

# The Elder Law Advocate

*"Serving Florida's Elder Law Practitioners"*

Featuring:

*From the Chair: Is this Groundhog Day?*

*2022 Legislation Session: Elder attorneys advocate for  
Uniform Jurisdiction Act and other provisions to protect Florida's seniors*

*New income and asset rules for working disabled persons*

Vol. XXIX, No. 2 • Spring 2022  
[eldersection.org](http://eldersection.org)





# The Elder Law Advocate

Established 1991

A publication of the Elder Law Section of The Florida Bar

## Officers

Carolyn Landon, West Palm Beach  
Chair

Howard S. Krooks, Boca Raton  
Chair-Elect

Victoria E. Heuler, Tallahassee  
Vice Chair, Administrative

William A. Johnson, Melbourne  
Vice Chair, Substantive

Shannon M. Miller, Gainesville  
Treasurer

Amy J. Fanzlaw, Boca Raton  
Secretary

Steven E. Hitchcock, Clearwater  
Immediate Past Chair

Genny Bernstein, West Palm Beach  
Editor

Matthew Thibaut, West Palm Beach  
Contributing Member,  
Publications Committee

Susan Trainor, Tallahassee  
Copy Editor

Emily Young, Tallahassee  
Program Administrator

Maliwan Theo, Tallahassee  
Design

Statements or expressions of opinion or comments appearing herein are those of the contributors and not of The Florida Bar or the section.

The Elder Law Advocate will be glad to run corrections the issue following the error.



## ON THE COVER

Key West  
Randy Traynor Photography

## Contents

*Message From the Chair: Is this Groundhog Day?* .....3

*Mark your calendar* .....3

*Capitol Update: 2022 Legislation Session: Elder attorneys advocate for Uniform Jurisdiction Act and other provisions to protect Florida's seniors* ..... 4

*New income and asset rules for working disabled persons* .....8

*Committees keep you current* .....12

*Committee Reports*..... 14

*Practice Management: 7 tips you need to address ASAP when you are opening a law practice or looking to take your success to the next level*.....17

*Tips & Tales: The will is valid but cannot be admitted to probate* ....18

*Tax Tips: FBARs and trusts* .....20

*Summary of selected case law* .....21

## Submit Articles

The deadline for the FALL 2022 EDITION: JULY 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](mailto:gbernstein@jonesfoster.com), or call Emily Young at 850/561-5650 for additional information.



## Message From the Chair

by Carolyn Landon

# Is this *Groundhog Day*?

My husband and I, like many of our friends, have been hesitant about returning to movie theaters. We've been watching Netflix selections and sometimes substituting popcorn for dinner. One Saturday evening, when it was Jay's turn to pick, he scrolled through a list and I looked up in horror when I heard him say, "Remember *Groundhog Day*?" You might remember that one—the movie in which Bill Murray played a self-absorbed weatherman caught in a time loop. I found that movie so disturbing when it came out that I certainly didn't want to see it again. Worse yet, I sometimes feel like this pandemic has us living in a time loop.

Last June we thought it was safe to go out again. Our section held an in-person meeting in Orlando. (June 2020 had been virtual.) But by late summer, we were postponing our Boston Retreat for the second time. Early December looked promising, and AFELA held its Unprogram in person in Orlando. Then, one month later, Omicron hit! We were forced at the last minute to change the Annual Update & Essentials from a much looked

forward to in-person event to an entirely virtual event. Has this been *Groundhog Day*?

Most impressive, through all the ups and downs and time loops, our members have remained committed to our practice and to the Elder Law Section.

Howie Krooks, our chair-elect, and Emily Young, our program administrator, turned the plans for the Annual Update & Essentials around in days! Our speakers were phenomenal! Can you imagine thinking you are going to be speaking in front of a live audience only to find at the last minute you will be talking to a camera?

Our committees have continued to meet via Zoom and/or telephone. Deb Slater and Travis Finchum have worked tirelessly on legislative issues. We have a new Public Relations Committee to assist with those legislative issues and public relations in general. Collett Small planned a successful CLE (with credit) for the Inclusion, Diversity, and Engagement Committee. All of our committees have

taken on the challenge of remote meetings and have built on them.

As practitioners, we've faced the challenges of continuing to represent our clients: when to see them in our office; whether to make that nursing home or hospital visit; how to best represent our clients at Zoom hearings; and how to keep our staff safe and healthy, to name just a few.

Looking ahead, we are having an in-person meeting at the Annual Florida Bar Convention on June 24 in Orlando. Our CLE committee is planning a half-day seminar on exploitation. In late September we will be going to Boston—Steve Hitchcock's long planned, twice postponed, and patiently awaited Elder Law Section Retreat is really going to happen. Thanks to the Omni Parker House Hotel for being so understanding and working with us.

I look forward to seeing you all in June.

P.S. If you were wondering, we did not watch *Groundhog Day*. We watched *The Longest Yard*. The popcorn was good.

## Mark your calendar!



### ANNUAL FLORIDA BAR CONVENTION

June 22-25, 2022

Signia by Hilton Orlando Bonnet Creek  
Orlando, Florida



# 2022 Legislation Session: Elder attorneys advocate for Uniform Jurisdiction Act and other provisions to protect Florida's seniors

The 2022 Legislative Session is an “early session,” meaning committee meetings were held from September to December 2021 with session starting on January 11, 2022, and ending on March 14, 2022. The 2023 Legislative Session will begin in March 2023.

Unlike the 2021 Legislative Session, when legislators, staff, and advocacy groups had limited access to the Capitol Complex, the Capitol was fully open, with many groups attending their “day in the Capitol” as well as attending committee meetings.

As noted in media reports, Florida's economy is surging, which has significantly increased state revenues—by more than \$4 billion over pre-pandemic revenue estimates. Coupled with the federal stimulus funds, Florida is well positioned to fund the budget this year and to maintain sufficient financial reserves to brace against future economic downturns and revenue shortfalls.

## Redistricting

An important issue receiving a great deal of attention by legislators and the media is redistricting. By way of background, every 10 years the Florida House and the Florida Senate are required to redraw the districts for all 160 state legislative seats and Florida's U.S. congressional seats to reflect shifts

in population. Florida will receive one new U.S. congressional seat due to the increasing Florida population. On February 3, the Florida Legislature passed CS/SJR 100, which contains the new state House and state Senate districts, which were sent to the Florida Supreme Court for their review, and the Court did not object to the new maps. CS/SJR 102 contains the congressional reapportionment maps and was vetoed by Governor DeSantis on March 29. The Florida Legislature returned April 19-22 for a Special Session to address the issue of congressional reapportionment.

## Legislative Session overview

The Florida Bar Elder Law Section (ELS) and the Academy of Florida Elder Law Attorneys (AFELA) are once again actively engaged with several key legislative issues, and the following are issues of interest.

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

- Florida is one of four states not to adopt the Uniform Act. ELS and AFELA do not support the Uniform Guardianship Act—but are actively supporting the Uniform *Jurisdiction Act*. ELS and AFELA were pleased that Senator Danny Burgess (R-Pasco County) and Representative Tracy

Koster (R-Pinellas County) agreed to file legislation (Senate Bill 1032 and House Bill 845) to help ensure that Florida's guardianship laws are not weakened while also ensuring that Florida's vulnerable adults are protected when they leave Florida's borders.

- Forty-six of 50 states have adopted some version of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (the Uniform Act) so vulnerable adults under guardianships will remain protected even if they cross state lines, so long as the states concerned have adopted some form of the Uniform Act. Florida, Texas, Kansas, and Michigan have not adopted the Uniform Act or any version of it.
- Since Florida has not yet adopted a version of the Uniform Adult Guardianship Jurisdiction Act, courts in other states have ruled against our ability to help Florida residents once they are taken across state lines. This has made transferring guardianships opened in other states more problematic.
- Florida is widely recognized as a leader in adopting laws to prevent exploitation and to protect Florida's vulnerable adults—yet those protections are eroded and compromised



when a vulnerable Florida resident crosses the state line or when a ward of another state attempts to relocate to Florida to avail themselves of our state's protections.

- According to the American Bar Association's Commission on Law and Aging report entitled *State Adult Guardianship Legislation: Directions of Reform – 2014*:

In our increasingly mobile society, adult guardianships often involve more than one state, raising complex jurisdictional issues. For example, many older people own property in different states. Family members may be scattered across the country. Frail, at-risk individuals may need to be moved for medical or financial reasons. Thus, judges, guardians, and lawyers frequently are faced with problems about which state should have initial jurisdiction, how to transfer a guardianship to another state, and whether a guardianship in one state will be recognized in another.

*Such jurisdictional quandaries can take up vast amounts of time for courts*

*and lawyers, cause cumbersome delays and financial burdens for family members, and exacerbate family conflict—aggravating sibling rivalry as each side must hire lawyers to battle over which state will hear a case and where a final order will be lodged. Moreover, lack of clear jurisdictional guideposts can facilitate “granny snatching” and other abusive actions.* (emphasis added)

ELS and AFELA seek to include Florida in the Uniform Act to protect our vulnerable citizens, particularly when they are in another state, while preserving the protections in place pursuant to Florida's current laws. Under the bill suggested by ELS and AFELA, the essential provisions:

- Adopt uniform provisions for communication and cooperation between Florida courts and the courts of other states regarding a Florida resident who is temporarily within the borders of another state.
- Define when a person has significant connections to Florida such that the court of another state that has adopted

the Uniform Act will honor the orders of the Florida court regarding the proper jurisdiction for the proceeding (Florida).

- Permit a Florida court to decline to exercise jurisdiction when the basis for jurisdiction would be based on the bad conduct of a person seeking the Florida court's jurisdiction.
- Outline a procedure when two states are attempting to exercise concurrent jurisdiction.
- Establish procedures for Florida to accept the transfer of a guardianship from another state, and the procedures to transfer a guardianship established in Florida to another state.

ELS and AFELA have seen the financial and emotional strain on families when their loved ones/incapacitated adults have been caught up in a guardianship dispute between two states. By joining the Uniform Act, Florida can protect vulnerable Florida residents when they are removed to another state.

continued, next page

## 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/](https://facebook.com/FloridaBarElderLawSection/).

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

Alison Hickman  
904/264-8800  
[alison@floridaelder.com](mailto:alison@floridaelder.com)





ELS and AFELA worked closely with The Florida Bar Real Property, Probate, and Trust Law Section (RPPTL) prior to session on revised language, but RPPTL remained actively opposed to the legislation. Senate Bill 1032 unanimously passed two Senate committees; however, House Bill 845 did not receive a hearing in the House. ELS and AFELA will review the bill again over the summer and fall in preparation for the 2023 Session.

### **Trusts**

Representative Mike Beltran (R-Hillsborough County) and Senator Joe Gruters (R-Sarasota County) filed House Bill 1001 and Senate Bill 1368. As initially filed, the bills:

- Amended Florida's rule against perpetuities for a trust created on or after July 1, 2022, by extending to 1,000 years the time in which the trust must vest.
- Authorized a specified financial statement in lieu of an annual trust accounting when not otherwise prohibited by the trust's terms.
- Expressly authorized service of a notice or document by email, which may include use of a hyperlink or an attached document.
- Clarified the applicability of a statute relating to a trustee's reimbursement

to a grantor trust's grantor for tax payments made by the grantor.

- Extended the enforcement period for a purpose trust from 21 years to 1,000 years.

Working with RPPTL, ELS and AFELA oppose this significant change to the trust laws because the bills fundamentally shift the burden *from* trustees to beneficiaries for several key aspects of trust administration by providing regular accountings, detailing certain information in accountings, and formatting of accountings. Further, the bills erode the protections afforded to trust beneficiaries that were originally and purposefully built into the Florida Trust Code when Florida adopted the Uniform Trust Code. ELS and AFELA believe there has been no demonstration of compelling public policy that supports the removal of these essential beneficiary protections or the shift in burdens from the trustee, who is in a position of power and fiduciary duty, to the beneficiaries of the trust. Senate Bill 1368 was adopted by the Legislature.

### ***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, including the creation of a state-wide guardianship database. Representative Linda Chaney (R-Pinellas County) and Senator Jennifer Bradley (R-Clay County) filed House Bill 1349 and Senate

Bill 1710 aimed at creating the database. Overall, elder law attorneys supported and recognized that additional guardianship data should be collected; however, ELS and AFELA had concerns with the bills as originally written and believed the bills provided too much specific personal information. The bill was amended to create two databases. The first will be accessible by the judges, direct judicial staff, and court and clerks of court personnel authorized by a judge to assist with guardianship matters to perform their respective duties and includes specific information about the guardianships. The second database will be accessible by the public and include information relating to the public and professional guardians, including contact information, licensure status, and whether there has been any disciplinary actions taken by the Department of Elder Affairs (DoEA). Additionally, all aggregate and deidentified data from the first database will be sent to the Office of Program Policy Analysis and Government Accountability (OPPAGA) for annual reports beginning in July 2024. This consolidated data will be compiled to conduct a comparative analysis between the use of guardianships in Florida and that of guardianship laws in other states.

### ***Public records exemption/elder abuse fatality review teams***

House Bill 1243 by Representative Fred Hawkins (R-Osceola County) and Senate Bill 1594 by Senator Audrey



**Florida Lawyers Helpline**  
**833-FL1-WELL**



Gibson (D-Duval County) create public record and public meeting exemptions related to review teams by specifically requiring any information obtained by the review team for the purposes of conducting a case review, which is exempt from public records requirements, *remains* exempt when held by the review team. ELS and AFELA were concerned about the initial draft of the bill because some exempt information may have inadvertently been available to the public. An amendment supported by ELS and AFELA was adopted to address the concerns, and ELS and AFELA support the amended legislation. The bills were not adopted during the 2022 Session but are expected to return for the 2023 Session.

### ***Supportive decision making***

The 2022 Legislative Session is the second time Representative Allison Tant (D-Tallahassee) filed this legislation that seeks 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 over the summer to resolve concerns raised about the initial draft. ELS and AFELA opposed House Bill 1207 and Senate Bill 1772

by Senator Victor Tores (D-Kissimmee) and will continue to actively work with the sponsors to address our concerns. The bills were not adopted during the 2022 Legislative Session and may return for the 2023 Session.

### **Legislative Committee**

The Legislative Committee meets *every* Friday at 8:00 a.m. during session to discuss issues reviewed by the ELS committees.

If you want to participate on a substantive committee or review/comment on the bills that are filed, please contact the chair and co-vice chairs of the ELS Legislative Committee:

Debra Slater

[dslater@slater-small.com](mailto:dslater@slater-small.com)

Travis Finchum

[Travis@specialneedslawyers.com](mailto:Travis@specialneedslawyers.com)

Grady Williams

[grady@floridaelder.com](mailto: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. It is imperative that we continue to have thorough and timely responses available

during the Interim Committee Weeks and Legislative Session as meeting notices leave minimal time to respond. 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 ELS and AFELA 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 related 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.

## **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](mailto: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.





# New income and asset rules for working disabled persons

by Heidi M. Brown

Did you know that your working disabled clients who are on a Medicaid waiver program, such as iBudget, Long-Term Care, Familial Dysautonomia, or Model programs, can now own more than \$2,000 in countable assets and have more than \$2,523 in countable gross monthly income? Under the Working People with Disabilities program, an individual on a Home and Community-Based Services (HCBS) waiver who is disabled and working can have up to 550% of the federal benefit rate (FBR) or \$4,626 in countable gross monthly income and up to \$13,000 in countable assets.<sup>1</sup> An eligible couple can have up to \$9,252 in countable gross monthly income and up to \$24,000 in countable assets.<sup>2</sup> Also, according to 1640.0205 of the DCF ACCESS Policy Manual, the asset limits exclude “a retirement account recognized by the Internal Revenue Service.”<sup>3</sup> According to the Florida Agency for Health Care Administration’s (AHCA) frequently asked questions (FAQs), to qualify the individual or couple:

1. must be enrolled in the iBudget Waiver (Developmental Disabilities Individual Budgeting Waiver), the Long-Term Care Waiver, the Familial Dysautonomia (FD) Waiver, or Model Waiver<sup>4</sup>;
2. be 21 years of age or older; and
3. have their increased assets and income be due to earned income through paid employment.<sup>5</sup>

How to apply or remain eligible for the Working People with Disabilities program and take advantage of the increased income and asset limits depends on whether the individual receives Supplemental Security Income (SSI). If the individual or couple receives SSI, they should report changes in employment and/or increased earnings or

assets to the Social Security Administration (SSA) through the standard reporting process.<sup>6</sup> If the individual or couples does not receive SSI but is enrolled in a waiver program or is applying for a waiver program, then they should report changes in employment or increases in income or assets to the Florida Department of Children and Families (DCF) through the standard reporting process.<sup>7</sup>

By way of history, in 2019 the Florida Legislature in its General Appropriations Act bill passed the Working People with Disabilities legislation.<sup>8</sup> According to the bill, AHCA was directed to seek federal approval for a waiver, state plan amendment, or other federal authority for a program called Working People with Disabilities, which would allow “an increase to the monthly income limit up to 550 percent of the [FBR] for individuals with earned income through paid employment.”<sup>9</sup> Additionally, the bill stated that single individuals could have “cash assets ... up to the amount of \$13,000” and couples could have up to \$24,000.<sup>10</sup> Finally, the bill stated that the “participants [can] have a retirement account recognized by the Internal Revenue Service.”<sup>11</sup> The original language seemed to indicate that this program would be for adults with “developmental disabilities”;<sup>12</sup> however, later versions of the program rules in the proposed amendment to the Florida Administrative Code and the DCF ACCESS policy manual do not mention the requirement that the individual have a developmental disability.<sup>13</sup>

The first iteration of this legislation was found in the 2018 General Appropriations Act bill, which ordered AHCA to seek federal approval for the program after providing a report on the estimated costs to the Medicaid program and the status of the federal approval.<sup>14</sup> In response, AHCA

issued a report entitled “Working People with Disabilities” (dated November 30, 2008).<sup>15</sup> In Section I of the report, AHCA noted that the intent of the request from the Florida Legislature was to “explore potential options to enable certain groups of individuals to work and maintain access to Florida Medicaid coverage.”<sup>16</sup> Another interesting element of the report is that AHCA acknowledged that “[m]aintaining gainful employment is considered an important aspect of adult life,” but yet “many people with disabilities are unemployed or underemployed.”<sup>17</sup> The report quoted statistics from the United States Department of Labor that in 2017, “only 19% of people with disabilities were employed”<sup>18</sup> and in Florida, 33% of people with disabilities were employed.<sup>19</sup> Moreover, the report noted that people with disabilities earn less than those without disabilities.<sup>20</sup>

In its report to discharge its mandate, AHCA evaluated the following three options and issued recommendations:

1. “submit a state plan amendment to ‘disregard’ certain specified income sources determining Medicaid eligibility” whereby it would “waive certain income and resource rules for individuals receiving services through home and community-based services waivers and allow it to increase the monthly income limit above 300% of the [FBR];”
2. “increase utilization of Miller Trusts/Qualified Income Trusts” for those in HCBS programs; or
3. “implement a Medicaid Buy-In program” and allow individuals to pay a premium and have it be enacted either through the Federal Balanced Budget Act or the Federal Ticket to Work Incentives Improvement Act.<sup>21</sup>



When evaluating Option 1, to submit a state plan amendment to apply income disregards, AHCA analyzed two different proposed income increases, 400% of the FBR and 500% of the FBR, which in 2018 equaled \$3,000 per month and \$3,750 per month, respectively.<sup>22</sup> AHCA noted that setting the rate at 500% of FBR “would provide the ability for an individual to work more hours and/or at a higher paying position than the first approach.”<sup>23</sup> To implement this option, AHCA reasoned that the State of Florida can “apply income disregards in several different ways”; however, to effectuate the intent of the Working People with Disabilities program, DCF would only allow these earned income disregards for people applying for waivers and those “who have increased income due to employment, as opposed to other sources, such as Social Security, unemployment benefits, gifts, etc.”<sup>24</sup> AHCA estimated that this method would affect approximately 13,397 people who are enrolled in HCBS programs, including approximately 2,200 people on the iBudget program and 11,197 who are receiving services through the Long-Term Care waiver.<sup>25</sup> At the time of the report, AHCA noted that the total maximum number of people who could enroll in iBudget was 40,818, in the Long-Term Care program was 70,702, and in the Familial Dysautonomia waiver or Model waiver was 35.<sup>26</sup> Finally, AHCA opined that the costs to the State of Florida to implement this specific change would be about \$160,000 and would take about one year to obtain the necessary federal approval.<sup>27</sup>

For Option 2, ACHA described how Miller Trusts or qualified income trusts (QITs) typically work for applicants who have too much income to qualify for the Institutional Care program, Institutional Hospice, Program of All-Inclusive Care for the Elderly, or HCBS.<sup>28</sup> AHCA acknowledged that applicants whose income is too high may already use QITs to obtain eligibility.<sup>29</sup> Then AHCA listed certain considerations, such as, it

would not be expensive for the State to implement this program; however, that applicants who use a QIT do not enjoy the benefits of the additional income and would thus not be able to effectuate the purpose of the program, which is to allow working people with disabilities to increase their income yet still be eligible for Medicaid.<sup>30</sup> Additionally, AHCA stated that applicants who use a QIT undergo a burden due to the legal and technical requirements of establishing the QIT and providing proper trust administration and funding.<sup>31</sup> AHCA noted that this option would not require federal approval and the cost to implement would be low as they could use existing resources.<sup>32</sup> For evaluating the impact on the targeted population, AHCA once again observed that this option may affect approximately 13,397 applicants that are currently employed and on the iBudget waiver or are ages 18 to 64 and on the Long-Term Care waiver.<sup>33</sup> The report then stated that in June 2018, there were 6,752 QITs being used for eligibility purposes of which only 1,553 or 23% were for recipients of HCBS programs.

Regarding Option 3, where eligible individuals could buy-in to Medicaid, AHCA remarked that if the buy-in is promulgated, then not only working disabled people who are on HCBS waivers could participate, but “all working people with disabilities would be eligible to buy-in” because in order to increase limits for working people with disabilities, Florida would have to add a Medicaid eligibility group to the State Medicaid plan or to its HCBS waivers, which would increase the number of people eligible for Florida Medicaid.<sup>34</sup> AHCA was unable to calculate the fiscal impact; however, AHCA was able to state that there would be increased costs to update the ACCESS Florida computer system, train staff, hold fair hearings, and

pay for medical care for the new recipients.<sup>35</sup> Finally, AHCA noted that it would require at least two years to implement a Medicaid buy-in.<sup>36</sup>

Ultimately, AHCA recommended submitting a state plan amendment with income disregards as the most effective method to implement the Working People with Disabilities program.<sup>37</sup> AHCA “determined this to be the most direct path to implement the program” while at the same time having a low fiscal impact on the State and the least administrative burden on the individuals receiving HCBS services.<sup>38</sup>

In terms of proper rule-making authority, DCF issued a Notice of Development of Rulemaking on April 30, 2021, where it proposed to “amend rule 65A-1.712, F.A.C. to codify federal requirements, codify a waiver group’s resource limits, and clarify federal guidance regarding SSI-Related Medicaid Resource Eligibility criteria.”<sup>39</sup> Along with amending rules regarding the use of pooled trusts for those over age 64, the amendments would have amended 65A-1.712(1)(g) regarding HCBS programs, to add a new subsection (1)(g) 2, which stated “[i]ndividuals qualifying under Working People with Disabilities cannot have countable resources exceeding \$13,000 [and] [i]ndividuals can exclude one Individual Retirement Account (IRA) recognized by the Internal Revenue Service.” Also, the amendment would have added new subsection (1)(g)3, which stated “[c]ouples qualifying under Working People with Disabilities cannot have countable resources exceeding \$24,000 [and] [c]ouples can exclude one Individual Retirement Account (IRA) recognized by the Internal Revenue Service for each eligible spouse.”<sup>40</sup> As of February 11, 2022, Rule 65A-1.712 has not been

continued, next page



**LEGALfuel**

The Practice Resource Center  
of The Florida Bar

manage your practice.  
*fuel* your business.

Visit  
**LEGALfuel.com**  
to find out how.



amended and implemented; however, Rule 65A-1.716 (5)(b) regarding Income and Resource Criteria has been amended to reflect the new income limits and asset limits.<sup>41</sup> In addition, the definitions in Rule 65A-1.701 have been amended to define the term *Working People with Disabilities (WPwD) eligibility* as “[t]he increased income and resource limits allowed to individuals aged 21 and older with earned income and who are enrolled in a HCBS waiver.”<sup>42</sup>

As a result of the implementation of the Working People with Disabilities program, income and asset levels have been increased for those who work and are on an HCBS waiver program such iBudget, Long-Term Care, FD, or Model. Instead of asset limits of \$2,000 for individuals and \$3,000 for a couple, the asset limits are \$13,000 for individuals and \$24,000 for couples. Also, the individual is allowed to have one retirement account that is not counted, and spouses may each have one retirement account that is not counted. These welcome changes should allow applicants and recipients to earn more money from work and be more productive. It should also allow more working disabled people to qualify for Medicaid, who otherwise would not have met the income limit.



**Heidi M. Brown, Esq.**, a board certified elder law attorney, is an associate with Osterhout & McKinney PA in Fort Myers, Fla. She is chair of the ELS Medicaid/Government Benefits Committee. Her practice includes Medicaid planning, VA planning, estate planning, probate, and trust administration. She received her law degree from the College of William and Mary Law School in Williamsburg, Va., and her undergraduate degree from Georgetown University in Washington, D.C.

## Endnotes

1 See FLA. DEP’T of Children & Families ACCESS FLA. Policy Manual Appendix A-9 available at [https://www.myflfamilies.com/service-programs/access/docs/esspolicymanual/a\\_09.pdf](https://www.myflfamilies.com/service-programs/access/docs/esspolicymanual/a_09.pdf).

2 *Id.*

3 See FLA. DEP’T of Children & Families ACCESS FLA. Policy Manual, Ch. 1640.0205 available at <file:///C:/Users/12399/Documents/Work/ELS/Medicaid%20Committee/Articles/Increase%20in%20Income%20and%20Assets%20Limits%20for%20Working%20Disabled%20Persons/1630%20DCF%20policy%20manual.pdf>.

4 FLA. Agency for Health Care Administration Florida “Did You Know You Can Work and Also Receive Home and Community-Based Waiver Services?” available at [https://ahca.myflorida.com/medicaid/Policy\\_and\\_Quality/Policy/federal\\_authorities/federal\\_waivers/docs/wpwd\\_Handout.pdf](https://ahca.myflorida.com/medicaid/Policy_and_Quality/Policy/federal_authorities/federal_waivers/docs/wpwd_Handout.pdf).

5 See FLA. Agency for Health Care Administration Florida Medicaid Working People with Disability Frequently Asked Questions, at question 2, available at [https://ahca.myflorida.com/medicaid/Policy\\_and\\_Quality/Policy/federal\\_authorities/federal\\_waivers/docs/wpwd\\_FAQ.pdf](https://ahca.myflorida.com/medicaid/Policy_and_Quality/Policy/federal_authorities/federal_waivers/docs/wpwd_FAQ.pdf) and FLA. Agency for Health Care Administration Florida “Did You Know You Can Work and Also Receive Home and Community-Based Waiver Services?” available at [https://ahca.myflorida.com/medicaid/Policy\\_and\\_Quality/Policy/federal\\_authorities/federal\\_waivers/docs/wpwd\\_Handout.pdf](https://ahca.myflorida.com/medicaid/Policy_and_Quality/Policy/federal_authorities/federal_waivers/docs/wpwd_Handout.pdf).

6 See FLA. Agency for Health Care Administration Florida Medicaid Working People with Disability Frequently Asked Questions, at question 2, available at [https://ahca.myflorida.com/medicaid/Policy\\_and\\_Quality/Policy/federal\\_authorities/federal\\_waivers/docs/wpwd\\_FAQ.pdf](https://ahca.myflorida.com/medicaid/Policy_and_Quality/Policy/federal_authorities/federal_waivers/docs/wpwd_FAQ.pdf).

7 *Id.* NB., it may be a good idea to state in the Notes text box on the ACCESS application/Changes report form or cover letter that the individual or couple qualifies for Working People with Disabilities and list the policy manual cite and increased asset and income limits.

8 2019 FL. ALS 115, 2019 Fla. Laws ch. 115, 2019 Fla. SB 2500, 2019 FL. ALS 115, 2019 Fla. Laws ch. 115, 2019 Fla. SB 2500, at page 64 line 218, available at <http://laws.flrules.org/2019/115>.

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.* The bill also directed AHCA to enact the program after federal approval and provide a report by June 20, 2020, to the Executive Office of the Governor, the President of the Senate, and the Speaker of the House of Representatives. *Id.*

13 See *supra* note 2 and *infra* notes 38-41.

14 2018 FL. ALS 9, 2018 Fla. Laws ch. 9, 2018 Fla. HB 5001, 2018 FL. ALS 9, 2018 Fla. Laws ch. 9, 2018 Fla. HB 5001, at Page 61, line 214, available at <http://laws.flrules.org/2018/9>.

15 FLA. Agency for Health Care Administration, Working People with Disabilities Report to the Florida Legislature, November 30, 2018, available at [https://ahca.myflorida.com/medicaid/recent\\_presentations/Working\\_People\\_with\\_Disabilities\\_Report\\_Final.pdf](https://ahca.myflorida.com/medicaid/recent_presentations/Working_People_with_Disabilities_Report_Final.pdf).

16 *Id.* at page 4.

17 *Id.*

18 *Id.* quoting U.S. Dep’t of Labor, Bureau of Labor Statistics (2018). Persons with a Disability: Labor Force Characteristics Summary.

19 *Id.* quoting Erickson, W. Lee, C., & von

Schrader, S. (2018). 2016 Disability Status Report: Florida.

20 *Id.* quoting U.S. Census Bureau (2017). Median Earnings in the Past 12 Months (in 2016 inflation-adjusted dollars) by Disability Status by Sex for the Civilian Noninstitutionalized Population 16 Years and Over with Earnings: Civilian noninstitutionalized population 16 years and over with earnings in the past 12 months.

21 *Id.*

22 *Id.* at page 15. For a couple, the amounts would be \$6,000 and \$7,500, respectively. *Id.*

23 *Id.* at page 16. Also, AHCA notes that “there is no specific federal limit on the income disregards” that the Florida Legislature could choose. *Id.*

24 *Id.*

25 *Id.* at page 17. To arrive at the estimated person affected in the Long-Term Care waiver, AHCA counted the individuals in the program who are ages 18 to 64, but AHCA believed the actual number of people with disabilities who are employed or willing to be employed is significantly lower. *Id.*

26 *Id.* In the report, AHCA acknowledged that enrollees in the FD waiver and Model waiver are unlikely to be able or willing to work given their young age and spinocerebellar disease. *Id.*

27 *Id.* at page 17-18.

28 *Id.* at page 19-20.

29 *Id.* at page 20.

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.* at page 22.

35 *Id.* at page 28.

36 *Id.*

37 *Id.* at page 3.

38 *Id.* at page 30.

39 See Florida Administrative Code and Florida Administrative Registrar at <https://www.flrules.org/gateway/ruleno.asp?id=65A-1.712&PDate=4/30/2021&Section=1>. This Notice was published in Vol. 47/84.

40 Unadopted Proposed Rule (1)(g)2 – 3, Fla. Admin. Code Ann. R. 65A-1.712 (1)(g)2 – 3, which was given to author.

41 Fla. Admin. Code Ann. R. 65A-1.716 (5) (6) available at <https://www.flrules.org/gateway/RuleNo.asp?title=PUBLIC%20ASSISTANCE%20PROGRAMS&ID=65A-1.716>.

42 Fla. Admin. Code Ann. R. 65A-1.701 (75) available at <https://www.flrules.org/gateway/RuleNo.asp?title=PUBLIC%20ASSISTANCE%20PROGRAMS&ID=65A-1.701>.



**Is your EMAIL  
ADDRESS current?**

**Log on to The Florida Bar's website  
([www.FLORIDABAR.org](http://www.FLORIDABAR.org)) and go to the  
"Member Profile" link under "Member Tools."**



# YOUR SNT TRUSTEE

TRUST US TO PROTECT THE  
FUTURE FOR YOUR CLIENTS  
EACH AND EVERY DAY.

GUARDIAN TRUST

EST. 2002

- Affordable Fees
- Protect Public Benefits Eligibility
- No Minimum Trust Deposits or Balances
- Professional and Compassionate Service
- Experienced and Knowledgeable Trustee

*"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*

727 - 210 - 1185 | 901 CHESTNUT STREET, CLEARWATER, FL 33756

[www.GuardianTrusts.org](http://www.GuardianTrusts.org)



# Committees keep you current on practice issues

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

## ADMINISTRATIVE DIVISION

### BUDGET

#### Chair

**Shannon Miller**

The Miller Elder Law Firm,

Gainesville

352/379-1900

shannon@millerelderlawfirm.com

### CONTINUING LEGAL EDUCATION

#### Chair

**Danielle R. Faller**

Hemness Faller Elder Law,

Brandon

813/661-5297 (office)

danielle@hemnesslaw.com

### MEMBERSHIP

#### Chair

**Donna R. McMillan**

McCarthy Summers et. al., Stuart

772/286-1700

drm@mccarthysummers.com

### PUBLICATIONS

#### Chair

**Genny Bernstein**

Jones Foster, PA,

West Palm Beach

561/650-0469

gbernstein@jonesfoster.com

## SUBSTANTIVE DIVISION

### ABUSE, NEGLECT, & EXPLOITATION

#### Chair

**Ellen L. Cheek**

Bay Area Legal Services Inc.,

Tampa

813/232-1343, ext. 121

echeel@bals.org

### ESTATE PLANNING & ADVANCE DIRECTIVES, PROBATE

#### Chair

**Amy M. Collins**

Waldoch & McConnaughay PA,

Tallahassee

850/385-1246

amy@mclawgroup.com

### ETHICS

#### Chair

**Heather Boyer Samuels**

Samuels Wood PLLC

561/864-3371

heather@samuelswood.com

### GUARDIANSHIP

#### Chair

**Twyla L. Sketchley**

The Sketchley Law Firm PA,

Tallahassee

850/894-0152

service@sketchleylaw.com

### LEGISLATIVE

#### Chair

**Debra J. Slater**

Slater & Small PLLC,

Coral Springs

954/753-4388

dslater@slater-small.com

## MEDICAID/GOVERNMENT BENEFITS

#### Chair

**Heidi M. Brown**

Osterhout & McKinney PA,

Fort Myers

239/939-4888

heidib@omplaw.com

## SPECIAL NEEDS TRUST

#### Chair

**Kole J. Long**

Special Needs Lawyer PA,

Clearwater

727/443-7898

kole@specialneedslawyer.com

## VETERANS BENEFITS

#### Chair

**Teresa K. Bowman**

Teresa K. Bowman PA, Sarasota

941/735-5200

tkbowman@tkbowmanpa.com

## SPECIAL COMMITTEES

### BYLAWS REVISION

#### Chair

**Jason A. Waddell**

Waddell & Waddell PA, Pensacola

850/434-8500

jason@waddellandwaddell.com

### CERTIFICATION

(Appointed through The Florida Bar)

#### Chair

**Jana McConnaughay**

Waldoch and McConnaughay PA,

Tallahassee

850/385-1246

jana@mclawgroup.com

## DISABILITY LAW

### Chair

**Jack M. Rosenkranz**

Rosenkranz Law Firm, Tampa  
813/223-4195  
jackrosenkranz@gmail.com

## LITIGATION

### Chair

**Cara C. Singeltary**

Hunt Law Firm PA, Leesburg  
352/365-2262  
cara@huntlawpa.com

## STRATEGIC PLANNING

### Chair

**Collett P. Small**

Slater & Small PLLC,  
Pembroke Pines  
954/437-4603  
csmall@slater-small.com

## INCLUSION, DIVERSITY, & ENGAGEMENT

### Chair

**Collett P. Small**

Slater & Small PLLC,  
Pembroke Pines  
954/437-4603  
csmall@slater-small.com

## NEW PRACTITIONERS

### Chair

**Max J. Solomon**

Heuler-Wakeman Law Group PL,  
Tallahassee  
850/421-2400  
max@hwelderlaw.com

## TECHNOLOGY

### Chair

**Alison E. Hickman**

Grady H. Williams, Jr., LLM Attys.  
PA, Orange Park  
904/264-8800  
alison@floridaelder.com

## LAW SCHOOL LIAISON

### Chair

**Enrique D. Zamora**

Zamora, Hillman & Villavicencio,  
Coconut Grove  
305/285-0285  
ezamora@zhlaw.net

## SPONSORSHIP

### Chair

**Jill R. Ginsburg**

Ginsburg Shulman PL  
Fort Lauderdale  
954/332-2310  
jill@ginsbergshulman.com

## UNLICENSED PRACTICE OF LAW

### Chair

**John R. Frazier**

John R. Frazier JD, LLM, PLC/  
Jos. Phippen PL, Largo  
727/586-3306, ext. 104  
john@attypip.com



## Florida's Disability Savings Program

ABLE United provides tax-advantaged savings and investment accounts designed specifically for Floridians with disabilities whose diagnosis was made prior to age 26.

Learn how your clients can utilize an ABLE account alongside a third-party special needs trust.

- ✓ Save tax-free for qualified expenses
- ✓ Save with the help of family and friends
- ✓ Save without impacting Medicaid or SSI
- ✓ Save time with easy online enrollment

[ableunited.com](http://ableunited.com) | 888-524-ABLE (2253)



A non-profit trust company  
in Central Florida

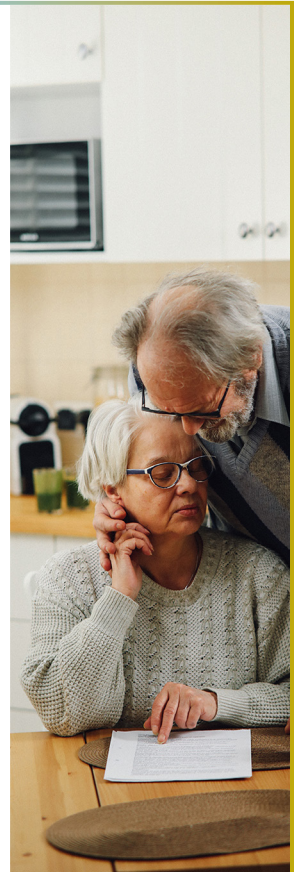
### Special Needs Trusts

- D(4)(A) Disability Trusts
- D(4)(C) Pooled Trusts
- Third Party Supplemental

### Irrevocable Trusts (non Special Needs)

Accounts of any size  
no minimum or maximum

(407) 682-4111  
[www.TrustAGED.org](http://www.TrustAGED.org)





# Committee Reports

## **Abuse, Neglect, & Exploitation (Ellen L. Cheek)**

The ANE Committee meets monthly and continues to explore ANE from various perspectives. For example, recent meetings have included discussions of the codification of undue influence, the use of the exploitation injunction, the challenges faced by ANE victims in the criminal context, and practices in the financial services community that put vulnerable adults at risk. Additionally, during the Legislative Session the committee works closely with the Legislative Committee, reviewing bills as well as proposing legislation. This year, the ANE Committee is working to advance a pending proposal that would promote and facilitate elder abuse fatality review teams by protecting the confidentiality of their records and proceedings.

Finally, the ANE Committee is continuing to work on a statewide repository for information about advocates' experiences with the Injunction for Protection Against Exploitation (Fla. Stat. § 825.1035). If you have filed or responded to one of these injunctions, have knowledge of them being addressed in your area, or want more information on this topic, please let us know at [anecommittee@gmail.com](mailto:anecommittee@gmail.com).

## **Estate Planning & Advance Directives, Probate (Amy M. Collins)**

The Estate Planning and Advance Directives, Probate Committee holds biweekly meetings on the second and fourth Thursdays every month at noon (on an as-needed basis).

We actively participate with the Legislative Committee reviewing legislation related to estate planning, advance directives, probate, and trusts. This year, our committee provided a response to SB 1368, which proposed significant

changes to Florida's trust code.

We hope to continue to schedule interesting speakers to discuss topics that are relevant to the committee and the Elder Law Section. We also offer committee discussions on current topics of importance to the profession and/or recent case law.

As a committee, we would like to start working again on a statewide probate project that would provide essential local information, rules, standards, and practices of each circuit and/or county to help Elder Law Section members easily locate information if they are handling a probate either within or outside of their usual jurisdiction. We are looking for volunteers to collect and report this local information using a standard template. For more information, please email Amy M. Collins at [amy@mclawgroup.com](mailto:amy@mclawgroup.com).

## **Ethics (Heather Boyer Samuels)**

The Ethics Committee is charged with the review, study, and recommendations for legislative, agency, and other actions to address ethical issues that arise in the legal or other professions. Our main project at this time is to produce materials for the Board Certification Project; thereafter, with the addition of new committee members, we will focus our discussions on ethical issues faced by those in the profession and in related areas. For more information, email Heather Boyer Samuels at [heather@samuelswood.com](mailto:heather@samuelswood.com).

## **Guardianship (Twyla L. Sketchley)**

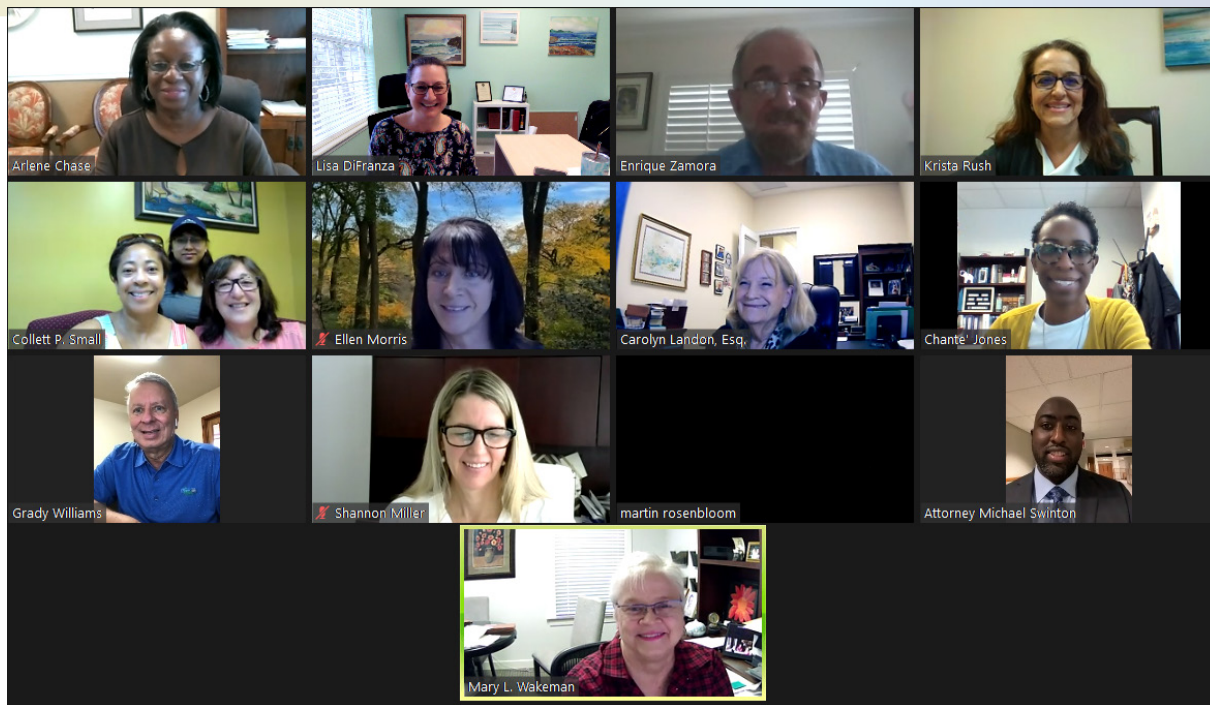
The Guardianship Committee had an active 2022 Florida Legislative Session. In addition, the Guardianship Committee has continued to move forward with several projects to improve guardianship practice throughout the state and to provide guardianship support for elder law attorneys throughout Florida.

During the 2022 Florida Legislative Session, the Guardianship Committee

advocated for passage of the Uniform Guardianship Jurisdiction Act. While it was sponsored in the House and the Senate, it did not pass this year. Next year, we will again seek sponsors and advocate for passage. To assist in this advocacy effort, the Guardianship Committee is collecting and cataloguing cases where guardianship transfers between Florida and other states have been difficult due to Florida's failure to adopt the Uniform Guardianship Jurisdiction Act or where Florida residents have been taken to other states and guardianship implemented in the foreign state has required litigation to try to return the guardianship and the Florida resident to Florida. If you have a case where this has been an issue, please forward the case specifics to the chair of the Guardianship Committee.

The Florida Clerks of Court introduced legislation to collect data on guardianship in Florida. The Guardianship Committee's volunteers worked tirelessly to ensure that what started as an unprotected collection of unlimited data on guardianships and wards in Florida was tailored to collect specific data for specific purposes with the goals of ensuring the privacy of wards and providing data to the courts to improve guardianship practice, procedures, and protections in Florida. The legislation will go into effect in 2023. (See HB 1349, which passed the House and the Senate.)

While the Legislative Session raged on, the Guardianship Committee continued to monitor local, state, and national press regarding guardianship stories and misinformation. During the "Free Britney" media blitz, guardianship committee members gave presentations to the public, wrote articles, and presented continuing legal education on how guardianship actually works in Florida and the differences between the guardianship of Britney Spears and a Florida guardianship.



*The ELS Inclusion, Diversity, and Engagement Committee meets via Zoom on the third Friday of each month.*

Through this monitoring, the Guardianship Committee has learned there is an unending river of misinformation about guardianship that affects every facet of the process in Florida, from the courts and clerks to clients and the media. While some of this misinformation is purposefully perpetuated by a few groups with an agenda, much of it is based in the lack of information about Florida law and the need for guardianship. The Guardianship Committee is looking for ideas, solutions, and suggestions on how best to overcome this misinformation and to assist in the understanding of guardianship and its alternatives. Heading this effort are William Johnson and Paul Lemieux. They are looking for volunteers, information, and implementable suggestions.

The Guardianship Committee has also been working on a guardianship practice repository to be housed on the committee's webpage. This project will bring together the divergent local rules, administrative orders, and a list of practitioners by geographic location to assist guardianship practitioners with guardianship outside their regular geographical practice area. It will also assist the Guardianship Committee in addressing problems when

they are seen in local rules, practices, or administrative orders. The chair of this project is Melissa Finley Williams, and she is looking for volunteers, information, and substantive materials for the repository.

Volunteers on the Guardianship Committee are still working with the Real Property, Probate, and Trust Law Section's (RPPTL) guardianship committee on the guardianship statute rewrite initiated by RPPTL several years ago. That rewrite subcommittee is working through proposed legislation, line by line, that would rewrite the guardianship code now codified in Chapter 744, Florida Statutes. Michelle Kenney is our volunteer for the rewrite committee and gives an update at each guardianship committee meeting.

To join the Guardianship Committee, email Twyla Sketchley at [service@sketchleylaw.com](mailto:service@sketchleylaw.com).

#### **Inclusion, Diversity, & Engagement (Collett P. Small)**

In June 2021, ELS Chair Carolyn Landon created the Inclusion, Diversity, and Engagement Committee chaired by Collett P. Small, Esq., past chair of the Elder Law Section (2017-18). The interest

was immediate, and this newly created committee has drawn members and representation from throughout the state. In the first few weeks the committee approved a mission statement that expresses its intent to create a section committed to being more inclusive, diverse, and engaged:

To increase inclusion, diversity, and engagement within the Elder Law Section from those who have been historically marginalized. We are committed to having a diverse and inclusive section with representation from every background to be able to better serve the increasingly diverse community as people age or face special needs. Through this committee, the Elder Law Section seeks to promote engagement, foster a sense of belonging, and empower a diverse group of professionals to meet the needs of our elderly and special needs individuals.

The committee currently has 21 members. We meet on the third Friday of each month via Zoom from 11:00 a.m. to 12:00 noon and welcome everyone looking to make a difference in our section and for our clients through diversity, inclusion, and engagement.

*continued, next page*



## Committee Reports . . . from previous page

For additional information, please email [csmall@slater-small.com](mailto:csmall@slater-small.com).

### Legislative (Debra J. Slater)

The Legislative Committee consists of the chair, two co-vice chairs, and the chairs of all of the substantive committees of the Elder Law Section. Other members can be admitted by the chair. During the off-season the committee reviews legislative initiatives the section may wish to pursue in an upcoming session as well as responds to initiatives put forth by other stakeholders. Over the past several years, the section has promoted one legislative initiative each year as well as responded to numerous bills proposed by other sections of the Bar or other stakeholders working in our legal domain. The committee works closely with our legislative consultants at Waypoint Strategies, our public relations firm, Sachs Media, and other sections of the Bar. We hold monthly meetings with the legislative leadership and lobbyists of the Real Property, Probate, and Trust Law Section where we discuss the various legislative initiatives being pursued by our two sections, initiatives being pursued by other stakeholders, and how we may collaborate to support issues important to the other section.

Before the start of each annual Legislative Session, the committee meets monthly and then twice monthly as the session nears. After the start of session, the committee meets weekly, on Fridays at 8:00 a.m. via Zoom. These meetings are open to members of the Legislative Committee and others as permitted by the chair. During the Legislative Session, the committee is very busy reviewing all bills that fall under our area of the law, which in a typical year can be several dozen subjects consisting of 50 or more bills. In any given year there are 3,000 to 4,000 bills filed. The Legislative Committee, with the assistance of the substantive

committees, reviews all relevant bills and determines whether the section should take a position in support of or opposition to a bill or whether to stay neutral and merely follow the bill. If the section wishes to take a formal position on a bill, we must first determine whether the Elder Law Section has adopted a legislative position (approved by The Florida Bar) that allows us to advocate for or against a proposed bill. If the section does not have an adopted legislative position on point, the committee will propose a position for the section to consider for approval by the Bar. With an adopted legislative position on point, the section can decide to expend time and resources advocating for or against a bill and will engage our lobbyists and public relations firm in furtherance of the section's position.

This year's session was a busy one. The legislative initiative promoted by the Elder Law Section, House Bill 845/Senate Bill 1032, sought the adoption of the Uniform Guardianship Jurisdiction Act. Despite our work to address the issues surrounding the proposed legislation, it failed in committee. This legislation sought to (1) facilitate cooperation between the courts of different states; (2) determine which court has jurisdiction when there are multiple guardianship proceedings in different jurisdictions concerning one ward; (3) locate jurisdiction in one and only one state, except when an emergency exists or in situations where the individual owns property in multiple states; (4) provide a procedure for transferring guardianship proceedings from one state to another when the protected adult changes domicile; and (5) registration and enforcement of out-of-state guardianships and protective orders. The committee also actively worked to promote those bills that seek to protect and enhance the lives of our vulnerable and disabled adults and to oppose those initiatives that we viewed as doing the opposite. For more information, email Debra J. Slater at [dslater@slater-small.com](mailto:dslater@slater-small.com).

### Medicaid/Government Benefits (Heidi M. Brown)

The Medicaid/Government Benefits Committee meets with the VA Benefits Committee every first and third Tuesday of the month at noon. During our calls we review pending state legislation, Florida administrative rules, and DCF policies and procedures impacting Medicaid. Finally, we have a subcommittee devoted to dealing with the SMMC-LTC waiver. If you are interested in joining us, please let Heidi M. Brown know at [heidib@omplaw.com](mailto:heidib@omplaw.com).

### Veterans Benefits (Teresa K. Bowman)

The Veterans Benefits Committee meets with the Medicaid/Government Benefits Committee the first and third Tuesday of the month at noon. During our Zoom calls we discuss issues regarding coordination of benefits between veterans benefits and Medicaid. We also follow ongoing appeals concerning VA and Medicaid, changes to current VA rules, or pending legislation that might impact our senior veterans and their surviving spouses. If you practice in the area of VA aid and attendance and Medicaid, please consider joining our committee to stay current on the issues and to share in the knowledge of your fellow practitioners. For more information, email Teresa K. Bowman at [tkbowman@tkbowmanpa.com](mailto:tkbowman@tkbowmanpa.com).

### Special Needs Trust (Kole J. Long)

The Special Needs Trust Committee is responsible for monitoring and effecting change in the world of special needs trust, both in Florida and nationally. By joining the committee, you will have the opportunity to discuss the topic with the foremost experts on special needs trusts. The committee meets the second Tuesday of every month via Zoom. Each meeting has an agenda of topics to discuss and allows for an open discussion during which you can bounce ideas off of other special needs trust practitioners. I hope you will consider joining our group. For more information, email Kole J. Long at [kole@specialneedslawyer.com](mailto:kole@specialneedslawyer.com).

# 7 tips you need to address ASAP when you are opening a law practice or looking to take your success to the next level

by Audrey Gay Ehrhardt

When the entrepreneurial spirit is high, you may find yourself bursting at the seams to open your own law practice—or take your existing law practice to the next level of success. It is an exciting time, but not the time to move forward without first taking care of many important tasks.

While we know the journey is different for every attorney, there are steps we can take to ensure long-term success whether you are getting started for the first time or looking to enhance your existing practice. No matter where you are in your journey, here are 7 tips you should make a priority to address.

**1. Do your research.** Before opening or enhancing your law practice, know the industry first. This means knowing your market. Being aware of your competitors and what will set you apart from them. Be thorough in your demographic study as a part of this investigation to know what playing field you are getting into.

**2. Know your audience.** Do you have a clear picture of your target demographic? Can you describe your “client avatar” for your practice areas? Who will be needing your services? How will you help? Having answers to these questions can be essential to many aspects of your business, marketing efforts included. Defining your market means you can better zero in on who you need to reach and retain for your client or customer base.

**3. Set your mission and make it strong.** Have you developed a mission statement for your law practice? You may have thought about it, but putting it down into writing, into something concrete can be beneficial to helping

ensure you have your guiding principles in order. Your mission statement will be your guidepost. It will be the touchstone you can always go back to whenever you are faced with an important decision—and you will be faced with many. If you have been open for a period of time, is it time to update your mission statement to reflect where you and your practice are now?

**4. Detail your finances.** How clear are you on your financial situation? The more detailed you are about your finances, the better. Be scrupulous in your outline of costs, as well as how you plan to cover them. Nothing can tank a firm, in any phase of its growth, like failure to plan for costs, both expected and unexpected.

**5. Make a business plan.** Much like your mission, you may have thought about how your law practice will be structured, managed, and run. Now is the time to put it all in writing. Outline the steps you will need to take to get your business off the ground or take it to the next level. How will you foster consistent and sustainable growth? Include your mission statement and what services your firm will provide in your business plan, as well as the industry and market research you have conducted. Your plan should also detail your financials and your financial goals.

**6. Get a mentor.** When questions and concerns arise, do you have someone you can turn to for advice or just someone to act as a sounding board? Find a mentor or a professional coach, ideally one who is a lawyer and knows the challenges you are facing. This person can provide you

with more support than you may initially anticipate.

Especially when you own your own law practice and as your success grows, it can be lonely at the top. Shifting into a focused training path with a performance coach can be a real game changer to know you have someone to turn to for advice when you need it.

**7. Assemble your team and support staff.** Who is going to help your law practice run successfully? Determine the support and management roles you need in your firm and find the individuals who will uphold their respective responsibilities accordingly. Granted, this may be easier said than done, but it is nonetheless an important part of starting a business out on the right foot as well as positioning an existing business for greater success.

While it can be overwhelming to tackle this list, jump into it and get started! Your services, whether you are just getting started or looking to enhance your practice, will help your community.



**Audrey Gay Ehrhardt, Esq., CBC,** builds successful law firms and corporations across the country. A former Florida elder law attorney, she is the

founder of Practice42 LLC, a strategic development firm for attorneys. She focuses her time creating solutions in the four major areas of practice development: business strategy, marketing today, building team, and the administrative ecosystem. Join the conversation at [www.practice42.com](http://www.practice42.com).





## Tips & Tales by Kara Evans

# The will is valid but cannot be admitted to probate

**The tale:** A prospective client comes in with her deceased husband's Last Will and Testament. Mr. and Mrs. Smith recently moved to Florida from Michigan. They had meant to have their estate planning documents reviewed and updated, but Mr. Smith contracted COVID-19 and died before they could do so. He left several bank accounts that were titled in his name alone. Mrs. Smith tried to do a Summary Administration by herself, but the court stated the will is not "self-proved" and so cannot be admitted to probate. She does not understand what the court wants and has come to you for advice.

**The tip:** In order to initiate any testate probate proceeding, the original Last Will and Testament must be admitted to probate. Florida Statute 732.502 sets out the requirements for the proper execution of a will. The testator must sign at the end and two attesting witnesses must sign in the presence of the testator and in the presence of each other. That is it. That, in itself, makes a valid Last Will and Testament; however, a Last Will and Testament, even if executed in accordance with the statute, will not be admitted to probate without more. It is the "more" that Mrs. Smith needs.

Often, a Last Will and Testament will be self-proved. According to Florida Statute 732.503, a will can be made self-proved, either at execution or later, by

an acknowledgment of it by the testator and the affidavits of the witnesses, made before an office authorized to administer oaths. But Mr. Smith's will was not self-proved.

Florida Statute 733.201 tells us that to admit this admittedly valid will to probate, the court will need the oath of any one of the attesting witnesses. This oath must be taken before any circuit judge, a commissioner appointed by the court, or a clerk. Under 731.201(5), "clerk" means the clerk or deputy clerk of the court. If our witness is local, they can just come down to the court and complete the oath. If they are in a different county, but still in Florida, they can appear before any circuit judge or clerk in any county.

But Mr. Smith's Last Will and Testament was executed in Michigan. The witnesses are in Michigan. Mrs. Smith will need to petition the court to appoint a commissioner to take the oath from one of the witnesses in Michigan. Probate Rule 5.230 explains how this process works. As a practical matter, you will need to contact the witness that will sign the oath and find out the name of someone who is authorized to administer an oath under the laws of the state or county where the witness is located. Start with the office of the attorney who drew up the will. The witnesses will often be known to the attorney, of which the attorney, or someone in their office, will

be authorized to administer oaths.

Once you have everyone's names, you can create the Petition to Appoint a Commissioner and the Commission. You send that to the court along with the Oath of Witness to Will, the Certificate of Commissioner (a document that certifies to the court that the commissioner properly took the oath of the witness), and a copy of the Last Will and Testament. Once the judge signs the Commission, you will send the whole packet to Michigan where the appointed commissioner can take the oath of the witness. When the entire executed package is filed with the court, the will can be admitted. Whew!

But in the process of obtaining the names for the Commission, you discover that the attorney has retired, one of the witnesses has dementia, and the other has died. As a last resort, Florida Statute 733.201(3) allows the will to be admitted on the oath of the nominated personal representative or any disinterested person, stating that they believe the document to be the true last will of the decedent. This document should contain an explanation of why the witnesses are unavailable.

***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.*

# YOUR SUCCESS. OUR COMMITMENT.



ElderCounsel is dedicated to the professional development and full practice support of elder law attorneys through education, collegiality, practice development, and our document drafting system.

**Being an attorney is very different from running your own law firm. ElderCounsel helps you keep up in an ever-changing elder law environment and sustain a successful practice.**

## 01 ElderDocx<sup>®</sup>

Generate a wide array of elder law (including general estate planning) special needs planning and veterans pension planning documents.

## 02 Education

Our catalog covers a wide variety of legal theory and strategies for elder law, VA planning, estate planning, and special needs planning attorneys.

## 03 Resources

Members have access to quality education, valuable practice tools, and a robust drafting system.

## 04 Practice Development

We deliver the tools and resources you need to enhance your practice today, while positioning your firm to increase profits and reach full potential tomorrow.







## Tax Tips by Michael A. Lampert

# FBARs and trusts

Yes, I know, not more about FBARs! I have previously written on the FBAR filing requirements. (See *The Elder Law Advocate* “Tax Tips” in Spring 2017, Winter 2018, Fall 2020, and Fall 2021.) As a reminder, the Report of Foreign Financial Accounts—technically called Form 114 and commonly called the FBAR, requires reporting of certain ownership or control of foreign (non-U.S.) financial accounts exceeding \$10,000 in the aggregate during a calendar year. The FBAR requirements are part of the Bank Secrecy Act in U.S. Code Title 31 rather than in the Internal Revenue Code in U.S. Code Title 26.

Remember that the penalties for non-compliance are steep. Willful violation can be up to \$100,000 or 50% of the account balance at the time of the violation, and the IRS can go back as far as six years. The non-willful penalty can be up to \$10,000 for up to six years. While there have been some contrary court decisions, it does appear that the non-willful penalty can be applied per account rather than per year. So, the penalties can be significant.

But what about trusts? This article is

not intended to be a deep dive into the FBAR rules regarding trusts. Instead, it is to note some pitfalls and items that elder law attorneys should be aware of that are often missed. Remember that the reporting requirement is ownership *or* control. This can result in not only the trust having to report, but also the trust’s beneficiaries, the trustees, and even the trust’s settlors.

### BOLO—Be On The Lookout

What should the elder law attorney BOLO for? At least these five things:

1. Does the trust have ownership or control of a foreign financial asset (exceeding \$10,000 in the aggregate)? If so, the trust needs to file an FBAR—because it owns or controls the assets. The trustee also personally needs an FBAR—because the trustee has control over the assets. For this purpose, the trust’s assets and the trustee’s personal assets are aggregated to determine the \$10,000 threshold for FBAR filing by the trustee.
2. Is there a nominee or similar person or entity acting on behalf of the trust? Will the nominee have title to, or

control over, the foreign financial account? If so, the trust needs to file an FBAR, as does the trustee, if the \$10,000 filing threshold is met.

3. Is there a trust, partnership, corporation, or other entity in which the trust owns, directly or indirectly, more than 50% of the voting power or control of the shares, interest in profit or capital, or beneficial interest in assets or income, as applicable? If so, as above, the trust and the trustee need to file an FBAR if the filing threshold is met.
4. Does the trust’s settlor still have ownership or control of a trust that must file an FBAR? The settlor likely also has an FBAR filing requirement.
5. If the trust has to file an FBAR, the beneficiary of the trust may also have to file an FBAR.

### U.S. or foreign trust?

Remember that the FBAR filing requirement applies to U.S. persons. U.S. situs trusts are deemed to be a U.S. person for FBAR reporting. But what about foreign trusts? Do they need to file FBARs?

## ADVERTISE in The Elder Law Advocate!

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

### Advertising rates per issue are:

Full Page	\$750
Half Page	\$500
Quarter Page	\$250

Call Emily Young at 850/561-5650 for additional information.

The general rule for determining if a trust is U.S. situs under the Internal Revenue Code (Title 26) is if a U.S. court can exercise primary jurisdiction over the trust *and* if one or more U.S. persons has the power to control all *substantial* decisions of the trust (often called the control test). The rules behind these tests are detailed, and the relevant regulations should be consulted based on the facts of each trust document.

Sometimes a trust created in the United States is intentionally drafted to fail the control test and thereby make the trust foreign (this is often the case when a revocable trust is established by a foreign person for a U.S. family member). The elder law attorney may see this with clients who have inadvertently created a foreign trust with the inclusion of a foreign family member as a trust fiduciary. This makes a trust created in the United States a foreign trust for income tax purposes. Where there is a U.S. settlor or beneficiary of a foreign trust, Forms 3520 and 3520-A must also be considered (as each of these

forms also have significant penalties for the failure to file). But watch out ...

### **Back to Title 26 USC versus Title 31 USC**

Remember that the FBAR requirement is pursuant to Title 31, not Title 26 (income tax). Title 31 defines a U.S. person (and hence a U.S. trust) to include “trusts or estates formed under the laws of the United States.” Therefore, even if a trust is foreign for U.S. tax purposes, it may well be subject to the FBAR requirements as a “U.S. trust.” And if it is a foreign trust subject to FBAR requirements, not only will the trust need to file an FBAR if the assets are over the \$10,000 filing threshold, but the trustee and the beneficiary may also need to file.

**Practice tip:** A non-U.S. individual or estate may create a U.S. trust to own certain assets. This trust may always have been treated as a foreign trust for tax purposes; however, if this trust has ownership or control over foreign financial assets and if a U.S.-based client is now a beneficiary, that client is now a beneficiary of a trust

holding non-U.S. assets. Not only does the trust have to file an FBAR, the beneficiary and the trustee personally may also need to file.

Complicated? Yes.

The take aways:

- Do not assume that a U.S. trust, its beneficiaries, and its trustees do not have an FBAR requirement. Does the trust hold foreign financial assets?
- Do not assume that a foreign trust, its beneficiaries, and its trustees do not have an FBAR requirement. Was the foreign trust created in the United States?
- If the trust has an FBAR filing requirement, the U.S.-based trust beneficiary likely also has an FBAR filing requirement.

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

## **Summary of selected case law**

**by Elizabeth J. Maykut**

### **Challenge to exercise of power of appointment over grandfather's trust in decedent's will was not a challenge that must be brought within time period in 733.212(3), Fla. Stat., for validity of a will.**

*Tendler v. Johnson*, 47 Fla. L. Weekly D40 (Fla. 4th DCA December 22, 2021)

**Issue:** Whether the appellant's challenge to the propriety of a disposition of assets of a trust by a provision in the decedent's will constituted a challenge to the “validity” of the will such that it was time-barred by the three-month limitation period in section 733.212(3), Florida Statutes.

**Answer:** No.

The decedent was the primary beneficiary under the Rison trust, which was

created by his grandfather; the decedent's mother was the secondary beneficiary under the trust; and the appellant was the decedent's brother. Upon the decedent's death, the appellant was the only living child of his mother. The trust provisions stated that the assets should be held in trust for the appellant unless the decedent effectively exercised a limited power of appointment (LPOA) granted to him by the trust. The LPOA language in the trust provided that the decedent may exercise this power in favor of anyone except himself, his creditors, his estate, or creditors of his estate.

In his will, the decedent attempted to exercise the LPOA by directing that the trust assets be distributed to the trustee of the decedent's revocable living trust

(RLT) and used to satisfy specific gifts set forth in the RLT and that any balance be distributed pursuant to the RLT's residuary clause. The RLT also stated that any creditors of the estate could be paid out of the RLT's assets.

As part of the probate of the decedent's will, a notice of administration was served on the appellant advising him that any challenge to the validity of the will must be brought within three months pursuant to section 733.212(3), Florida Statutes. After the three-month period had elapsed, the appellant challenged the decedent's attempted exercise of the LPOA, arguing that it was ineffective because it violated

continued, next page



the terms of the trust by directing the assets of the trust be distributed as part of the RLT's residuary, which would make them subject to the decedent's creditors. The trial court dismissed the appellant's challenge as untimely under section 733.212(3), Florida Statutes.

The Fourth District held that the appellant's challenge to the effectiveness of the decedent's exercise of the LPOA did not constitute a challenge to the validity of the will under section 733.212(3), Florida Statutes. Rather, it was more akin to a request that the court construe a provision of the will and analyze the language of the RLT. The court pointed out that this conclusion was supported by the procedural path of the case where the appellant had filed his challenge in response to the personal representatives' petition for instruction requesting that the court instruct them on whether the trustee of the trust had properly refused to transfer all of the trust's assets to the RLT asserting that the LPOA was ineffective. The court stated: "It is as if the PRs filed within the probate case a declaratory judgment action with regard to the . . . Trust assets."

**Practice tip:** A practitioner drafting a power of appointment over a trust's assets must carefully analyze the language of the trust and all possible outcomes under the document being drafted to avoid running afoul of any prohibitions on the exercise of the appointment. Challenges to the construction of a will may be brought well after the three-month period to challenge the validity of a will found in section 733.212, Florida Statutes.

**Guardian who requested ward's mother be appointed as successor guardian was estopped from changing his position after mother met judge's requirements for transition.**

*Ash v. Guardianship of Ash*, 46 Fla. L. Weekly D2658 (Fla. 3d DCA December 15, 2021)

**Issue:** Whether the doctrine of equitable estoppel precluded the father from changing his position on the mother becoming successor guardian for their adult disabled son when he had initially requested she be appointed as successor and the mother had created a transition plan that met the judge's requirements.

**Answer:** Yes.

When the adult disabled son was adjudicated incapacitated in 1992, the ward's mother agreed that the ward's father should serve as his guardian. The mother maintained her visitation rights and equal decision-making rights. When the father asked the mother to take over the guardianship in 2019, the mother filed a petition for appointment of successor guardian outlining steps she would take if she was appointed successor guardian.

At a hearing on the petition, the father stated he agreed to the mother's service as successor, but asserted she could not be appointed until she completed the steps laid out in her petition, which would make for a seamless transition. The mother testified she could not do so because she did not have access to the ward's finances. The trial court reserved ruling on the petition, directed the bank to disclose the ward's financial information to the mother, and directed her to establish a care plan and a home for the ward. After reviewing the ward's financial information, the mother developed a care plan for the ward.

After a meeting between both parties and their counsel, the father agreed to the mother serving as successor guardian under the care plan and to her living separately from the ward (as he did). The meeting was memorialized in an email to the father's counsel and no objection to it was asserted. At the hearing on the care plan, the mother asserted she had fulfilled each step in her petition as directed by the judge; however, the father changed his position and objected to the plan, alleging he had just learned the mother planned to live separately from the ward so that the ward could be cared for by his caregiver of 32 years. The mother argued that the

father was bound by his prior pleadings and statements and estopped from changing his position as she had complied with the judge's previous ruling.

After reviewing the law, which provides that litigants are not permitted to take inconsistent positions in judicial proceedings, the Third District held that equitable estoppel prevented the father from objecting to the mother becoming successor guardian because he had previously supported it in his pleadings along with at hearing and that she had relied on his agreement in meeting the requirements of the judge's order.

In remanding the case for further proceedings, the appellate court also admonished the trial court for failing to take into account the ward's best interest in making its decision as to whether or not the mother should serve as successor guardian.

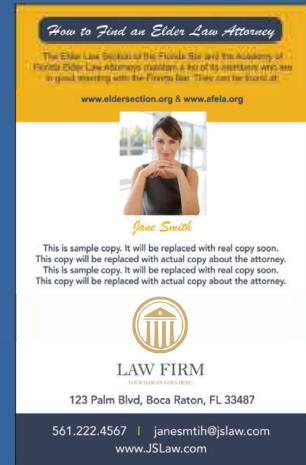
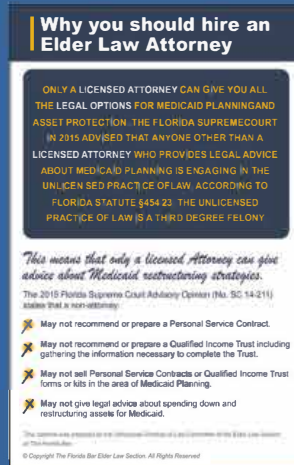
**Practice tip:** As practitioners, it's incumbent upon us to help our clients analyze the outcome of any particular position and develop a position that he or she can maintain throughout a guardianship proceeding. We are also reminded to always insist that a guardianship court's decision take the ward's best interest into account.



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

# NEW TOOL FOR ELDER LAW ATTORNEYS...

The Academy of Florida Elder Law Attorneys and the Elder Law Section of The Florida Bar are proud to present new materials designed to highlight the Florida Supreme Court decision about what constitutes UPL by non-attorney Medicaid planners. The new materials include a **traditional folded brochure** and a **one-page digital brochure** for social media. All variations can be purchased and customized with your photo and contact information on the back page.



## Folded Brochure



Perfect hand out for your office!

Perfect for your web site or social media!

## One-Page Digital Brochure

**AFELA**  
advocate • educator • action

The Academy of  
**FLORIDA ELDER  
LAW ATTORNEYS**



**THE FLORIDA BAR  
ELDER LAW SECTION**

Use the link below to order your  
UPL materials today!

<https://eldersection.org/upl-brochure/>

Thank you to the UPL Committee for their work on this!



The Florida Bar  
651 E. Jefferson Street  
Tallahassee, FL 32399-2300

PRSR-STD  
U.S. POSTAGE  
PAID  
TALLAHASSEE, FL  
Permit No. 43

## Thank you to our section sponsors!

We extend our thanks to ElderCounsel and Guardian Trust for their ongoing support as our section sponsors. Their support allows the section to continue to provide cutting-edge legal training, advocacy support, and great events like the Annual Update and Hot Topics. Both organizations have long supported the ELS; however, this level of support exhibits a higher commitment and to the section's mission and its members. We hope our ELS members will **take time to thank them** for their support!

