance Program (SNAP), Medicaid, or other benefits at risk. Because the stimulus checks of up to $1,200 per person work like tax rebates, they "shall not be taken into account as resources for a period of 12 months from receipt, for purposes of determining the eligibility of such individual (or any other individual) for benefits or assistance (or the amount or extent of benefits or assistance) under any Federal program or under any State or local program financed in whole or in part with Federal funds" (26 U.S. Code Section 6409).

Complimentary CLE

The Elder Law Section is offering a series of complimentary CLE courses with various topics of concern during the COVID-19 crisis. The presentations are being recorded and the materials will remain available for section members to review. Please monitor your email for announcements regarding future web-based sessions. You can email randy@hoyt-bryan.com if you have suggestions for future topics and speakers.

Florida Bar President John M. Stewart recently published a message to members on the Bar's website. In it he outlined what Florida Bar members need to know about what the Bar and Florida's courts are doing regarding COVID-19. Following is a brief recap, and you can read the entire message at www.floridabar.org.

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COVID-19 information and resources page

As a central source of up-to-date information for Florida Bar members, the COVID-19 web page available at www.floridabar.org/covid19 is being constantly updated with lists and links to Supreme Court orders and announcements, and links to a list of trial courts' emergency orders and directives, including closures and all district court notices.

Florida Bar announcements are posted, as are resources for practice management assistance, ethics guidance, mental health and wellness tips, free trials and expanded member benefits, and state and federal assistance and information programs.

When the immediate crisis starts to subside, the Bar will send additional communications regarding government assistance programs and Florida Bar member benefits to assist your law firm and staff in getting through the financial, logistical, and emotional challenges the pandemic has caused.

Essential and critical court proceedings

AOSC20-15, issued March 17, details what constitutes "essential" and "critical" court proceedings and directs the state courts to give them priority over other cases. It also requires that proceedings be conducted in a way that minimizes the risk of COVID-19 exposure. It also orders the rescheduling, postponement, or cancellation of nonessential and noncritical court proceedings unless they can be effectively conducted using remote technology.

Florida Bar essential operations continue

Many Florida Bar staff members are working remotely to carry out essential functions while Bar offices are temporarily closed to reduce exposure to COVID-19. Please be patient if you experience any delays in responses from the staff and if some services are suspended at this time.

Florida Courts E-Filing Portal

Although Florida's court system operations have been appropriately cut back because of the pandemic, the Florida Courts E-Filing Portal is open and available to anyone who needs to file documents, and the Portal Help Desk remains available during regularly scheduled business hours.

CLE reporting deadlines extended; online CLE still available

The deadlines for members scheduled to report their three-year cycle CLE reporting in February, March, April, and May have been extended to August 31, 2020. The 24/7 OnDemand CLE catalog is active, but many upcoming in-person CLE programs have been canceled, and processing orders and shipping CLE CDs and CLE DVDs are suspended.

The next edition of *The Elder Law Advocate* will be out in early fall. We are hopeful the immediate crisis will have passed by then. In the meantime, be safe and be kind to yourself and others. This is hard. It is natural to be anxious. We are finding the best way to remain positive is to focus on our work and the good we do for our clients. But along the way, do take time for yourself. It's old advice but it is especially true in these times: eat a healthy diet, remain (or get) active each day, sleep!, and reach out to the people you love (aren't we all thankful for the internet?). We'll get through this together!

Randy C. Bryan

Message from the Chair

It's been a busy and productive year!

The legislative session is coming to an end as I write this article, and it has been a very busy and productive year! Although our section's legislative priorities at the start of the session were quickly sidelined by the political firestorm arising from the Orlando professional guardian issues, our section has remained active throughout the legislative process. In my last message I reported that Senator Kathleen Passidomo invited the section to be a part of the workgroup established to come up with new protective guardianship legislation. Our legislative committee co-chairs, Shannon Miller, Travis Finchum, and Debra Slater, and our legislative advisor, Brian Jogerst, led the section's efforts on the workgroup with Senator Passidomo and other stakeholders, creating draft language we were optimistic would satisfy the concerns of legislators.

Unfortunately, as often happens in the legislative sausage-making process, the workgroup's proposed language looked drastically different when it emerged from bill writing. As a consequence, many of the stakeholders initially invited to the table pushed their chairs away, cutting off active engagement or transitioning to provide only "technical" advice. Our section, however, led by the Legislative and Guardianship committees, remained actively engaged.

We pushed back strongly on several provisions included in the first version of the bill that we believed were unworkable and potentially harmful to the clients we serve. Our Guardianship Committee, led by co-chair Twyla Sketchley, worked around the clock to draft and to advocate for alternative language more in line with the language initially proposed by the workgroup. Armed with the new language, Brian Jogerst tenaciously represented our interests in the House and the Senate. Although our efforts to modify the bill language initially ran into numerous roadblocks and it seemed unlikely we would be able to change the legislators' position on the bill, our team did not give up and remained engaged. This continuous engagement was finally rewarded when the House and the Senate both passed amendments to the bill removing the language we believed would be unworkable and including the language our Guardianship and Legislative committees advocated and subsequently approved the legislation with our recommended changes.

In addition to the guardianship bill, the section was instrumental in getting protective language included in a vulnerable investors bill. This bill sought, among other things, to provide financial advisors the opportunity to delay a disbursement or transaction of funds or securities from an account when the advisor believes the account owner is subject to potential financial exploitation. Although the intent of the bill was supported by the section, we expressed concern that certain less scrupulous advisors may attempt to utilize this delay tactic as a sword to maintain control over the funds rather than the shield for which it was intended.

For this bill our Legislative Committee teamed with our Abuse, Neglect, and Exploitation Committee, led by co-chairs David Weintraub and Ellen Cheek, to come up with protective language that would allow for the protection of potentially vulnerable investors, while also creating a disincentive for advisors to use the protections afforded by the proposed legislation to unreasonably delay or hinder a valid request from an investor to move the funds to a new advisor.

Not coincidentally, David and Ellen led a panel discussion on combating elder exploitation at the section's Annual Update Program in January 2020, which included representatives from the Florida Office of Financial Regulation, Florida's Office of Statewide Prosecution, and the Alabama Attorney General's Office.

Building on the success from this panel and our relationship with the other stakeholders, David, Ellen, and the section's other legislative advisor, Greg Black, worked with all interested parties to draft language that would provide financial advisors, who are often the first to see signs of potential financial exploitation, the opportunity to protect seniors from potential exploitation, while also

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incorporating a form the advisor is required to complete and file with the Office of Financial Regulation within three business days of placing the hold requiring the advisor to confirm he or she believes financial exploitation is suspected, that funds are at risk for being lost, and importantly, acknowledging that the Office of Financial Regulation may take disciplinary action against an advisor who makes a knowing and willful misrepresentation on the form. This compromise allows the proposed legislation to serve its primary purpose of protecting vulnerable investors, while simultaneously creating a disincentive for advisors to delay a transfer for the purpose of attempting to maintain control of assets under their management. The House and the Senate both approved this legislation as well!

Although the deadline for this article came before either of these bills reached the governor's desk for final signature, we have every reason to be confident he will sign both bills into law. These are both examples of the amazing work the joint efforts of the Elder Law Section and the Academy of Elder Law Attorneys have been able to accomplish through the Joint Public Policy Task Force for the Elderly and Disabled. This dedicated group of largely volunteer representatives from both organizations meets every Thursday at 8 a.m. to discuss important matters impacting the Elder Law Bar and the clients we serve. At this time of year, legislative issues often take center stage, but throughout the year the task force advocates on behalf of every member of the Elder Law Bar to ensure our voices are heard in the legislative, executive, and judicial branches of our state government.

Although the bulk of the work done in support of the task force is by the volunteer leaders of the respective organizations, there are financial expenses that have been key to the task force's success that far exceed what either organization could afford through regular membership dues. For these expenses, the task force largely relies on volunteer contributions from elder law practitioners across the state.

These expenses include paying the legislative advisors, Brian Jogerst and Greg Black, who have been instrumental in having the Elder Law Bar occupy a prominent seat in the Legislature on matters affecting Florida's seniors. It wasn't long ago that we had to fight to have the opportunity to be heard on bills that may impact the clients we serve. Now, it is not unusual for proponents of legislation to seek us out for input before filing a bill to be certain we will not have an objection or may have suggestions to improve the legislation.

With regard to executive advocacy efforts, the task force monitors proposed rule changes filed by the various executive departments in state government (e.g., Agency for Health Care Administration, Department of Children and Families, Agency for Persons with Disabilities, etc.) to be certain proposed changes conform with existing laws and will not harm the clients we serve. In addition, the task force will often intervene when it receives reports that a state agency may be taking actions or making decisions on a statewide basis that may be contrary to or in violation of existing rules.

Most of the time the task force can resolve concerns brought to its attention through the volunteer efforts of task force members. There are the occasions, however, when the task force is required to retain litigation counsel or other experts to assist with rule challenges or other advocacy efforts to protect the interests of the clients we serve.

Finally, on the judicial advocacy front, there are often appellate cases that come to the attention of the task force that could have broad impact on the clients the Elder Law Bar serves. When this occurs, it may be necessary to retain appellate counsel to assist with preparing and filing an amicus curiae.

Most elder law practitioners in Florida tend to be solo or small firm practices. The challenge this presents is having a centralized place from which all of our voices can be heard to protect the clients we serve and our practices. The Joint Public Policy Taskforce for the Elderly and Disabled is that voice for the Elder Law Bar. Although the task force certainly has a lot to be proud of from past successes, its future successes will depend in large part on its financial viability. The source of this future viability is not the dues of either organization, but the commitment of members of the Elder Law Bar who want to continue to be able to assist the clients they serve in their independent practices.

If you want the task force to be able to continue its efforts of representing your interests as part of the Elder Law Bar, I encourage you to go to https://afela.org/the-florida-joint-public-policy-task-force/ and make your voluntary contribution today. There are significant challenges in our future with more talk of Medicaid block grants coming from the federal government, and we need to be prepared. With your help, the Elder Law Bar will continue to be the voice for Florida's seniors and individuals with disabilities.

Capitol Update

by Brian Jogerst

Recap: 2020 Legislative Session

The House and the Senate ended the 2020 Legislative Session after a six-day extension to provide additional time to finalize the state budget and to provide the constitutionally required 72-hour cooling off period before the Legislature could vote on the bill.

Health care once again received a great deal of attention—including autonomous practice of nurse practitioners. In addition, the Legislature once again adopted a narrowly crafted guardianship bill.

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

- Total number of bills filed (including appropriation bills/projects): 3,578
- Total number of amendments filed: 2,596
- Total votes taken: 4,223
- Total bills that passed *both* the House and the Senate: 210

Thank you to LobbyTools, a legislative tracking system, for the above statistics.

Elder law attorneys and the Legislative Committee reviewed more than 90 bills and amendments this past year, and the following is an overview of key issues.

Budget

As noted above, the Legislature extended the session by six days to complete work on the state budget. While the Legislature set aside additional reserves, many believe the Legislature will return to Tallahassee prior to the beginning of the fiscal year due to the economic impact of the COVID-19 crisis.

The following is a summary of the items in the Department of Elder Affairs budget:

- Department of Elder Affairs total: $371.6 million – 404 positions
- Community Care for the Elderly (CCE) program (500 slots) – $4.2 million
- Aging resource centers – $1.5 million
- Alzheimer's Disease initiative (257 slots) – $2.8 million
- Specialized Alzheimer's services adult day care – $0.75 million
- Home Care for the Elderly (HCE) program (139 slots) – $0.6 million
- Public Guardianship program – $8.7 million
- Client Information and Registration Tracking System (eCIRTS) project implementation – $1.7 million
- Program of All-Inclusive Care for the Elderly (PACE) – $6.3 million
- Adult Care Food program – $1 million

Guardianship

As noted above, the Legislature once again adopted a guardianship bill this last session—in response to concerns raised in the *Orlando Sentinel* this past year. Senator Kathleen Passidomo and Representative Colleen Burton, both Elder Law Section Legislator of the Year recipients, reached out to the Elder Law Section asking for input and solutions, and the elder law attorneys joined with other stakeholders in providing comments and suggestion. Prior to session, Senator Passidomo filed Senate Bill 994 and Representative Burton filed House Bill 709. The following are central points of the bill:

- Court approval for Do Not Resuscitate (DNR) orders
- Disclosure of compensation paid to guardian from other sources, either before or during the guardianship
- Disclosure of conflicts of interest with any individuals in the process: judges, magistrates, examining committee members, attorneys
- A professional guardian may not petition for his or her own appointment unless the petitioner is related to the alleged incapacitated person

Throughout the session, interested parties raised other guardianship concerns, and we can anticipate that additional legislation will be filed for the 2021 Legislative Session, starting in March 2021.

The Elder Law Section supported the bill, and we are grateful to Governor DeSantis, Senator Passidomo, Representative Burton, and to the Legislature for adopting Senate Bill 994.

Vulnerable investors/security dealers

Senator Doug Broxson and Representative Lawrence McClure filed Senate Bill 1672 and House Bill 813, designed to give security dealers the ability to place a temporary hold on transactions if they suspect exploitation. This past session was the third session for this bill, and once again, elder law supported the overarching goal to protect vulnerable investors/adults. Concerns continued with other provisions of the bill, however. For example, a security dealer who places a temporary freeze on an account receives "safe harbor" protection. Elder law was concerned about security dealers who might place a freeze on an account not

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because of exploitation concerns but to prevent the funds from being transferred to a new security dealer. In this instance, the security dealer should not receive the safe harbor benefits. Elder law worked with the sponsors and proponents of the bill throughout session, along with the Office of Financial Regulation (OFR), to develop a form that a dealer must use when placing a hold on an account. The form will provide sufficient information so OFR has the details to investigate a security dealer who inappropriately uses the hold.

Elder law supported the final version of House Bill 813, and we are grateful to Senator Broxson and Representative McClure and the Office of Financial Regulation for working to find a solution.

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 2019 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. The federal Centers for Medicare & Medicaid Services (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 by the Florida Agency for Health Care Administration before the next session. During this past session, it was determined that additional time and data were needed for the study/review, so the Legislature extended the policy for one year and will address the issue again during the 2021 Legislative Session.

Individuals with disabilities

Senate Bill 82 by Senator Aaron Bean was approved by the Legislature as part of the overall budget agreement between the House and the Senate. It makes operational changes to the Medicaid Home and Community-Based Services Waiver operated by the Agency for Persons with Disabilities (APD) to improve the quality of services provided and to standardize agency processes.

Program of All Inclusive Care for Elderly (PACE)

Senate Bill 916 by Senator Dennis Baxley and House Bill 833 by Representative Bob Rommel created specific parameters and criteria for PACE program services and participating organizations. The bill did not pass prior to adjournment but will likely return for the 2021 Legislative Session.

Support for incapacitated adult children

House Bill 965 by Representative Tommy Gregory and Senate Bill 1648 by Senator Ben Albritton addressed a parent's obligation to support an incapacitated or a dependent in fact adult child, including that the right of a parent to receive and manage support for an incapacitated adult child must be established in a guardianship proceeding. The bill did not pass this session. The Family Law Section of The Florida Bar supported the bill, and elder law will be working with this section during the summer and fall in preparation for the 2021 Legislative Session.

Personal representatives

House Bill 1421 by Representative Anika Omphroy provided that a member of The Florida Bar who is a nonresident of Florida may serve as a personal representative for an estate, even if the person does not meet any of the other criteria provided in law. The bill did not pass. The Out-of-State Division of The Florida Bar supported the bill, and elder law will be working with this division during the summer and fall in preparation for the 2021 Legislative Session.

Looking ahead: 2021 Legislative Session

The 2020 Legislative Session was the "early session" starting in January, but the 2021 Legislative Session will begin in March, with committee meetings starting in January.

Elder law is already reviewing legislative proposals for the 2021 Legislative Session and will be meeting in late spring to outline the legislative priorities. Issues under consideration include exploiter disinheritance, exploitation injunction, and out-of-state granny snatching/Uniform Guardianship Adult Jurisdiction Act. In addition, the Real Property, Probate & Trust Law Section of The Florida Bar has proposed a complete rewrite of the guardianship laws, which elder law is actively reviewing. Clearly, an active and aggressive session is on the horizon for 2021, and the legislative and substantive committees could use additional help.

Legislative Committee

The ELS 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 committee:

Travis Finchum
travis@specialneedslawyers.com

Shannon Miller
shannon@millerelderlawfirm.com

Deb 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 grassroots 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 a founder of Waypoint Strategies LLC, a Tallahassee-based governmental consulting firm, and has more than 30 years of experience in lobbying on health care related issues. He, along with Waypoint Strategies co-founder Greg Black, is 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.*

Planning for an ill or disabled spouse — The elective share

by Charlie Robinson

Robert M. Morgan and Eliot J. Safer wrote a great article in the December 2004 *Florida Bar Journal* titled "The Medicaid Institutional Care Program, The Simple Estate Plan, and The Elective Share: Why the Qualified Special Needs Trust was Born."

In addition, Chapter 7 of *Practice Under the Probate Code, Ninth Edition Florida Bar / Lexis / Nexis 2017* titled "Elective Share" and written by Daniel A. Hanley, William T. Hennessey, and Christina Papanikos contains a comprehensive analysis of elective share and the tax and other legal issues faced in probate administration of the elective share. The article is not intended to treat the trust choices extensively but provides a great overview of Florida elective share.

I hope to present a slightly different perspective of elective share and the swinging pendulum of spousal rights along with a few things learned in the 15 years since the Morgan and Safer article.

A brief history of elective share law

Florida adopted the common law of England when it became a state. At common law, a widow's right to enhance her share of her husband's estate was called *dower* and a widower's share was known as *curtesy*. Until 1975, a Florida widow could elect dower, but a widower had no similar power.

Dower was the widow's right to claim:

1. One-third in fee of real property owned by the deceased spouse, plus
2. One-third of all personal property, plus
3. One-third of the income from the property dating back to date of death.

Dower was free from all claims against the estate and all administrative expenses.

Example: A $300,000 probate estate with $200,000 in debts, claims, and administrative expenses left the widow with $100,000 and the estate insolvent.

The pendulum swung in 1975 from a widow-friendly to an anti-elective share point of view.

The term *dower* disappeared to be replaced by *elective share*. Elective share went from one-third of estate to 30% of net probate estate and became a right for either spouse to claim.

Example: A $300,000 probate estate with $200,000 in debts and claims made the elective share .30 times $100,000 or $30,000.

The elective share became easy to avoid altogether by using trusts and joint POD/ITF accounts, leaving an even worse situation for the surviving spouse. What is 30% of zero?

The elective share that replaced a spousal dower right essentially eliminated any rights of the surviving spouse to count on her or his share of the deceased spouse's estate. It was time for the pendulum to swing again. Two cases illustrate the frustration resulting from the limited rights of the surviving spouse.

***Friedberg v. Sunbank/Miami*, N.A., 648 So. 2d 204 (Fla. 3d DCA 1995)**

Milton and Nancy Friedberg had been married 38 years at the time of his death in 1992. Milton signed a revocable inter vivos trust in 1990. After setting up the trust, Milton, joined by his wife, Nancy, deeded a condominium and their residence to the trust.

At the time of his death, Milton's trust was valued at over $7 million and his probate estate at $247,386. Milton's trust provided Nancy with a charitable remainder trust valued at $1.5 million, along with a life estate in the condominium. The condominium remainder interest was left to charity and the charitable remainder trust also went to charity and bypassed not only Nancy's control of her trust interest, but also left her unable to leave anything more for their daughter Lori.

The court, understanding the inequity of Nancy's situation, added a footnote to the opinion urging the Real Property, Probate and Trust Law, the Tax Law, and the Family Law sections of The Florida Bar to file amicus briefs to deal with the question of whether assets placed in a revocable inter vivos trust are subject to an elective share claim.

A second footnote acknowledged that the RPPTL, Family Law, and Elder Law sections were developing statutory solutions to the issue.

***Faile v. Fleming*, 763 So. 2d 459 (Fla. 4th DCA 2000)**

This case illustrates another serious flaw in the elective share law still in place. Elaine and David Faire were married in 1983 and were in the process of dissolving the marriage when David died during the pendency of the dissolution action. David had assets of over $9 million, and the dissolution action would have resulted in up to $4.5 million to Nancy had the action gone to final judgment. It was clear that the equity contained in family law statutes is not relevant under the probate and trust codes. If David Faile had a mean streak, this case worked out perfectly for him. The new elective share law was being debated in the Florida Legislature and had passed by the time the case arrived to the Fourth DCA in 2000, after the law had changed but before the effective date of persons dying after October 1, 2001. Mrs. Faile failed to get her elective share.

The pendulum swings again. The Bar took the request from the *Friedberg* court to heart, and under the leadership of the Real Property, Probate and

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Trust Law Section, along with the Tax Law, Family Law, and Elder Law sections, a new statutory proposal emerged for elective share. New York and some other states were changing their laws to bring in the augmented estate concept so that the law could develop reach beyond probate assets in calculating elective share.

As the new proposed statute began to take form, Chris Likens, chair of the Elder Law Section Legislative Committee, lobbied for a new trust under the elective share umbrella that would allow a spouse the opportunity to provide for an ill or disabled spouse with two new trusts that would protect the ill or disabled spouse and allow the disabled spouse to qualify for public benefits in the event the caregiver spouse was first to die. Often, while the ill or disabled spouse suffers from chronic illness, such as Alzheimer's disease, Parkinson's, MS, ALS, or other chronic conditions, the caregiver spouse suffers from stress and other ailments that result from the rigors of caregiving, resulting in a macabre race between chronic illness and disability and stress. Stress is often the faster killer.

The new elective share statute became law on October 1, 1999, for decedents dying after October 1, 2001. Under the law, a surviving spouse is entitled to elect 30% of the elective estate. The elective estate includes but is not limited to:

1. Probate assets
2. Joint property or transfer on death or payable on death
3. Property in most trusts

Just about any property owned by the deceased spouse is included in calculating the elective share.

Two new trusts emerged to satisfy the elective share:

1. The qualifying special needs trust under Section 732.2025(8)
   a. A qualifying special needs trust or supplemental needs trust means a trust established for an ill or disabled surviving spouse … if commencing on the decedent's death:
      i. The income and principal are distributable to or for the benefit of the spouse for life in the discretion of one or more trustees, less than half of whom are ineligible family trustees. For purposes of this paragraph, ineligible family trustees include the decedent's grandparents and any descendants of the deceased grandparents who are not also descendants of the surviving spouse; and
      ii. During the spouse's life, no person other than the spouse has the power to distribute income or principal to anyone other than the spouse; and
      iii. The requirement for a court approval and the limitation on ineligible family trustees shall not apply if the aggregate of the special needs trust is less than $100,000.
      iv. Full credit toward the elective share amount in the funding of the Qualifying Special Needs Trust. 732.2095(2)d
2. The elective share trust under Section 732.2025 (2)
   a. The surviving spouse is entitled for life to the use of the property or all of the income payable at least annually.
   b. The trust is subject to the underproductive property provisions of Section 738.12 of the Florida Principal and Income Act. The surviving spouse has the right to require the trustee to make the property productive.
   c. The trust is for the sole benefit of the surviving spouse.
   d. There is no limitation on who can serve as trustee other than regular statutory requirements.
   e. The elective share trust is a close relative of the qualified terminable interest property trust (QTIP) originally designed to qualify for the estate tax marital deduction that allows the QTIP to restrict options available to the spouse yet qualify the trust for the marital deduction.

Strategies using the qualifying special needs trust (QSNT) and the elective share trust (EST) for public benefit planning

1. Medicaid benefits in estate planning for the ill or disabled spouse require that any trust be established under the deceased spouse's will.
2. If the proposed trustee of the trust is a child of both spouses, the QSNT is almost always the first choice.
   a. Total trustee distributive discretion
   b. No requirement to distribute income
   c. The Prudent Investor Rule, Florida Statutes Section 518.11, probably allows the trustee to invest in ways that favor long-term growth rather than balancing growth and income because distributions are totally discretionary.
   d. Still consider the EST as a backup in case the court rejects the QSNT. Remember that the judge has discretion to approve or disapprove the pleading to authorize a QSNT. If your trust is likely to be over $100,000, what is your backup if the QSNT doesn't match up with the judge's political beliefs or if the judge has an issue with a totally discretionary trust? I believe the EST is often the best backup, so the QSNT provides that if the QSNT is not approved by the court, the EST will serve as the backup provision.
3. Blended families often have more issues.
   a. For example, assume that each spouse has one adult child. Since interspousal transfers carry no look-back issues for Medicaid purposes, the caregiver spouse now owns the assets that go into the trust.
      i. The caregiver spouse has

total faith in her child to serve as trustee and much less in the ill or disabled spouse's adult child and is leery of naming the ill or disabled spouse's offspring to be fair in dealing with her offspring.

ii. She is left with limited choices:

1. Name the stepchild trustee who is qualified to serve as QSNT trustee under the statute.
2. Name an independent trustee not related to either spouse.
3. Name her choice for trustee as trustee of an EST.
   a. The EST will have to distribute all income to the ill spouse.
   b. She will have to overfund the trust as 50%-80% will qualify toward the elective share.

4. Where does the revocable intervivo trust fit within typical planning scenarios?

a. The caregiver spouse will take the following steps:

i. Transfer most of the countable assets to the caregiver spouse alone.

ii. The caregiver spouse establishes a revocable trust to deal with the order of the spouses' deaths.

1. If the ill or disabled spouse dies first, the trust will continue as a revocable trust until the later death of the caregiver spouse.
2. If the caregiver spouse dies first, the trust provides that from 30% to 100% of the trust pours back into the caregiver spouse's estate to be distributed to a QSNT or an EST for the ill or disabled spouse's trust under the caregiver spouse's will.

Conclusion

Not a lot has happened to provide clarity to the questions about possible interpretations of the elective share statute since the Morgan and Safer article was written. For instance, we still have no clear standard for what is an "ill or disabled spouse." If the spouse has pneumonia, does the caregiver spouse have the right to create a trust that leaves the ill spouse little discretion over her or his life savings? What public policy restricts a testator from the right to choose a trustee who is otherwise qualified under Florida law to serve? What is our political risk if we try to fix the statute?

When the law was passed effective October 1, 1999, I was concerned about the interpretation of the new law as it applied to my practice, so I invited the Florida Department of Children and Families (DCF) district chief supervisor and DCF district counsel to donuts and coffee at my office. We illustrated our questions with three scenarios that we deal with regularly and asked them to run our scenarios up the line for answers. They did a quick read of the scenarios and escaped with donuts in hand promising to get back to us.

About a year later, the district chief supervisor was a speaker at a local elder law program. Before the program got underway, the supervisor called me over to tell me that the law was "just too complicated" and that it would be ignored by DCF. There are some lawyers who believe they can simply ignore elective share and QSNT/EST planning. I personally believe that Rip Van Winkle is likely to wake up one day, and those of us who continue to plan for the elective share will be relieved and pleased that we covered this base.

There are some caregiver spouses who want to avoid the expense of a probate administration at their death by creating joint tenancies, payable on death, and transfer on death accounts to the person they trust to take care of the surviving ill or disabled spouse. They are willing to bet that there will be no elective share claimed. In this scenario, I often recommend that we draft a QSNT/EST trust in their will.

If an elective share claim is made, the surviving joint tenant may fund the QSNT from the survivorship property since it is included in determining the elective share amount, but chances are excellent that no such claim will be filed.

Three questions have been raised by a friend reviewing a draft of this article:

1. Should the QSNT be prepared anyway, with disregard to the QSNT trustee rules?

   Although I can't conceive that I would draft in direct disregard for the statutory requirement, I can see that some practitioners may take this approach with an elective share trust drafted in the alternative.

2. Should the will be drafted with a plan A/Plan B approach, whereby if the QSNT fails for any reason, then the elective share trust kicks in?

   That approach is exactly how I typically draft the QSNT.

3. If a trustee is known to be ineligible, should the drafting attorney simply bypass the QSNT altogether and only include the elective share trust approach?
   That is exactly my approach when faced with this situation.

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Successful fair-hearing results— A homemade power of attorney held sufficient to join a pooled trust in two cases

by Steven E. Quinnell

As elder law attorneys, we frequently encounter clients who are incapacitated, coming to us by and through their agents. These agents are empowered to act by durable power of attorney documents that are anything but standard. We run into trouble when we attempt to apply for Medicaid on behalf of these clients when their durable power of attorney documents do not meet the strict requirements of the law. This article is a summary of one such case, which the author took to Fair Hearing, and achieved a positive result on behalf of the client.

The point of this article is to provide information about a positive development in the fair-hearings process. Recently, we prevailed on a point in the matter of *Lerlie Smith v. DCF*, Appeal No. 19F-08555, a case that illustrates the increasing willingness of hearing officers at the Department of Children and Families in multiple regions to accept durable power of attorney (DPOA) documents that are "less than perfect" in a way that ultimately serves to benefit the applicant, rather than delaying their receipt of benefits and forcing them to go through a largely unnecessary court proceeding. This case started with a DPOA form that the business office staff at a local nursing home had used for many years, which we used to join into a pooled trust. Of course, this form did not contain any clear language or initialing required by the 2011 overhaul of the power of attorney statute, Sec. 709.2101 et. seq., Fla. Stat., Florida Power of Attorney Act. It was basically a homemade form, similar to the wide variety of borderline DPOA forms we all see in our practices, downloaded off the internet or cobbled together from someone else's form, and also, dangerously, some of them prepared by attorneys dabbling in elder law.

Unknown to the author, in this case, the well-meaning nursing home staff had the resident sign this form, appointing the author personally as the agent. Then, they referred the matter to us to apply for nursing-home Medicaid. And despite many attempts by us, this resident later refused to sign any new improved DPOA, and her health declined such that she probably would not have been able to sign a new document anyway.

This resident had a little too much money, but we did not want to just spend it all down. She had a vacant homestead to maintain, for instance. And she did not have any family to consult with, or to approve any spending plan, or to be paid under a personal services contract. Plus, we did not want to file a guardianship and simply waste her money on fees and costs. Therefore, we used the authority under the DPOA to sign a joinder agreement to a pooled trust, and the pooled trust accepted it.

The Department of Children and Families objected, arguing that this DPOA failed under Sec. 709.2202(1)(a), Fla. Stat., to "Create an inter vivos trust" because it did not expressly authorize such creation, nor was anything initialed.

We, in turn, argued that we did not "create" a trust, but instead simply joined an existing pooled trust with a sub-account for the client. This particular DPOA form had some useable language authorizing opening financial accounts, making medical decisions, and authorizing transfer to a trust for the benefit of the client and upon death payable to the client's estate.

The department argued that this particular "trust-authority" language

continued, next page

does not apply to pooled trusts because pooled trusts never pay any money to the client's estate. However, the hearing officer astutely noticed a provision in the documents for this particular pooled trust noting the trust may, but may not, pay out all remaining funds to the State. Therefore, the hearing officer rejected the department's argument that all pooled trusts always keep the money after death.

We also argued that the general provisions of Chapter 709 provide sufficient authority, i.e., Sec. 709.2208(2)(a), Fla. Stat., authorizing transactions with investment instruments, coupled with Sec. 709.2208(2)(f) defining an "investment instrument" as including a trust or a common trust fund.

Moreover, Sec. 709.2201(4), Fla. Stat., states that if overlapping authority is granted in a DPOA, the broadest authority controls.

The hearing officer also took judicial notice of a very similar previous case, *Marshack v. DCF*, Appeal No. 18F-02780, as won by Heather Samuels of Solkoff Legal, and we used many arguments from that case. In fact, that case's DPOA actually contained a provision expressly prohibiting the creation of any trust!

So now we have two recent cases, originating from different ends of the state, both confirming that a less-than-perfect POA can sometimes still be used to join a pooled trust as a way of sheltering funds for a Medicaid applicant. We encourage our fellow elder law attorneys to look critically at their clients' existing DPOA documents, and if necessary, and you have sufficient time, to consider taking the case to Fair Hearing rather than automatically initiating what can be a costly guardianship or declaratory civil action. And now, there are two cases to cite in two very different parts of the state!

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Visit the Elder Law Section on Facebook

We are happy to announce that the Elder Law Section has created a Facebook page. The page will help promote upcoming section events as well as provide valuable information related to the field of elder law.

Part of the section's mission is to "cultivate and promote professionalism, expertise, and knowledge in the practice of law regarding issues affecting the elderly and persons with special needs…" We see this Facebook page as a way of helping to promote information needed by our members.

We need your help. Please take a few moments and "Like" the section's page. You can search on Facebook for "Elder Law Section of The Florida Bar" or visit *facebook.com/FloridaBarElderLawSection/*.

If you have any suggestions or would like to help with this social media campaign, please contact:

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THE FLORIDA BAR
ELDER LAW SECTION

How to file a UPL complaint and how to request UPL public record documents from The Florida Bar

by John R. Frazier and Leonard E. Mondschein

Filing a UPL (unlicensed practice of law) complaint with The Florida Bar and requesting UPL public records from the Bar (regarding either an active or a past Florida UPL investigation) are fairly simple processes.

How to file a UPL complaint with The Florida Bar

The Florida Bar UPL investigative process has been described as an entirely "complaint driven" process. Florida Bar Rule 10-5 (a) states:

> All complaints alleging unlicensed practice of law, except those initiated by The Florida Bar, must be in writing and signed by the complainant and contain a statement providing that:
>
> Under penalties of perjury I declare that I have read the foregoing document and that to the best of my knowledge and belief the facts stated are true.

That means that unless The Florida Bar has initiated the UPL investigation on its own, a UPL complaint **must** be filed with The Florida Bar before the Bar will open a UPL investigation.

The Florida Bar UPL complaint form is readily available on The Florida Bar website at www.floridabar.org. Additionally, the ELS UPL Committee can assist you or your client, if you or your client wishes to file a UPL complaint.

How to request UPL public record documents

It is also relatively easy to request Florida Bar UPL investigation records that are part of The Florida Bar's public records. If you know the name of The Florida Bar UPL attorney who handled the investigation, you can request the records directly from the attorney. If you do not know the name of The Florida Bar attorney who conducted the UPL investigation, you can call The Florida Bar at 850/561-5840 to request the UPL public record documents.

It is important to note that The Florida Bar does not permanently maintain all UPL public records.

Under Rule 2.440 (b) **Retention Requirements, Florida Rules of Judicial Administration**, many UPL investigation records are destroyed by The Florida Bar after a certain period of time. The Florida Bar's documents retention schedule is set in accordance with how the UPL documents are classified by the Bar. Accordingly, if you wish to request the records regarding a specific Florida Bar UPL investigation, you must request those records from The Florida Bar prior to the destruction of those records per the Judicial Branch Records Retention Schedule.

John R. Frazier *practices primarily in the areas of elder law and Medicaid planning in Largo, Florida. He holds the BA in economics from Hampden-Sydney College, the MBA from Virginia Tech, the JD from the University of Toledo College of Law, and the LLM in taxation from the University of Florida College of Law.*

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SECTION SCENE

2020 Elder Law Essentials & Annual Update
January 17-19 • Orlando, Florida

The Elder Law Essentials & Annual Update took place on January 17-19 live and via webcast from the Loews Portofino Bay Hotel in Orlando. The three-day lecture program featured beginning, intermediate, and advanced topics of great variety and interest, as well as various executive council and committee meetings. We are grateful to our presenters for sharing their expertise with us. Many thanks to Steve Hitchcock for chairing the program.

The Elder Law Section Executive Council holds its January meeting in conjunction with the 2020 Elder Law Essentials & Annual Update.

Twyla Sketchley presents a session on "Fair Hearings."

Steve Hitchcock introduces Lawrence Levy and Cara Singletary for their presentation "Litigating the Improper Exercise of Fiduciary Duty in Medicaid Planning."

Thank you to our sponsors!

Gregory Glenn discusses “Income Issues in Medicaid.”

Pamela Grace and Vanessa Ferguson present a session entitled “Managing Your Elder Law Practice in the Digital Age: Best Practices on Privacy and Technology.”

David Weintraub, Ellen Morris, Karen Murillo, Ryann White, Joelle A. Sims, and Amanda Senn present a panel discussion on “Combating Elder Exploitation.”

Elizabeth Hughes and Cady Huss present “Guardians vs. Trustees: A Battle of Fiduciaries.”

Randy Nakir presents a session entitled “Fixing Broken SNTs for Public Benefits Purposes.”

Travis Finchum presents a session on “Electronic Notary/E-Wills.”

SECTION SCENE

2020 Elder Law Essentials & Annual Update
January 17-19 • Orlando, Florida

Emma Hemness presents "Beyond Medicaid ICP: Post Eligibility and Coordination of Other Benefits."

Steve Kotler presents "IRAs in Tax and Public Benefits Planning."

Thank you to these presenters who are not pictured:

Heidi Brown: "Medicaid Application – Nuts and Bolts"
Danielle R. Faller and Jonathan Gigele: "Ethical Dilemmas: Fact Pattern Analysis"
Alice Reiter Feld: "VA New Rules: As Applied One Year In"
Benjamin T. Jepson: "Lady Bird Deeds/Homesteads to Trust from the Title Insurer Perspective"
David Lillesand: "Representing Clients Before the SSA/ Becoming a Rep; SSI/SSA Update of Fees, etc."
Stacy Rubel: "Legislative and Case Law Update"
Yoshimi Smith: "Trust Protectors vs. Modification/Decanting"
Eric Virgil: "Restoration of Rights in Guardianship"
Marjorie Wolasky: "Drafting Living Trusts/Joint Trusts" & "Ethical Dilemmas: Fact Pattern Analysis"
Gwen Young: "Bar Rule 4-1.14 Revision Proposal"

Collet P. Small presents a session on "Life Prolonging Procedures in Guardianship/Representing Family Guardians vs. Professional Guardians."

SECTION NEWS

Mark your calendar!

UPCOMING EVENTS

NOTE: As of this writing, the Annual Florida Bar Convention is scheduled for June 17-20, 2020, at the Hilton Orlando Bonnet Creek & Waldorf Astoria in Orlando. The Florida Bar is closely monitoring the effects of the COVID-19 pandemic and will provide updates should the scheduling or format of the event change. Please refer to The Florida Bar website for up-to-date information.

2020 Elder Law Section Annual Retreat
October 22-24, 2020
Omni Parker House
Boston, Massachusetts

2021 Elder Law Essentials & Annual Update
January 14-16, 2021
Wyndham Grand Orlando Resort Bonnet Creek
Orlando

SECTION NEWS

Elder law attorney Marynelle Hardee receives 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, elder law attorney Marynelle Hardee received the award for the 8th Judicial Circuit for her work on behalf of low-income and disadvantaged clients.

Established in 1981, The Florida Bar President's Pro Bono Service Awards are intended to encourage lawyers to volunteer free legal services to the poor. The annual awards recognize those who make public service commitments and raise public awareness of the volunteer services provided by Florida lawyers. The awards recognize pro bono service in each of Florida's 20 judicial circuits as well as service by one Florida Bar member practicing outside the state of Florida.

Florida Bar President John M. Stewart presented the 2020 awards at a January 30 ceremony at the Supreme Court of Florida.

The Elder Law Section congratulates Marynelle on this well-deserved honor and is grateful for her time, dedication, and commitment to serving clients in need.

Marynelle Hardee celebrates receiving her award with Florida Bar President John M. Stewart

Marynelle Hardee

8th Judicial Circuit (Alachua, Baker, Bradford, Gilchrist, Levy, and Union counties)

Marynelle Hardee shares her pro bono time with the Statewide Guardian ad Litem office and Three Rivers Legal Services. Hardee has volunteered with the Defending Best Interests Project since 2017, which works with the Guardian ad Litem's appellate division on appeals in dependence and termination of parental rights cases.

In all, Hardee has devoted approximately 145 hours on four cases for Guardian ad Litem. Her efforts have helped numerous children, including two who have been adopted. In addition to finding permanent homes for individual children, Hardee volunteers writing appeal briefs for the Statewide Guardian ad Litem Office. In 2019, Hardee won a case and helped secure a written opinion that will help Florida's dependent children going forward.

Hardee also volunteers with Three Rivers Legal Services. For the last two years, she has taken cases from the agency in areas of family law, probate, and appeals. She has handled a guardian advocacy case and the probate of an estate to clear title to heirs' property, to name just two of her pro bono cases.

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

A decade in review Law practice management insights that may surprise you

by Audrey Ehrhardt

In addition to beginning a new year, 2020 ushered in a new decade! As we continue to move forward with our law practices, what should we be focusing on? In addition to making sure our firms are set up to reach our goals both now and in the future, we need to think about what our potential client audiences and local professional network are looking for when working with an attorney.

Grab your pen and continue reading! You can check out these seven statistics from recent industry reports and surveys that give us valuable information on the last decade—and be sure to cross off what you are already addressing in your law firm.

1. 32% of potential clients do not expect a lawyer to get back to them.
2. 25% of potential clients prefer email as a method of first communication.
3. Lawyers only have 2.3 hours of billable time each day and collect only 1.6 hours of this time.
4. Over 70% want a clear understanding of the legal process before hiring the attorney.
5. When it comes to receiving a call back from you, 10% of potential clients expect a call back within one hour.
6. 81% want an answer to every question asked in the preliminary call.
7. 92% of all local consumers trust online reviews as much as they trust a good friend.

How can you use this information to leverage success in your firm? Have you previously taken the pulse on what potential clients are looking for before they hire you? How much insight did you already have about the information above? How have you implemented it in your practice and with your team?

Do not wait to think through this information and find ways to implement it into your law firm to have the greatest success you can this year, and for years to come.

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The 2019 Clio Legal Trends Report, https://www.clio.com/resources/legal-trends/2019-report/read-online/

Legal Profession Statistics, https://www.americanbar.org/about_the_aba/profession_statistics/

***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.](http://www.practice42.com)*

Tips & Tales

by
Kara Evans

Trust? What trust? Grandma had a trust?

The tale: A potential client comes to you. Her step-grandmother, Helga, created a last will and testament that left her home to her deceased husband's children and grandchildren. The client is named as the personal representative in the will and would like for you to assist her with the probate. You look up the home on the property appraiser's website and see that it is titled in the Helga and Bob Revocable Trust dated June 1, 1989. You ask the granddaughter for a copy of the trust and she just looks at you with a blank stare. When asked, the other children and grandchildren have no idea that a trust ever existed. You try to use the recording information on the deed to find the attorney who wrote the trust; however, it turns out that the attorney passed away not long after the trust was created. Trying to find where his files ended up leads to a dead end.

The tip: Fortunately, the Florida Trust Code can help you help this client. F.S. 736.04113 allows the court to modify an irrevocable trust, under certain circumstances, if the modification is not inconsistent with the settlor's purpose. A trustee or a qualified beneficiary need only petition the court and prove one of the conditions enumerated in the statute: 1) that the purposes of the trust have been fulfilled or have become illegal, impossible, wasteful, or impracticable to fulfill; 2) because of circumstances not anticipated by the settlor, compliance with the terms of the trust would defeat or substantially impair the accomplishment of a material purpose of the trust; or 3) a material purpose of the trust no longer exists. In our case, not only is there no copy of the trust, but none of the beneficiaries knew the trust existed and so cannot prove the contents of the trust. It follows that the purpose of this trust has become impossible to fulfill.

What remedies can the court offer your client under the statute and how can the court modify a trust? The court has the ability to amend or change the terms of the trust. F.S. 736.04113(2) offers four suggestions as to how a court *may* modify a trust. It can amend or change the terms of the trust, terminate the trust in whole or in part, direct or permit the trustee to do acts that are not authorized or that are prohibited by the terms of the trust, or prohibit the trustee from performing acts that are permitted or required by the terms of the trust. The word *may* indicates that the court has quite a bit of discretion in modifying a trust, limited only by 736.04113(3), which directs what the court *shall* consider in exercising discretion to modify a trust. The court must take into consideration the terms and purposes of the trust, the facts and circumstances surrounding the creation of the trust, and extrinsic evidence relevant to the proposed modification. The court must also consider spendthrift provisions as a factor in making a decision, but the existence of a spendthrift provision does not preclude the court from modifying a trust.

Remember our purpose is to distribute the home to the heirs named in Helga's last will and testament. First, a probate administration must be opened. Then, a separate trust case should be filed that petitions the court to terminate the trust under F.S. 736.04113(2)(b) on the grounds that the terms of the trust have become impossible to fulfill as described in 736.04113(1)(a). That petition will request an order terminating the trust and distributing the home to Helga's estate. As in any proceeding, don't forget the notice requirements involved. Beneficiaries and heirs want to know!

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TAX TIPS

by Michael A. Lampert

Eleven Secure Act tips and traps

With all of the articles and seminars addressing the Secure Act, it was tempting not to add to the din. Yet how could I not add some tips and traps? The Setting Every Community Up for Retirement Enhancement Act of 2019 (Secure Act) was passed in December 2019 and is effective as of January 1, 2020.

As a reminder, in most cases, the Secure Act requires that non-spousal IRA-type "inherited" benefits be distributed within 10 years after the participant's death. This contrasts with the prior law's stretched payouts where most non-spousal beneficiaries could take withdrawals over their own life expectancy. The new law allows contributions after age 70½ and does not require distributions from the plan until participants reach age 72.

1. **Key date for new rules:** The date of death of the original account owner, not the date of transfer of the account.
2. **Contributions made in calendar year 2020 but applied to tax year 2019:** Contributions in calendar year 2020 but applied to tax year 2019 are subject to the pre-Secure Act contribution rules. This means, for example, that the new rules allowing contributions above age 70½ do not apply for the 2019 calendar year contributions.
3. **Required RMD Secure Act trap:** Generally, the required minimum distribution (RMD) does not need to be taken from each retirement account. Instead, it can be taken from one or more accounts provided the total distribution meets (or exceeds) the total RMD. Inherited IRA distributions do not count toward meeting the RMD requirements of non-inherited accounts.
4. **Distributions for qualified birth and adoption expenses – special rule:** The general rules regarding the 10% penalty for early distributions from plans remain unchanged. There is an exemption for $5,000 of qualified birth and adoption expenses. While perhaps not clear, this exemption is likely per parent, not total for both parents.
5. **Student loans and Section 529 plans:** The Secure Act allows up to $10,000 in distributions to pay interest and principal of student loans.

Practice tip: While this is a lifetime limit, it is on the beneficiary. The account holder can apply the 529 distribution to, for example, the beneficiary's sibling (including stepsibling) with the additional distributions applied to the second recipient's $10,000 lifetime limit.

6. **Minor child exception to 10-year payout rule:** In addition to the surviving spouse being able to use the old rules of payout over his or her life expectancy or rolling the account to his or her own IRA, there is a special rule for minor children. Minor children of the original account holder are not subject to the new 10-year distribution rule until they reach the age of majority. Therefore, the benefit to a minor child can be stretched to the age of majority plus 10 years.

Trap: The exception only applies to the child of the original account owner.

7. **Medically disabled or chronically ill exception to the 10-year payout rule:** There is also an exception for a person who is medically disabled (IRC § 72 (m)(7)) or chronically ill as defined in 7702 B(c)(2) (with modification).

(Possible!) Practice tip: How will this Secure Act 10-year payout rule exception for medically disabled or chronically ill persons be utilized with VA pension and Medicaid benefit planning?

8. **Less than 10 year's younger exception to the 10-year payout rule:** There is also an exception to the 10-year payout rules when the beneficiary is less than 10 years younger than the original account holder.

Practice tip: While planning with a client who does not have children, or does not want to provide for the client's children, consider designating a beneficiary, such as a sibling, who is in good health and who meets the less than 10 year age difference rule. Leave other assets (adjusting for estimated income tax for future plan withdrawals) to other beneficiaries. This can allow the potential for a significant stretch.

9. **Tax-savings tip:** Time IRA distributions for lower income years or years when, if operating a business, there is a net business loss.

It is not uncommon in the closing year or so of a client's business, that the company will "show" a business loss.

10. **Tax-savings tip:** While it is tempting to wait until the end of the 10-year payout period and take a lump-sum distribution, this may force the client into a much higher income tax bracket. It can also subject the taxpayer to various phaseouts and loss of credits that can also cause a particularly high marginal income tax rate. Remember also that we have no idea what the tax law will be in the future. We do know that if the tax law does not change, the lower individual income tax rates enacted as part of the Tax Cuts and Jobs Act sunset after 2025.

11. **IRA benefit trust:** While not a tax-savings tip as such, a trust can still be created to hold the IRA distributions. The income from distributions can be taxed to the beneficiary while not necessarily making an actual distribution to the beneficiary (perhaps distribute enough to pay the income tax). This can allow some protection of the corpus of the plan.

Transfer certificates—Another good reason to have a U.S. estate administrator

Scenario

A U.S. citizen lives offshore with his family. He has assets offshore and in the United States. The U.S. citizen dies and the decedent's U.S. citizen child who also lives offshore is appointed personal representative in the United States. All non-U.S. income, assets, gifts, entities, etc., have been properly reported and taxes properly paid.

The personal representative child asks the U.S. financial institution to transfer or liquidate the decedent's account. A certified copy of the letters of administration is provided along with the tax ID number of the estate, as well as all of the other financial institution's paperwork.

But the account is not released. The U.S. financial institution wants something else—a transfer certificate.

Overview

Previously, I have addressed various tax issues regarding offshore financial accounts, gifts, and other issues. I have addressed the reporting of offshore financial accounts (and the challenges with non-reporting) by U.S. persons, as well as estate, gift, and income tax rules and issues regarding non-citizens. Within all of these scenarios, there is a relatively little-known estate administration reporting requirement that is easy to miss. Why? Because it applies to estate administrators who are U.S. citizens but non-U.S. residents if the decedent was a non-U.S. resident, even if the decedent was a U.S. citizen. There is also a similar reporting requirement for non-U.S. administrators of estates of non-resident non-citizens. Both of these circumstances need to be addressed by the estate administrator and, by extension, the estate's attorney.

The "transfer certificate" filing requirements apply in administering estates both of non-resident non-citizens *and* non-resident *citizens* of the United States. This second requirement is particularly surprising. It is not uncommon for the estate administrator or estate attorney to first learn of these requirements when asked for the transfer certificate by a financial institution when trying to move the decedent's financial accounts.

When does it apply?

U.S. citizen decedents

Estates of a non-U.S. resident but U.S. citizen (including U.S. dual citizens) when the property is administered by an executor appointed, qualified, and acting *outside* the United States. It does not apply if the executor is within the United States.

Practice tip: Another reason to use a U.S. situs estate executor.

So, if it applies, now what?

If the worldwide gross estate exceeds the lifetime estate tax exemption amount, Form 706, Federal Estate Tax Return needs to be filed. That is fairly straight forward; however, for many of us, with the relatively high current estate tax exemption, it is less likely a 706 will be required.

So, what to do:

If the value of the decedent's *worldwide* gross estate did not exceed the lifetime exception amount for the year of death, the following items need to be submitted to the IRS:

1. Either (a) State Department Form DS-2060 (PDF), Report of the Death of an American Citizen (obtainable from the U.S. Embassy or Consulate nearest the place of death), or (b) death certificate and a copy of the photo page of the decedent's current U.S. passport or other proof of U.S. citizenship;
2. An affidavit (made under oath before a notary public or other comparable local official). The affidavit may be in the form of a letter. It must be signed by the executor, administrator, or other personal representative of the estate and include (a) a listing of all assets worldwide in which the decedent had any interest at the date of

continued, next page

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death together with their values on that date, and (b) all taxable gifts made by the decedent after 1976. The account number for any U.S. bank or investment account must be included. Often this is what the U.S. financial institution looks for;

3. One copy of each inventory filed with domestic or foreign probate authorities, with English translation if not in English;
4. One copy of each death tax or inheritance tax return and any corrective statements filed with taxing authorities other than the United States, with English translation if in another language. If the decedent's country of residence does not have a death tax or inheritance tax, provide a copy of the decedent's last income tax return and a copy of any wealth tax return filed; and
5. Copies of the decedent's last will and testament along with any codicils, with English translation if in another language.

If any of the above-listed items are not available, a statement explaining the lack of availability needs to be included with the submission.

The stated time frame for the IRS to process the affidavit and supporting documents is 90 days from the time the IRS receives all necessary documentation.

Practice tip: Unnecessary use of Form 706 will delay the issuance of a transfer certificate.

Non-U.S. citizen decedents

First, if an estate tax return is required, the same basic rules apply. Remember, the estate tax return (706-NA) filing requirement is over $60,000 (not a typo) in U.S. situs assets.

If the value of the decedent's taxable assets in the United States was $60,000 or less (below the 706-NA filing requirement threshold), the submission needs to include:

1. Copies of the decedent's last will and testament along with any codicils. Include English translation if in another language;
2. One copy of each death tax or inheritance tax return and any corrective statements filed with taxing authorities other than the United States. Include English translation if in another language;
3. One copy of the decedent's death certificate. Include English translation if in another language;
4. An affidavit (made under oath before a notary public or other comparable local official). The affidavit may be in the form of a letter. It must be signed by the executor, administrator, or other personal representative of the estate and include all of the following items:
   a. The decedent's date and country of birth;
   b. The date of the decedent's naturalization as a U.S. citizen, or a statement that the decedent had never become a naturalized U.S. citizen;
   c. A list of all the decedent's U.S. assets in which the decedent had any interest at the date of death (whatever may be their legal situs for U.S. estate tax purposes) and their values at the decedent's date of death. For any U.S. bank or investment account, please include the account number;
   d. The decedent's citizenship and residence at the date of death; and
   e. Whether any of the decedent's U.S. bank accounts were used in connection with a trade or business in the United States.

As with U.S. citizens, if any of the above-listed items are not available, include a statement to explain why.

Likewise, the official time frame for the IRS to process the affidavit and supporting documents is 90 days from the time the IRS receives all necessary documentation.

Practice tip: Do not file Form 706-NA if it is not required. As the IRS notes, unnecessary use of Form 706-NA will delay the issuance of a transfer certificate.

Final tips

Practice tip: If the documentation provided supports that there is not a filing requirement, correspondence will be issued by the IRS stating a transfer certificate is not required and will not be issued.

Practice tip: Remember to include lifetime gifts when determining if the decedent's gross estate meets the estate tax return (Form 706 or 706-NA as applicable) filing requirement.

Practice tip: These requirements are a good reason to utilize a U.S.-based estate administrator. The issue typically arises when a spouse or a child of a decedent is serving as the estate administrator and that family member, while a U.S. citizen, is living offshore.

Challenge

Recently I administered an estate of a U.S. citizen/U.S. resident decedent with a non-citizen/non-resident *child* of the decedent as the personal representative. It has been challenging to convince the U.S. financial institution that a transfer certificate is not required.

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Summary of selected case law

by Elizabeth J. Maykut

Denial of application for Home & Community-Based Services Medicaid Waiver made by autistic adult was proper

A.W. v. Agency for Persons with Disabilities, 288 So.3d 91 (Fla. 1st DCA 2019)

Issue: Did applicant's diagnosis of Autism Spectrum Disorder Level 1, which fell within the definition of autism on the Diagnostic and Statistical Manual (DSM-5), satisfy the definition of autism in Chapter 65G-4.017 and 4.014 sufficient for the applicant to qualify for the Home & Community-Based Services Medicaid Waiver (HCBS waiver) administered by the Agency for Persons with Disabilities?

Answer: No.

At an administrative hearing on the applicant's application for HCBS waiver, the applicant's mother and her certified behavior analyst testified as to the characteristics of autism exhibited by the applicant. The senior psychologist for the agency testified that the agency's definition of autism was stricter than the definition under the DSM as Chapter 65G-4.014(1)(e), Florida Administrative Code, required that an individual with autism demonstrate that the autism causes severe learning disorders characterized by at least six of the 12 features listed in the rule.

In affirming the hearing officer's denial of the application, the First District rejected the applicant's argument that the hearing officer had given improper deference to the agency in violation of Article V, § 21, Florida Constitution, as it stated that the hearing officer had merely found that the applicant failed to carry her burden. The court also reiterated that the applicant failed to carry her burden as Chapter 65G-4.017(1), Florida Administrative Code, requires that a diagnosis of autism be made by a specified list of professionals, including certain types of psychiatrists, psychologists, or pediatricians. Therefore, based on the documents submitted, the applicant was not eligible for the HCBS waiver.

Practice tip: Not all autistic adults will qualify for the HCBS waiver, but only those who can demonstrate their autism is severe. Only certain types of professionals may provide a diagnosis of autism sufficient to meet this definition.

Health care surrogate could be compelled to produce personal finances, but records of nonparty trust and those protected by attorney-client privilege could not be compelled

Hett v. Barron-Lunde, 45 Fla. L. Weekly D177 (Fla. 2d DCA January 22, 2020)

Issue: Is a personal representative (PR) who sues a decedent's health care surrogate (HCS) for theft and breach of fiduciary duty entitled to compel the HCS to produce her personal financial records where deposition evidence showed that the HCS also assisted decedent with his finances?

Answer: Yes.

In this case, the PR, who was the decedent's daughter, sued the decedent's girlfriend, who was serving as the decedent's HCS, alleging she had wrongfully obtained $200,000 from the decedent. The girlfriend testified at deposition that she helped the decedent by driving him to the bank and assisting him with retaining an attorney to set up a trust for him. The decedent would write checks to the girlfriend, which she would deposit into the trust. The PR requested production of the girlfriend's tax returns and also served nonparty subpoenas on her financial institutions and the law firm that set up the trust.

The girlfriend argued the subpoenas violated her constitutional right to privacy and improperly sought documents related to her role as trustee when she had only been sued in her individual capacity, and that the subpoena to the law office sought documents protected by the attorney-client privilege.

The Second District held that the personal financial information was discoverable as it was relevant to the theft claims, which overcame the girlfriend's right to privacy. However, the trust records were not discoverable because they were not relevant to the allegations in the complaint, but instead had been brought out by the girlfriend's deposition testimony. Further, the court had never held a hearing on their relevancy and the trust was not a party to the action. Finally, the records of the attorney should not have been compelled without an evidentiary hearing or in camera inspection to determine whether the attorney-client privilege applied.

Practice tip: Personal financial records of a health care surrogate may be discoverable when the HCS is sued for theft. A trustee must be sued in her capacity as trustee in order to obtain trust documents through litigation. Assertions of attorney-client privilege should not be overruled without an in-camera review.

Statute of limitations extinguished intestate claims of child born out of wedlock because exception in 2009 amendment to probate code did not apply retroactively

Robinson v. Estate of Robinson, 45 Fla. L. Weekly D310 (3d DCA February 12, 2020)

Issue: Whether the 2009 amendment to section 732.108(2)(b), Florida

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Case law ...
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Statutes, providing that the statutes of limitation in Chapter 95 do not apply in determining paternity in an intestate probate proceeding provided relief to a child born out of wedlock who had attained majority before 2009.

Answer: No.

Twelve years after the decedent's death, an individual born out of wedlock who claimed to be the adult daughter of the decedent obtained an order of summary administration and determination of homestead in her favor. Later, the decedent's brother requested that the estate be reopened and the orders vacated based on lack of notice to him. He also disputed the individual's claim to be the decedent's daughter. The alleged daughter moved to obtain the release of a blood sample of the decedent. The trial court ordered that the blood sample be released, reasoning that it was a court of equity and that it would be an extreme injustice for this not to occur.

The Third District held that the alleged daughter's paternity claim was time barred by section 95.11(3)(b), which requires that a claim for paternity be filed within four years of the individual attaining the age of majority. Here, the alleged daughter had been born in 1980 and reached the age of majority in 1998. She did not petition for summary adjudication until 2016. Her claim was not revived by the 2009 amendment to section 732.108(2)(b), which now provides that Chapter 95 shall not apply in determining paternity in a probate proceeding related to intestate succession, as the new provision did not apply retroactively although it would prospectively provide relief of similarly situated individuals in probate proceedings.

Practice tip: Based on section 732.108(2), Florida Statutes, an adult child born out of wedlock can always make a claim for a share of his or her parent's estate unless his or her claim was already extinguished by the applicable statute of limitations before 2009.

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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.


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