The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

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The Elder Law Advocate

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ON THE COVER

Florida Spring
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The deadline for the WINTER 2021 EDITION: OCTOBER 5, 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 Genny Bernstein at *gbernstein@jonesfoster.com*, or call Leslie Reithmiller at 850/561-5625 for additional information.

Steven E. Hitchcock

Message from the Chair

New initiatives for a new year

Just think … It's mid-July, a time of year where the big question typically asked is "Where are you all taking the kids for vacation this summer?" Historically, summer is a time to pause, regroup, and slowly reinvigorate. A time to just relax for a couple of months before jumping back in again. Only this year is not, as we all know, typical. We continue to have the Coronavirus pandemic and not only the uncertainty that brings to the fortunes of the section, but to the Elder Law Bar in general.

Whatever this year brings, the Elder Law Section is no longer seen as that "little group of Medicaid application lawyers." The Elder Law Section has fought and earned the respect of not only those in that distant land known as Tallahassee, home of the Legislature, AHCA, and DCF, but is recognized as a decisive voice and participant in the legislative arena, sometimes taking the lead on new legislative efforts, and at other times being the opposition and the voice of reason on legislative issues. The Elder Law Section no longer takes a back seat to anyone or any other section, and the section has enthusiastic leadership and great committee chairs who are the future leaders of the section.

I would like to thank my predecessors for their hard work and leadership in guiding the section to where it is today.

As this is a very atypical year, there is no time for the section to take a vacation, and so we are immediately jumping into new initiatives and projects. We are getting "ahead of the game" on many fronts, as we, as Captain Kirk once said, are "boldly go[ing] where no one has gone before."

This year many of the traditional ways the section has functioned are being revisited and reviewed, with an eye toward the section fulfilling its mission to "cultivate and promote professionalism, expertise, and knowledge in the practice of law regarding issues affecting the elderly and persons with special needs [and] advocate on behalf of its members."

There are several bold projects in the works, and I'd like to share some of the details with you. We will be having many web-based events this coming year, as we unfortunately don't see in-person events being on the horizon. The Essentials and Annual Update events will be in the virtual world during what our administrator, Leslie Reithmiller, likes to refer to as "Elder Law Week." Chair-elect Carolyn Landon and the CLE Committee are hard at work developing a fantastic virtual event for January; stay tuned for more details in the coming months.

We are reviewing and potentially revising the bylaws of the section to bring them into the 21st century. Within that we are considering revamping the committee structure of the section and have begun to pilot some of that structure to better provide services to our members, such as having only one chair per committee, who will provide a singular vision for each committee. Those committee chairs who believe

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Chair's message. . .
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they need one will select vice chairs for assistance with special projects or subcommittees. Jason Waddell is chair of the Bylaws Revision Committee and is taking that task head on.

Aimed squarely at "promot[ing] professionalism, expertise, and knowledge in the practice," we have an ambitious new CLE project to provide comprehensive legal and practical information on elder law for newer practitioners and those looking to take the board certification exam. The substantive committees are hard at work putting together materials and PowerPoints for that CLE with the CLE Committee, chaired by Danielle Faller (newly minted board certified elder law attorney) managing the project. We hope to have the final CLE "package" available by the end of 2020.

The lifeblood of the Elder Law Section is its committees, and one of our goals this year is to strengthen our committees, bring in new active members, and help committees collaborate for a common purpose. To that end, things are moving at warp speed with our committees. We are engaging in a new outreach to newer elder law practitioners by creating a section committee aptly named the Newer Practitioners Committee, chaired by Max Solomon. The purpose of this committee is to identify newer practitioners and cultivate an opportunity where they can collaborate with their peers, form lasting relationships, participate in work with other committees, such as the Mentoring Committee chaired by Dayami Sans, and become active members and future leaders of other committees and the section. This is not just a committee for new or young attorneys, but also for that seasoned practitioner who is new to elder law. We encourage any Elder Law Section member who has five or fewer years in the practice of elder law to join this committee.

The Litigation and Disability Law committees are expanding the horizons of elder law into new, less charted territory. We are looking forward to CLE events from both committees in the future on topics such as litigation strategies and techniques, as well as more on Social Security and SSI and other areas that are beyond the traditional elder law practice.

This year the Veterans Benefits Committee, chaired by Teresa Bowman, is working under the wing of the Medicaid/Government Benefits Committee chaired by Heidi Brown. This has two purposes: (1) to give the VA committee the strength in numbers of the larger Medicaid/Government Benefits Committee; and (2) as a pilot for the potential revamping of the overall committee structure under the bylaws revision.

The Legislative Committee, chaired by Deb Slater, is getting ahead of the 2021 Legislative Session by identifying issues of importance to the section for the upcoming session and working with our lobbyist, Brian Jogerst, to formulate those strategies. Brian's services to the section are very valuable and have certainly contributed to our section's increased standing in the legislative arena by opening doors and getting our message across to the powers that be in Tallahassee.

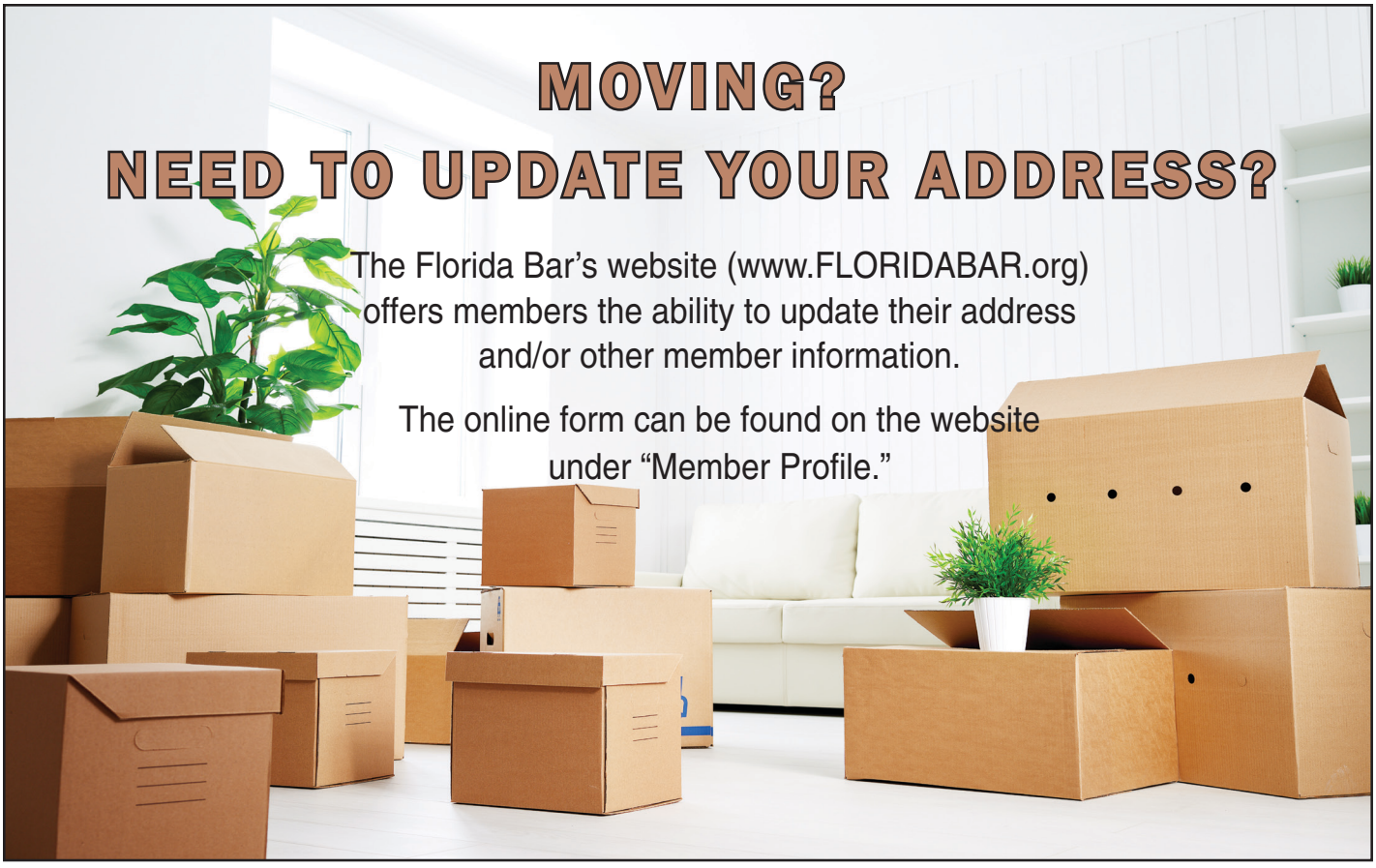
Brian's services are paid solely through our voluntary donations to the Elder Law Section and the Academy of Florida Elder Law Attorneys (AFELA) Florida Joint Public Policy Task Force for the Elderly and Disabled. I ask every section member to please consider how much the task force and Brian's efforts over the years have resulted in positive changes to proposed legislation, initiated new legislation beneficial to our clientele, influenced court case outcomes through amicus briefs, and assisted with rule challenges. These efforts have not only directly benefited our clients and improved our practices, but have also provided a demonstrable benefit to all elderly and/or disabled citizens of Florida. The task force and Brian cannot continue these efforts without ongoing financial support of all of the members of the Elder Law Bar, and I ask each and every section member to consider a donation to the task force to continue this important work.

As in years past, we have an active group of Elder Law Section liaisons to other Florida Bar sections and allied organizations such as the Real Property, Probate, and Trust Law Section, with Marjorie Wolasky

and Travis Finchum as our liaisons, and to AFELA, with Mike Jorgensen as our liaison. This year we added three new liaison positions: the Family Law Section, with Cassandra Jelincic as our liaison; WINGS (a statewide guardianship stakeholder group), with Michelle Kenny as our liaison; and the Judiciary, for which we are looking for a judge or a former judge to fill the role of liaison. Please contact me directly if you know of anyone you think would be a good candidate.

As we are all aware, 2020 has thus far been quite a year for change, most of which has been brought about not by choice, but by necessity. The purpose of the Elder Law Section, however, has not changed: "The Elder Law Section exists to cultivate and promote professionalism, expertise, and knowledge in the practice of law regarding issues affecting the elderly and persons with special needs, and advocates on behalf of its members."

I certainly look forward to my year as your section chair and hope the changes to the structure and focus of the Elder Law Section will be met with enthusiasm and will bring positive outcomes. The goal is not only to strengthen the section, but more importantly to help us fulfill our own missions: to provide the best legal advice and service to our clients, those most vulnerable and in need of assistance, Florida's elderly and persons with special needs.



Capitol Update

by Brian Jogerst

COVID-19 casts large shadow over sessions past and future

On March 20, when the last Capitol Update was written, the 2020 Legislative Session had just ended—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 can vote on the bill. Florida, like the rest of the country, was in the early stages of COVID-19, with no one really knowing or understanding what was about to happen. In the following four-plus months, state revenues have been reduced, residents throughout the state experienced a "shutdown" due to local curfews and a statewide safer-at-home order, parents home schooled their children, and businesses closed, causing significant unemployment for Florida's workforce. Looking ahead, much is still not known, such as when the first vaccines or therapeutics will be available, but the immediate impacts from COVID-19 will be with the state for many months to come and the effects felt for quite some time.

The following is a final "look back" from the last session and also a brief overview of potential issues for the 2021 Legislative Session.

Budget

With the closure of the theme parks, the resulting drop in tourism, as well as the economic impact of stores and businesses closing in late March and April, the governor and legislators were closely monitoring the state's revenue collections. According to a report from the Legislature's Office of Economic & Demographic Research, the state's net tax revenue during May fell $779.6 million, and that followed April revenue collections being $878.1 million lower than estimates—for a total $1.657 billion in lower revenues.

The Legislature sent the state budget to Governor DeSantis on June 15, and on June 29, he released his line item vetoes—a record-breaking $1 billion-plus in vetoes. With the lower tax collections, the depth of the vetoes provided an additional cushion in state reserves, coupled with the existing reserves, so that the Legislature would not need to return to Tallahassee for a special session later this summer or fall. Many local and statewide programs, including some the governor included in his own recommended budget, were vetoed to increase the state's reserves. As such, a special session is not anticipated until late 2020, at the earliest.

The following is a summary of the reserves after Governor DeSantis took action on the state's budget:

- $2.3 billion in unallocated General Revenue
- $1.7 billion in the Budget Stabilization Fund
- $1.5 billion in unallocated Trust Funds
- $0.8 billion in Tobacco Reserves
- $6.3 billion in Total Reserves

Legislative issues/update

Elder law attorneys and the section's Legislative Committee reviewed more than 90 bills and amendments this past year, and the following is an update on two key bills discussed in our previous legislative update:

Guardianship – Senate Bill 994 by Senator Kathleen Passidomo (House Bill 709 by Representative Colleen Burton) was adopted by the Legislature and signed into law by Governor DeSantis on June 18, 2020 [Chapter No. 2020-035].

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 – House Bill 813 by Representative Lawrence McClure (Senate Bill 1672 by Senator Doug Broxson) was approved by the Legislature and signed into law by Governor DeSantis on June 30, 2020.

Elder Law supported the final version of House Bill 813 and is grateful to Senator Broxson, Representative McClure, the Office of Financial Regulation, and to Governor DeSantis for signing the bill into law.

Looking ahead: 2021 Legislative Session

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

Clearly the impact of COVID-19 on the state will hang over the 2021 Session, with each committee addressing some aspect of the pandemic, including the additional impact on the state budget, education, health care, as well as liability protections for providers

and businesses. More details will be provided in future Capitol Updates.

While most of the discussion in 2021 will be COVID-19 centered, Elder Law is actively reviewing the following legislative proposals:

- Guardianship rewrite proposed by RPPTL, which Elder Law is actively reviewing
- The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act/granny snatching
- Exploiter disinheritance
- Exploitation injunction revisions from the 2018 Legislative Session

Once again, Elder Law will have an active session in 2021, and the section's legislative and substantive committees greatly benefit from the input provided by ELS members. Please consider actively engaging on a committee, or a specific proposal, of interest to you.

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 chair or vice chair of the ELS Legislative Committee:

Debra J. Slater, Chair

dslater@slater-small.com

Travis D. Finchum, Vice Chair

travis@specialneedslawyers.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. Continued relationship building with legislators, the state's policy makers, is a critical component of our advocacy efforts because the local relationships and outreach to legislators, from trusted sources, helps Elder Law be a trusted voice and improves our advocacy efforts.

Brian Jogerst *and Greg Black are co-founders of Waypoint Strategies LLC, a Tallahassee-based governmental consulting firm. Waypoint Strategies, with more than 40 years' experience lobbying on health care and legal issues, 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.*

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:

Alison Hickman
904/264-8800
alison@ floridaelder.com

THE FLORIDA BAR
ELDER LAW SECTION

A brief history of the VA

by Teresa K. Bowman

I love history and a few years ago as I was searching through the U.S. Department of Veterans Affairs website,[1] I came across the fascinating history of the VA. Who knew that while our nation was growing and fighting for independence, and even before that, the system we call the Veterans Administration was growing with us? The idea of caring for our veterans dates back to 1636, when the Pilgrims of Plymouth Colony were at war with the Pequot Indians. Recognizing the sacrifices made to protect the colony, the Pilgrims passed a law stating that disabled soldiers would be supported by the colony.

In 1776, the Continental Congress called upon and encouraged colonists to enlist during the Revolutionary War by offering pensions to disabled soldiers. Heeding the call, individual states and communities worked together to provide medical and hospital care to wounded soldiers. In 1811, the federal government authorized the first rehabilitation and medical facility for veterans, and over time, assistance programs expanded to include benefits and pensions for widows and dependents of veterans.

After the Civil War, State Veterans Homes were established as Congress recognized the need to provide care to veterans left homeless by the war and in need of medical care. Known as National Homes, they provided medical care to veterans for every injury or disease, even if not service related.

After World War I, new benefits were created providing for disability benefits, vocational rehabilitation, and insurance. By 1920, Congress had created three federal agencies to serve our veterans: the Veterans Bureau, the Bureau of Pensions of the Interior Department, and the National Home for Disabled Volunteer Soldiers.

The Veterans Bureau began managing the veteran hospitals, and recognizing a need created by the lasting effects of WWI, the bureau increased hospital construction to provide for soldiers who had been exposed to chemical warfare. Veterans were returning with respiratory illnesses, tuberculosis, and mental health issues, now known as PTSD.

By 1924, veteran benefits were expanded to cover non-service-related illnesses. In 1928, admission to the National Homes was extended to women, the National Guard, and militia veterans.

On July 21, 1930, President Herbert Hoover signed Executive Order 5398 and made the Veterans Bureau a federal administration, thereby creating the Veterans Administration (VA). Since that time, programs and services have been added to meet the needs of our nation's veterans.

The GI Bill, signed on June 22, 1944, after WWII, provided home loans and unemployment benefits. "It is said the GI Bill had more impact on the American way of life than any law since the Homestead Act of 1862."[2]

In 1946, the Department of Medicine and Surgery was created within the VA, and by 1948, there were 125 VA hospitals run by some of the country's top medical talent, recruited through the efforts of General Omar Bradley, head of the VA.

In October 1988, President Ronald Reagan made the Veterans Administration a cabinet-level executive department, and it was renamed the Department of Veterans Affairs.

The Veterans Health Administration under the Department of Veterans Affairs runs one of the largest health care systems in the world. It is estimated that approximately 60% of all medical residents obtain a portion of their training with the VA.

The National Cemetery Administration began with legislation in 1862, which gave the president authority to purchase cemetery grounds as national cemeteries. That year 4,476 Union soldiers were laid to rest following the Battle of Antietam. After the Civil War, some 300,000 Union soldiers were buried in 73 national cemeteries. Since 1873, all honorably discharged veterans are eligible for burial in a national cemetery. More than 3.5 million people, to include veterans of every war and conflict, are buried in VA national cemeteries across our country.

During his second inaugural address,[3] President Abraham Lincoln made a statement that today is incorporated into the Mission Statement of the VA and engraved on a plaque outside the entrance to the VA headquarters in Washington, D.C.:

> To fulfill President Lincoln's promise "To care for him who shall have borne the battle, and for his widow, and his orphan" by serving and honoring the men and women who are America's veterans.[4]

To read more about the history of the VA and to read the entire inaugural message of President Lincoln, use the links provided below.

***Teresa K. Bowman, Esq.**, is a sole practitioner in Sarasota, Florida. She concentrates her practice exclusively in the area of elder law, advising clients on long-term care planning; special needs planning; and wills, trusts, and estates.*

Endnotes

1. https://www.va.gov/about_va/vahistory.asp
2. *Id.*
3. https://www.facinghistory.org/reconstruction-era/speech-president-lincoln-second-inaugural-address?
4. https://www.va.gov/landing2_about.htm#:~:text=Mission%20Statement,women%20who%20are%20America's%20veterans

Veteran Directed Care: A secret no more

by Jack M. Rosenkranz

The Veteran Directed Care program (VDC) is available to Florida veterans who need Long Term Care Services and Supports (LTCSS). It is offered because of a partnership between Health and Human Services and the VA. It is a result of decades of research on self-directed care. This program has reported a 95% satisfaction score from veterans who thought the "VDC helped a lot." Only 4% of veterans reported that VDC helped a little, and less than 1% of veterans felt that the VDC did not help at all. All the responses indicated the program improved the veteran's life and provided independence.

Formerly known as the VA Home and Community Based Services, the program offers funding to pay for caregivers chosen by the veteran. The amount of funding depends on the care plan along with the authorized spending budget and can be accessed through the Aging and Disability Resource Center (ADRC) or the VA health care system. Currently six Florida VA medical centers are participating: Bay Pines, Tampa, Gainesville, Miami, Orlando, and West Palm Beach. These locations have large service areas, so make sure to check with your local ADRC. If the veteran is not enrolled in the VA health care system, the ADRC will make the referral.

An appropriate veteran for VDC is one who the VA would have approved for a homemaker's services or a home health aide. Details for coverage can be found in the VHA Handbook 1140.6. The VDC is a choice not to use the homemaker/home health aide purchased and monitored by the VA and instead use the care providers that the veteran has self-directed for payment by the VA.

When a veteran is accepted into the VDC program, it is the ADRC that works with the veteran and his or her family to establish the care plan and budget. The VDC program can be used in conjunction with Medicaid HCBS and the VA Pension or Compensation program. Use of the VDC does not lower the benefits of the veteran's Medicaid HCBS or VA Pension entitlements.

The VDC program may be used with the Medicaid HCBS Participant Directed Option, which is another self-directed choice to provide additional LTCSS. These are accessed through the case manager of the managed care organization under Medicaid HCBS. A veteran who seeks VDC does not lose the ability to use the VA health care system; however, the services provided under VDC will not be duplicated by the VA.

The budgeted funds are managed by a provider who performs a "financial management service." The veteran can select, hire, and fire the people who will provide the services, including family members. The veteran will be the employer and will be responsible for keeping proper records of payment and taxes with the assistance of the financial management service.

This may sound like a challenging undertaking for the veteran; however, the ADRC provides a service coordinator to help the veteran understand how the program works, to develop a care plan as well as a budget, and to help resolve problems. The budgeted amount is larger than the actual need to provide for a rainy day fund and/or respite services for the caregiver.

The VDC and PDO programs are useful tools for clients who wish to remain at home. An elder law attorney's value as an advocate is clear when services and funding are layered in such a manner that multiple government programs are utilized at the same time. Will you be using these programs to build a tailored care plan that avoids placement of your client in a facility? Stay tuned; this is a good topic for a CLE.

Jack M. Rosenkranz, Esq., *established his elder care law firm in 1991. He recognized early the growing need for these services and the expanding choices under health care policy, regulations, and laws. Estate planning, government benefits, guardianship, and advising parents of children with special needs are the focus of his practice. Jack has an AV rating from Martindale-Hubbell and is recognized in Best Lawyers in America. for his work in elder law. Jack has testified before the Schmieding Conference on Elder Home Care and was a contributor to the White House Conference on Aging. Please feel free to contact him at jack@law4elders.com.*

SSI update

by David J. Lillesand

Submitted on behalf of the Special Needs Trust Committee

Designating a representative payee. Individuals holding a power of attorney (POA) for another are often surprised that the Social Security Administration (SSA) will not recognize the POA authorizing the attorney-in-fact to receive and manage Social Security or Supplemental Security Income (SSI) benefits. However, SSA has recently issued its final rules for an alternative: an advance designation of a representative payee. POMS GN 00502.085.

A representative payee is a person appointed by SSA to receive Social Security or SSI benefits for a claimant who cannot manage or direct the use of his or her benefits. The rules prohibit a legal guardian or an attorney-in-fact under a POA to designate in advance a representative payee on behalf of a beneficiary or claimant, regardless of capacity. Under the new procedure, however, any competent individual may predesignate up to three persons for SSA to consider when appointing a representative payee, in the event of later incapacity.

Attorneys preparing clients' estate planning documents can now add another to their list of typical documents: one to designate up to three persons the client would prefer to be his or her representative payee if one becomes needed in the future.

No special drafting language or forms are needed, so estate planners can be creative as long as the designation provides names and phone numbers of the suggested designees. Social Security numbers of the designated individuals are not required. Persons so designated will still go through the SSA vetting process to determine if they are eligible under law.

Advance designation does not expire with time and can be changed by the beneficiary or claimant at any time. Advance designation is also not connected to any particular claim for benefits or a claim's duration. If SSA denies a claim or the beneficiary stops receiving benefits, the advance designation information remains in the SSA database and can be accessed again once the claimant or beneficiary reapplies for benefits, becomes a beneficiary, or files an appeal.

Trouble getting through? In response to COVID-19, beginning March 17, 2020, and continuing at least through August 2020, SSA offers only phone service at local offices that are otherwise closed to the public. SSA suggests as a first alternative going online to www.socialsecurity.gov/onlineservices where persons may print proof of benefits, file a new claim, apply for extra help with Medicare prescriptions, check the status of an appeal, change an address or bank for direct deposit, and much more.

When absolutely necessary in an emergency or crisis to speak to someone by phone, callers may reach the local office by using SSA's online Local Office Locator and looking under "Additional Office Information." Callers are provided a direct line to emergency staff at the local office. SSA warns, however, that it can take up to 90 minutes or more to reach an SSA agent.

The SSA claims specialists are working from home. If corresponding with them by mail, be advised that those staff may only prepare written responses for mailing, and the actual addressing and stuffing of envelopes to you or your client may be done only by supervisors who frequent the office to download, print, and mail notices prepared by the claims specialists at home.

Recognizing the issue of responding to SSA deadlines and requests for information from claimants to process a benefit claim, SSA states that it will provide maximum flexibility in extending deadlines for "good cause" for late filing.

What SSA is currently postponing. On the upside, SSA is not currently conducting any medical continuing disability reviews (CDRs) to possibly terminate a claimant's benefits. SSA is also suspending the processing and collection of overpayments. However, the SSA commissioner announced that they hope to resume CDRs and overpayment actions "in August." On the downside, SSA will not process third-party requests for information except from appointed representatives and representative payees. This could interfere with Florida Medicaid applications, unless individuals get (and Medicaid will accept) proof of benefit statements or appeal status statements generated online.

SSA telephone hearings only. As another response to COVID-19, the Offices of Hearing Operations have been closed to the public. Claimants with pending or new administrative law judge (ALJ) hearing requests will be offered only a telephone hearing.

Of particular note to elder law attorneys and special needs planners is that ALJs will not hear any cases involving "paper folders," which are physical files rather than the digital files now almost universally used in ALJ appeals. The problem is that financial eligibility appeals for new SSI claims or continuation of SSI benefits when SSA has improperly rejected a valid special needs trust are always "paper folders." The ALJs are working from home, but it is a federal crime to remove a document or file from a Social Security judge's office. Thus, ALJs have no access to the file materials until SSA re-opens the Offices of Hearing Operations and financial appeal hearings can be reset. In the meantime, there is currently no mechanism in place to hold financial appeal hearings, in person, by video, or by telephone.

David J. 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 topic 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. David is one of the authors of Chapter 17, "Special Needs Trusts" in the Florida Bar Lexis/Nexus publication, Trust Administration in Florida, 10th edition.*

Florida's new Elder Abuse Fatality Review Team statute

by Ellen Cheek

Elder justice advocates marked a major milestone this year after Senate Bill 400, which authorized the creation of Elder Abuse Fatality Review Teams across the state, was passed by the Florida Legislature. The bill, now Florida Statute 415.1103, became state law on July 1, 2020, representing the culmination of a four-year crusade led by Senate Minority Leader Audrey Gibson. This new law finally provides a mechanism for systemic review and data collection in fatal cases of elder abuse, similar to those that have been in place in Florida for both child abuse and domestic violence fatalities for over 20 years.

To ask why provision for fatality review in elder abuse cases has lagged so far behind legislation aimed at protecting other vulnerable victim populations underscores the problem—elder abuse, though unfortunately common, is not well documented. Elder justice advocates suggest that other differences between elder abuse and child abuse or domestic violence may also be relevant; notably, because it is *expected* that elderly people will die, there is a pervasive assumption that a senior's death was from natural causes—no investigation required.

While this statute may have been a long time coming, it now provides a promising opportunity to finally gather much-needed data and information pertaining to fatal cases of elder abuse. First, section 415.1103 authorizes the state attorney in each circuit to create a Review Team and to refer for its consideration closed cases in which a fatality was caused by, or related to, elder abuse or neglect. The Review Teams themselves are intended to be multidisciplinary "silo busters," with members representing aging services, geriatric medicine, elder law, law enforcement, and prosecution, among others. This diverse membership allows for careful scrutiny of all the circumstances and factors leading up to a death, as well as the identification of problems and gaps in services from many different perspectives. Teams will submit an annual report of their findings and recommendations (i.e., prevention tactics, agency response issues, and legislative or policy considerations) to the Department of Children and Families, the Department of Elder Affairs, the Legislature, and the Governor's Office.

These provisions are forward-looking and constructive, and have the potential to facilitate much-needed attention and prioritization in cases of elder abuse and neglect. Whether that potential will be realized, however, remains in the hands of state attorneys across the state; a Review Team may only consider cases referred to it by the state attorney. In fact, section 415.1103 does not require the creation of an Elder Abuse Fatality Review Team *at all*; that decision is wholly within the discretion of each circuit's elected state attorney. The great deal of discretion in creating these teams stands in stark contrast with section 383.402, Florida Statutes, which *mandates* the establishment of a State Child Abuse Death Review Committee.

All things considered, however, section 415.1103 provides elder advocates with cause to hope. Hope that the Review Team concept will be embraced throughout the state. Hope that diverse, locally based, multidisciplinary teams will begin the difficult but invaluable work of reviewing these important cases. And hope that we can learn after honest assessments of those cases how Florida can better support and protect its most vulnerable elders.

Ellen Cheek *is a senior staff attorney on the Florida Senior Legal Helpline at Bay Area Legal Services in Tampa, Florida. The focus of her current work is a federal grant-funded project that uses technology to facilitate elder abuse victims' access to civil legal services, as well as to increase the investigation and prosecution of criminal cases. A graduate of Mount Holyoke College and the University of Santa Clara School of Law, Ellen serves as chair of the Abuse, Neglect, and Exploitation Committee of the Elder Law Section of The Florida Bar.*

Using a trigger trust in the context of a special needs trust

by Kole J. Long

Special needs trusts are tools that can protect the assets of our clients while ensuring they receive much-needed public benefits. Whether the public benefits are Medicaid or Supplemental Security Income (SSI), a special needs trust can enhance the quality of life for our disabled clients. But what if we are unsure whether a beneficiary will need public benefits? What if a beneficiary has a diagnosed disability but is able to work, does not need benefits right now, and may need them later? In cases like this (and others), a trigger trust may be an appropriate tool.

You have probably heard the term *trigger trust,* but what exactly is it? A trigger trust is a trust that, upon some triggering event, changes how the trust is administered. In the context of a special needs trust, a trigger trust can be used to automatically or manually change (trigger) from a general support trust (or some other third-party non-special needs trust) to a third-party special needs trust.

In drafting a trigger trust, you will have a few things to consider. First, when should the trust be triggered? Second, how is the trust to be triggered? Finally, what are some pitfalls to be aware of so as not to jeopardize your beneficiary's eligibility for benefits?

A trigger trust is activated only when necessary, but in all events prior to the application of benefits. Timing can be very important. If triggered too early and the beneficiary does not need the public benefits, the trustee's use of the trust assets may be unnecessarily restricted. If triggered too late, for example, after initial application for benefits, the trust will be considered a countable asset and the application for benefits will be denied.

Determining how the trust is triggered can fall into two categories. The trust can automatically trigger upon a certain occurrence or event, or the trust can be manually triggered by someone with authority to pull the trigger.

An automatic trigger can be written in the trust so that when a specific event happens, the trust is then "automatically" administered pursuant to different provisions of the trust (those being the special needs trust provisions). The event can be a number of things including the filing of an application of public benefits by the beneficiary, upon the beneficiary becoming disabled, or upon the beneficiary reaching a certain age. Be aware that there is cause for concern when using an automatic trigger. The agency reviewing the trust (Social Security Administration or Department of Children & Families) might argue that the trust was not properly triggered or that the triggering event described in the trust has not happened yet.

The more conservative approach is to use a manual trigger. In using a manual trigger, the trust language can appoint and give someone, such as a trust protector or a trust advisor (or perhaps even the trustee), authority to trigger the trust manually. This person will have the ultimate authority to decide when the trust should be triggered. The following is language I have used that gives a trust protector authority to trigger a trust:

> The Trust Protector shall decide on whether Article 2 or Article 3 shall be implemented by the Trustee. At no time is the Trust Protector to direct the Trustee to implement both Article 2 and Article 3 simultaneously.

Using this language, Article 2 would be the general support trust language (or other non-special needs trust language), and Article 3 would be the special needs trust language. Once triggered, a trust must be administered pursuant to the different article of the trust. This manual triggering can be done through some form of written declaration or directive from the trust protector to the trustee.

Although the trust might never be triggered, we still must be mindful of the drafting, execution, and funding requirements found in SI POMS 01120.200. The trust must be executed/created by someone other than the trust beneficiary with resources (assets) that are not those of the trust beneficiary, and the trust beneficiary cannot control or direct the use of the trust assets. The trustee must be someone other than the trust beneficiary. If you draft a trust protector provision that gives them the triggering authority, the trust protector should be someone other than the beneficiary. Under no circumstances may the individual (SSI or Medicaid recipient) have the authority to "revoke or terminate the trust or direct the use of the trust assets for his or her own support and maintenance." SI POMS 01120.200D(2). SSA will look to the trust agreement and individual state law in determining the revocability of the trust. *Id*.

Kole J. Long *is an associate attorney with the law firm of Special Needs Lawyers PA, where he practices elder, probate, guardianship, and special needs trust law. In addition, he serves as co-trustee of the Guardian Trusts, which assists individuals with disabilities in protecting their assets for use during their lifetimes without disqualifying them for much-needed public benefits.*

SECTION NEWS

Committees keep you current on practice issues

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

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Call for papers – *Florida Bar Journal*

Steven E. Hitchcock is the contact person for publications for the Executive Council of the Elder Law Section. Please email Steven at *hitchcocklawyer@gmail.com* for information on submitting elder law articles to The Florida Bar Journal for 2020-2021.

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.

SECTION NEWS

The final meeting of the Elder Law Section looked quite different this year!

Elder Law Section Zooms year-end meeting, recognizes 2020 award winners

As the 2019-2020 term came to an end, the Elder Law Section board of directors participated in a final meeting via Zoom. During this meeting we thanked outgoing chair, Randy Bryan, for his exceptional leadership of our section and welcomed our new chair, Steven Hitchcock.

Additionally, the ELS recognized members for their outstanding work and commitment to the section for the 2019-2020 term.

MEMBER OF THE YEAR
Genny Bernstein

MEMBER OF THE YEAR
Heather Boyer Samuels

Genny Bernstein and Heather Samuels co-chaired the ELS Publications Committee and oversaw publication of *The Elder Law Advocate*. Under their leadership, membership involvement increased, building upon the publication's excellence and increasing its value to members.

In addition to being named an ELS Member of the Year, Heather B. Samuels has been selected to join Class VIII of The Florida Bar's William Reece Smith, Jr. Leadership Academy, which is designed to help lawyers enhance their personal leadership skills through professional development, increasing their knowledge base and experience, and welcoming them to events and special programming hosted by The Florida Bar.

Shannon Miller (right) meets with Nancy Wright outdoors to present the Charlotte Brayer Award. Awards presentations are trickier to do during a pandemic.

The Charlotte Brayer
PUBLIC SERVICE AWARD
Nancy E. Wright

In recognition of her years of public service to the elderly and disabled community and her recent advocacy efforts regarding the Home and Community Based Service Waiver implementation in Florida, ensuing seniors receive services and benefits to allow them to continue residing in the community and reduce the risk of forced institutionalization.

Examples of Nancy's advocacy include working with Three Rivers Legal Services to head its Medical-Legal Partnership at Shands, addressing pressing legal needs of vulnerable hospital patients; and facilitating the North Central Florida Senior Advocates Network, setting the agenda and creating a forum for aging service professionals and elder justice advocates to tackle tough problems. Nancy often shares her expertise through presentations on the national as well as the state level, and she mentors other attorneys, sharing advice and materials so they can serve vulnerable populations in their own communities.

OUTSTANDING SERVICE AWARDS

David J. Lillesand

For outstanding service in providing a webinar on the changes in the Social Security POMS and invaluable and sage advice on the listserv for all things SSI/SSDI related

David A. Weintraub

For outstanding service and work on the vulnerable investor legislation during the 2020 Legislative Session

Ellen Cheek

For outstanding service and work on the vulnerable investor legislation during the 2020 Legislative Session

Twyla Sketchley

For outstanding service as co-chair of the Guardianship Committee and outstanding efforts during the 2020 Legislative Session on multiple guardianship-related legislative initiatives

Stephanie Villavicencio

For outstanding service as co-chair of the Guardianship Committee and outstanding efforts during the 2020 Legislative Session on multiple guardianship-related legislative initiatives

Shannon M. Miller

For outstanding service and work as co-chair of the Legislative Committee and outstanding efforts during the active 2020 Legislative Session

Travis D. Finchum

For outstanding service and work as co-chair of the Legislative Committee and outstanding efforts during the active 2020 Legislative Session

Debra J. Slater

For outstanding service and work as co-chair of the Legislative Committee and outstanding efforts during the active 2020 Legislative Session

Jason A. Waddell

For outstanding service and dedication as immediate past chair of the Elder Law Section

SECTION NEWS

Mark your calendar!

UPCOMING EVENTS

LIVE WEBCAST
2021 Essentials of Elder Law
Friday, January 15, 2021

LIVE WEBCAST SESSIONS DAILY
2021 Elder Law Annual Update
Monday, January 18 – Friday, January 22, 2021

PRACTICE MANAGEMENT

How to choose the right tech platform during the pandemic, and beyond

by Audrey J. Ehrhardt

Choosing the right tech platform is important to effectively manage your law firm in the digital age, and it is even more critical during a pandemic. While more and more people are relying on remote technology, having the right tech platform for your law practice is essential. Effective tech can do many things, including building credibility with your community, referral network, clients, and potential clients.

The tech platform that is the right fit for your law practice ecosystem is not necessarily going to be the right one for others. It is a choice based on personal preferences and finding the solutions that meet your specific needs and those of your practice. To help you through the decision process, consider the following nine factors:

1. **Ease of use.** This not only applies to you; you should also consider ease of use for your clients and potential clients.
2. **Court system requirements.** See what your court system is using. Consider selecting a tech platform setup that will comply with local court requirements.
3. **Cybersecurity issues and management.** As use of tech platforms continues to increase, platforms have made serious efforts to safeguard users' privacy. In short, several providers have significantly updated their security practices. Consider incorporating language into your retainer agreements and intake process that addresses your virtual technology. Explain that while your firm adheres to best practices, some risks come with using technology.
4. **Recording and storage.** Investigate the recording and storage options for each platform. Make sure you understand how to disable recording if you wish. If you will be making use of the recording function, find out which platform is best for this.
5. **Immediate post-production video.** Does the tech platform provide ready-to-go post-production video? If you will be making use of this feature, you will want to ensure that the platform effectively generates reliable post-production video.
6. **Customization tools.** Most tech platforms offer customization tools that can make the experience unique for you and your clients. For example, there are special backgrounds and automatic chat features you can use.
7. **Interaction tools.** Interaction tools can be a great way to increase engagement with the tech platform.
8. **Chatting and commenting.** Be aware that these features may create a record by default. Consider whether you will want to use these features or disable them.
9. **Integration with your law practice management software.** Look at your options for integrating your tech platform with your law practice management software. Synthesizing these solutions help streamline the whole operation.

We know "tech" decisions are difficult. Many solutions exist, so take your time to make the right decision. Keep an open mind, and stay informed about other potential options as your needs change. Further, stay kind, be confident, and know that you and your practice are strong enough to get through anything!

***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.*

Tips & Tales

by Kara Evans

Oops, I did it again! Violating the devise and descent clause of the Florida Constitution (on purpose)

The tale: Sofia would like to leave her home to her children. She moved to Florida from Michigan and purchased a small villa. She used her deceased husband's life insurance proceeds to purchase her new Florida home and wants to ensure that her children receive the home after her death. However, she would like for her new husband to have the right to live in the home for the rest of his life, or for however long he would like to stay.

The tip: First, you inquire if Sofia and her new husband signed a prenuptial agreement and if not, would new hubby sign a postnuptial agreement. Of course, the answer is a resounding no. You, as Sofia's attorney, have the unenviable task of explaining constitutional homestead issues to Sofia. Article X Section 4(c) of the Florida Constitution states in part: "The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child." Sofia's children are grown, which means under this clause the only thing she is able to do is to leave her villa to her new husband. Sofia is understandably horrified.

But is that really her only option? Just because the constitution prohibits the transfer to Sofia's children does not mean that Sofia, at the very least, cannot give her children a portion of the homestead. Furthermore, she may be able to actually achieve the very thing she set out to do. The reason her goal may still be achievable is section 732.401(1), Florida Statutes, which lays out the process by which the homestead does pass should the devise violate the constitutional dictate in Article X Section 4. This statute states that "if the decedent is survived by a spouse and one or more descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent's death per stirpes." Well, is that not exactly what Sofia wanted in the first place? And now you are a hero. Except for section 732.401(2).

Section 732.401(2) was added to the statute effective October 1, 2010. It allows the surviving spouse to give up the life estate in exchange for an undivided one-half interest in the home. The children would be the owners of the other half. This addition was made in response to the housing crisis of 2008. The manner in which expenses are allocated between the life tenant and the remainderpersons requires a certain level of cooperation that is often lacking between the surviving spouse and the decedent's children. All too often, the surviving spouse can ill afford these expenses.

Should Sofia's new husband take advantage of the election in section 732.401(2), he would own one-half of the home and the children would own the other half. Either party could force a sale. The worst-case scenario here is that Sofia's children end up with half of what she intended.

There is a deadline to make the election. It must be made within six months after the decedent's death and during the surviving spouse's lifetime. It is a deadline that is easily missed by those who are unaware of their options. If Sofia's new husband is not the named personal representative under Sofia's last will and testament, he may not seek timely advice. Sofia may get her wish after all.

The next time you review a will or trust that violates the devise and descent clause of the Constitution, do not assume it was a mistake. It may be part of a deliberate and sound strategy. Oops, I did it again, on purpose.

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

TAX TIPS

by Michael A. Lampert

A walk through the Internal Revenue Code Title 26 and a bit more

Recently, I presented "Taxation of Special Needs Trusts" for The Florida Bar Elder Law Section. In preparing the materials, I realized that before we could address the taxation of SNTs, we needed to start at the beginning and first address the taxation of trusts.

In the years I have been writing for what has become my Tax Tips column, while I have sometimes addressed where a particular tax or tax-related provision came from, I never really started at the very beginning, a very good place to start (cue up the *Sound of Music*!).

The Federal Tax Code (yes, for this article I am sticking with federal law), otherwise known as the Internal Revenue Code, is more technically known as Title 26 of the United States Code or 26 USC. Why should you care? It often can make things easier to understand where "it all fits in." For example, S Corp., 1031 like-kind exchange, and 529 plan are all shorthand terms that refer to a portion of the Internal Revenue Code. In addition, there are areas of tax law that are determined by non-tax law and vice versa. There are also other areas of law that are confused with tax law but have nothing to do with it (such as the allowed annual tax exemption for gifts up to a certain amount that has nothing to do with Medicaid).

Let's look at the basic outline of the Internal Revenue Code so you can better see how things fit and flow, and to help you understand some of the buzzwords. I know, this article is longer than usual, but it reads fast!

Title 26

USC Title 26 is the Internal Revenue Code. Title 26 is broken up as follows (selected provisions):

- Subtitle (A through K)
- Chapter
- Subchapter
- Part
- Section

Subtitle A is Income Taxes (Chapters 1-6).

Chapter 1– Normal Taxes and Surtaxes has the following subchapters, parts, and sections.

Subchapter A– Determination of Tax Liability (the tax rates)

Part I– Tax on Individuals

Part II– Tax on Corporations

There are parts addressing credit, the alternative minimum tax, etc., and even some repealed parts.

Subchapter B– Computation of Taxable Income

Part I– Definition of gross income, adjusted gross income, etc.

Part I is where the basic definition of gross income comes from—IRC § 61, more formally known as 26 USC § 61.

Part II– Items specifically included in gross income

Part III– Items specifically excluded from gross income

Part V– Deductions for personal exemptions

Part VI– Itemized deductions

Some deductions in Part VI include § 162 trade or business expenses, § 167 depreciation, and § 170 charitable contributions. So yes, to be income tax deductible, the donation needs to meet the requirements of 26 USC § 170. There are esoteric provisions, too, such as the § 179E election to expense advanced mine safety equipment.

Subchapter C– Corporate Distributions and Adjustments

This is where the term *C corporation* comes from. The corporation is being taxed pursuant to Subchapter C.

Subchapter J– Estates, Trusts, Beneficiaries, and Decedents (income tax)

Part I– Estates, Trusts, and Beneficiaries

Subpart A– General rules for taxation of estates and trusts

Subpart B– Trusts which distribute current income only

Subpart C– Estates and trusts which may accumulate income or which distribute corpus

continued, next page

Tax Tips ...
from page 21

Subpart D– Treatment of excess distributions by trusts

Subpart E– Grantors and others treated as substantial owners

Subpart F– Miscellaneous

Part II– Income in Respect of Decedents

§ 691. Recipients of income in respect of decedents

§ 692. Income taxes of members of Armed Forces, astronauts, and victims of certain terrorist attacks on death

Practice tip: Remember that this is income tax, *not* estate and gift tax.

Practice tip: Note that the term *grantor trust* is not used.

Subchapter K– Partners and Partnerships

Part I– Determination of Tax Liability

Part II– Contributions, Distributions, and Transfers

Part III– Definitions

Subchapter O– Gain or Loss on Disposition of Property

Subchapter P– Capital Gains and Losses

Subchapter S– Tax Treatment of S Corporations and Their Shareholders

This is where the term *Sub S corporation* comes from.

Part I– In General

Part II– Tax Treatment of Shareholders

Part III– Special Rules

Part IV– Definitions; Miscellaneous

Buzzword tip: When someone says it is subject to "sub" followed by a letter, they are generally referring to a subchapter of the Internal Revenue Code.

Chapter 2– Tax on Self-Employment Income

Subtitle B is Estate and Gift Taxes (Chapters 11-15).

Chapter 11– Estate Tax

Chapter 12– Gift Tax

Chapter 13– Tax on Generation-Skipping Transfers

Chapter 14– Gifts and Bequests from Expatriates

Practice tip: Subtitle B is *not* income tax.

Subtitle C is Employment Taxes (Chapters 21-25).

Chapter 21– Federal Insurance Contributions Act

Subchapter A– Tax on Employees

Subtitle D– Miscellaneous Excise Taxes

Subtitle E– Alcohol, Tobacco, and Certain Other Excise Taxes

Subtitle F is Procedure and Administration (Chapters 61-80).

Chapter 61– Information and Returns

Subchapter A– Returns and Records

Part I– Records, Statements, and Special Returns

Part II– Tax Returns or Statements

Part III– Information Returns

Part IV– Signing and Verifying of Returns and Other Documents

Part V– Time for Filing Returns and Other Documents

Part VI– Extension of Time for Filing Returns

Part VII– Place for Filing Returns or Other Documents

Part VIII– Designation of Income Tax Payments to Presidential Election Campaign Fund

Subchapter B– Miscellaneous Provisions

Chapter 62– Time and Place for Paying Tax

Chapter 63– Assessment

Chapter 64– Collection

Subchapter A– General Provisions

Subchapter B– Receipt of Payment

Subchapter C– Lien for Taxes

Part I– Due Process for Liens

Part II– Liens

§ 6321. Lien for taxes

§ 6322. Period of lien

§ 6323. Validity and priority against certain persons

§ 6324. Special liens for estate and gift taxes

§ 6324A. Special lien for estate tax deferred under section 6166

§ 6324B. Special lien for additional estate tax attributable to farm, etc., valuation

§ 6325. Release of lien or discharge of property

§ 6326. Administrative appeal of liens

§ 6327. Cross references

Practice tip: Note that the special liens regarding estate and gift taxes are not in Subtitle B (Estate and Gift Taxes) but in Subtitle F (Procedure and Administration).

Subchapter D– Seizure of Property for Collection of Taxes

Part I– Due Process for Collections

Part II– Levy

Subtitle H is Financing of Presidential Election Campaigns.

What do you do with the Internal Revenue Code? How do you interpret it?

Internal Revenue Regulations (IRR)

The Treasury Department issues regulations ("regs" or IRR) regarding the Tax Code and tax procedure. These are very authoritative. They also issue proposed and temporary regulations. Some proposed and temporary regulations can be around for years.

Other guidance

The Internal Revenue Service (IRS or "the Service") issues a lot of guidance. These include Revenue Rulings (RRs), which often address treatment of a specific tax issue; Revenue Procedures (Rev. Procs.), which often address a procedure or "how to" as part of tax compliance; and Private Letter Rulings (PLRs), which provide guidance for a specific taxpayer. PLRs are not supposed to be cited as precedent even though the United States Supreme Court has done so.

There is other guidance from the

IRS. These include press releases, publications, instructions on tax forms, memorandums issued through the IRS counsel's office, etc. Along with other guidance, the IRS has increasingly been issuing FAQs. While they can be helpful, and often the IRS will look at FAQ items authoritatively, they are neither a formal regulation nor technically an official pronouncement.

In addition, of course, there are court cases interpreting tax law.

Practice tip: Remember that it is not uncommon for a court case addressing a tax matter to be determined under old law. When researching tax law for planning purposes, make sure the case law is still applicable to current law.

Practice tip: Sometimes, while the tax law may have changed, the taxpayer's transaction may be covered under "old" law.

Non Title 26

There are areas of tax law that are not technically tax law. They include:

Circular 230. Circular 230 is an Internal Revenue regulation that governs practice before the Internal Revenue Service, including tax return preparation. Violation can cause suspension or "disbarment" from practice before the Internal Revenue Service, monetary penalty, and public censure. With that said, the whole structure of practitioner regulation, including the Office of Professional Responsibility, is fundamentally Title 31. Technically, Circular 230 is Treasury Department (not IRS) Circular 230, Title 31 CFR Subtitle A, Part 10.

Report of Foreign Bank and Financial Accounts (FBAR) FinCEN Form 114. By now, most practitioners, I hope, are familiar with the basic requirement of reporting ownership or control over foreign financial accounts. While the IRS is primarily responsible for enforcement, it is a Title 31 Treasury requirement, not Title 26.

Why does this matter? All of the reasons are beyond the scope of this article, but in addition to having a better idea where to look up the law, a basic reason comes to mind—statute of limitations. There is no statute of limitations on assessment of tax on an unfiled income tax return. There is a six-year statute on FBARs, even if they are not filed. Even enforcement procedures may differ.

FOIA Title 5– 5 U.S.C. While there are some disclosure provisions in the Internal Revenue Code (26 U.S.C. 6103), the bulk of federal disclosure law is seen in the Freedom of Information Act (5 U.S.C. § 552) and the Privacy Act (5 U.S.C. § 552(a)).

Treaties. The United States has entered into tax treaties with other countries. Some cover a broad area of tax including income and estate and gift taxes. Some treaties are more limited. These treaties may not show up in a "Title 26" search.

So, what do you do with all of this?

Practice tip: More than in many areas of law, it is not uncommon in the tax law arena for administrative and case law to involve aspects of prior law. Even a current income or estate tax filing may address last year's law.

Practice tip: Let the buzzwords help guide you. Know that a Sub S corporation is simply an election under subchapter S of the Internal Revenue Code. That a § 529 plan is governed by 26 U.S.C. § 529. A § 1035 life insurance/annuity exchange is covered by 26 U.S.C. § 1035.

The law may be complicated, but don't let the jargon throw you, at least not too much.

Practice tip: Be careful not to confuse income tax with estate and gift tax. On the surface that is obvious, but in practice, it is easy to mix up the two. For example, the charitable deduction limitations are different in an estate tax context than in an income tax context. The concept of "grantor trust" inclusion for estate tax purposes may overlap with inclusion for income tax purposes, but the rules are not necessarily the same.

Practice tip: In the same way that not all areas that impact on tax law are contained in Title 26, there are areas of tax law that turn on compliance with non-tax law, and vice versa. For example, qualified disability trust qualification under tax law is determined in part by a determination of disability under the Social Security law and regulations. Arguing with the IRS about denial of a disability determination by Social Security will not help. The U.S. State Department may withhold issuance or may revoke a U.S. passport for a seriously delinquent tax debt. Arguing with the State Department will not help; they are simply responding as required to a certification to them by the IRS. Know what law and agency are applicable in a given situation.

Practice tip: I started this article by saying I am only going to address federal law. I will close with an exception. Many state (and local) governments that have entity level or individual income taxes or estate/gift taxes use the federal definitions and simply specify different tax rates and exemption amounts; however, some have very different definitions. In addition, some states lag the federal law as they have to pass some form of enabling legislation periodically to change the state or local tax law to mirror the federal law. Be careful.

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

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of The Florida Bar

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Summary of selected case law

by Elizabeth J. Maykut

Holographic will executed in Belgium before one witness not valid in Florida

Zaidman v. Zaidman, 45 Fla. L. Weekly D820 (Fla. 3d DCA April 8, 2020)

Issue: Which will controlled—a 2012 document executed in Florida with the requisite formalities or a 2015 handwritten will executed in Belgium before one witness that purported to revoke the 2012 will?

Answer: The 2012 will controlled because the 2015 will was not executed with the formalities required by Florida law.

Here, the decedent's wife filed a petition for administration and presented the decedent's 2012 will. The decedent's children filed a counter-petition contending that a 2015 will controlled because it revoked the 2012 will.

The trial court granted the wife's motion to strike the children's counter-petition. In affirming the trial court's order, the Third District began by noting that a testator must strictly comply with the Florida Probate Code's requirement in section 732.502(1), Florida Statutes, that a will be executed by the testator in the presence of two witnesses in order to be valid. It then reviewed section 732.502(2), Florida Statutes, which provides that any will, "other than a holographic or nuncupative will," executed by a nonresident of Florida may be valid in Florida if it was valid under the laws of the state or country where it was executed. This subsection also provides: "A will in the testator's handwriting that has been executed in accordance with subsection (1) shall not be considered a holographic will." § 732.502(2), Florida Statutes.

The court held that, since the 2015 will was handwritten, it must comply with section 732.502(1), which requires that it be executed in the presence of two witnesses. Since the 2015 will was executed in the presence of only one witness, it was invalid as a matter of law. The court held that the revocation in the 2015 will also failed because it did not comply with the formalities required to revoke a will under Florida law.

Practice tip: Holographic wills are to be avoided. Although this case seems to suggest that a holographic will executed outside Florida must comply with the formalities required for the execution of a will in Florida, the court in *Malleiro v. Mori*, 182 So. 3d 5, 8 (Fla. 3d DCA 2015), cited in this case, actually states that holographic wills are never valid in Florida.

Decedent's four-bedroom home maintained homestead creditor protection even though three bedrooms were rented by tenants

Anderson v. Letosky, 45 Fla. L. Weekly D1266 (Fla. 2d DCA May 27, 2020)

Issue: Whether the decedent's entire residence constituted homestead property exempt from a creditor's claims even though he had rented out three bedrooms in the four-bedroom home.

Answer: Yes, since the residence was a single-family home, it could not be divided in such a way as to lose its homestead character.

The decedent died owning a four-bedroom home. At the time of his death, three of the bedrooms were rented to tenants, and the decedent lived in the fourth bedroom. The decedent had $38,551 in judgment liens that a creditor was attempting to enforce against his estate. The decedent's son filed a petition with the probate court seeking judicial determination that the decedent's entire home was protected homestead and exempt from creditor claims. The creditor argued that 75% of the value of the home was not protected and could be used to pay the creditor. The trial court agreed with the creditor. The appellate court reversed.

In holding that the entire home constituted homestead, the Second District cited to *First Leasing & Funding of Florida, Inc. v. Fiedler*, 591 So. 2d 1152 (Fla. 2d DCA 1992), which suggested the following two-part analysis to determine whether the homestead exemption would extend to an entire property when the owner/debtor rented out some portion of it: (1) whether the owner/debtor's residence is a fraction of the entire property; and (2) whether the property could be severed from the remainder of the property. After applying this test to the single-family residence, the court held that the rented bedrooms in the home could not be severed from the residence without destroying its utility as a single-family dwelling. Therefore, this case differed from *First Leasing*, which dealt with a triplex where the decedent lived in one unit and rented out the other two units. In *First Leasing*, only the unit in which decedent lived was held to be entitled to homestead protection because it could be severed from the whole and still leave each tenant with a fully functioning property.

Practice tip: Rental of a homestead will defeat the constitutional protection against creditors' claims after death if the entire single-family house has been rented, but the rental of a portion of the home will not as long as that portion cannot stand alone as a fully functioning residence.

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Case law ...
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Guardian's appointment improper because ward's court-appointed counsel failed to represent her expressed wishes to court

Erlandsson v. Guardianship of Erlandsson, 45 Fla. L.Weekly D1101 (Fla. 4th DCA May 6, 2020)

Issue: Whether the alleged incapacitated person (AIP) had constitutional rights to counsel and effective assistance of counsel and whether the AIP's counsel had a conflict of interest because she advocated for the appointment of a guardian even though the AIP opposed the guardianship.

Answer: The AIP did not have a constitutional right to counsel or to effective assistance of counsel as these concepts only extend to criminal proceedings. However, the AIP was entitled to counsel who would represent her expressed wishes, not one who would advocate for what counsel believed was in the AIP's best interest.

The appellant's parents believed their adult daughter, who was schizophrenic, needed a guardian because she was not taking care of her medical or psychiatric needs. They petitioned the court for limited guardianship, and an attorney was appointed to represent the daughter. The Examining Committee recommended a plenary guardianship. At the hearing on the appointment of guardian, the appointed counsel agreed that the daughter needed a guardian and declined to offer any contrary evidence on the daughter's behalf even though she openly opposed guardianship and asked for her counsel to be discharged.

On appeal, the daughter argued she was not afforded her constitutional right to counsel or effective assistance of counsel. The Fourth District rejected both of these arguments, stating the AIP has no constitutional right to counsel, but rather a statutory right to counsel under section 744.331(2)(b), Florida Statutes, and that due process only requires effective assistance of counsel in proceedings where incarceration or involuntary commitment may be imposed.

In analyzing whether a conflict of interest existed between the AIP and her counsel, the court reviewed the language in section 744.102(1), Florida Statutes, which requires that the AIP's attorney "represent the expressed wishes of the alleged incapacitated person to the extent it is consistent with the rules regulating The Florida Bar." After finding a dearth of Florida cases on the issue of the obligation of appointed counsel in guardianship, the court turned to other states' case law.

The court held that the AIP did not receive the type of assistance from her counsel that is mandated by statute. The court-appointed counsel should have taken action to ensure that the AIP's voice and wishes were considered by the court. Since counsel did not defend against the guardianship petition as requested by the AIP, a conflict of interest existed between the AIP and her attorney that violated section 744.102(a), Florida Statutes. Accordingly, this case was remanded with directions for the trial court to appoint a "conflict-free" counsel to represent the daughter at a new hearing on the petition for guardianship.

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