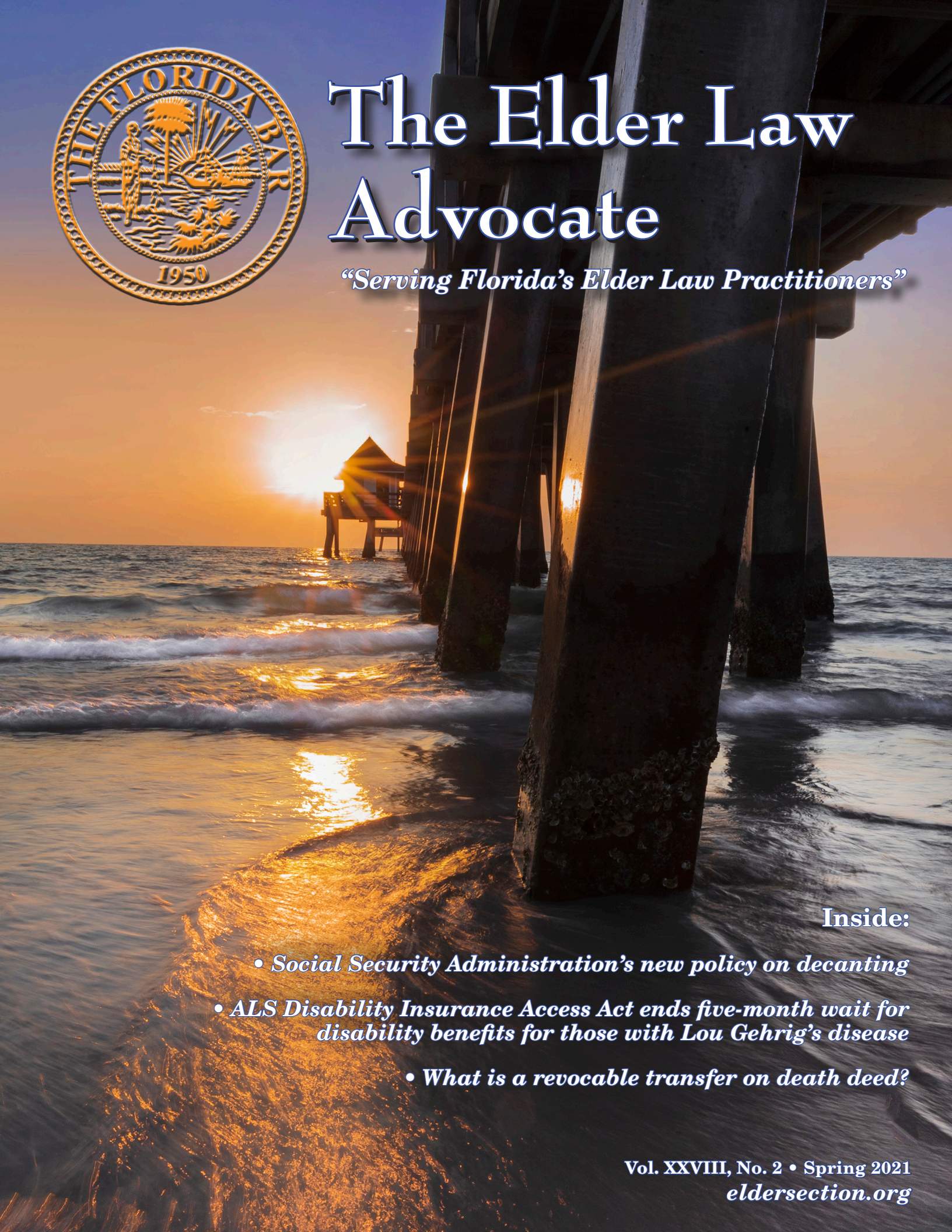

The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

Inside:

- *Social Security Administration's new policy on decanting*
- *ALS Disability Insurance Access Act ends five-month wait for disability benefits for those with Lou Gehrig's disease*
- *What is a revocable transfer on death deed?*

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The Elder Law Advocate

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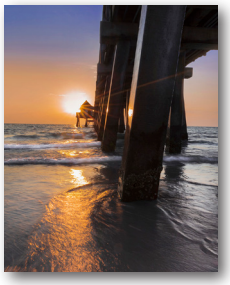

ON THE COVER

Naples Pier
Randy Traynor Photography

4/2021

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The deadline for the FALL 2021 EDITION: OCTOBER 8, 2021. 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 Emily Young at 850/561-5650 for additional information.

Steven E. Hitchcock

Message from the Chair

Spring 2021: A time to look to the future

2020 is finally gone … Thank goodness for that! As I look back on the first half of my tenure as your section chair, I am extremely grateful for the enormous amount of work the section leadership, committee chairs, committee members, and section liaisons have done this term. Each one of you is to be commended for that. We have accomplished a lot, despite all the difficulties COVID has brought to our families, friends, clients, and practices. I realize I put out a very aggressive agenda for the year, and all of you have come together, worked very hard, and helped move the section forward. Thank you very much.

We are now several months into 2021, and the future is starting to look brighter. There is a feeling that the long COVID "winter" we have experienced may be ending, and spring may finally be here. COVID vaccines are going into people's arms and hope is on the horizon that we can eventually return to our "new normal," post COVID. As our annual meeting is scheduled for June in Orlando, I hope the "spring" we are experiencing turns into a great summer so we can hold our annual meeting in person, see each other, and maybe even sit at a bar with Jason Waddell and finally get a lesson from him on how to tell a good bourbon from bad ...

Through all the adversity and change, we have managed to accomplish a lot the last six months. I made elder law education and CLE the top priority for my year as chair, and the section committees have not let me down. In January, we had a very successful Elder Law Week, with the virtual Essentials of Elder Law and Annual Update & Hot Topics CLE. Section Chair-Elect Carolyn Landon and her team from the CLE Committee did an absolutely fabulous job putting together what were described by some as the best presentations at our annual event in recent years. The event is available to view online through the Bar for those who were not able to attend. Just a couple of weeks ago, the Litigation Committee put on the half-day Litigation for Elder Law Attorneys as a free CLE for section members. This virtual event was attended by more than 300 attorneys, with the participants giving high praise for the event and many asking for it to be expanded in scope.

Our Elder Law Concepts and Board Certification Review Course is on track for completion this year with the materials almost completed and videography starting in March. We anticipate the course being available by the end of June. Kudos to every section committee for their hard work in preparing materials. Many of the presenters are already in place for this course and are among the best and brightest attorneys in our section. If you are interested in presenting on a topic covered on the

continued, next page

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Chair's message
from page 3

board certification exam, please contact Danielle Faller, chair of the CLE Committee.

We are also moving the Elder Law Section into the future by reviewing and restructuring the section's leadership and committee structures through a complete review and possible revision of the section's bylaws. This effort is being spearheaded by Past Chair Jason Waddell and Immediate Past Chair Randy Bryan, along with an ad hoc committee of current and past section leadership.

Collett Small, chair of the Strategic Planning Committee, is working on a planning session to further the vision and direction of the section for the future. I will have much more to report on those efforts after the planning meeting takes place later in the spring. Collett is a past section chair and continues to be very active in the section as section liaison to the Diversity and Inclusion Committee of The Florida Bar, and in that role, she is working with others in the section on developing strategies to enhance minority participation in the section.

The New Practitioners Committee has been growing under Max Solomon's leadership as chair and has created a "home" for younger practitioners or those "seasoned attorneys" who are new to the practice of elder law. These newer practitioners are the future of the section. If you have a new associate or are new to the practice yourself, reach out to Max for information on this committee and its work.

The Disability Law Committee is expanding the committee's reach outside of the traditional elder law community and in May is going to be presenting at two educational events for families with children or young adults with disabilities. The events will provide information on diagnosis, early intervention programs, special education opportunities and standards, public benefits, and other available resources. This event is being spearheaded by the committee chair, Melissa Lader Barnhardt.

The legislative session is in full swing as I write this, and the Legislative Committee, chaired by Deb Slater along with vice chairs Travis Finchum and Grady Williams and section lobbyists Bryan Jogerst and Greg Black, is engaging with legislators and staff to argue in support of our legislative agenda, including the attorney general's exploitation bill, which many section members, including section Secretary Shannon Miller, have had a hand in crafting. I am very hopeful to be able to announce some big wins for the section on its legislative efforts in the next edition of the *Advocate*.

Spring is here; enjoy the warmth and sunshine. I will see you all in June!

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

Capitol Update

by Brian Jogerst

Lawmakers consider legislation to protect elderly and vulnerable adults against a backdrop of budget reductions and safety protocols

With COVID protocols in place and in preparation for the 2021 Legislative Session, the House and Senate returned to Tallahassee for January and February committee meetings, with the session beginning on March 2 and scheduled to end on April 30, 2021.

A little more than a year ago in January, the House and the Senate were in session and headed toward the end of session in mid-March when COVID first hit the state. After adjournment and following the stay-at-home orders, the impact from unemployment, closures of businesses, and lack of tourism revenue was quickly felt as the state's revenue collections began to fall. Revenue has improved over the past few months, but revenue returning to pre-pandemic levels is not anticipated until 2023. As such, significant budget reductions—between $4 and $5 billion—are anticipated during the 2021 Session.

Both the House and the Senate implemented COVID protocols for the committee weeks and legislative session. In the House, many presenters are included via Webex and are allowed in a committee meeting if a specific bill is on the agenda. In the Senate, anyone wishing to testify before a Senate committee must go to the Donald L. Tucker Civic Center for livestreamed testimony. All House and Senate members must undergo COVID testing and wait for results prior to entering the Capitol.

Groups and organizations that traditionally descend on the Florida Capitol each year for "their day in the Capitol" are canceling, and many are transitioning to virtual advocacy days.

Clearly, COVID's impact will be felt by constituents, especially as it relates to the state budget, legislative issues, and access to the Capitol during the session.

Legislative Session

Once again the Elder Law Section is actively meeting—both in person and virtually—with key legislators and cabinet members to advance protections for Florida's elderly and vulnerable adults. With the above as a backdrop, here is an overview of key issues for the 2021 Session:

Expanded protections for vulnerable and exploited adults – Attorney General Ashley Moody, working with Senator Danny Burgess and Representative Colleen Burton, proposed legislation to expand the jurisdiction of the Office of Statewide Prosecutor to prosecute crimes against the elderly and vulnerable adults. Provisions of the bill include:

- Expands definitions of *improper benefit* and *kickback* that more closely track the guardianship modifications and rewrites adopted during the 2020 Session
- Clarifies that fiduciaries should be performing their responsibilities in the best interest of the principal or ward
- Provides additional methods of proving abuse of an elderly person or disabled adult due to the intentional isolation of vulnerable adults from their family members
- Enhances provisions addressing the conduct of an exploiter who changes the terms of a will or a trust of a vulnerable adult in order to benefit him/herself or a co-conspirator

In addition to the criminal prosecution provisions in the legislation, Senate Bill 1344 by Senator Burgess and House Bill 1041 by Representative Burton also include two Elder Law priority issues:

1. Exploitation injunction revisions – During the 2018 Legislative Session, Elder Law worked closely with Senator Kathleen Passidomo and Representative Colleen Burton on drafting legislation, which was signed into law by Governor Rick Scott, to provide for a 15-day temporary injunction without the assistance of an attorney and without notification to the perpetrator, who otherwise would have an opportunity to clean out the assets of the vulnerable adult. Once a temporary injunction is in place, there are options available for extending the injunction after the hearing, or the victim can seek protection through guardianship or other procedures.

The Elder Law Section has been pleased with the success of this law as another tool to fight and prevent elder abuse and exploitation.

Over the past few months, several elder law attorneys—and judges—have

continued, next page

raised the issue of also permitting a person with a power of attorney to file for the 15-day injunction and allowing an additional 30-day extension for the injunction, and each provision was included in Senate Bill 1344 and House Bill 1041.

2. Exploiter disinheritance – Another priority issue dealing with elder law addresses prohibiting a person who has been found guilty of exploitation from subsequently receiving an inheritance from the person he or she exploited. The Elder Law Section is pleased that this provision was also included in Senate Bill 1344 and House Bill 1041.

Florida is widely recognized for its laws protecting vulnerable and exploited adults. Elder Law applauds Attorney General Moody, Senator Burgess, and Representative Burton for crafting of this new landmark legislation.

Other bills of interest

As noted, the Legislative Committee is actively reviewing bills filed for this session. The following is a brief sampling of bills under review:

Civil liability for damages relating to COVID-19 – Senate Bill 72 by Senator Jeff Brandes and House Bill 7 by Representative Lawrence McClure provide requirements for civil action based on COVID-19-related claims—including that the plaintiff has the burden of proof—and the legislation provides for a statute of limitations and retroactive applicability.

Civil liability/health care providers for damages relating to COVID-19 – Senate Bill 74 by Senator Jeff Brandes and House Proposed Committee Bill PCB HHS 21-01 by the House Health and Human Services Committee, chaired by Representative Colleen Burton, provide civil liability protections for health care providers, including a standard of proof that the defendants' actions must have been grossly negligent or with intentional misconduct.

The Elder Law Section is closely evaluating all four COVID-19 liability bills.

Transfers in divorce/individual retirement accounts – Senate Bill 702 by Senator Perry Thurston and House Bill 253 by Representative Joe Geller specify that certain interests received by the transferee after divorce are exempt from claims of creditors upon being awarded to or received by the transferee.

Dementia-related staff training – Senate Bill 634 by Senator Audrey Gibson and House Bill 309 by Representative Cord Byrd require certain entities, as condition of licensure, to provide dementia-related training for new employees, with such training to be developed or approved by the Department of Elder Affairs.

Elder-focused dispute resolution process [elder care coordination] – Senate Bill 368 by Senator Dennis Baxley and House Bill 441 by Representative Brett Hage authorize courts to appoint eldercaring coordinators and to refer certain parties and elders to eldercaring coordination programs.

Estates and trusts – House Bill 609 by Representative Ben Diamond revises provisions relating to estates, trusts, dissolution of marriage, trustees, and homestead property. The bill also creates the Florida Uniform Directed Trust Act and the Community Property Trust Act.

Waivers of exemptions of applicable assets – Senate Bill 688 by Senator Lori Berman provides that certain exemptions of certain assets may not be waived unless certain conditions are met.

Attorney compensation/compensation in estate administration – Senate Bill 954 by Senator Aaron Bean and House Bill 625 by Representative Clay Yarborough authorize/revise compensation for services of attorneys in formal estate administration to be based on the compensable value of the estate and delete a presumption that such compensation is reasonable if it is based on the compensable value of the estate.

For the full text of these bills or any bills under consideration by the Legislature, please use the following links:

Florida Senate: www.flsenate.gov

Florida House of Representatives: www.myfloridahouse.gov

Legislative Committee

The Legislative Committee meets *every other* Friday at 8:30 a.m. prior to session and then *every* Friday during session. More than 3,000 bills are filed each session, and last year the Legislative Committee reviewed more than 90 bills.

If you want to participate on a substantive committee and also review/comment on the bills that are filed, please contact the ELS Legislative Committee:

Debra J. Slater, Chair
dslater@slater-small.com

Travis D. Finchum, Vice Chair
travis@specialneedslawyers.com

Grady H. Williams, Jr., Vice Chair
grady@floridaelder.com

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

You can 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.*

Social Security Administration's new policy on decanting

by Amy J. Fanzlaw

Despite decanting's surge in popularity over the past two decades, the Social Security Administration (SSA) only recently published a uniform policy statement advising how it would treat the decanting of special needs trusts (SNTs). In October 2020, SSA released its national policy on decanting.

Under the new policy, decanting is broadly defined as "the distribution or transfer of trust property from one trust to one or more other trusts."[1] The policy considers decanting to be either a transaction involving early termination of the first trust directly or a transaction in which the result is materially the same as termination.[2] Recognizing that decanting is complex and heavily dependent upon state law, review by regional chief counsel may be appropriate to determine whether decanting results in early termination or should be treated as if it does.[3] If so determined, the SSA will evaluate the decanting provision under early termination policy.[4]

There is one narrow exception. A self-settled SNT may include a decanting clause without a Medicaid reimbursement clause or otherwise meeting early termination requirements if it allows solely for a transfer of the beneficiary's assets to a self-settled SNT for the same beneficiary, i.e., a trust meeting the requirements of either 42 U.S.C. § 1396p(d)(4)(A) or 42 U.S.C. § 1396p(d)(4)(C) (a pooled SNT).[5] To qualify for this exception, the decanting clause must contain "specific limiting language" precluding disbursements other than to another self-settled SNT for the same beneficiary or to pay certain administrative expenses.[6] Presumably, the beneficiary must also be under age 65 at the time of transfer.[7] This is the first time the SSA has specifically authorized decanting from a self-settled SNT to another self-settled SNT in lieu of complying with early termination policy.[8]

Should drafting and decanting SNTs change as a result of this new policy, and if so, how? Avoiding application of the policy altogether is the most conservative approach. Strict compliance with early termination policy is tricky, and any departure will negatively affect means-tested benefits eligibility. Even if everything is done correctly, if the SSA erroneously applies early termination policy, relief comes, if at all, only after lengthy and costly appellate proceedings. The better practice—the safer practice—is to reduce the likelihood the SSA will apply early termination policy.

These three strategies will help:

1. Avoid decanting clauses

The first and most obvious way to avoid scrutiny is to avoid decanting clauses, both in drafting SNTs and decanting SNTs. Most inquiry involving decanting, as seen in the regional chief counsel precedents, centers on decanting clauses drafted in SNTs, and the national policy reflects this. Florida's decanting statute, section 736.04117, Florida Statutes, is a relatively robust and permissive decanting statute, at least compared to many states, many of which do not even have decanting statutes. Because of this, and given that decanting is wrought with many subtle complexities and hidden traps (particularly with regard to tax issues), it would be difficult for even the advanced practitioner to improve upon sec. 736.04117 without inadvertently creating potentially serious issues. In light of this, for trusts sitused in Florida, there is seldom reason to draft or rely upon decanting clauses drafted into SNTs—including, by the way, third-party SNTs. Of course, early termination policy applies only to self-settled SNTs, but the SSA has been known to confuse third-party SNTs with self-settled SNTs, so why invite mayhem unnecessarily?

2. Treat decanting like a trust modification

Second, treat decanting like a trust modification as much as possible. Some jurisdictions allow decanting to be treated either as a power to invade or a modification.[9] If decanting in one of these jurisdictions because the SNT is sitused there, opt for the modification treatment.[10] If decanting in Florida, it is a little trickier because Florida has traditionally approached decanting as an extension of the trustee's power to invade (and distribute) principal rather than a modification power. Even so, steps can be taken to make the decanting appear more like a trust modification than a trust termination. Unless the plan is to decant to a preexisting trust, make the product of the decanting an amended version of the first trust (even if amended by restatement) rather than creating a separate trust that is a distinct legal entity. Keeping as many of the provisions of the first trust as possible goes a long way toward this. In addition, absent a compelling concern that decanting would be an income-taxable event that would make filing a final tax return to start the statute of limitations desirable, consider using the same taxpayer identification number.[11] There are limitations to what can be done in Florida to make a decanting mimic a pure trust modification, but to the extent such steps do not compromise the integrity of the process, they are worthy of consideration in

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an effort to avoid potential problems with the SSA.

3. Explore other options

Third, explore options other than decanting. Rather than decanting an entire SNT to a second SNT, decant only a portion, and then focus distributions from the first SNT until assets are naturally depleted. If the beneficiary is age 65 or older at the time a self-settled SNT is decanted, exercise caution employing this route; if the SSA treats the second trust as a new SNT, then the federal age requirement for establishing a self-settled SNT would not be met, thus jeopardizing SSI eligibility. Another option for self-settled SNTs, assuming the beneficiary is under age 65 and the trustee is amenable, is for the trustee to invade principal to distribute a portion of assets to the beneficiary, who then uses them to fund a new self-settled SNT.[12] If the transaction is completed within a month, benefits may not even be lost.[13] Or … forget decanting and use judicial modification instead.[14]

Of course, it is possible to decant SNTs and draft decanting clauses in SNTs and still have the SNT considered a non-countable resource by strictly complying with the decanting policy and the early termination policy. But triggering early termination policy should be a conscious decision, not an inadvertent misstep. If the choice is made to not avoid early termination policy, strict adherence is critical. It may be wise to co-counsel with an experienced practitioner.

The SSA's new policy on decanting SNTs has several nuances and some language that could cause concern in its application. Detailed discussion of this is outside the scope of this article. For more in-depth analysis of the SSA's new decanting policy and its effect on decanting SNTs, *see* Amy J. Fanzlaw, Decanting SNTs: Preserving SSI Eligibility by Avoiding Early Termination Policy, 46 *ACTEC L.J. 43* (2020).

Amy J. Fanzlaw *is dual board certified by The Florida Bar in wills, trusts, and estates, and in elder law. She currently chairs the Special Needs Trust Committee of the Elder Law Section and is a past chair of the Elder Law Certification Committee. A former editor-in-chief of the Stetson Law Review, she focuses her practice on special needs trust planning, estate and trust planning and administration, and long-term care planning, frequently consulting with practitioners across the state and nationally on trust decanting. Outside of the practice of law, she is a writer, bourbon enthusiast, and avid Gators fan.*

Endnotes

1 *See* Soc. Sec. Admin., Program Operations Manual System (POMS), SI 01120.199 Early Termination Provisions and Trusts, Pt. D. Defining Terms for Trusts § 7, pt. E. Policy for Early Termination Provisions (Oct. 22, 2020) [hereinafter POMS SI 01120.199], https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120199 [https://perma.cc/Z39Z-8SVT].

2 *See id.* at pt. E.

3 *See id.*

4 *See id.* Early termination policy states that self-settled SNTs with an early termination clause will be a countable resource unless the SNT also requires, upon termination, reimbursement to states that provided Medicaid services before any other disbursements (except taxes and some administrative expenses) and distribution of the remaining assets to the disabled beneficiary. *See* POMS SI 01120.199.

5 *See id.* at Pt. E. § 2.

6 *See id.*

7 By federal law, SSI beneficiaries older than 64 may not establish self-settled SNTs or pooled SNTs without penalty. *See* 42 U.S.C. § 1396p(d)(4)(A), (C).

8 Previously, there was at least one regional chief counsel precedent approving an early termination clause directing a self-settled SNT to a second trust for the sole benefit of the beneficiary rather than outright to the beneficiary. *See* Soc. Sec. Admin., Program Operations Manual System (POMS), PS 01825.026 Minnesota, pt. C CPM 19-103 Six State Survey on Decanting Statutes Within Region V (Aug. 16, 2019), https://secure.ssa.gov/apps10/poms.nsf/lnx/1601825026 [https://perma.cc/9P3D-C2NX]. This view was adopted in the recent revisions to POMS SI 01120.199, at Pt. E. § 2.

9 This includes those jurisdictions that have adopted the Uniform Trust Decanting Act.

10 Decanting in a jurisdiction where the practitioner is not licensed to practice law is ill-advised. Enlist competent co-counsel in the other jurisdiction.

11 Note that for federal income tax purposes, a new TIN may be required when trust terms are not substantially similar.

12 Any concern of a later claim that the trustee has breached its fiduciary duty through this type of distribution could be alleviated by indemnification agreements from the beneficiaries and service of a trust accounting.

13 If distribution and funding were completed in the same month, waiver of the one-month SSI overpayment could be requested, thus preserving eligibility. *See* Soc. Sec. Admin., Program Operations Manual System (POMS), SI 02260.030 Impede Effective or Efficient Administration of Title XVI of the Act (Administrative Waiver), pt. B. Policy for Administrative Waiver (Apr. 4, 2016), https://secure.ssa.gov/poms.nsf/lnx/0502260030 [https://perma.cc/R7PQ-3MGJ].

14 Nonjudicial modification is rarely advised with SNTs, at least in most circumstances, but space limitations prohibit waxing on about that here.

Visit The Florida Bar's website at www.FloridaBar.org

ALS Disability Insurance Access Act ends five-month wait for disability benefits for those with Lou Gehrig's disease

by David J. Lillesand

Ordinarily, when a person is found disabled and awarded Social Security Disability Insurance (SSDI) benefits, the Social Security Administration (SSA) imposes two separate statutory waiting periods: first, a five-month waiting period before the first monthly SSDI cash benefit is due; and second, the 24-month waiting period before Medicare health insurance kicks in.

Because amyotrophic lateral sclerosis (ALS), also called Lou Gehrig's disease, can often result in death before the expiration of the waiting periods, Congress had previously ended the 24-month waiting period for Medicare coverage for victims of ALS. Recently, Congress also took steps to eliminate the five-month wait for SSDI payments to begin.

In December 2020, Congress passed and the president signed the ALS Disability Insurance Access Act (H.R. 1407/S. 578). This amendment to the Social Security Act eliminates the five-month waiting period for SSDI for anyone disabled due to ALS who applies for SSDI on or after December 23, 2020.

In January 2020, SSA published Emergency Message EM-21003 announcing these changes to staff, to the public, and instructs SSA adjudicators to flag cases where ALS is alleged. SSA will be publishing additional emergency messages with further instructions on how to process these compassionate allowance cases.

On a broader scale, advocates for persons with disabilities have been advocating for the elimination of both the five-month waiting period and the 24-month waiting period for Medicare coverage for all SSDI claimants, regardless of diagnosis, via the Stop the Wait Act, H.R.4386/S. 2496. The arguments supporting the ALS legislation apply to many other conditions, such as terminal cancer. Proponents allege that relief from the waiting periods should not depend on any senator's or congressperson's personal interest in or family experience with a particular severe disease.

***David J. Lillesand, Esq.**, is a partner of Lillesand, Wolasky & 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 special needs planning, Social Security, SSI, and Medicaid Waiver eligibility. He is the primary author of Chapter 17, "Special Needs Trusts" in the Florida Bar Lexis / Nexus publication,* Trust Administration in Florida, *10th edition.*

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.

What is a revocable transfer on death deed?

by Amy Mason Collins[1]

As elder law attorneys, we handle a variety of client matters. We help clients plan for incapacity; we plan for a client's death; we get involved in guardianship when someone did not plan for incapacity or when a client's planning simply is not enough to protect him or her from the circumstances he or she currently faces; we assist clients who need long-term care through the process of qualifying and applying for public benefits; and the list goes on.

We have many tools at our disposal to meet the needs of our clients. For estate planning, many of our clients have the goal to avoid probate at their death. Whether probate is a huge, ugly monster that should be avoided at all costs is certainly debatable, but in many cases we are able reach into our attorney tool box and find a means to meet the client's goals. These tools typically include creating and funding a revocable trust and/or making appropriate beneficiary designations on financial assets such as life insurance, retirement accounts, investment accounts, and bank accounts.

Handling the devise of real property at death, however, tends to be more challenging in the quest to avoid probate, particularly for clients who do not like the idea of trusts or their potential for increased complexity in estate planning. Florida is among the few jurisdictions that have the following two tools for avoiding probate at death for real property: (1) a "traditional" life estate deed; and (2) an "enhanced" life estate deed, also commonly referred to as a "ladybird" deed. While many states use traditional life estate deeds, Florida is among the few jurisdictions that recognize enhanced life estate deeds. While the goals of both deeds are typically the same, i.e., the ability to pass real property by operation of law to the remainder beneficiaries named in the deed on the death of the grantor (the life tenant), there are marked differences between the two deeds. Important note: the goal of this article is not to provide a complete review of the characteristics of life estate deeds (and the duties of the parties thereunder), so only a brief, non-exhaustive description and review of Florida's two existing life estate deed options are provided.

The traditional life estate deed

A traditional life estate deed is often used to grant a vested remainder interest in the real property to the named remainder beneficiaries while reserving a lifetime interest in the real property for the grantor.[2] At death, the property passes automatically to the remainder beneficiaries. Because the traditional life estate deed grants a *vested remainder* interest in the real property to the remainder beneficiaries, the grantor has the power to mortgage and create liens on the property, but no interest created by the life tenant can extend beyond the period of the life tenant's life.[3] Therefore, the life tenant may not convey more than a life estate interest or encumber the property beyond the term of the life estate interest without the consent of the remainder beneficiaries. As a result, if there is a disagreement between the grantor and the remainder beneficiaries or an estrangement of the parties, the grantor's ability to use the property to fulfill his or her own wishes at a later date can be greatly restricted. The remainder beneficiary's creditors also could cause an encumbrance on the property during the grantor's lifetime due to the remainder beneficiary's vested interest in the property.[4]

The enhanced life estate deed

In an enhanced life estate deed, the remainder interest in the real property is subject not only to the grantor's lifetime interest but is subject to divestment by the grantor through additional retained powers. The retained powers include the power to convey, lease, or otherwise dispose of the property without the joinder of the named remainder beneficiary, and the power to change the named remainder beneficiary at any time without the consent of the remainder beneficiary. In addition to the benefit of the grantor's reserved flexibility and control over the property, the Florida Department of Revenue does not consider the conveyance under an enhanced life estate to be subject to the documentary stamp tax,[5] and the Department of Children and Families does not consider this type of conveyance to be an uncompensated transfer/gift by the grantor to the remainder beneficiary.[6,7] Florida is one of only a handful of states that have enhanced life estate deeds,[8] and the legal authority for enhanced life estate deeds is provided for under Florida common law rather than being codified under the Florida Statutes.[9]

A benefit to both the traditional life estate deed and the enhanced life estate deed is that because the property passes to the remainder beneficiary by operation of law at the death of the grantor, not only is probate avoided for that property, but so are the claims of the grantor's unsecured creditors against that property after the grantor's death. It is important to note that although probate may be avoided for the grantor with these type of deeds, probate may not be avoided in all cases. If a remainder beneficiary dies prior to the life tenant and the life tenant does not address the remainder interest, then the remainder beneficiary's interest may be subject to probate through his or her estate, depending upon how the deed is worded.

Revocable...
from previous page

The revocable transfer on death deed

In 2009, the Uniform Law Commission approved the Uniform Real Property Transfer on Death Act (URPTODA). The Uniform Law Commission describes the URPTODA as providing a simple process for designating a beneficiary to automatically receive the property upon the property owner's death without the need for a probate procedure or a transfer on death deed (TOD deed).[10] Similar to the enhanced life estate deed, the beneficiary of a TOD deed has no interest in the property during the owner's lifetime, and the owner retains full power to transfer or encumber the property or to revoke the deed.

While many jurisdictions had their own versions of a TOD deed before the Uniform Law Commission drafted the URPTODA,[11] the Commission reports that several jurisdictions have since enacted or introduced legislation based on URPTODA for TOD deeds.[12] TOD deeds may be coming to Florida. The Real Property, Probate and Trust Law Section (RPPTL) of The Florida Bar is working on such a bill for legislative consideration. But why do we need TOD deeds in Florida if we have enhanced life estate deeds? Some practitioners argue that because the authority for enhanced life estate deeds is provided under Florida common law rather than pursuant to statutory framework, there is uncertainty under the law as to how certain interests are protected and treated. While the Florida Uniform Title Standards have been updated to address common issues raised by enhanced life estate deeds,[13] which helps our use of this type of deed in our practices from a practical perspective, not all practitioners agree with the positions taken under the title standards.[14]

While RPPTL has not published a final version of its proposed bill for TOD deeds, the goals of the current draft are to provide more certainty and uniformity in revocable deed transfers relating to definitions, disclosures, methods, and forms for the transfer; acceptance by the beneficiary; and revocation of the transfer and disclaimer of the transfer by the beneficiary. One of the most marked differences in the draft TOD deed legislation is the protection and process given to creditors holding involuntary liens that are not specific to the real property but that have attached to the real property during the grantor's lifetime and after the recording of the TOD deed.

The stated purpose of RPPTL's draft bill on TOD deeds is not to replace enhanced life estate deeds (similar to the law in Texas, which currently has both enhanced life estate deeds and TOD deeds) or to eliminate the existing benefits that are currently afforded to enhanced life estate deeds as described above. Elder law practitioners, however, may have concerns about whether title companies will begin to favor one type of deed over the other or whether Florida's Department of Children & Families may change its policy or position with regard to enhanced life estate deeds, given the option of TOD deeds.

Although a bill on a Florida version of TOD deeds may not be introduced in the 2021 Florida Legislative session, leadership for the Elder Law Section believes that a proposed bill on TOD deeds in Florida is on the horizon. If you have interest in following and participating in the final development of the TOD deed legislation, please reach out to the Elder Law Section's Legislative Committee.

***Amy Mason Collins, Esq.**, is an associate attorney of Waldoch & McConnaughhay PA in Tallahassee, Florida. She chairs the Estate Planning and Advance Directives, Probate Committee of the Elder Law Section of The Florida Bar.*

Endnotes

1 The author extends her gratitude to Emma Hemness, Esq., who so graciously and generously shared her presentation materials, Enhanced Life Estate Deeds ("Ladybird Deeds"), for the author's reference and use in drafting this article.

2 *See* RALPH E. BOYER, ET AL., THE LAW OF PROPERTY, at 109-10 (4th ed. 1991).

3 *See id*. at 92.

4 *See* Joseph M. Percopo, *Ladybird Deed: An Inexpensive Probate Avoidance Technique*, ACTIONLINE, at 22-23, footnote 28 (Spring 2020).

5 *See id*, footnote 31 (referencing Letter of Technical Advice No. 00B4-024 addressed to Fund member, Mike Pyle, Esq. (2000)).

6 See Mondschein, Leonard E., *Elder Law Advocate* "Estate and Elder Law Planning with Lady Bird Deeds," Summer 2014.

7 *See* FLA. DEP'T OF CHILD. & FAM., ACCESS FLA. PROG. POL'Y MANUAL, Ch. 1640.0305.03, Life Estate Ownership (MSSI, SFP), https://www.myflfamilies.com/service-programs/access/docs/esspolicymanual/1630.pdf.

8 In addition to Florida, the following states have enhanced life estate deeds: Texas, Michigan, Vermont and West Virginia.

9 *See* Oglesby v. Lee, 73 So. 840 (Fla. 1917).

10 *See* UNIF. REAL PROP. TRANSFER ON DEATH ACT pref. note (UNIF. L. COMM'N 2009), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=d61e6b8f-7e1b-65d1-8e97-6247f35b0150.

11 Prior to 2009, the following jurisdictions had their own version of revocable transfer on death deeds: Missouri, Kansas, Ohio, New Mexico, Arizona, Nevada, Colorado, Arkansas, Wisconsin, Montana, Oklahoma, Minnesota, and Indiana.

12 After the creation of the URPTODA, the following jurisdictions have either enacted or have introduced legislation on revocable TOD deeds based on the URPTODA in some form: New Hampshire (introduced), Tennessee (introduced), Mississippi, U.S. Virgin Islands, Montana, Utah, Maine, Texas, South Dakota, Washington, Alaska, West Virginia, District of Columbia, New Mexico, Virginia, Nebraska, North Dakota, Illinois, Hawaii, Oregon, and Nevada.

13 *See* TITLE ISSUES & STANDARDS CMTE., THE FLA. BAR REAL PROP., PROB. & TR. L. SECTION, THE FLORIDA UNIFORM TITLE STANDARDS, ch. 6.10--.12 (No. 4, 2020) (https://www.rpptl.org/Uploads/UTS%20Updated%2011.4.2020.pdf).

14 THE FLA. BAR. REAL PROP., PROB. & TR. L. SECTION, WHITE PAPER on proposed amendment of §§733.607, 733.702, 733.705, and 733.707, Florida Statutes, and enactment of §733.6075, Florida Statutes, to create an orderly process for the payment of enforceable claims of creditors from a decedent's interest in non-exempt, non-probate assets when the probate estate and any revocable trust are insufficient to pay all enforceable claims, at 52 (2013) (https://rpptl.org/images/PT_2013_1.pdf).

SECTION NEWS

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

Every year, The Florida Bar recognizes the pro bono service of extraordinary Florida Bar lawyers with The Florida Bar President's Pro Bono Service Awards. This year, two of the Elder Law Section's dedicated members received the Pro Bono Service Award for their judicial circuit. Florida Bar President Dori Foster-Morales presented the awards in a virtual ceremony before the Florida Supreme Court on January 28, 2021. Congratulations to …

Beth Kathryn Roland

9th Judicial Circuit (Orange and Osceola counties)

Beth Roland is one of the Guardian ad Litem's most outstanding pro bono attorneys. A partner at a busy family law firm, Roland still consistently drafts high-quality, insightful briefs for the GAL program. Roland was one of the project's earliest volunteers, and she continues to take cases. Since June 2017, Roland has donated more than 286 hours to brief 23 cases for the Defending Best Interests Project. Roland is a tremendous voice for Florida's dependent children, and her devotion to pro bono service is evident to all who have the pleasure of working with her. Roland has positively influenced so many lives and embodies all of the qualities represented in The Florida Bar President's Pro Bono Service Award. Roland earned her JD in 1992 from Wake Forest University School of Law and is an associate attorney at the Family First Firm in Central Florida, where she practices in the areas of probate, trust administration, guardianship, estate planning, and Medicaid.

Jill Robin Ginsberg

17th Judicial Circuit (Broward County)

Jill Robin Ginsberg's work ethic—whether in the field of law or the community—coupled with her altruism inspires many. Ginsberg is a volunteer with Legal Aid Service of Broward County working mainly with their MISSION UNITED Veterans Pro Bono Legal Project. The Project, in partnership with the United Way of Broward County, provides access to civil justice for military veterans. In 2015, Ginsberg won the 2015 Mission United Star Attorney Award. She averages more than 250 pro bono hours per year. Through her pro bono work, Ginsberg restored rights to a ward when his guardians refused; helped restore people's benefits; helped people maintain benefits when they were about to lose them; arranged a guardianship when a client had no one and there was no one to assist; and probated for veterans to get the funds from estates when they could not access the funds. Ginsberg earned her JD from Brooklyn Law School in 1987 with a concentration in tax and family law. She is a partner attorney at Ginsberg Shulman in Fort Lauderdale.

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SECTION NEWS

Meet Emily Young, the Elder Law Section's new administrator

Emily Young

The Elder Law Section is pleased to welcome Emily Young in her new role of administrator. Originally from Central Florida, Emily relocated to Tallahassee for college and subsequently made her home in the capital city. Emily is a graduate of Florida State University and comes to The Florida Bar with a strong professional and customer service background.

Outside the office, Emily is an archery coach and an avid traveler, and she has a particular love for bull terriers. Please contact her at 850/561-5650 or eyoung@floridabar.org if she can be of assistance.

Thank you, Leslie!

We bid a fond farewell to Leslie Reithmiller and thank her for her years of excellent service as our section administrator. She hasn't gone far—Leslie assumed the role of assistant to The Florida Bar's president in January. We wish her well in her new endeavor and hope to see her at Bar meetings in the future.

Mark your calendar!

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SECTION NEWS

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PRACTICE MANAGEMENT

Did you buy a furnished apartment?

by Audrey J. Ehrhardt

It may sound like an unusual question to ask, especially when it comes to your law practice. After all, you are mostly likely not running your law practice in an apartment. Although in the new normal of the pandemic world, you may very well be.

No. The heart of this question dives into your law practice management software to ask if you are "sleeping on the floor" of a platform that does not have what you need to live comfortably, or better yet, thrive in your forever home.

When it comes to your law practice management software, how much do you use it? Are you spending time each week, each day, each hour, each minute actively using it to run your law practice? Is your support staff using it to get work done and to record their time? Are you tracking billable hours? Running reports to ensure you have the most effective law firm possible? Adding scripts so anyone who answers the phone knows the information to share and also to gather? These questions just skim the surface of what your law practice management software can do for you.

What about how it interfaces with your clients? Although there continues to be discrimination against older Americans that assumes they cannot use technology, this is simply not true.[15] The same Florida senior who is coming to you for your services is also going to see doctors, dentists, and medical specialists who require them not only to use technology but also be able to maneuver around it in a sophisticated manner.

Hiding behind the assumption that a senior cannot use technology is no longer a defense for a practicing attorney not to move into an ecosystem that supports seamless electronic communication between all parties. With the continued issues the postal service is facing, it may no longer be a smart business decision for a law firm to enforce sending documents by pen and paper mail. Instead, there is real power in the ability of the receptionist or client manager to be able to share information electronically, in real time, while on the phone with an existing client, and it may make all the difference in being hired or not. For existing clients, that simultaneous transfer of data not only may help the law firm to reduce cybersecurity threats, but also ensure it does not get stuck in a long-standing battle to receive mailed responses or become trapped in continual email conversations.

Let's not overlook the power of having a potential client provide his or her own data in an electronic format. When this process is built into the law practice management system, it can be coded to use through the duration of the case. This transfer of information can include everything that transpires from the minute the person is interested in hiring the firm through the closure of the case. Gone are the days of misspelled names. Gone are the days of missing, crucial information. Instead, these practices encourage transparency, efficiency, and increased overall profitability through a reduction of administrative and client management time.

Law practice management software, however, can be challenging. There are more than 40 law practice management software options on the market. There are 100 more that are not specific to lawyers but can be modified to work for them. While there are many shared characteristics, many are specific to certain types of software platform options. The key is determining what you need and what your support staff needs. Then you must train yourself to actually use the software you purchase.

Look at your law practice management software. Ask yourself these key questions: Is it what I need? Will it help me build the firm I want? Does it really run my practice? Can it perform the way I want to have my practice run? Does it get me the data I need to make critical decisions? Does it reduce the burden of running my practice? If the answer to these questions is not a resounding yes, it may be time to think about making a change.

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

Endnote

1 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6801827/

Tips & Tales

by Kara Evans

Selling the homestead before the homestead order is signed

The tale: A pair of panicked siblings come to your office late one Friday afternoon. Both of their parents passed away from COVID-19 in October 2020. The siblings spent the last few months cleaning out their parents' home and putting it up for sale. The home was under contract right away, but now the title company is asking for some documents from the court. The siblings do not understand. Both parents' last will and testaments state the siblings inherit the home equally; what does the court have to do with it? The closing is in 45 days, and they need your help. In addition to the homestead question, the siblings' parents had credit card debt. What do they do with the bills?

The tip: Beneficiaries often do not understand that the last will and testament directs the distribution of assets but does not actually pass ownership of those assets. A supervised court process, known as probate, is required to effect the change of title. Of course, homestead property is a bit different, and while this article will not go into the finer details of homestead title, it will explain how to assist the siblings.

Section X, Article 4(a)(2)(b) of the Florida Constitution protects a Florida resident's homestead property from the claims of the deceased owner's creditors when it passes to an heir. Under Probate Rule 5.405, the probate court has the authority to determine whether a certain piece of real property constitutes homestead and is entitled to the protection granted under the Constitution. While there are other proceedings that could be used to establish homestead, such as a quiet title or declaratory judgment action, the most common method is a probate proceeding. The process is fairly simple, but time consuming. First, a probate proceeding must be established and a petition to determine homestead status of real property filed. It is recommended to check your local court rules. Many judges will not sign the homestead order until the notice to creditors period has expired. Florida Probate Rule 5.041 requires that "every petition or motion for an order determining rights of an interested person, and every other pleading or document filed in the particular proceeding which is the subject matter of such petition or motion … shall be served on interested persons." Creditors, being interested persons, must be notified of the homestead petition. After all, if the property is determined to be non-homestead, the asset will be available to satisfy creditors' claims.

Technically, the siblings are correct. Death is the time when inherited interests vest. They do already own the home according to section 732.514, Florida Statutes; however, without the order determining homestead, there is no official record of the chain of title. The purchasers are not going to take the siblings' word that they own the home. Any purchaser would want title insurance, and no title insurer would offer insurance without written and recorded evidence of title. This brings us back to the siblings' dilemma of how to sell the homestead prior to the order determining homestead being issued.

I have had success using the following approach. A probate should be filed and a personal representative appointed. The personal representative should file a petition to sell real property. Note that this petition will differ from a petition to sell real property filed in an intestate estate or a testate estate where the last will and testament did not confer the power of sale. This petition to sell real property should lay the groundwork for a designation of homestead, including language to the effect that the decedent was a Florida resident for x number of years, resided upon the property, and claimed the homestead tax exemption for such property. The petition should also state that a petition to determine homestead has been or will be filed in the proceeding. Do not state that the property is homestead, just that the petitioner believes the real property to be exempt homestead. The beneficiaries of the estate and any other interested parties should be listed in the petition. Most important, the petition should state that all the proceeds from the sale of this property will be held in escrow until all creditors have been ascertained, are noticed of the petition to determine the property to be protected from claims, and the court issues an order determining homestead status of real property or otherwise directs how the proceeds should be paid.

Formal notice of this petition should be sent to all interested parties. Depending on your local court rules, the order allowing the sale could be signed immediately or as soon as the formal notice time frame expires. Either way, 45 days should provide sufficient time to accomplish your task if handled timely.

If you would like an example of the above-described petition and the accompanying order, email your request to kara@karaevansattorney.com and I will be happy to share.

***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

Didn't file your tax return?
Consequences may impact Social Security benefits

I regularly handle non-filer tax cases, which are cases where, for a number of years (sometimes a decade or more), the "taxpayer" has not filed a federal income tax return. Most of the time I need to address the civil and sometimes criminal implications in an effort to help the non-filing client get on with his or her life.

What is often not discussed is the possible impact of non-filing on Social Security benefits. I have seen this arise in several ways. The client reaches retirement age and finds he or she does not have enough quarters of reported credit to obtain benefits. Sometimes this arises when the client is injured or develops a chronic medical condition and applies for Social Security Disability, only to be denied for lack of sufficient quarters of credit.

This issue also arises with long-term household or other "employees" who were paid "off the books." The "employee" retires or becomes disabled, and applies for Social Security benefits. The application is denied because this worker has no Social Security credits and, therefore, no benefits. The "employee" then proceeds against the "employer." I have even been retained by a trust company to address such a case where the long-term "employee" never filed a personal income tax return reporting his or her income; but the employer client of the trust company also never reported the payments.

So, what is the problem?

The Social Security Administration has a strict deadline for filing an earnings record. The general rule is that an earnings record can be corrected at any time up to three years, three months, and 15 days after the year in which the wages were paid or the self-employed income was derived 42 USC § 405 (Social Security Act §205(C)(1).

The Social Security Act § 205 (C)(5), addresses when the earnings record can be corrected after the deadline. Many of the exceptions address technical reporting errors.

There are even some exceptions for late filed income tax returns showing wages. Unfortunately, 42 USC § 205 (C)(5) states "except that no amount of self-employment income of an individual for any taxable year (if such return or statement was filed after the expiration of the time limitation following the taxable year) shall be included in the Commissioner's record … ."

There are various technical exceptions, but the basic conclusion is this: if income tax returns are filed too late or not at all, while it may be possible to "fix" wages in the Social Security record, it will be almost impossible to do so for self-employment income.

Practice tip: Be alert to this issue while doing planning, particularly during the pandemic, when increasing numbers of workers are considering "calling it quits" and retiring or hoping to "go out" on disability.

ADVERTISE in *The Elder Law Advocate!*

The Elder Law Section publishes three issues of *The Elder Law Advocate* per year. The deadlines are March 1, July 1, and November 1. Artwork may be mailed in a print-ready format or sent via email attachment in a .jpg or .tif format for an 8-½ x 11 page.

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Tax deadline on weekends and holidays—Back to basics

I recently received a call from a first-rate international tax lawyer. His firm was concerned. The firm had filed an appeal of a significant offshore reporting penalty. (I often call something significant if the amount involved far exceeds my malpractice insurance coverage limits.) But it was two days late. Or maybe it wasn't.

The due date for filing the appeal fell on a Saturday. The appeal was otherwise properly filed, immediately, on the following Monday. The attorney thought the appeal was filed timely, but wanted to be sure.

I said I would take a look. I started with the language on the penalty notice and then tried to find the penalty procedure in the I.R.M. (Internal Revenue Manual, essentially the manual of internal IRS procedures). I found a lot of good stuff, but not regarding the due date on the *exact* penalty at issue. Surely the answer shouldn't be that hard to find. I started reading some articles. Still, nothing on that exact penalty.

Now what? As we were all taught early on and which I (almost) forgot—go back to the law (or as they taught us in LL.M. tax school, "What does the Code say?"). In this case, we are referring to Title 26, the Internal Revenue Code. You do not need to be a tax lawyer to understand this Internal Revenue Code section:

> **26 U.S. Code § 7503. Time for performance of acts where last day falls on Saturday, Sunday, or legal holiday**
>
> When the last day prescribed under authority of the internal revenue laws for performing any act falls on Saturday, Sunday, or a legal holiday, the performance of such act shall be considered timely if it is performed on the next succeeding day which is not a Saturday, Sunday, or a legal holiday. For purposes of this section, the last day for the performance of any act shall be determined by including any authorized extension of time; the term "legal holiday" means a legal holiday in the District of Columbia; and in the case of any return, statement, or other document required to be filed, or any other act required under authority of the internal revenue laws to be performed, at any office of the Secretary or at any other office of the United States or any agency thereof, located outside the District of Columbia but within an internal revenue district; and the term "legal holiday" also means a Statewide legal holiday in the State where such office is located.

So, while our gut told us that the appeal was timely filed, it was much more comforting to confirm it with a section of the Internal Revenue Code. While none of us likes to wait until the last minute to file something with a strict deadline (unless timing is the tactical plan), it is helpful to know that we at least do have the weekends and legal holidays!

***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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Summary of selected case law

by Elizabeth J. Maykut

Common law "intent of decedent" controls disposition of remains, not section 497.005, Florida Statutes, which governs funeral establishments

Giat v. SCI Funeral Serv. of Fla., LLC, 45 Fla. L. Weekly D2735 (Fla. 4th DCA Dec. 9, 2020)

Issue: Does section 497.005(43), Florida Statutes, which defines a "legally authorized person" who may take possession of a dead human body, control the disposition of remains?

Answer: No.

The widow had arranged for the decedent's cremation with a crematory. The decedent's son filed suit to enjoin the crematory from cremating the decedent's remains, arguing that his father had told him he wanted to be buried in accordance with orthodox Jewish law and custom and not cremated. The widow argued the decedent was not religious and had often stated his desire to be cremated so his ashes could remain with her. The trial court denied the injunction, ruling that the spouse's intent controlled.

On appeal, the son argued the trial court should not have applied section 497.005(43), Florida Statutes, which governs funeral homes, because by its language, it does not apply to disputes between private parties as to the disposition of remains.

The Fourth District held that common law and not section 497.005(43), Florida Statutes, controls a dispute as to disposition of a decedent's remains. It reasoned that the focus of chapter 497 on the definition of "legally authorized person" only specifies the person with whom a funeral home may contract to arrange services. It does not purport to designate the manner of disposition of remains where there is a dispute among family members. Rather, when a dispute arises as to burial type or location, that is a factual question that must be resolved by the court. Here, where there was no will or other written instructions regarding the disposition of remains, the trial court should have held an evidentiary hearing and received evidence as to the decedent's intent. The case was remanded to the lower court for an evidentiary hearing to determine what the decedent's intentions were with respect to his remains.

Practice tip: Encourage estate planning clients to include in their last will and testament their intent as to the disposition of their remains and to nominate someone to take possession of their body after death. Encourage guardians to determine who their wards want to have control over their remains and document those instructions.

Creditor's satisfaction and release filed in probate may not be rescinded where an error in the underlying statement of claim was the result of an inexcusable lack of due care by attorneys

Mellini v. Paulucci, 45 Fla. L. Weekly D2843 (Fla. 5th DCA Dec. 18, 2020)

Issue: May the probate court allow a creditor to rescind a satisfaction and release when the creditor's attorneys committed a unilateral mistake in preparing the underlying statement of claim and advising the creditor to sign the satisfaction and release when the actual claim amount was not in fact fully satisfied?

Answer: A satisfaction and release cannot be rescinded based on a unilateral mistake by the creditor's attorney(s) that was the result of an inexcusable lack of due care in preparing the underlying statement of claim and thereafter directing the creditor to execute the satisfaction and release of claim.

A creditor who was owed millions of dollars under a promissory note executed by her late father filed a statement of claim in her father's probate estate. The

Case law ...
continued

statement of claim was prepared by her attorneys. After she received payment from her father's estate, based on her attorneys' advice, she filed a satisfaction and release in the estate and returned the promissory note marked "paid in full." Eighteen months later, the creditor's accountant discovered the creditor's attorneys had failed to calculate interest correctly when they calculated the amount of the original statement of claim and the creditor was still due $1,726,560.

The trial court allowed the creditor to amend her claim and directed the personal representative to pay it. The Fifth District stated that the general rule is that a party may rescind a contract based on a unilateral mistake unless the mistake results from an inexcusable lack of due care or the other party has so detrimentally relied on the contract that it would be inequitable to order rescission. Here, the court found that the creditor's attorneys' failure to review the terms of the settlement agreement that led to the issuance of the promissory note and the note itself before preparing the statement of claim and later advising their client to execute the satisfaction and release constituted an inexcusable lack of due care. Therefore, the creditor failed to establish a legitimate basis for setting aside the satisfaction and release of claim.

Practice tip: Take care in advising creditor clients by reviewing the supporting documentation for a claim before preparing a statement of claim or advising they sign a satisfaction and release of claim. If you are representing the personal representative and receive a payment from a creditor that looks like it may be incorrect, take the time to investigate it to avoid the creditor discovering the mistake later and seeking to rescind the satisfaction and release.

Elizabeth J. Maykut *is a Florida Bar board certified elder law attorney who focuses her practice on guardianship, Medicaid planning, estate planning, and probate, and is of counsel with the law firm of King & Wood PA in Tallahassee, Florida. A graduate of San Diego State University (BA, 1988) and Florida State University College of Law (JD, 1994) who is AV-rated by Martindale-Hubbell, her prior experience includes several years practicing Florida administrative law with a large multinational firm that represented the Florida secretary of state in the 2000 presidential election litigation.*

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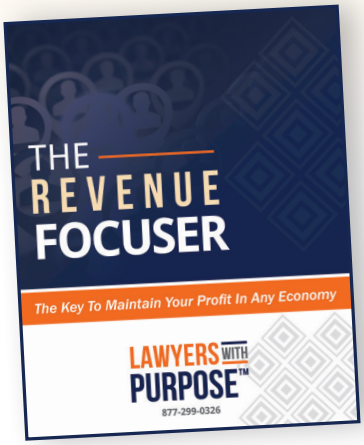

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