The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

Featuring:

- *Message From the Chair: The good attorneys*
- *Capitol Update: Looking ahead to the 2022 Legislative Session*
- *ISM contracts as a special needs planning technique*

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The Elder Law Advocate

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Officers

ON THE COVER

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Submit Articles

The deadline for the SPRING 2022 EDITION: FEBRUARY 15, 2022. 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

The good attorneys

As I sat down to write this message, I learned of the passing of my favorite judge. It was unexpected. She was brilliant and hardworking. Her personality could be quite acerbic, and that likely cost her in a reelection bid. You did not want to appear in her courtroom unprepared. But those who knew her only as a judge didn't know the real Diana. She was a champion for the downtrodden, and not just by checkbook. She was hands-on. Her grandfather, once homeless, became a successful businessman and donated his vast earnings to charities. Her father, a former state senator, had a homeless shelter named in his honor. She and her eight siblings were raised to be givers. She was a generous and giving person. She was very much like the elder law attorneys I know.

Why do I think she was like an elder law attorney? We are the champions of the downtrodden. We work hard and we often become too emotionally involved. We spend many sleepless nights worried about clients. We do a lot of pro bono work because we just can't turn away someone who is unable to pay. A good friend of mine, over 10 years ago, opined that we as elder law attorneys are the good attorneys.

Obviously we have to know the basic practice areas, and if we choose to limit our practice to certain areas, we need to know enough to refer a client. If we don't draft special needs trusts, we must know when they are necessary so we can refer our client to someone who does. Or if we don't do guardianship, we need to recognize when one is necessary. We are all really good at referring to others and good at asking for help and giving help. If you doubt that, read the listserv.

So now that I've appealed to your sensitive side and told you how wonderful you are—because you are wonderful—what's my pitch? Here it comes!

WE NEED YOU!

We need you to pitch in and join a committee. Not just sign up, but become actively involved. We want your input. You are important. You are brilliant. Your opinions and your knowledge are important to us. You have so much to contribute. You are elder law attorneys—the good attorneys.

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.

Capitol Update

by Brian Jogerst

Looking ahead to the 2022 Legislative Session

The 2022 Legislative Session is an "early session," meaning House and Senate committee meetings are being held from September to December 2021, with the Legislative Session beginning January 11, 2022, with a scheduled ending on March 11, 2022.

By way of background, prior to the 2021 Legislative Session, legislators, staff, and advocacy groups were all concerned that effects from COVID-19 would greatly reduce state revenues and require significant budget reductions. Instead, with the state's economy quickly rebounding and the influx of federal relief funds, no significant budget reductions were required, and Florida placed additional revenues into its reserves. Going into the 2022 Session, state revenues continue to increase and are well above pre-pandemic levels, which should minimize budget constraints or challenges during the upcoming session. These additional revenues come on top of remaining, and unexpended, federal relief funds that the Legislature held back during the 2021 Legislative Session.

Prior to the 2021 Legislative Session, both the House and the 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 events and transitioned to "virtual days" rather than in-person meetings. Going into the 2022 Legislative Session, legislators, staff, and constituents should have full access to the Capitol Complex.

One important issue to be considered during the 2022 Legislative Session will garner a lot of attention from legislators and the media: redistricting. Every 10 years, the House and the Senate are required to redraw all 160 House and Senate legislative seats and the U.S. congressional seats to reflect shifts in population. Florida will receive one new U.S. congressional seat due to the increase in Florida's population. Once the districts are finalized, then the courts will review the redistricting plan to ensure its compliance with the Florida Constitution Fair Districts Amendments, adopted by the voters in 2010.

Legislative Session overview

Committee meetings began in September, and legislators are filing bills. By the beginning of session, more than 3,000 House and Senate bills will be introduced, and the Elder Law Section Legislative Committee will actively review many of the bills and provide input on key issues. The following are issues of interest, and a more detailed update on legislation will be provided in the next update.

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (granny snatching)

Florida is one of four states not to adopt the Uniform Act, and the Elder Law Section is once again working closely with RPPTL and the Uniform Law Commission to be included in the uniform protections while also safeguarding Florida's widely regarded guardianship protections.

Guardianship rewrite

Part of a 10-plus-year initiative, RPPTL has been drafting a complete rewrite of the Guardianship statute. The Elder Law Section continues to review the draft proposal and provide feedback.

Clerk of the Courts Guardianship Improvement Task Force

Over the summer, the Florida Clerks of the Court convened a work group to look at revisions to Florida's guardianship statutes. The Elder Law Section has been an active participant on the task force, and clerks may also seek legislation during the upcoming session. No drafts or specific proposals are currently available. Further details will be provided in the next update.

Supportive decision-making

Last session, Representative Allison Tant and Senator Joe Gruters filed legislation aimed to provide an alternative to guardianship for individuals with disabilities. While the bills did not receive a committee hearing last year, Rep. Tant convened a work group to meet over the summer to resolve concerns raised with the initial draft. The Elder Law Section has been an active member of the work group and will continue to provide input prior to session.

Legislative Committee

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 substantive bills and myriad amendments.

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 the local relationships and outreach to legislators from trusted sources helps the Elder Law Section continue to be a trusted voice and improves our advocacy efforts.

***Brian Jogerst** and Greg Black are co-founders of Waypoint Strategies LLC, a Tallahassee-based governmental consulting firm. Waypoint Strategies, with more than 40 years' experience lobbying on health care and legal issues, is under contract with the Academy of Florida Elder Law Attorneys and the Elder Law Section of The Florida Bar for lobbying and governmental relations services in the State Capitol.*

Visit the Elder Law Section on Facebook

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

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

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

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

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ELDER LAW SECTION

ISM contracts as a special needs planning technique

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

When a person with disabilities who is on SSI disability or SSI elder benefits receives an unexpected inheritance or lawsuit proceeds, the event calls for some special needs planning to continue the SSI monthly checks and Florida Medicaid without going over the $2,000 resource limit. Many think the best or only answer is an individual or pooled special needs trust (SNT). That is not the case. This article discusses the advantages of a room and board contract for a term of months or lifetime, which can in some circumstances have significant cash and other benefits over a personal services contract or a SNT.

In 1999 the Social Security Act was changed[1] to impose a Supplemental Security Income (SSI) transfer of resources penalty for transferring assets for less than fair market value (FMV) for a period of months capped at 36 months. Before this change, persons with disabilities could simply give away excess resources and continue to receive SSI, which would trigger continuation of Medicaid.[2]

In response to the new law, the Social Security Administration (SSA) immediately added SI 01150.005 to the Program Operations Manual System (POMS) to explain how the agency is to assess FMV and to delineate the exceptions to the transfer penalty, giving the special needs attorney some additional and often better tools to maintain public benefits.

SSA defines fair market value as "the current market value (CMV) at the time the resource transfers," noting that CMV is the going price at which the resource could reasonably be expected to sell on the open market in the local area.[3] SSA defines compensation as the cash or other valuable consideration provided in exchange for the resource, paid by cash or real or personal property received in exchange.[4]

The value of the compensation received by the SSI claimant is determined by looking at the legally binding agreement between the SSI claimant-transferor and the person or entity receiving the resource. Particularly important is the POMS statement that "The transferor may actually receive the compensation before, at, or after the actual time of transfer."[5] In-kind support and maintenance (ISM) may provide the compensation for the transfer valued at its full CMV multiplied by the length of time for which the ISM is to be provided under the agreement. SSA provides a helpful example of a contract for a period of years:

Example: Determining whether ISM applies

Bill Thomas transfers $30,000 in cash to his sister based on a written contract that she will provide him with food and shelter for five years. The sister values the food and shelter at $500 per month. The claims representative (CR) develops Bill's living arrangements and determines he has a flat fee arrangement with his sister and is required to pay $500 per month. The food and shelter for five years is worth $30,000 (5 years x $6,000 per year). Therefore, Bill received FMV for the $30,000 he transferred. ISM is not counted because Bill has prepaid for his food and shelter with the $30,000 he transferred.

SSA staff are instructed to use the *actual* value of the ISM as defined in the standard food and shelter instructions[6] and not a one-third reduction or presumed maximum value (PMV) to set the value of the compensation in the agreement.[7] Staff are further instructed to obtain a statement from the ISM provider to confirm the ISM is being provided using SSA's form 8011-F3 (Statement of Household Expenses and Contributions).

What about a legally binding agreement that in exchange for some real property, personal property, or cash, the SSI claimant will receive ISM for his or her life? Staff are instructed to multiply the yearly CMV of the ISM provided by the "years of life remaining" corresponding to the SSI claimant's age (or next lower age) found in POMS SI 01150.005F. Note that this chart may be different from the life expectancy charts in the Florida Medicaid Manual.

SSA provides two useful examples showing the effect of an agreement to provide ISM for life:

Example 1: Total value of ISM results in FMV compensation

Valerie Payne transfers non-home real property valued at $185,000 to her sister. As compensation, her sister agrees to provide Valerie with room and board in the sister's home for the rest of Valerie's life. ISM development shows that the sister's total household expenses are $1,500 per month. The household consists of three persons, including Valerie who was age 53 at the time of the transfer. The CMV of the ISM is $6,000 per year ($1,500/3 = $500 per month x 12 months = $6,000). Then, $6,000 x 31.61 (average years of life remaining at age 50) = $189,660 compensation. In this case, Valerie received FMV for the transferred

resource. We do not count ISM because the individual prepaid for her own food and shelter with the value of the home she transferred. For the procedure on determining an individual's contribution toward household operating expenses, see SI 00835.480D.

Example 2: Total value of ISM results in uncompensated value

Assume the same case facts as in Example 1 except that Valerie is 80 years old at the time of the transfer. As in Example 1, the ISM is worth $6,000 per year. At 80 years of age, the life expectancy table indicates 7.16 years. Multiplying 7.16 years times $6,000 results in compensation of $42,960. In this case there is uncompensated value of $142,040 ($185,000 minus $42,960). Therefore, Valerie is subject to a period of ineligibility for SSI because she transferred the house for less than FMV.

The agreement between Valerie Payne, the SSI claimant, and her sister could arise in a couple of ways. Perhaps Valerie and her sister have been living together for years when Valerie inherits a home (described in the example as "non-home real property") from another person. Or perhaps Valerie has been living in her own home, and now that she is becoming more physically frail, she wants to move in with her sister who can help care for her. Valerie's former home becomes a countable resource since it is no longer her primary residence.

In all likelihood, before the ISM agreement and property transfer, either scenario would see Valerie's SSI check go down due to her inability to pay her fair share of her sister's household expenses. SSI is subject to a one-third deduction for the ISM Valerie is receiving from her sister who is shouldering disproportionately more of the household expenses. This one-third deduction from Valerie's SSI check amounts to approximately $3,000 per year.

At this point Valerie decides to sell for cash or transfer the real property and move in with her sister. What are the options?

Option 1: Give the money to her sister. If Valerie sells the house, receives the $185,000 sales proceeds, and gives the money to her sister with no agreement for anything in return, the transfer penalty applies in full. The amount transferred ($185k) divided by the federal benefit rate (currently $794 per month) results in a penalty calculation of 232 months, but is capped at 36 months from the date of transfer. While that choice results in a loss of approximately $10,000 tax free per year for three years, or $30,000 total, the more significant potential loss is the SSI-related Medicaid health insurance coverage. There are no income tax consequences to the sister since it is a gift.

Option 2: Use a special needs trust. If Valerie sells the home, receives $185,000, and puts the funds in a SNT with the trust paying Valerie's share of the household expenses, the trust's contribution triggers the ISM reduction for payments for food and shelter. She still loses over $3,000 per year in tax-free SSI benefits by having a trust because her SSI check is reduced from $794 to $530 per month. And she incurs attorney fees, trustee fees, and CPA fees, and if she uses a pooled or individual SNT, a potential startup fee as well. The result is that Valerie has more expenses and less tax-free income. At 31 years of life expectancy, the one-third loss of tax-free SSI income amounts to $93,000, and the trustee fee could amount to $172,000 (at 3% over 31 years).

Option 3: Use a personal services contract. Instead, Valerie decides to engage in some other special needs planning and transfers the sales proceeds to her sister in an agreement for personal services to be received in the future. Such personal service contracts (PSC) are specifically allowed under the same POMS.[8] How to draft a proper PSC is laid out in an SSA Atlanta Regional Chief Counsel Precedent (opinion letter).[9] The amount the sister receives is IRS-taxable income of $185,000, which results in a potential substantial loss of $36,011 if using the standard deduction.

Option 4: Use the ISM contract for room and board detailed in the POMS above. The benefit to Valerie of using the SSA-suggested option of transferring the sales proceeds or transferring title to the non-home property to the sister include avoiding:

- the ISM deduction from her SSI checks;
- attorney fees for trust preparation; and
- lifetime trustee fees and expenses.

Once the sister receives the payment under the terms of the contract, she does not have to account further for the funds. She is required under the contract to provide food and shelter for Valerie, but she does not need to maintain an account to do so. Ongoing accounting fees are also eliminated.

In addition, three separate tax experts have advised our office in three separate cases that the room and board contract to share food and shelter expenses results in no federal income tax consequences for the person who receives the funds and agrees to provide the food and shelter. Thus, the $36,011 income tax loss incurred by using the PSC is eliminated by the ISM agreement.

Special needs planning should not be one shoe fits all, nor should special needs planners apply only a single technique to a particular SSI claimant's situation. Combinations of appropriate spend down (paying off credit card bills; paying down mortgages; purchasing new appliances, vehicles, clothes, computers, dental care, and infinitely more), ABLE accounts for those eligible, some funds in ISM contracts, etc., can make clients extremely happy to have a special needs plan tailored to meet their individual needs.

continued, next page

ISM contracts. . .
from previous page

Room and board or ISM contracts can effectively handle small or larger amounts of funds since such contracts can be for a term of several months, several years, or as described by SSA in the POMS example, for a lifetime. Additionally, room and board contracts increase the SSI check over the use of SNTs by legally avoiding the monthly loss of full SSI benefits due to ISM deductions.

Such contracts are not appropriate in every case, but where they are, the advantages over SNTs and PSCs are substantial.

***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 Social Security, SSI, Medicare and Medicaid, and the application of the Patient Protection and Affordable Care Act to the practice of social security and elder law. David is one of the authors of Chapter 17, "Special Needs Trusts" in the Florida Bar Lexis/Nexus publication,* Trust Administration in Florida, *10th edition.*

Endnotes

1 Foster Care Independence Act of 1999 (P.L. 106-169).

2 Florida Statutes § 409.903(2) enacted pursuant to the Social Security Act, Section 1634.

3 SI 01150.005.B.1.

4 SI 01150.005.B.2.

5 SI 01150.005.C.2.

6 POMS SI 00835.001.

7 POMS SI 01150.005.D.3.

8 POMS SI 01150.005.D.4

9 PS 01820.011 Florida, A. PS 14-102 Supplemental Security Income Resource Determination—Validity of Personal Services Contract.

Mark your calendar!

ELS EXECUTIVE COUNCIL MEETING
January 13, 2022
JW Marriott Orlando Bonnet Creek Resort & Spa
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2022 ELDER LAW ESSENTIALS
January 13, 2022 • In-Person and Live Webcast
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January 14-15, 2022 • In-Person and Live Webcast
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Committees keep you current on practice issues

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

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Can law practice management software help you take your firm to the next level?

by Audrey J. Ehrhardt

Are you looking for a better way to consistently execute your workflow and manage your cases on a weekly, if not daily, basis? Did you know there are law practice management software programs that can help firms streamline legal practice management, client relationship management, and potential client intake? There are!

And the best part? By utilizing this form of technology, attorneys and staff can focus on what truly matters: the clients! Accessible on Macs, PCs, iPhones, Androids, and tablets of all kinds, there are numerous features for you to explore that are intended to make law firm processes more efficient.

Law practice management software tools can allow for firm team members to collaborate with matter-centric conversations. When it is used consistently, everything is easy to find as all case-related materials are in one place. The task management features allow for the organization and delegation of tasks, setting of deadlines, and tracking of work in progress, all of which facilitates tasks getting done faster.

The time, billing, and expense features that the majority of cloud-based software systems offer can seem life-altering to those who dread the end of the month and manual entry of billable hours. Document management and electronic signature features allow for the automation of your documents by quickly creating them from pre-saved templates and encouraging clients to quickly complete necessary documents with ease through the ability to e-sign documents. Plus, many of the software companies today are focusing on ways to streamline client intake. The client relationship management features in a number of the cloud-based tools can allow you to maximize the value of your contacts through contact management where you can track lead sources, referrals, and also the estimated value of a case.

The important first step is to commit to learn more about how law practice management software can help you maximize your business productivity. Unfortunately, there is no one perfect legal software out there today. Believe me, if there were, we would all be using it. The best step forward you can take for yourself and the growth and success of your law practice is to find the one that works for you.

What should be your next steps? Here are a few you can use right now:

- Inventory what you need right now.
- Make a list of your questions, including what you think could make your firm even better.
- Take a look at the software options out there.
- Read all you can about them before you contact the vendors.
- Pick your top choices and decide to dive in.
- Use the trial period, when it is available.

While I know this can be challenging, there is light at the end of the tunnel. Think about what you need to unlock the true potential of law practice management software in your law firm.

***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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Tips & Tales
by Kara Evans

Property in another state? No worries, there's an ancillary for that.

The tale: Mr. Samuel's husband, Eric, has passed away. Mr. Samuel has come into your office for assistance with a problem. It seems Eric, a resident of Georgia, had a vacation home on the beach in Sarasota. He left that home to Mr. Samuel. Eric's will is being probated in Georgia, but the attorney in Georgia said she cannot assist with the Florida property. What are Mr. Samuel's options?

The tip: Ancillary proceedings are addressed under Section 734 of the Florida Statutes and in Probate Rules 5.470 and 5.475. When a resident of another state dies leaving property in Florida, Florida law will apply to the proceedings that govern the "validity and effect of the disposition, whether intestate or testate …" (F.S. 731.1055); however, the decedent's last will and testament can still direct who receives the property.

First, you will need to provide the court with authenticated copies of the domiciliary proceedings as directed in Probate Rule 5.470. An authenticated copy of any document is a document that contains a court seal from the out-of-state court where the original document was filed. Which documents you must file will depend on whether the estate was intestate or testate. Take care to examine the documents prior to filing as section 734.102(3) provides that the will can be admitted only if it was executed as required by the Florida Statutes. If there is no self-proving affidavit, you will need an oath of a witness to the will. If the witness is in the other state, you will need a commission. Similarly, the personal representative appointed under the nonresident's last will and testament must meet the requirements set out under sections 733.302 through 733.305.

If the estate is intestate, the preferences in appointment under section 733.301 must be followed. In fact, all of the issues that face an attorney in any probate proceeding will apply. I often use the term *parallel probate* to explain the process to my clients. This means you must still publish a notice to creditors, serve the notice on ascertainable creditors, send a copy of the inventory to the beneficiaries, etc.

There is one slight difference from a regular probate proceeding. In the ancillary proceeding, pursuant to 734.102(6) once the expenses of administration and any claims have been paid, the court may order that the remaining property be transferred to the foreign personal representative for distribution. Alternatively, the court may order the property be distributed directly to the beneficiaries. If a summary administration is appropriate, the ancillary proceeding can be handled as a summary administration as provided under section 735.203.

The subject of the ancillary administration does not have to be real property. Under section 731.106(1), it can also apply to personal property or debt instruments.

The statutes also provide for two other forms of ancillary administration. These are shorter proceedings but apply only in very specific situations. Section 734.1025 allows a foreign personal representative to transfer property, the gross value of which does not exceed $50,000. The foreign personal representative must file an authenticated transcript of the foreign proceeding that will show the last will and testament and the beneficiaries. Again, the documents must comply with Florida law to be admitted to the record. The foreign personal representative must then publish a notice to creditors. If no claims are filed, the property can be distributed. If claims are filed, a personal representative must be appointed as provided by the Florida Probate Rules, and the proceeding goes forward as a traditional probate. This proceeding is available only to testate estates and within two years of the decedent's date of death.

Section 734.104 sets out the proceeding for a testate estate if two years have passed from the decedent's date of death or any time after the domiciliary personal representative has been discharged. In this case, the will must meet the execution requirements of Chapter 732. The will must have been admitted in the proper court in another state, territory, or country; an authenticated copy must be admitted in the county where the property is located; and a petition to admit the foreign will may be filed by any person pursuant to section 734.104. If all the requirements have been met, the court will enter an order admitting the will to the record. Under this section, admitting the foreign will to record will suffice to pass title.

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Tax Tips
by Michael A. Lampert

The primary residence gain on sale exclusion: The basics and some loopholes

Most elder lawyers are familiar with the taxable gain exclusion, within certain limits, on the sale of a taxpayer's principal residence. This article will review the basic rules of the sale of this gain exclusion and address some exceptions and prorations—aka, the loopholes.

The basics

Under IRC § 121, if a taxpayer has a capital gain from the sale of his or her primary residence, the taxpayer may qualify to exclude up to $250,000 of that gain from his or her income or up to $500,000 of that gain if a joint return with the client's spouse is filed. IRS Publication 523, Selling Your Home, provides rules and worksheets.

Qualifying for the exclusion

In general, to qualify for the § 121 exclusion, the client must meet both the ownership test and the use test. The client is eligible for the exclusion if he or she has owned *and* used the home as his or her main home for a period aggregating at least two years out of the five years prior to its date of sale. The client can meet the ownership and use tests during different two-year periods; however, the client must meet both tests during the five-year period ending on the date of the sale.

Generally, the client is not eligible for the exclusion if he or she excluded the gain from the sale of another home during the two-year period prior to the sale of the home.

Reporting the sale

Remember that a client still needs to report the sale of the home even if the gain from the sale is fully excludable. And, of course, the client must report the sale of the home if he or she cannot exclude all of the capital gain from the sale of the home from his or her income.

Practice tip: Make sure that the client does report the sale. I have had multiple cases where the sale is reported to the IRS by the closing agent, but not included on the client's income tax return. The IRS assesses income tax on the entire net proceeds rather than the net gain after subtracting the client's basis (purchase price plus certain improvements and other adjustments) and the § 121 gain exclusion.

Installment sales

If your client sold his or her home under a contract that provides for all or part of the selling price to be paid in a later year, the client has made an installment sale.

With an installment sale, the client reports the sale under the installment method unless the client elects out. Even if the installment method is used to defer some of the gain, the exclusion of gain under § 121 remains available.

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Practice tip: Remember that this is a tax law rule, not a Medicaid rule. The qualification of a promissory note for installment sale purposes may not be the same as its qualification for Medicaid purposes.

Taxpayer in care facility

If the client becomes physically or mentally unable to care for him or herself, the rule becomes 12 months out of the five years prior to the sale date rather than two years. Further, time spent in a care facility such as a nursing home counts toward the client's residency requirement. For this exception to apply, the facility needs to have a state (or other applicable governmental authority) license to care for persons with the client's condition.

Practice tip: This exception is underrecognized in elder planning. If this exception is met, the full gain exclusion is allowed.

Practice tip: Make sure the client keeps records documenting the licensed nature of the facility and the length of residency in the primary residence and the care facility. Remember that an IRS audit or other inquiry may not occur for a number of years after the home sale.

Widowed taxpayers

If the client is widowed and does not meet the two-year ownership and residence requirements on his or her own, a special rule may apply. If the widowed client sells the home within two years of the death of the spouse and the client has not remarried at the time of the sale, then the client may include any time when the deceased spouse owned and lived in the home, even if without the surviving spouse, to meet the ownership and residence requirements. Also, the client may be able to increase the exclusion amount from $250,000 to $500,000. The client may take the higher exclusion if he or she meets all of the following conditions: (1) the client sells the surviving spouse's home within two years of the death of the surviving client's spouse; (2) the client has not remarried at the time of the sale; (3) neither the client nor the late spouse took the exclusion on another home sold less than two years before the date of the current home sale; and (4) the client meets the two-year ownership and residence requirements (including the deceased spouse's times of ownership and residence if needed).

Practice tip: Remember that under current law, there may be a basis step-up (or step-down) to fair market value at death. To the extent that the first spouse to die owned all or part of the primary residence at his or her death, the basis of the property may have fully or partially adjusted to fair market value as of the date of death. This adjustment should also be considered, along with the § 121 exclusion, in determining the taxable gain on the sale of the primary residence.

Practice tip: Remember that if a new primary residence is timely purchased in Florida, it may be possible to "port" the Save Our Homes property tax treatment to the new primary residence.

Loopholes - special proration rules

But what if your client simply does not meet the two-year rule (or even the one-year rule if in a care facility), yet has significant gain on the sale of the primary residence? In some cases, the law allows a proration of the gain exclusion amount.

Computation of special proration

To compute the proration gain amount, take the applicable gain exclusion amount $250,000 (or $500,000) and multiply it by a fraction. The numerator (top number) is the total period the client owned and used the property as a principal residence during the five years ending on the sale date. If the ownership is less than five years, and the gain exclusion was used, use the time period between the last sale where the exclusion was claimed and the sale date. The numerator is then divided by two years (the denominator) (use months or days as needed). In some cases, the partial exemption may be enough to shield all of the gain on the sale.

Exceptions - the loopholes

This special proration rule is only available if the primary reason for the sale is due to a change in place of employment for health reasons or for certain other specific circumstances.

Employment change

Employment change includes not only the taxpayer but the taxpayer's spouse as well. It also includes any co-owner of the primary residence and any person whose principal residence is within this taxpayer's household. All of these people are referred to as *qualified individuals*.

There is a safe harbor if the new job is 50 miles farther from the former residence than the prior job.

Practice tip: If the 50-mile test is failed but the taxpayer can otherwise document the need to change homes due to employment, such as a requirement to live very close to the place of employment due to a call schedule, then the proration can be taken. Carefully document this as it is an audit issue.

Practice tip: This provision can be helpful when a caregiving family member lives with a parent or other family member (or even a non-family member) who owns the primary residence. For example, the residential caregiver gets a new job. The parent can sell and take the proration if he or she does not otherwise meet the two of the last five-year rule and moves with the caregiver. The caregiver can still live with and help the parent.

Health reasons

The health reasons exception includes obtaining, providing, or facilitating the diagnosis, care, mitigation, or treatment of disease, illness, or injury of a qualified individual. Also included is obtaining or providing medical or personal care for

a qualified individual suffering from a disease, illness, or injury.

Qualified individuals are defined as above and also include any descendant of the taxpayer's grandparent.

Practice tip: A doctor's recommendation for change of residence to obtain, provide for, or facilitate the above is automatically considered qualified. If, however, the recommendation is general in nature, for example, moving to a warmer climate, more back up will be needed. The recommendation needs to be more specific.

Practice tip: Especially during the COVID-19 pandemic, there may be unexpected health issues. This exception allows the move not just for the taxpayer, taxpayer's spouse, and residents in the primary residence, but also to address medical needs of close family members.

Unforeseen circumstances

The third category allowing use of the proration exclusion is unforeseen circumstances. There are numerous safe harbors: involuntary conversion of the residence; disaster or similar resulting in casualty to the residence; death of a qualified individual; loss of employment resulting in eligibility for unemployment benefits or resulting in inability to pay housing and reasonable basic living expenses; divorce or legal separation; and multiple births resulting from a single pregnancy of a qualified individual.

Practice tip: If the individual does not meet the safe harbor, carefully document the unforeseen change in facts and circumstances. (And simply wanting a newer house is not a reason!)

Practice tip: Some clients should sell their primary residence, perhaps as a result of an employment change or other change in the client's or family member's circumstances. Yet they are holding out for the two out of five-year gain exclusion. Letting the client know of the possibility of an exception to the proration may facilitate a quicker decision to sell and move to more appropriate housing.

Trap: While more of a calculation issue, the gain exclusion (and partial gain exclusion, as applicable) for the sale of a primary residence does apply to the sale of a home also used for business or rental; however, there is depreciation recapture to consider. This means that depreciation taken is taxable. Still, not a bad result.

One more loophole - sale of principal residence and adjacent vacant land

The exclusion rule can apply to the sale of the vacant land used as part of the principal residence provided it is adjacent to the principal residence and certain requirements are met. The properties can even be sold separately within a certain time period. Only one total exemption may be taken. This can afford some flexibility for the client with significant adjacent land holdings that are part of the residence and yet are to be sold separately.

Many clients know that selling their primary residence qualifies for the general exclusion or gain on the sale of the principal residence up to $250,000 (or $500,000 for a joint return). But knowing the "loopholes" can help with planning and possibly save your client significant taxes after the fact.

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Summary of selected case law

by Elizabeth J. Maykut

Nursing home arbitration agreement valid as prohibitive cost defense does not apply in Florida and agreement was not void as a matter of public policy.

Wick v. Orange Park Mgt., LLC, ---- So. 3d ----, 2021 WL 3719353 (Fla. 1st DCA August 23, 2021)

Issue: Whether an arbitration agreement can be rendered invalid solely because the costs of arbitration are prohibitively high and whether this agreement eliminated or limited the remedy provided under the Nursing Home Residents Act such that it violated public policy.

Answer: No.

The personal representative (PR) sued the nursing home where the decedent resided, alleging negligence, wrongful death, and violation of the nursing home residents' rights, section 400.022, Florida Statutes. The defendant facility (Facility) moved to compel arbitration based on the arbitration clause in the admission agreement. The PR argued the arbitration clause was invalid because the cost of arbitration was so expensive (the Prohibitive Expense Defense) and void as a matter of public policy. The Facility argued that the Prohibitive Expense Defense only applied if the arbitration clause was substantively and procedurally unconscionable as it was not available as a standalone defense and that the clause did not violate public policy. The trial court granted the motion to compel arbitration.

The PR sought to invalidate the agreement on grounds of unconscionability, arguing the cost of arbitration was too prohibitively expensive for her to prosecute her statutory claims; however, she put forth no evidence that met the traditional tests for procedural and substantive unconscionability. The First

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District reviewed federal law, which allows the Prohibitive Expense Defense as a standalone defense, but in reviewing Florida law, it found a split in the districts on this issue. The First District sided with the Fourth District in refusing to extend this defense to a Florida arbitration agreement absent a showing of unconscionability and certified the case to the Florida Supreme Court.

Next, the PR argued the arbitration clause was void as a matter of public policy because the prohibitive cost of arbitration substantially diminished the remedy provided her for a statutory violation of a resident's rights. The First District disagreed, finding that nothing in the agreement eliminated or limited the statutory remedy for the violation of a resident's rights.

The PR filed this case in the Florida Supreme Court (Case No. SC21-1494) invoking the discretionary jurisdiction of the court to review conflict cases.

Practice tip: As the First District reminded us, arbitration agreements are favored in Florida. Therefore, the time for a client to decide whether he or she can live with an arbitration agreement is before it is signed, not after it is signed as defenses to it will then be limited.

Prenuptial agreement excluded homestead; therefore, wife was entitled to exercise spousal homestead rights under Florida law.

Williams-Paris v. Joseph, ---- So. 3d ----, 2021 WL 3890371 (Fla. 4th DCA September 1, 2021)

Issue: Whether a prenuptial agreement executed in Massachusetts was governed by Florida law and whether the wife waived her rights to the homestead under language that stated the homestead was not affected by the agreement.

Answer: Yes and no.

The morning of the appellant's marriage to the decedent in Martha's Vineyard, Massachusetts, the appellant (age 58) was awakened early by the decedent (age 83), who insisted she find an online prenuptial agreement and execute it before their nuptials took place that afternoon. The appellant wife reluctantly complied. After her husband's death, the appellant sought to invalidate the agreement and receive a one-half interest in the homestead as well as her intestate and elective shares, arguing that she had been coerced into signing the agreement, that it was unfair, and that it constituted a unilateral mistake.

Paragraph 2 of the agreement stated it was the intention of the parties that the decedent's residence, identified by its address, not be affected by the agreement. That clause also dictated who paid for expenses associated with the residence. In paragraph 10 of the agreement, each party agreed that if he or she survived the death of the other, such party would make no claim to any part of the real or personal property of the other and further clarified that the survivor waived any right to the homestead and to any inheritance from the other.

After determining that Florida law governed the agreement even though it was signed in Massachusetts, the Fourth District went on to interpret the agreement.

The appellant argued that the agreement unambiguously excluded the decedent's homestead under paragraph 2; the decedent's children argued that paragraph 2 applied only during the decedent's life (pointing out that it included instructions on expenses) and that the appellant waived any right to the homestead in paragraph 10. After citing precedent stating that a court must give effect to the plain language of a contract and that a specific provision controls over a general provision, the Fourth District agreed with the appellant that the language in paragraph 2 controlled and unambiguously exempted the homestead from the agreement. Therefore, the appellant was entitled to exercise her spousal homestead rights granted under Florida law.

Interestingly, the court noted in footnote 1 that the agreement did not comply with Florida law as it was only signed by the parties and notarized, but was not witnessed in accordance with section 732.702(1), Florida Statutes. However, the court did not analyze the agreement under this provision as neither side addressed that point either in the trial or appellate courts. The court clarified that, although a notary may serve as notary and a subscribing witness on some documents, the notary's signature on the acknowledgment is not sufficient in and of itself to show that the notary was also serving as a witness on that document.

Practice tip: Think twice before you marry a guy who drags you out of bed on your wedding day to insist that you find a prenuptial agreement online and sign it before the wedding! Be certain that the language in any prenuptial agreement is clear and that it doesn't include contradictory provisions.

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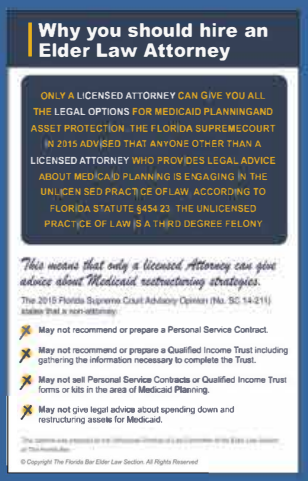

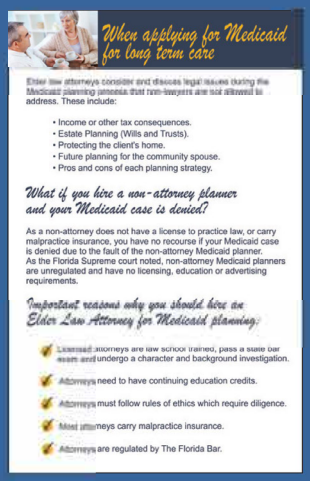

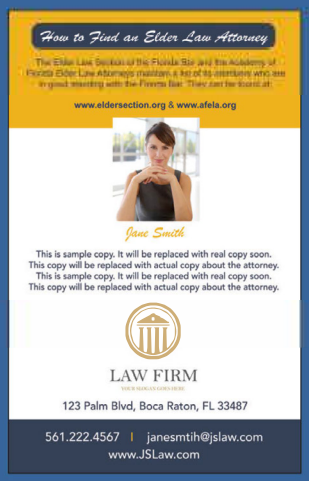

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