The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

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The Elder Law Advocate

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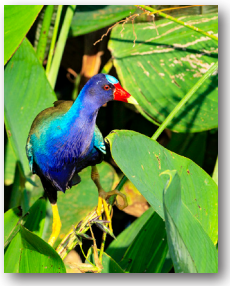

ON THE COVER

Purple Gallinule
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8/2021

Contents

The deadline for the WINTER 2022 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.

Message from the Chair

by Carolyn Landon

Hopes and aspirations for the new year

Welcome to a new year of, we hope, open offices and in-person meetings!

First and most important, my thanks to Steve Hitchcock for his dedicated leadership during a most difficult time. None of us were prepared for the challenges COVID-19 brought to our personal and professional lives. Nevertheless, Steve managed to get his goal of the Elder Law Concepts and Board Certification Review Course off and running. We will be continuing with Steve's plan this year.

This was not the first time Steve has shown such amazing leadership skills. When he was treasurer of the section, he spent countless hours with our then program administrator, Chris Hargrett, in studying and learning how the accounting systems work for us in the Elder Law Section. Steve then patiently taught the Executive Committee what we needed to know about the finances in order for us to have a fiscally responsible section. That was truly a gift that will benefit the section for many years to come.

Steve had all the work and none of the glory. His "crowning" was done virtually. His swan song was a small and last-minute (BUT FUN!) celebration. He missed getting to hold his Elder Law Section Retreat in Boston, where he planned to eat "chowda" and Boston cream pie. We had plans to do Boston for Steve and to make up for lost time this October. But alas, that nasty C-19 again raised its ugly head, and in the interest of the health and safety of our members, we postponed that celebration. However, do not despair, our chair-elect, Howie Krooks, has graciously agreed to Boston being the retreat's location in fall 2022.

Speaking of retreats, I remember my first one. It was in the early 2000s at a hotel in South Palm Beach. I reluctantly signed up, resigned to spending time with no one I knew. I walked into the hotel and was soon greeted by a woman with a very friendly smile and the question "are you here for the Elder Law Retreat?" When I responded in the affirmative, she replied, "I'm Vicki Bowers and I'm happy you are here." I think Vicki introduced me to everyone there, and I will always remember them as being the friendliest group I'd ever been around. Vicki told me what books I should buy and what seminars/conferences I should attend. She made certain I had her contact information and let me know she was available for any help I needed.

That memory leads me to my goal for this coming year. I want everyone who attends an Elder Law Section event to have the same positive experience. In order for us to best serve the community, we need to be willing and able to help and encourage elder law attorneys. Toward meeting that goal, I have enlisted the help of Collett Small to chair a new committee: Inclusivity & Diversity.

Our Strategic Planning Committee, also under the leadership of Collett, is continuing to work on furthering the vision and direction of our section. We are meeting frequently and welcome any suggestions from all of our valuable members.

We will face more challenges this year: an unexpected protracted COVID-19 season; concerns about pooled trusts for our clients over 65; and bad publicity for guardianship—to name just a few. But we are resilient, and we will come through these challenges stronger than we've ever been because that is who we are.

I won't be able to greet you at our retreat this year, but I am optimistically looking forward to seeing you in person in January at our Annual Update. Take care, stay safe, and let us know what we can do to help you.

Capitol Update

by Brian Jogerst

Session 2021: Lawmakers provide expanded protections for vulnerable and exploited adults

Heading into the 2021 Legislative Session, the financial fallout from COVID-19 was on the minds of legislators, staff, and advocacy groups. As a result of the downturn in the economy, some analysts anticipated budget reductions between $4 and $5 billion. Florida's economy quickly rebounded, however, and revenues significantly improved. Coupled with the increase in federal relief funds, many of the feared budget reductions were not necessary, and Florida placed additional funds into its reserve funds.

When committee hearings began in January, both the House and Senate implemented COVID protocols, including weekly testing for legislators and staff prior to entering the Capitol. Public testimony was done via WebEx or livestreamed from the Donald L. Tucker Civic Center. Groups and organizations that historically traveled to Tallahassee for "their day in the Capitol" canceled and transitioned to "virtual days" rather than in-person meetings.

Despite the uncertainty, the session ended on time, the budget was balanced, and several bills of interest were adopted by the Legislature.

Session overview

Once again Elder Law actively met—both in person and virtually—with key legislators and cabinet members to advance protections for Florida's elderly and vulnerable adults. The following is an overview of the 2021 Session.

Session quick facts

- Number of bills filed: 3,140
- Number of amendments filed: 2,632
- Votes taken: 3,788
- Bills passed by House and Senate: 275

Expanded protections for vulnerable and exploited adults

Senate Bill 1344 by Senator Danny Burgess and House Bill 1041 by Representative Colleen Burton originated

Call for papers – *Florida Bar Journal*

Carolyn Landon is the contact person for publications for the Executive Council of the Elder Law Section. Please email *carolyn@landonlaw.net* for information on submitting elder law articles to The Florida Bar Journal for 2021-2022.

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.

as a proposed legislative initiative of the Academy of Florida Elder Law Attorneys and the Elder Law Section of The Florida Bar (AFELA/ELS) to address two major issues:

1. Exploiter disinheritance
2. Exploitation injunction revisions

Through discussions with the Department of Legal Affairs and the Office of the Attorney General, specifically individuals within Attorney General Moody's senior leadership team and the Office of Statewide Prosecution, the attorney general sought to strengthen the ability of the Office of Statewide Prosecution as it relates to its authority to pursue and bring criminal charges against individuals who abuse, neglect, or exploit elderly or disabled individuals. Working with Attorney General Moody, Senator Burgess, and Representative Burton, all three issues were included in the legislation.

Attorney General/Office of Statewide Prosecution

HB 1041 makes the following changes to these sections of Florida Statutes:

- Amends s. 16.56, F.S., to authorize the Office of Statewide Prosecution to investigate and prosecute crime under Ch. 825, F.S.;
- Amends s. 825.101, F.S., to include the defined terms *improper benefit* and incorporates the existing definition of *kickback* used in s. 456.054(1), F.S., and later incorporates receiving either as a breach of fiduciary duty pursuant to s. 825.103, F.S.;
- Amends s. 825.102, F.S., to expand the offense of abuse, aggravated abuse, and neglect of an elderly person or disabled adult by prohibiting intentional isolation or restriction of access from family members which can reasonably be expected to result in physical or psychological injury with the intent to promote, facilitate, conceal, or disguise some form of criminal activity;
- Amends s. 825.103, F.S., to prohibit seeking out appointment as a guardian, trustee, or agent under a power of attorney (POA) with the intent to obtain control over the victim's assets and person for the bad actor or a third party's benefit; and
- Amends s. 825.103, F.S., to prohibit the intentional conduct of a bad actor who modifies or alters the victim's originally intended estate plan to financially benefit the bad actor or a third party unless:
  - The person has a court order;
  - There is a written instrument executed by the elderly person or disabled adult, sworn to and witnessed by two persons who would be competent as witnesses to a will authorizing the changes; or
  - It is the action of an agent under a valid POA executed by the elderly person or disabled adult authorizing the modifications.

Exploiter disinheritance

HB 1041 made a number of changes to how and what happens if a person is convicted of the following offenses on an elderly or disabled person in any state or jurisdiction:

- Abuse;
- Neglect;
- Exploitation; or
- Aggravated manslaughter.

An individual found to have committed any of those offenses shall be seen as having predeceased the victim; shall not inherit from the victim's estate, trust, or other beneficiary interests; and shall be prohibited from serving as a personal representative of an estate.

In the absence of a qualifying conviction of the enumerated offenses, the court may determine by the greater weight of the evidence whether the bad actor's conduct caused the victim's death.

Exploitation injunction revisions

During the 2018 Legislative Session, Elder Law worked closely with Senator Kathleen Passidomo and Representative Colleen Burton on drafting legislation that 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 the temporary injunction is in place, there are options available for extending the injunction after a hearing, or the victim can seek protection through guardianship or other procedures. Elder Law has been pleased with the success of this law as another tool to fight and prevent elder abuse and exploitation.

HB 1041 expands the injunction provisions under s. 825.1035, F.S., to authorize an agent under a durable power of attorney (DPOA) to also petition for an injunction for protection against exploitation of a vulnerable adult if the DPOA specifically grants this authority and also permits the court to make a one-time extension of the injunction for up to 30 days. Additionally, changes to s. 825.1035, F.S., amend the statutory form for a petition for injunction to include sufficient identifying information about the petitioner or vulnerable adult.

HB 1041 passed the Florida House and Senate unanimously, with votes of 117-0 and 39-0, and was signed into law by Governor DeSantis [Chapter 2021-221].

Florida is widely recognized for its laws protecting protections vulnerable and exploited adults. Elder Law is grateful to Attorney General Moody, Senator Burgess, and Representative Burton for crafting this new landmark legislation and further strengthening Florida's protections.

COVID-19 civil liability protection

Prior to the session, the governor along with the House and Senate legislative leadership announced their support for COVID civil liability protections for business and health care providers. Initially the bills were separate—one for business and one for health care—but the bills were combined prior to adoption.

continued, next page

The comments below focus on the health care provider sections of the bill.

Liability protections for health care providers

- The liability protections for COVID-19-related claims against a health care provider mainly relate to claims:
  - Arising from the diagnosis or treatment of a person for COVID-19;
  - The provision of a novel or experimental COVID-19 treatment;
  - The transmission of COVID-19; and
  - The delay or cancellation of a surgery or medical procedure.
- To prevail in a claim against a health care provider, the plaintiff must plead the claim with particularity and generally must prove by the greater weight of the evidence that the health care provider was grossly negligent or engaged in intentional misconduct.
- A COVID-19-related lawsuit against any type of defendant must be brought within one year after a cause of action accrues unless the cause of action occurred before the effective date of the bill; however, if a cause accrues before the effective date of the bill, the plaintiff has one year from the effective date of the act to bring the claim.
- While the bill takes effect upon becoming a law, it applies retroactively; however, the bill does not apply in a civil action against a particular named defendant to a suit filed before the bill's effective date.

Affirmative defenses include:

- Substantial compliance with government-issued health standards relating to COVID-19;
- Substantial compliance with government-issued health standards specific to infectious diseases in the absence of standards specifically applicable to COVID-19;
- Substantial compliance with government-issued health standards relating to COVID-19 or other relevant standards was not possible due to widespread shortages of necessary supplies, materials, equipment, or personnel;
- Substantial compliance with any applicable government-issued health standards relating to COVID-19 or other relevant standards if the applicable standards were in conflict; and
- Substantial compliance with government-issued health standards relating to COVID-19 or other relevant standards was not possible because there was insufficient time to implement the standards.

Senate Bill 72 by Senator Jeff Brandes was adopted by the Legislature and was the first bill signed into law by Governor DeSantis [Chapter 2021-001].

Attorney compensation/compensation in estate administration

House Bill 625 by Representative Clay Yarborough and Senate Bill 954 by Senator Aaron Bean deleted the statutorily defined probate fee schedule, and the 2021 Session marked the third consecutive session the bill was filed. Elder Law was concerned with the elimination of the fee schedule but worked with the sponsors of the bill to maintain the fee schedule along with "guard rails" for fee disclosures.

The legislation provides for the following:

- Amends ss. 733.6171 and 736.1007, F.S., to require that certain disclosures be made by an attorney to the personal representative or trustee in an estate or initial trust administration;
- Clarifies that if an attorney intends to use the statutory schedule for the determination of fees in an estate or initial trust administration, he or she must make specified disclosures to the personal representative or trustee and must obtain his or her signature acknowledging receipt of such disclosures;
- An attorney who fails to provide the required disclosures may not be paid for legal services without prior court approval of the fees or the written consent of all interested parties or qualified beneficiaries;
- An attorney representing a personal representative or trustee using the fee structure provided in the statutory schedule must provide a summary of ordinary and extraordinary services rendered at the conclusion of such representation; and
- Such summary of services rendered must include the total hours devoted to the representation or a detailed summary of the services performed.

House Bill 625 was adopted by the Legislature and signed into law by Governor DeSantis [Chapter 2021-145].

Elder dispute resolution

House Bill 441 by Representative Brett Hage and Senate Bill 368 by Senator Dennis Baxley created an alternative dispute resolution option in which court-appointed eldercaring coordinators assist elders, their legally authorized decision makers, and their family members in resolving high-conflict disputes that can impact an elder's safety and autonomy.

The bill authorizes the court to refer certain cases to eldercaring coordination and establishes a specified framework for the referral process.

Eldercaring coordination can assist elders, family members, and other parties by:

- Resolving non-legal issues outside of court;
- Fostering self-determination among both elders and family members;
- Monitoring high-risk situations for signs of elder abuse, neglect, or exploitation; and
- Offering an additional source of support during times of transition.

Elder Law actively supported House Bill 441, which was adopted by the Legislature and signed into law by Governor DeSantis [Chapter 2021-67].

Estates and trusts

House Bill 609 by Representative Ben Diamond and Senate Bill 1070 by Senator Lori Berman amended the laws on the transfer of property through wills, probate, and trusts.

The probate law was amended to provide that, absent specific intent in the divorce judgment, an ex-spouse is not a beneficiary of the former spouse's will, regardless of when the will was signed. (Under prior law, an ex-spouse remained a beneficiary after divorce if the will was signed prior to the marriage and the deceased failed to change the will after the divorce.) Additionally, the new legislation requires a probate court to allow a surety bond in lieu of the requirement to use a depository account; provides that the limitations periods for an action against a trust's trustee apply to directors, officers, and employees of the trustee; and applies homestead property law applicable to wills to homestead property held in a decedent's revocable trust.

Senate Bill 1070 was adopted by the Legislature and signed into law by Governor DeSantis [Chapter 2021-183]. The provisions of the bill relating to the effect of divorce and depository accounts took effect upon becoming a law, and the remaining provisions took effect July 1, 2021.

Program for all-inclusive care for the elderly

House Bill 905 by Representative Bob Rommel and Senate Bill 1242 by Senator Lauren Book codified the Program of All-Inclusive Care for the Elderly (PACE) in s. 430.84, F.S., by establishing a statutory process for the review, approval, and oversight of future and current PACE organizations. The Agency for Health Care Administration (AHCA) is authorized, in consultation with the Department of Elder Affairs (DOEA), to approve entities that have submitted the required application and data to the federal Centers for Medicare and Medicaid Services (CMS) as PACE organizations pursuant to federal regulations. PACE organizations are required to meet specific quality and performance standards established by the federal CMS and the AHCA; PACE organizations that have received funding for slots in a given geographic area are to use the funding and slots to provide services in an authorized contiguous geographic area, upon approval from AHCA; and AHCA is directed to provide oversight and monitoring of Florida's PACE program and organizations.

The bill also exempts all PACE organizations from the health maintenance organizations, prepaid health clinics, and other health care service program regulations.

House Bill 905 was adopted by the Legislature and signed into law by Governor DeSantis [Chapter 2021-149].

Looking ahead

The 2022 Legislative Session begins on January 11 and is scheduled to end on March 11. House and Senate committee meetings will be held September through December 2021.

Issues under initial consideration include:

- Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (granny snatching)
- Definition of undue influence
- Guardianship rewrite (RPPTL)
- Supportive decision making

In addition, the Legislature is constitutionally mandated every 10 years to redraw all 160 Florida House and Senate seats and to redraw all U.S. House seats based upon the new census data. Florida picked up one new seat in Congress.

Legislative Committee

Beginning August 6, 2021, the Legislative Committee is meeting *every other* Friday at 8:00 a.m. prior to session and then *every* Friday during session. As previously noted, more than 3,000 bills are filed each session, and during the 2021 Legislative Session, the Legislative Committee reviewed more than 90 bills.

If you want to participate on a substantive committee or 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 local 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.*

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SSA judge: Age 65+ SSI claimant can fund pooled SNT without penalty Rules fair market value was received for transfer

by David J. Lillesand
on behalf of Special Needs Trust Committee

Introduction

Conventional wisdom sometimes isn't. For decades, elderly SSI claimants seeking to put excess funds into a pooled trust were told such a transfer would retain Florida Medicaid but the claimant would lose his or her SSI monthly checks. No longer. Social Security ALJ Andrew Verne ruled June 16, 2021, that 20-year-old federal statutes and federal regulations prevent SSA from imposing a transfer of resources penalty if the claimant showed, as she did in the case before him, that she received fair market value in return for transferring funds to the pooled trust. Florida practitioners should note that retaining any SSI triggers automatic financial eligibility for Florida Medicaid per section 409.903(2), Florida Statutes. Which Medicaid benefits a claimant receives depends on other categorical factors, such as meeting level of care standards.

Attorney's legal brief

The SSI claimant's representative, attorney Vicki L. Vaughan of the Battaglia & Waltari law firm, successfully argued that not only did the claimant receive fair market value, but that the exchange actually resulted in increased value due to professional money management and access to Medicaid benefits. The standard rule is that if the pooled trust meets the requirements of 42 USC § 1396p(d)(4)(C), joinder by a claimant *under* age 65, it shall be automatically approved as a safe harbor. This case holds, like other state court decisions preceding it, that transfer of funds by joinder of persons age 65+ can also be approved as a safe harbor if the claimant shows:

- the funds shall be spent solely for her benefit during her expected lifetime;
- she continues to be the beneficiary owner of the trust property;
- the IRS treats funds in the SNT as funds owned by the beneficiary;
- value was added by the transfer to the SNT because of professional administration of the funds and the protections of eligibility for needs-based public benefits; and
- the anti-transfer statute, 42 USC § 1382b(c)(1)(C)(iii)(I), exempts a transfers from penalty if "the individual who disposed of the resources intended to dispose of the resources either at fair market value, or for other valuable consideration."

Judge Verne specifically asked Ms. Vaughan in a post-hearing brief to provide state court cases holding that fair market value received prevents the imposition of a transfer penalty. She produced cases including the *Pfoser* Minnesota Court of Appeals case, 939 N.W.2d 298 (Minn. App. 2020), which was subsequently affirmed by the Minnesota Supreme Court, 953 NW 2d 507 (Minn. Supreme Court 2021). The briefs and oral argument in *Pfoser* cited Social Security POMS SI 01150.005.5.C., which provides that the policy for determining the fair market value compensation amount is that a "transferor may actually receive the compensation before, at, *or after* the actual time of transfer." The Minnesota attorney general's argument that fair market value must be contemporaneously received at the moment of the transfer of funds was found to be in violation of the terms of the Social Security Act.

Observation

The Social Security judge's decision is based on the federal statute and the federal regulations. Judge Verne cited national agency policy in the POMS at SI 01150.121-.125 only when chiding the SSA staff for failure to follow its express directions, and instead repeatedly cited the terms of the Social Security Act itself and the published federal regulations that apply throughout the United States, including Florida.

[The fully favorable decision issued by Judge Andrew Verne is attached. We want to express our appreciation to attorneys Vicki L. Vaughan and Mary Waltari of Battaglia & Waltari LLP for numerous responsive emails and copies of the judge's decision and claimant's legal briefs.]

***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.

SOCIAL SECURITY ADMINISTRATION
Office of Hearings Operations

DECISION

IN THE CASE OF

Sarah A. _____
(Claimant)

XXX-XX-XXXX
(Social Security Number)

DISPUTE OF

Eligibility

JURISDICTION AND PROCEDURAL HISTORY

The claimant is an individual who began receiving Supplemental Security Income (SSI) benefits beginning November 2007. Exhibit 2D. On January 9, 2019, the Social Security Administration issued the claimant a notice stating that she was ineligible for SSI benefits from December 2017 through February 2020 due to receiving an inheritance and then transferring that resource at less than fair market value. Exhibit 9D/1.

On January 28, 2019, the claimant filed a request for reconsideration, disputing the determination of ineligibility of benefits. Exhibit 12D. Upon reconsideration dated April 4, 2019, the agency affirmed its initial determination. Exhibit 15D. Thereafter, the claimant filed a written request for hearing on April 22, 2019 (20 CFR 416.1429 *et seq).* Exhibit 17D.

The claimant appeared and testified at a hearing held on December 12, 2019, in San Diego, CA. The claimant is represented by Vicki L. Vaughan, an attorney.

ISSUE

The issue is whether the claimant received income within the meaning of section 1612 of the Social Security Act (Act), or resources under section 1613 of the Act, that would result in a reduction of, or ineligibility for SSI benefits under section 1611 of the Act.

After careful consideration of all the evidence of record, the undersigned concludes that the claimant's resources does not cause a reduction of, or ineligibility for, SSI benefits from January 2018 through February 2020.

APPLICABLE LAW

An individual is eligible for SSI benefits if he or she is an aged, blind, or disabled person who meets certain residency and citizenship requirements, and who has limited income and resources (20 CFR 416.202, 416.1100, 416.1205). If you live with your spouse, or are a child living with your parents, or someone living with an essential person or sponsor, we deem to you the income and resources of your spouse, parent, or essential person/sponsor.

If your countable income and/or resources do not exceed the applicable limits, they have no effect on your eligibility for SSI (20 CFR 416.202). However, the amount of your countable income reduces the amount

of your SSI benefits (20 CFR 416.1100). We generally do not count the first $20 of income received in a month (20 CFR 416.1112, 416.1124). We also do not count the first $65 of earnings and one-half of earnings over $65 received in a month (20 CFR 416.1112). There is a dollar for dollar reduction for monthly countable unearned income (20 CFR 416.1123). If countable resources exceed the limits, you are not eligible for any payment (20 CFR 416.202, 416.1100, 416.1205).

Income is defined as any item an individual receives in cash or in-kind that can be used to meet his or her needs for food or shelter (20 CFR 416.1102). There are different types of income, earned and unearned, and we have rules for counting each. Earned income consists of wages; net earnings from self-employment; refunds of Federal income taxes and advance payments by employers made in accordance with the earned income credit provisions of the Internal Revenue Code; payments for services performed in a sheltered workshop or work activities center; and certain royalties and honoraria (20 CFR 416.1110 through 416.1112). Types of unearned income include in-kind support and maintenance; annuities, pensions, and other periodic payments; alimony and support payments; dividends, interest, and certain royalties; rents; and death benefits (20 CFR 416.1104, and 416.1120 through 416.1124). Certain types of income, both earned and unearned, are not counted in our calculation of total income (20 CFR 416.1112 and 416.1124). However, in some situations we must consider the income of certain people with whom you live as available to you, and part of your income (20 CFR 416.1104 and 416.1160 *et seq.*)

Generally, the more income you have the less your benefit will be (20 CFR 416.1100). The amount of your monthly SSI payment will be computed by reducing the benefit rate by the amount of countable income (20 CFR 416.420). In evaluating your SSI eligibility and benefit amount, we count income on a monthly basis (20 CFR 416.1100, 416.1111, and 416.1123).

Resources are cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance, with the exception of the exclusions outlined in 20 CFR, Part 416, Subpart L. Resources may include items such as stocks, bonds, mutual fund shares, promissory notes, mortgages, life insurance policies, financial institution accounts, and similar items (20 CFR 416.1201). However, certain types of items are not counted as resources, including the home, if it is your primary residence (20 CFR 416.1212); household goods and personal effects (20 CFR 416.1216); and an automobile, if used for transportation (20 CFR 416.1218), among other exclusions (*See, generally,* 20 CFR, Part 416, Subpart L).

As of January 1, 1989, the statutory limit for resources is $2,000 for an individual, and $3,000 for an individual with an eligible spouse (20 CFR 416.1205). Resource eligibility is a determination made as of the first moment of each calendar month and is applicable for the entire month. Subsequent changes have no effect until the following month's resources determination. Thus, resources eligibility (or ineligibility) exists for an entire month at a time (20 CFR 416.1207).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. **The claimant became eligible to receive SSI benefits beginning November 7, 2007 (Exhibit 2D/2).**
2. **During the period of eligibility, the claimant had countable resources.**
3. **During the period of January 2018 through February 2020, the claimant's resources did not make her ineligible for SSI benefits (20 CFR 416.202, 416.1100, and 416.1205).**

On January 9, 2019, the Social Security Administration notified the claimant that she was not eligible for SSI benefits for the period of December 2017 through February 2020 due to receiving an inheritance and then transferring that resource at less than market value. Exhibit 9D/1. The claimant received a pension in the amount of $47,544.00 (Exhibit 5D/5) and the agency notified the claimant that the pension made her ineligible for SSI benefits due to excess income for the month of December 2017. Exhibit 9D/1. The agency further notified the claimant that during the same month (December 2017), the claimant transferred resources of $22,633.30 in cash to her Special Needs Trust Foundation (SNTF) Pooled Trust. *Id.*

The agency explained that while the trust is not countable as a resource, a transfer of resources to a trust for an individual age 65 or over might result in a transfer penalty. The agency stated that an exception for a period of ineligibility for transfers of resources to a trust only applies if the individual is under the age of 65. The agency stated that in December 2017, the claimant was over the age of 65, and she did not meet any other exceptions to the ineligibility period for transferring a resource at less than fair market value. The agency determined that based on the amount and date of money received and then transferred to the trust in the amount of $22,633.30, the claimant was not eligible for SSI from December 2017 through February 2020. Exhibit 9D/1-2.

In a Notice of Reconsideration dated April 4, 2019, the agency affirmed its *prior* determination of ineligibility but indicated a different ineligibility period from January 2018 through February 2020. The agency stated that the claimant gave away a retirement fund or sold it for less than it was worth in December 2017, thus causing the special needs trust to be a countable resource. Exhibit 15D/1. The agency stated that a person who gives away a resource or sells it for less than it is worth might be ineligible for *SST* for up to 36 months. *Id.*

Upon appeal, the claimant asserted that the placement of her retirement funds into a special needs trust was not a transfer for less than it is worth. The claimant indicated that the funds were to be used for purchases of goods and services for her benefit only; therefore, they have the exact same value as prior to putting them into the trust. Exhibit 17D.

The claimant has argued that she transferred the pension balance of $22,633.30 into the Sarah A. _____ Special Needs Trust with the Special Needs Trust Foundation of San Diego. Exhibit SD/3. She asserts that the trust meets all of the requirements of a Pooled Special Needs Trust under 42 U.S.C. 396p(d)(4)(C). For example, the Special Needs Trust Foundation of San Diego is a not for profit association, which established and manages the trust; the account is established solely for the benefit of the claimant; and the appropriate payback provisions are provided in the trust. *Id.*

The documentary evidence the claimant submitted included a copy of a Du Pont retirement plan payment dated November 30, 2017, to the payee Sarah A._____ in the amount of $47,544.00. Exhibit 5D/5. The claimant submitted a Wells Fargo Bank check No. 1389 from Sarah, dated December 21, 2017, with a pay to the order of "Sarah A._____ Special Need Trust" in the amount of $22,633.30. Exhibit 4D/2. A submitted copy of a bank statement indicated that the check amount was withdrawn from the claimant's Wells Fargo bank account on January 10, 2018. Exhibit 4D/4. The claimant has also submitted the relevant pooled special needs trust joinder agreement signed and dated October 18, 2017, by the beneficiary and November 17, 2017, by the trustee. Exhibit 30D/8.

On January 31, 2018, the claimant's representative sent the Social Security Administration field office in Oceanside, California, a certified mail reporting of a one-month spend down on behalf of the claimant for

the month of December 2017. Exhibit 5D/2. The notice indicated that the claimant received $47,544.00 from a pension that was dispersed in December 2017 and she spent down the funds by purchasing an automobile and automobile insurance. In addition, the reporting indicated a balance of $22,633.30, which was deposited into a Pooled Special Needs Trust as authorized under 42 U.S.C. 1396p(d)(4)(C). *Id.*

In a letter dated May 22, 2018, from the Special Needs Trust Foundation of San Diego, the not for profit organization verified that they received a check on December 27, 2017, payable to the Sarah A._____ Special Needs Trust in the amount of $22,633.30. Exhibit 8D/2. A bank account for the Trust was established and the check was deposited into the account on January 10, 2018. *Id.* The organization provided documentary evidence of the check and bank statement verifying the deposit. Exhibit 80/3.

Upon reviewing the applicable law, the Social Security Act at Section 1917 (d)(4)(A) and (C) (42 USC Section 1396p(d)(4)(A) and (C)) provides for two exceptions to the general rule of counting trusts as income and resources.

The first exception under Section 1917 (d)(4)(A) applies for trusts created for an individual under the age of 65 and disabled. The claimant was age 68 when the trust was created and this section would therefore result in the trust being counted as income and resources since the claimant does not qualify under this provision. The undersigned notes that the agency discussion of its rationale in an internal case analysis focused on this exception, providing that since the claimant was not under the age of 65, her trust was a countable resource. Exhibit 24F/57.

However, the agency did not adequately evaluate the other exception under Section 1917 and agency policy SI 01150.121-.125. Exhibit 24F/5-7. The second exception under 1917(d)(4)(C) indicates that "pooled trusts" are not considered a resource if the trust contains the assets of an individual who is disabled and meets the following conditions: (i) The trust is established and managed by a nonprofit association; (ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts; (iii) Accounts in the trust are established solely for the benefit of individuals who are disabled ... by such individuals; and (iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained in the trust by the trust, the trust pays the State from such remaining amounts of medical assistance.

Upon careful review of the documentary evidence in the record, including the claimant's trust agreement with the Special Needs Trust Foundation of San Diego (Exhibit 30D), the undersigned is satisfied that all of the statutory requirements of Section 1917(d)(4)(C) described above have been met. The applicable legal provision does not provide for an age limit of being under the age of 65, so this is not a valid basis for exclusion contrary to the agency provided rationale. The undersigned concurs with the claimant's argument that the trust at issue is managed by a nonprofit association; a separate account is maintained for each beneficiary; the trust was established by the claimant, solely for the benefit of the claimant, who is disabled; and the required MediCal pay-back language is included in the special needs trust. Exhibits 27D/4, 29D/5, 30D. Therefore, the undersigned finds that the claimant was within the law when she established her pooled special needs trust at the age of 68.

Upon careful reviewing of the record and the applicable law, the undersigned further finds that the claimant's transferred pension funds satisfied the requirements for a pooled special needs trust and qualified her for an exception as a countable resource under section 1917(D)(4)(C). The undersigned

also concurs with the claimant's argument that the placement of her retirement funds into a valid special needs trust was not a transfer for less than fair market value and that the agency improperly imposed a transfer penalty. Exhibit 290/5. The basis for the agency's transfer penalty determination was that the claimant gave away a retirement fund or sold it for less than it was worth in December 2017. Exhibit 15D/l. The agency stated that a person who gives away a resource or sells it for less than it is worth might be ineligible for SSI for up to 36 months. *Id.* However, the agency provided no proof or evidence that the claimant gave away a resource or sold it for less than it was worth, and they provided no rationale for how they came to such a conclusion. *Id.* The claimant has indicated that the special needs trust funds were to be used for purchases of goods and services for her benefit only and; therefore, they have the exact same value as prior to putting them into the trust. Exhibit 17D.

The undersigned finds that the documentary evidence in the record supports the claimant's position. The undersigned concurs with the claimant's arguments in the representative brief on this issue that the agency improperly imposed a transfer penalty. Exhibit 29D/5-15. The funding of the special needs trust did not constitute a disposition of assets for less than fair market value. The claimant has retained beneficial ownership of the assets for her benefit only via the pooled special needs trust she created. The claimant has received fair market value for the placement of the funds into her special needs trust, as the value of the assets remained unchanged as indicated in the bank account records. In addition, the claimant will have received valuable consideration for the placement of funds into her special needs trust within her life expectancy and the submitted balance sheets support as much. Exhibit 29D/50-52. The record clearly demonstrates that the claimant transferred the remaining balance of her pension funds after purchase of an automobile and insurance into a valid pooled special needs trust that is for her benefit only. The pooled special needs trust satisfied the statutory requirements and qualified as an exception under the law. Moreover, the undersigned finds no evidence that the pension transfer into the pooled special needs trust was at less than fair market value causing it to be a countable resource. Accordingly, the undersigned reverses the agency determination of an imposed transfer penalty of a period of SSI ineligibility.

The claimant's resources during her period of eligibility did not affect her SSI benefits from January 2018 through February 2020 (20 CFR 416.410, 416.412, and 416.1205). Accordingly, the agency shall reinstate the claimant's SSI benefits retroactively to the appropriate date(s) of ineligibility with no overpayment due.

DECISION

Based on the hearing request regarding the determination that the claimant had resources that effect the eligibility for or amount of SSI benefits, the undersigned finds that the claimant's resources did not subject her SSI benefits to a reduction from January 2018 through February 2020, pursuant to section 1611 of the Social Security Act.

/s/ *Andrew Verne*
Andrew Verne Administrative Law Judge
June 16, 2021
Date

Best practices when selecting a trustee of a supplemental needs trust

by Howard S. Krooks

on behalf of the Special Needs Trust Committee

A core requirement of any supplemental needs trust is that the beneficiary may not serve as trustee of the trust, whether it be a d4A, a third-party trust, or a pooled trust. One of the greatest challenges our clients face when establishing a supplemental needs trust is determining who will serve as trustee. While many parents are appointed initially to serve as trustees of a d4A or third-party trust, the question eventually arises about who will serve when the parents are no longer in a position to do so. As practitioners, we must be able to counsel our clients through this difficult decision.

At the outset, we must recognize that serving as trustee of a supplemental needs trust is not the same as serving as trustee of a revocable living trust or an irrevocable Medicaid asset protection trust. In addition to the ordinary duties associated with serving as a trustee of a trust, the trustee of a supplemental needs trust must be able to address the caregiving needs of the beneficiary, fiscal analysis and life plans involving the investing of trust assets and utilization of those funds over the course of the beneficiary's lifetime, and government benefits rules, including SSI, Medicaid, and Section 8 housing, among others.

Because of the additional knowledge and commitment required of a supplemental needs trust trustee, one cannot simply make the appointment in the trust itself without first discussing the appointment in advance with the person to be named and getting a commitment from that person that s/he is willing to serve when the time comes.

Another issue to consider is who will be named as remainder beneficiary of the trust. Even in a d4A scenario, there may be assets left over once the Medicaid agency has been reimbursed. In some cases, the named successor trustee may also be named as a remainder beneficiary of the trust. Can this person be trusted to use trust assets in the best interest of the disabled beneficiary? Or will that trustee/remainder beneficiary "conserve" assets (i.e., not spend the assets although the beneficiary has a

continued, next page

Best practices...
from previous page

real need that could be met) so as to increase the remainder interest that may eventually go to the trustee/beneficiary?

Does the trustee have the time to devote to serving as trustee of a supplemental needs trust? Serving as trustee of a typical trust is one thing, but a trustee of a supplemental needs trust also must take into account the additional responsibilities that go along with providing for an individual who is disabled. Time may have to be spent looking for housing arrangements, dealing with medical issues, addressing government program eligibility and processing requirements, dealing with a care manager, quarterbacking adult day care arrangements, etc.

Age is also a consideration. If the named successor is closer in age to the parents than the beneficiary, what has been accomplished by making such an appointment? A better choice may be to select an individual who is close in age to the named beneficiary. Or, the named successor can be given the authority to name another successor. Such authority can also be provided to a trust protector.

It is also helpful to select a person who knows the beneficiary well and has developed a good relationship with the beneficiary. While this may be a sibling of the beneficiary, often siblings may have ulterior motives or come with resentment developed over a lifetime of the disabled beneficiary getting more attention from the parents for no other reason than the needs of the beneficiary dictating that result.

Ultimately, if no individual presents as a logical choice to serve as a successor trustee of a supplemental needs trust, one may look to a corporate trustee. If you are considering a corporate trustee, it is best to select and work with one that has a dedicated supplemental needs trust department due to the specialized expertise needed to serve in this capacity. Alternatively, you may choose to work with a pooled trust that offers trustee services for non-pooled trust accounts given their breadth of knowledge and expertise acting as trustee of the pooled trust.

Or, if a family member is a good choice to serve as a successor trustee, but lacks some of the skills required, such as fiscal knowledge, organizational skills, government benefits knowledge, etc., it may be a good idea to pair this family member with a corporate trustee so that you can get the best of both worlds—someone who cares for and is empathetic to the beneficiary and an entity that has experience in serving as the trustee of a supplemental needs trust. Another approach would be to appoint a trust advisory committee (comprising people in the medical field, financial services industry, care management, etc.) that can counsel the lay family member trustee in making decisions.

Regardless of which direction you choose to go in selecting a suitable trustee of a supplemental needs trust, it is vital to the overall success of your special needs planning to invest a great deal of time in making this decision. Your loved one's care and well-being depend on it. Good luck!

***Howard S. Krooks, JD, CELA, CAP**, of Elder Law Associates PA, practices elder law and special needs planning in New York and Florida. He is a past president of NAELA, a past chair of the New York State Bar Association Elder Law Section, and currently serves as chair-elect of The Florida Bar Elder Law Section. He is a member of and submitted the above article on behalf of the Special Needs Trust Committee of The Florida Bar Elder Law Section.*

Verification of service for pension and compensation claims

by Teresa K. Bowman
on behalf of the Veterans Benefits Committee

In the VA world, pension claims help pay for in-home care or assisted living and have requirements similar to Medicaid. The applicant must need assistance with activities of daily living, have limited income, and have assets below the asset limit. In addition, the applicant must also prove military service, with active duty of at least 90 days with one day being during war time, and they must have left service other than by dishonorable discharge. Providing proof of service, length of service, date of service, and status of discharge is reported on a very important document called the DD214.

A DD214, known as a Certificate of Discharge, was issued when a service member was discharged from duty. The DD214 was first issued in the 1950s, replacing older documents used during the 1940s. Every service member knows the importance of the DD214. When a DD214 was created, there were eight original copies with two copies (copies 1 and 4) going to the service member, copy 3 going to the U.S. Department of Veterans Affairs (the Department), copy 5 going to the U.S. Department of Labor, copy 6 going to the state director of veterans affairs, and copies 7 and 8 either retained by the Department or shredded.

If a DD214 is lost or destroyed, it will be necessary to get a copy from the Department of Veterans Affairs. A copy can be requested at https://milconnect.dmdc.osd.mil/milconnect/ by setting up an online account. This link provides a full list of discharge documents, as well as other forms, in addition to the DD214, that can be used to prove service, although the DD214 is the one most often requested. Once a request is made online, an email will be sent verifying the request with a follow-up email sent when the documents are uploaded and ready for viewing.

A veteran can also mail or fax a request for the information to the National Personnel Records Center (NPRC) using SF 180, available at www.benefits.va.gov/homeloans/documents/docs/standard_form_180.pdf. If the information can be found in the archives, the documents will be sent to the veteran's address provided on the form. The form must be signed by the veteran, the veteran's legal guardian, or if the veteran is deceased, the next of kin and a death certificate must be provided.

Additionally, the DD214 can be obtained by visiting the NPCR in St. Louis, Missouri. This can be accomplished in person, asking the state or county veterans agency to request a copy, or there are independent firms that will locate the DD214 for you and provide a copy for a fee. I found a company online that does this very thing, and their office is directly across the street from the NPRC. The COVID-19 pandemic has made the effort of obtaining the information harder, so they charge a fee of $79 to get the DD214 for you.

Complicating the issue is the fire that occurred at the NPRC in 1973 that destroyed the records for veterans who were discharged from the Army or the Air Force during certain time periods. The VA has attempted to reconstruct records, when requested, using other documents on file. This is important not only for those applying for pension, but also for those applying for compensation for past injuries or illnesses related to service. It is not easy for the VA to reconstruct the complete military file, and veterans and their families may need to look for alternate options.

In compensation claims, time, location, and length of service are just as important as the medical records kept by the Veterans Health Administration. A list of presumptive illnesses currently recognized by the VA, based on time of service and location of service, can be found at www.benefits.va.gov/BENEFITS/factsheets/serviceconnected/presumption.pdf, with the newest being ALS. A veteran diagnosed with a presumptive illness and who proves the connection to service will be awarded disability. The process is complex and often lengthy.

To create the proof needed to assert a compensation claim, without a DD214 or if medical records were destroyed in the fire at the NPRC, the VA will accept private medical records, accident reports, letters written during service that referenced the injury, photos, and "buddy" affidavits from fellow soldiers who were present or had personal knowledge of the accident or injury that occurred during service or who served with the veteran in a particular location. An article available at https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=2130&context=blr (provided to me by Jack Rosenkranz) outlines the difficulties of establishing a service-connected compensation claim if records are lost or destroyed.

***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. She is chair of the section's Veterans Benefits Committee.*

SECTION NEWS

Elder Law Section presents annual awards

by Steven Hitchcock

Each year the chair of the Elder Law Section has the pleasure of recognizing section members who have made exceptional contributions to the practice, the community, and the section. This year that honor fell to me, and at the June executive council meeting I presented awards to some well-deserving section members. Each award has a special meaning, and I would like to share the details regarding each award and the exceptional individuals who were given these honors.

Lifetime Achievement Award

The Elder Law Section Lifetime Achievement Award is presented to elder law attorneys who have dedicated their lives to the practice and in recognition of their "dedication to professionalism and the promotion and advancement of the practice of elder law." This award is not given every year, and this year's award winner stands among the select few who have made an indelible impact on the practice of elder law from its very beginnings. She has helped guide the careers of a great many elder law attorneys as a section member, educator, and resource. This year' s recipient is Professor Rebecca C. Morgan.

Rebecca C. Morgan is the Boston Asset Management chair in elder law at Stetson University College of Law. Professor Morgan teaches a variety of elder law courses in the JD, MJ, and LLM programs. She is a member of the elder law editorial board for Matthew Bender, has authored a number of books and articles on a variety of elder law issues, and has spoken a great number of times on subjects of elder law.

For more than 20 years Professor Morgan has been instrumental in the development and organization of the Stetson National Conference on Special Needs Planning and Special Needs Trusts, which features nationally acclaimed presenters and experts on the subject.

Chair-elect Carolyn Landon presents outgoing Chair Steven Hitchcock with a plaque recognizing his service to the Elder Law Section. We thank you, Steve, for your outstanding leadership!

Professor Morgan is a past chair of the Elder Law Section, past president of the National Academy of Elder Law Attorneys, past president of the board of directors of the National Senior Citizens Law Center, past chair of the American Association of Law Schools Section on Aging and the Law, and is on the faculty of the National Judicial College. She served as the reporter for the Uniform Guardianship and Protective Proceedings Act. She served on the Florida Attorney General's Task Force on Elder Abuse and the Florida Legislative Guardianship Study Commission. She is a member of the American Law Institute (ALI), academic advisory board for the Borchard Center for Law and Aging, an academic fellow of the American College of Trusts & Estates Counsel (ACTEC), a NAELA fellow, and a member of NAELA's Council of Advanced Practitioners (chair 2012-2014). After a term on the board of the ABA Commission on Law and Aging, she is a special advisor to the ABA Commission on Law and Aging. She is a member of the board of directors for the Center for Medicare Advocacy.

Professor Morgan was the recipient of the 2003 Faculty Award on Professionalism from the Florida Supreme Court Commission on Professionalism. She received the NAELA Unaward in November 2004 from President Stu Zimring for her accomplishments in the field of elder law. Professor Morgan, along with Professor Roberta Flowers, received the 2005 Project Award on Professionalism from the Florida Supreme Court Commission on Professionalism for their video series on ethics in an elder law practice. She received the 2006 Rosalie Wolf Memorial Elder Abuse Prevention Award from the National Committee for the Prevention of Elder Abuse. She received the Homer & Dolly Hand Award for Faculty Scholarship in May 2008, and the NAELA President's Award from NAELA President Mark Shalloway in May 2008. She received the Theresa Award from the Theresa Alexandra Foundation in 2008. Professor Morgan was the 2009 recipient of the Treat Award from the National College of Probate Judges. In 2018 Professor Morgan received the Ben C. Willard Alumni Award for humanitarian achievements from Stetson University College of Law. Professor Morgan was inducted into the College of Law Hall of Fame in 2018.

Charlotte E. Brayer Public Service Award

The Charlotte E. Brayer Public Service Award is given to a member of the Elder Law Section who has

demonstrated excellence and achievement in the area of public service, in the spirit of giving back to the elder community that was the hallmark of Charlotte Brayer's legal career. This award is named in recognition of Charlotte E. Brayer, who was an inspiration to her colleagues as an individual who gave back to the community. A second-career attorney, Charlotte did not enter law school until approximately age 60 after her retirement as superintendent of schools in Attica, New York. Charlotte received her JD from Florida State University in 1987 and joined the Legal Services of North Florida, Inc., and the Tallahassee Senior Center pro bono panel, where she had served approximately 700 clients by 1996.

Also in 1996, Ms. Brayer wrote a chapter on Florida senior attorneys performing pro bono work for the ABA publication *Senior Lawyers Organizing & Volunteering: A National Profile*, ABA Center for Pro Bono, A Project of the Consortium on Legal Services and the Public.

When asked about the career change at retirement age she said, "I have spent twenty-nine and one-half years trying to help the younger generation; now I would like to concentrate on the senior generation (my own), those who have worked hard all their lives and could use some help to smooth the way."

Charlotte passed away in February 1998 at the age of 75.

The Charlotte E. Brayer Public Service Award is inscribed with the passage "You will become prosperous only if you are trying to give more than you receive." It is fitting that the 2021 recipient of the Charlotte E. Brayer Public Service Award is Ellen Cheek. Ellen is the chair of the Elder Law Section's Abuse, Neglect, & Exploitation Committee. She has been a tireless advocate, both in her work in the section and in her practice, in the fight against abuse and exploitation of the elderly.

Member of the Year

The Elder Law Section presents an annual Member of the Year award to a section member who has demonstrated commitment to the section and gives time and energy above and beyond all expectations. Danielle Faller is the 2021 recipient of this award. Danielle is the chair of the CLE Committee and always exhibits a willingness, enthusiasm, and can-do attitude when approached with any task on behalf of the section. She has taken on every challenge thrown at her, doing an exceptional job coordinating multiple CLE events this year and spearheading the efforts to build a comprehensive board certification CLE product. All of these efforts would be monumental tasks in any year, but were made exceptionally difficult because of the COVID-19 pandemic.

Exceptional Service Award

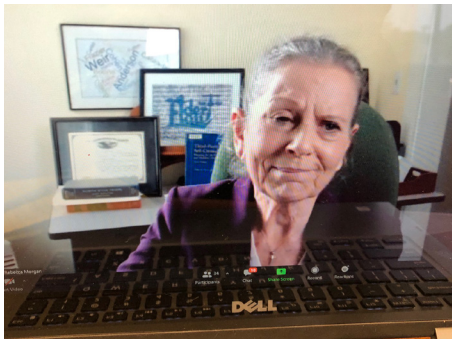
Exceptional service awards are within a section chair's purview to give "Recognition of Exceptional Service to the Elder Law Section" by a member.

This year, I chose to recognize the hard work of the legislative chair and vice chairs, Deb Slater, Travis Finchum, and Grady Williams, for each of their efforts in guiding the difficult task of advocating the section's legislative agenda. Under their leadership the Legislative Committee has grown and has been very effective in advancing our positions and proposals.

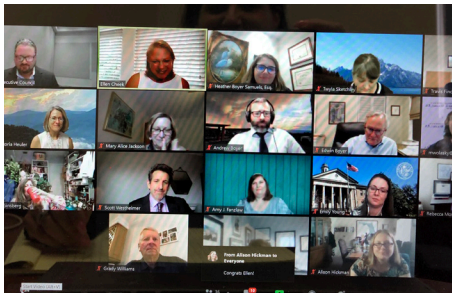
In addition, I recognized Jason Waddell, a past section chair, for continuing to give his time and energy to the section by taking on many roles on special projects and committees. Jason continues to participate by being on the Bylaws Revision (chair), CLE, and Strategic Planning committees and the Joint Public Policy Task Force, among other committees, and he continually demonstrates a willing attitude to contribute to the section.

It was a sincere honor to serve as your chair last term, and it was the highlight of my term to bestow these awards on such a very deserving group of individuals.

Steven Hitchcock *is immediate past chair of the Elder Law Section.*



Professor Rebecca Morgan graciously and with humility accepts the prestigious Lifetime Achievement Award via Zoom.



Ellen Cheek (top, second from left) accepts the Charlotte E. Brayer Public Service Award.

Steven Hitchcock presents the Member of the Year award to Danielle Faller.

Steven Hitchcock (right) presents the Exceptional Service Award to Jason Waddell.

SECTION NEWS

Committees keep you current on practice issues

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

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PRACTICE MANAGEMENT

The top 6 habits of successful attorneys

by Audrey J. Ehrhardt

Do you find yourself looking around to see that some attorneys are thriving while others seem to be just surviving? Do you find yourself becoming discouraged rather than motivated to develop your own success? It can be frustrating to look at those around you and wonder what they are doing to get the results YOU WANT! You may find yourself asking, "What sets apart those who get stuck in the day-to-day drudgery from the successful attorney leaders?"

If you have ever wondered what it takes to get to the level of practice success you want, you are not alone. Let us take a look at six habits of attorneys who excel in the professional field.

1. They put in the work.

Let's say that again, THEY PUT IN THE WORK. Often it is either first thing in the morning or late at night. This might not be the tip you hoped to see on this list, but there it is. Putting in the work before the office opens or after it closes, or on the weekends and on the holidays, can be essential to succeeding as an attorney practice leader. It is the time when the phone is not ringing nonstop. Email traffic goes down to a minimum. Distractions of a seemingly ever-growing to-do list are never lower than at these times of the day or week. Take advantage of this and reap the benefits of starting or ending your workday by checking off some of those things you have been meaning to do, but never get around to doing.

2. They pay themselves and take time off.

This sounds crazy, we know, but taking care of yourself can be an essential part of being an effective leader. Energy stores can be quickly depleted, and charging your batteries must happen from time to time. Pay yourself for the work you put in. Take those vacation days. Treat yourself to these periods of renewal so you can get back to work with a clear head, a fresh perspective, and the drive to take on that to-do list.

3. They have a handle on the data they need.

How are you tracking employee productivity? Tracking marketing ROI? Do you have an effective and efficient way of tracking firm costs and workflow? Having a handle on this kind of data means you know what is working and what is not working in your organization. Does there seem to be a barrier to growth? Look to the data and it will likely highlight potential bottlenecks.

4. They have a mission and use it as a touchstone each and every day.

Starting each day (and each week, month, and quarter) by reviewing your to-do list from the vantage point of how it serves your professional goals and your practice's mission can help keep you on track and continue to push you forward. It will help you prioritize your tasks and make sure those items with the highest return on investment get the attention they deserve.

5. They continue to find ways to evolve and improve.

The mastering of a profession or a practice is elusive as the world is ever growing and ever changing around us. Successful attorney practice leaders invest in pursuing professional and personal growth. Take the time to focus on the areas that are integral to not just sustaining success but growing success, and invest your energy in cultivating them.

6. They remember that success is multifaceted.

Professional success and personal success are not mutually exclusive, and this is something successful attorneys come to understand. Working hard and living a well-rounded life are both important, and both can be achieved through effective time management and prioritization of goals. Although it may not feel like it at times, being professionally successful and living a fulfilling life of time spent with loved ones and on the hobbies you are passionate about is possible!

The key is to determine what you need to perform at your highest level. Law practice success does not happen by chance. Take time to think about the help you need to work through the challenges you face so you can overcome them and reach your full practice potential. Your firm, and ultimate success, will thank you!

***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.*

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"You have been wonderful to my sister and family. I appreciate your prompt response to our questions, as well taking care of all the details involved in transferring her trust account from another trust company. This Thanksgiving I will be thinking of both of you when remembering all the people for whom I am thankful."
- Anne K., Beneficiary's Family

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Tips & Tales

by Kara Evans

Taking possession of the homestead

The tale: Molly has come to your office for assistance. Her sister, Pearl, has died, leaving only a modest home. The home was devised to Pearl's children, who all live in Michigan and cannot leave their jobs and children to tend to the home. Molly was named as the personal representative in Pearl's last will and testament but has been told by the real estate agent and the title company that she has no authority over the home. Molly knows she will have to pay someone to sell or remove the personal property and some repairs will need to be made before the home can be sold. Her nieces and nephews do not have the funds, and she is certain they will not pay her back from the proceeds of the home. Still, there is value in the home. She is reluctant to just leave it as is. After all, her sister was counting on her to help the kids.

The tip: Section 733.607, Florida Statutes ("every personal representative has a right to, and shall take possession or control of, the decedent's property, except the protected homestead …"), and section 733.608(2), Florida Statutes ("all real and personal property of the decedent, except the protected homestead, within this state and the rents, income, issues, and profits from it shall be assets in the hands of the personal representative"), clearly define what a personal representative has authority over. It is also clear from *McKean v. Warburton,* 919 So.2d 341, 347 (Fla. 2006) that "protected homestead is not a part of the decedent's estate for purposes of distribution." How then can you assist this client?

As you can imagine, this is not an uncommon issue. Florida has been, and still is, a magnet for retirees. Many people leave the state where they worked and raised their children to come live in the Florida sunshine. The children, however, most often remain in their home state. As mom and dad grow older and pass away, the children often are not able to come to Florida to deal with and dispose of an aging home full of "precious" keepsakes, tchotchkes, and bric-a-brac. But someone must.

Part of Molly's problem is that there are no funds from which she can pay expenses associated with the home. Even if the estate had funds, the personal representative cannot use the funds in the estate to pay the expenses of a piece of real property that is not an asset of the estate.

The statutes and the probate rules give excellent guidance in this situation. If the property is not occupied by a person with an interest in the home, the personal representative can take possession of the homestead property for the limited purpose of "preserving, insuring, and protecting it" pending the determination of homestead status. The personal representative is not obligated to take possession of the home for any reason. If the personal representative does take possession, he or she is entitled to collect any rents or revenues generated by the property, but he or she is not obligated to make the property productive.

Molly is relieved that she can take possession of the home; however, she is concerned about her ability to recover the funds she must expend in the process. You can alleviate her concerns. A personal representative that spends money on "preserving, insuring, and protecting" a homestead has the authority to place a lien on the home to ensure repayment of any funds so expended. Yes, this means a lien on the homestead that can be enforced through foreclosure, offset of a beneficiary's share of probate assets in the estate, or offset against any revenues generated by the property.

The technical details of how to accomplish the taking possession and the process for filing the lien can be found in section 733.608 (2) through (12), Florida Statutes, and in Probate Rules 5.402, 5.403, and 5.404. Prior to advising your client to embark on this process, there are some items to consider. First, there is absolutely no obligation to take possession and no liability incurred should the personal representative choose not to do so. Second, you want to ensure there will be enough funds to reimburse your client. With those thoughts in mind, this can be a beneficial tool for your clients.

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

Tax Tips: Schedules K-2 and K-3?

Every elder lawyer should be familiar with Schedule K-1. As a reminder, Schedule K-1 is issued by a partnership to report each partner's share of certain items of the partner's earnings, losses, deductions, and credits. Schedule K-1s are also issued to shareholders of S Corporations as well as to trusts and estates that have distributed income to beneficiaries. (I.R.C. § 6031 has the basic requirements for partnerships, I.R.C. § 6037 for S Corporations, and I.R.C. § 6034 for trusts and estates.) The recipient of the K-1 then includes the K-1 information on his or her personal income tax return.

As noted in prior articles, the IRS continues to work to address the reporting and taxation of non-U.S. income and certain non-U.S. assets. Examples include the reporting of ownership or control over foreign financial accounts, such as the FBAR Reporting of Foreign Bank and Financial Accounts using FinCEN Form 114 and even the reporting the receipt of certain gifts from foreigners (Form 3520).

There are also requirements under I.R.C. § 6038 and I.R.R. § 1.6038-3 that require a U.S. person that controls a foreign partnership, or holds at least a 10% interest in a foreign partnership that is controlled by U.S. persons holding at least a 10% interest, to provide information relating to the partnership. These requirements include reporting ownership interests in the partnership and allocations to the partners. There are various other technical requirements, and this is filed on Form 8865-Return of U.S. Person With Respect to Foreign Partnership. Much of this would normally be reported on the Schedule K-1 issued by a domestic partnership.

New Schedules K-2 and K-3 are an effort to assist partnerships in providing information in a more standardized way and to better provide information to include on the partner's income tax return when dealing with items of international tax relevance from the operation of a partnership. Of course, the IRS also believes it will be better able to verify tax compliance.

In summary, you may now encounter Forms K-2 and K-3. These forms are similar to Form K-1, but will address items relating to certain international aspects of the entity. Schedule K-2 is the Partner's (or shareholder's) Distributive Share Item—International. Schedule K-3 is the Partner's (or shareholder's) Share of Income, Deductions, Credits, etc.—International. These new forms are applicable in tax years beginning with 2021.

Practice tip: If you see Forms K-2 and K-3 regarding a client, consider probing further about foreign financial and other assets (ownership, or control, or signature majority) and foreign income generally. Depending on the response, additional planning or reporting may be needed.

Practice tip: If you discover that a client has an interest in a partnership and did not receive a K-2/K-3, consider inquiring if the client should have. Further, if the client is responsible for the filing of the returns, inquire if the forms should have been prepared and filed. As these forms are new, it is quite possible that your client's tax preparer may have mistakenly omitted them.

Practice tip: The IRS has stated there will be penalty relief if the client made a good-faith effort to comply.

continued, next page

Special rule to pay back IRA/pension distributions

Clients who received up to $100,000 in 2020 as a distribution from an IRA or employer-sponsored retirement plan have three years to repay all or part of the distribution back into an IRA or plan, if they meet one of the special rule's reasons. The repayment can be to the same or a different plan.

Allowable reasons for this special rule include: (1) positive COVID test; reduction of pay or self-employment income; delayed or rescinded job offer due to COVID; and (2) adverse financial consequences due to having to close or reduce business hours; inability to work due to COVID-related child care issues; or quarantined, furloughed, laid off, or reduced hours due to COVID.

Practice tip: If you see that your client took a big income tax "hit" in 2020 due to an IRA or qualified plan withdrawal, see if this special rule applies.

State tax law updates in Florida

The 2021 Regular Florida Legislative Session passed 275 of almost 3,100 filed bills. The number of bills passed is actually larger than the number passed in the prior three years. Some of the passed bills address taxes. This article briefly describes some of these new laws. For more information on the legislative session and both tax law and non-tax law legislation passed, consider reading the legislative articles by French Brown, Esq., and his team at Dean Mead (www.deanmead.com).

Senate Bill (SB) 50 was the economic nexus bill. It requires out-of-state retailers and marketplace providers with no physical presence in Florida to collect and remit Florida sales tax on purchases into Florida. There are various thresholds. The law also allows the marketplace providers to handle the collection and remittance of the sales tax to Florida.

Florida is one of the only states with a tax on rental of commercial real property. The tax is currently 5.5%. The new law reduces it to 2%, but not until after the Unemployment Compensation Trust Fund exceeds a certain balance. The idea was to first replenish the trust fund before reducing the revenue stream.

Up for a vote in the 2022 General Election in November, a proposed new law would prohibit an increase in assessed value of residential real property as a result of flood damage resistance improvements.

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Summary of selected case law

by Elizabeth J. Maykut

Residuary devise in a will is insufficient to devise partnership interest to a grandson as the partnership agreement stated the decedent could only devise interest to children.

Finlaw v. Finlaw, 46 Fla. L. Weekly D882 (Fla. 2d DCA April 16, 2021)

Issue: Whether the decedent's son was entitled to his mother's interest in a partnership pursuant to the partnership agreement requiring vesting of her interest by will only to her spouse or children, or whether the grandson was entitled to her interest based on her will attempting to devise the interest otherwise.

Answer: The partnership agreement controlled. The son was entitled to her partnership interest, and the personal representative of the estate was required to assign the interest to the son.

Many years before her death, the decedent and her husband created a partnership and entered into a partnership agreement stating that the surviving partner agrees to execute a last will and testament "so as to vest his or her interest in this Partnership in his or her children (lineal descendants)." When the decedent's husband died, she inherited his partnership interest. Subsequently, she executed a will naming her grandson as personal representative and as the residuary devisee, omitting any specificity addressing the partnership interest. After the decedent's death, the grandson admitted the will to probate. The son filed a statement of claim asserting an interest in the

partnership in the probate matter, to which the grandson objected.

The trial court ruled that the provisions of the will were contrary to the partnership agreement, which required that the partnership interest be vested in the decedent's "children," and ordered the grandson to assign the partnership interest to the son. The grandson appealed, alleging he was an appropriate recipient of the partnership interest because he was a "lineal descendant," and if he was precluded from inheriting the interest, the partnership must be dissolved pursuant to the agreement's terms.

The Second District affirmed. After analyzing the partnership agreement pursuant to Ohio law (where it was executed), the court held that the agreement, by its plain language, restricted the class of those to whom the decedent could transfer her partnership interest to "children," not "lineal descendants." It then reviewed Ohio and Florida law that provides that, where contracting parties expressly agree on the disposition of property upon death, that agreement generally controls over a testamentary disposition of the property. Since the devise to the decedent's grandson was contrary to the terms of the partnership agreement, it was an ineffective conveyance of the partnership interest.

The court also disagreed with the grandson's assertion that the partnership must be dissolved. A provision in the agreement stated that if any partner failed to execute a will so as to ultimately cause his/her interest to pass to an individual who was not a lineal descendant, the partnership should be dissolved. The court held this provision was inapplicable as the agreement only called for that drastic remedy if the interest was transferred to someone outside the family.

Practice tip: If your client owns an interest in a business, always review the operating agreement and correlating documents governing the client's interest in the business before initiating planning for that client, as those documents may trump the provisions in the client's will or trust after death.

"Daughter" had no standing to challenge the will as she was not the decedent's biological or adopted daughter despite the fact the decedent's name was on her birth certificate.

White v. Marks, 46 Fla. L. Weekly D747 (Fla. 5th DCA 2021)

Issue: Were written "acknowledgments" of paternity by the decedent sufficient under section 732.108(2)(c), Florida Statutes, to grant standing to the claimant who claimed she was the decedent's "daughter" even though she was not a biological child or adopted?

Answer: No.

The non-biological, non-adopted daughter (the daughter) petitioned for revocation of the will and for intestate administration of the decedent's estate alleging the will was executed due to undue influence and she was legal heir to the estate. The daughter argued she was a descendant of the decedent under section 732.108(2)(c), Florida Statutes, even though she was born out of wedlock, because the decedent had "acknowledged" paternity in writing as named on her birth certificate, as included in his will, and in a notation in his pocket planner. (In his will and pocket planner, he referred to her as his "adopted daughter.") The trial court found these writings sufficient and granted summary judgment on the issue of standing in the daughter's favor.

The Fifth District reversed. On appeal, the daughter's counsel conceded the birth certificate could not constitute a "written acknowledgment" as it was not signed by the decedent. The references to "daughter" in the decedent's will and in his pocket planner were also not sufficient as it was undisputed that an adoption had never occurred. Further, the evidence showed the decedent had never undertaken any type of parental responsibility for the daughter during his lifetime. Relying on precedent holding that the statute of limitations applies to probate actions, the appellate court also held that the daughter was time-barred from establishing paternity because the four-year statute of limitations on paternity claims had already expired. Therefore, the daughter lacked standing to contest the will, and the case was remanded for administration pursuant to the decedent's will.

Practice tip: Use precise descriptions of family members when drafting a client's will or trust. When administering an intestate estate that includes a child born out of wedlock, apply the statutory analysis in section 732.108(2)(c), Florida Statutes, to determine intestate heirs.

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