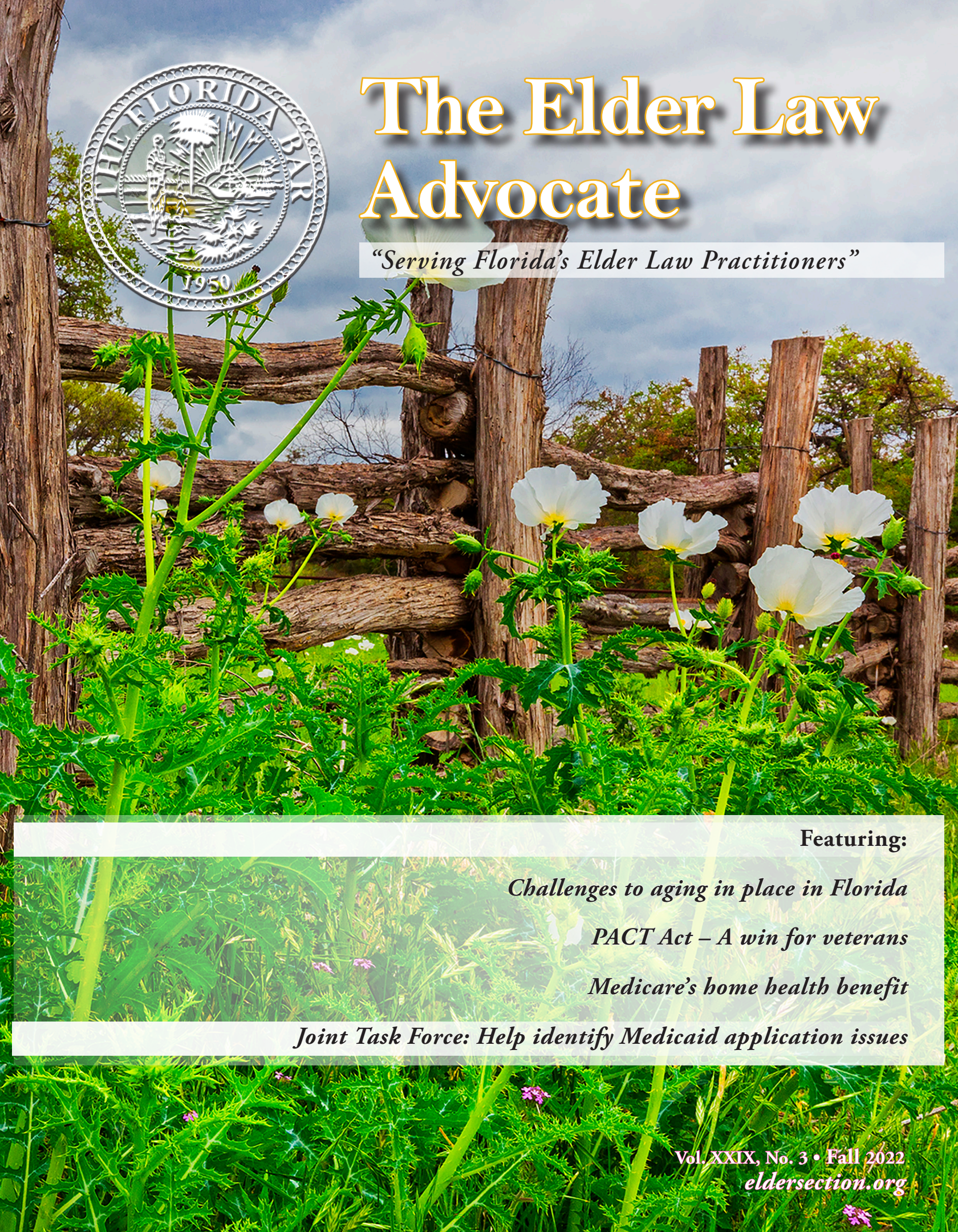

The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

Featuring:

Challenges to aging in place in Florida

PACT Act – A win for veterans

Medicare's home health benefit

Joint Task Force: Help identify Medicaid application issues

Vol. XXIX, No. 3 • Fall 2022
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The Elder Law Advocate

Established 1991

A publication of the Elder Law Section of The Florida Bar

Officers

ON THE COVER

Poppy Flowers
Randy Traynor Photography

8/2022

Contents

Submit Articles

The deadline for the WINTER 2023 EDITION: NOVEMBER 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 Howie Krooks

Building upon our section's strength

As I step into the role of chair of the Elder Law Section, I am reminded of one single day that forever altered the course of my professional career. I had been practicing in the areas of corporate/securities law for the first several years of my career when I became involved in a few elder law matters. I subsequently learned of an ABA commission, then known as the Commission on Legal Problems of the Elderly, that was holding a conference call. With my interest piqued, I signed up for the call expecting that I would listen to the conversation to hear about the issues with which the committee dealt. As the call progressed, I became energized in a way that eluded my first few years in the practice of law. When I got off the call, I couldn't shake this feeling that I wanted to change practice areas. In my heart, I knew there was something about this field, barely called "elder law" back then (this happened in 1991), that would fulfill me in ways I never could have imagined when I went to law school and set out upon my journey to become a lawyer. This one phone call changed my life.

One early case that I handled (in New York where I began my career and still practice today, in addition to Florida) left an indelible impression on me and characterizes the essence of what we, as elder law attorneys, do for our clients. The case involved a community spouse and her husband, who was in his 40s and residing in a nursing home, having been diagnosed with multiple sclerosis. She was struggling to make ends meet with two college-aged children, a mortgage, college expenses, and working two jobs (one as an aerobics instructor and one as a Hebrew school teacher). She came to me seeking an enhanced income allowance in Family Court so she could afford to meet monthly expenses (and the family could remain in the home where her children grew up). There are no words for the gratification I felt when I determined and then was able to explain to this family that I could help them. It is a feeling I will never forget. I remember what happened after the hearing examiner read his decision awarding the community spouse a portion of her husband's income so she could live a better life while her husband received the care he so desperately needed. The entire family ran toward me, almost fighting to be the first one to hug me and to thank me. For the first time in my career, I felt that I had a real impact on a family that was confronted by real-life problems. In an instant, life meant something more to me. I had become a problem-solver, and it felt good! It still feels good today. We are all so fortunate to practice in an area of law that is so deeply rewarding.

With that backdrop in mind, I want to thank all of you, the members of our great Elder Law Section, for entrusting the leadership of our section to me and our awesome slate of officers for the 2022-2023 year. It is a great honor and privilege for me to serve in this capacity. As some of you may be aware, I have had the pleasure of serving in a similar way twice before—in 2004-2005 when I served as chair of the New York State Bar Association Elder Law Section, and in 2013-2014, when I served as president of the National Academy of Elder Law Attorneys. I look forward to bringing that experience to all of the work we do this year as a section.

Speaking of officers, let me tell you what an amazing group of talented people we are all so fortunate to have in our leadership. Each one of them brings a special combination of skills and talent that collectively will benefit our section not only during the coming year, but for many years to come. They include Victoria Heuler as chair-elect, William Johnson as administrative vice chair, Shannon Miller as substantive vice chair, Amy Fanzlaw as treasurer, and Debra Slater as secretary.

And a big, heartfelt thank you to Carolyn Landon, our immediate past chair, who will remain on the Executive Committee as an officer for one more year. We all owe so much to Carolyn for her indefatigable efforts on behalf of the section in the last year and for all she has done in past years as well. Carolyn led our section through yet another difficult year with challenges posed on many fronts, including ongoing issues presented by Covid. We are so fortunate to have Carolyn continue as an officer of the section for one more year, but we're also happy that she can finally return to her life as she knew it before she became our section's chair!

Finally, we say "until next time we meet" to Steve Hitchcock, who after six years as an officer is rotating off the Executive Committee. Steve, you also led us through a very difficult year due to Covid, among other things, and we are

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thankful and grateful for your excellent service as well.

I attended the annual Florida Bar Convention in Orlando June 23-24, 2022, and I have to say it was great to see everyone who attended that meeting in-person! My most fervent hope is that we will be able to continue to meet in-person for our future meetings this year while remaining at the ready with a virtual option should the need arise.

An opening chair's message would not be complete without mentioning our section's strengths and ways in which you, our members, can become more involved in our section's activities. So, with that in mind, I'd like to highlight some of our strengths, which we will continue to build upon, and some of our goals for the coming year.

- **Ongoing lobbying efforts** – Our section can and should be very proud of our strong legislative advocacy efforts, which have been ongoing for many years. With strong leadership of our Legislative Committee this year (Co-Chairs Debra Slater and Travis Finchum) and in past years Shannon Miller, William Johnson, and Ellen S. Morris, coupled with our lobbyists from Waypoint Strategies, Brian Jogerst and Greg Black, we have and will continue to be a voice for section members and the clients we serve in developing and providing input into legislation that makes sense and is in our collective best interests.
- **Public relations** – This past year, we retained for the first time Sachs Media, our strategic relations partner that will be assisting us in developing a public relations strategy for issues that are important to our members and the clients we serve. Through this relationship, the section is well-positioned to address important issues such as guardianship reform, exploitation and neglect, as well as the work we as elder law attorneys perform every day. Please contact me or our Public Relations Committee Chair Victoria Heuler if you have an issue that you would like the section to be aware of and/or consider promoting.
- **Continuing legal education** – Our section offers some of the best legal education when it comes to elder law, special needs planning, guardianship, fraud, exploitation and neglect of the elderly, litigation, planning, public benefits, you name it. Whether it be our well-attended Annual Update in January, our CLE for the Retreat in September/October, our hot topic sessions offered throughout the year, or the library of topics available on the section's website, the section's CLE classes are a great way to learn a new area of the law or to keep current on recent changes. Kudos to our CLE Committee Chair Danielle Faller for her leadership. Please reach out to Danielle directly if you have any suggestions for future CLE topics and/or ways in which we can improve our CLE offerings.
- **Joint Public Policy Task Force** – Members of our section along with members of the Academy of Florida Elder Law Attorneys join a call every Thursday at 8:00 a.m. to discuss issues of import to our practices and that affect our clients. Whether it is a new piece of legislation, acting as a liaison between the elder law bar and the Florida Department of Children and Families and other government agencies, or solving legal problems encountered by our members, our two organizations work collaboratively and have done so for many years. We are grateful to Ellen Morris and Emma Hemness for serving as co-chairs of this task force. Together they lead us through important issues week in and week out.
- **Identify future leadership** – One of the most important functions of the current leadership in any organization is to identify future leaders. Your Executive Committee will be discussing how leaders are presently identified within the section and how we can approach this process in different ways to identify and cultivate new leaders.

Some of the goals we will be working on this year as a section will focus on enhancing communication among our members. In this regard, I have appointed former chairs of our section, Randy Bryan and Jason Waddell, to spearhead a committee that is exploring various technology options available to achieve this goal. As part of this effort, this committee will be looking at ways in which members and the consumer public can identify attorneys/members who practice in different geographic areas throughout the state.

Jason Waddell also continues the work of the section's Bylaws Revision Committee, which has been working very diligently to update and improve our section's bylaws. That work will continue, and we aim to have updated bylaws of the section that will need to be approved by the section leadership as well as by our members.

Finally, Aubrey Posey has agreed to lead our ad hoc Board Certification Committee, which is in the process of developing a comprehensive and extensive set of materials and coursework designed to facilitate member learning and understanding in anticipation of sitting for the board certification exam in elder law.

I look forward to seeing many of you at the Elder Law Section Retreat in Boston September 29 – October 1, 2022. I wish you all the best.

Howard S. Krooks, JD, CELA, CAP
Cozen O'Connor
Boca Raton, Florida

Farewell From the Past Chair

by Carolyn Landon

Celebrating a successful year

We started the year with a meeting in June 2021 to honor Steve Hitchcock for his excellent leadership during a time of unforeseen challenges. We ended the year with a real, that is, in-person meeting taking place at the annual Florida Bar Convention.

Every year the chair of the Elder Law Section has the pleasure of recognizing members who have made exceptional contributions to the practice of elder law and to the Elder Law Section. This year I was honored to recognize the following:

Collett Small and Carolyn Landon

The **Charlotte E. Brayer Public Service Award** is given to a member of the section who has demonstrated excellence and achievement in the area of public service, in the spirit of giving back to the elder community that was the hallmark of Charlotte Brayer's legal career. It is inscribed with the passage: "You will become prosperous only if you are trying to give more than you receive." This year's recipient is Collett Small. She is a past chair of the section and is active in the Big Bar. She chairs the Strategic Planning Committee and this year very successfully inaugurated our new Inclusion, Diversity, and Engagement Committee. She is a role model to many (even her daughter, Nicollette, is practicing elder law). This year Collett added adjunct professor of law to her list of accomplishments. She teaches the Elder Law Clinic at St. Thomas University School of Law.

Heidi Brown

Member of the Year is given to a section member who has demonstrated commitment to the section and gives time and energy above and beyond all expectations. This year's recipient is Heidi Brown. Heidi's time and energy spent on the Medicaid/Government Benefits Committee has been far beyond what is expected, and her knowledge of Medicaid is phenomenal. She has taken on every request with enthusiasm and has consistently volunteered to assist on matters relating to the elderly and disabled clients who rely on Medicaid for their care as well as the attorneys who represent them.

The **Exceptional Service Award** is presented to members in recognition of exceptional service. This year we recognized Katy DeBriere and Nancy Wright for their work toward requiring the Agency for Health Care Administration to make its redacted Medicaid administrative final orders available on DOAH's website; Jason Waddell for

Katy DeBriere

Nancy Wright

Jason Waddell and Carolyn Landon

Steve Hitchcock and Carolyn Landon

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his ability and willingness to continue chairing the Bylaws Committee, a thankless job akin to herding cats; and Steve Hitchcock and Amy Fanzlaw for their assistance in helping convince the Board of Governors to contribute a larger amount toward the section's cancellation fee with the Marriott after last January's cancellation of the in-person Annual Update and for their support and willingness to assist wherever and whenever needed this past year.

Although no award is given for program administrator, the section could not possibly continue its work without the guidance and assistance of Emily Young. There are not enough words to express my appreciation for all that Emily has done!

It was an honor to serve as chair of the Elder Law Section. I look forward to another successful year under the leadership of our new chair, Howie Krooks. I relinquish the gavel and say thank you to all of our hardworking members!

Howie Krooks and Carolyn Landon

Visit the Elder Law Section on Facebook

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

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

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

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

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

THE FLORIDA BAR
ELDER LAW SECTION

Capitol Update
by Brian Jogerst

Record state budget, midterm elections, and carryover legislative efforts to play large role in 2023

The 2022 Legislative Session adjourned on March 14, 2022. Here are some quicks facts from the session:

Number of bills filed: 3,735

Number of amendments filed: 1,896

Votes taken: 4,324

Bills passed House and Senate: 285

Budget

The House and the Senate approved a $112.1 billion state budget, which is the largest in Florida's history. By way of background, the following shows the size of the prior 10 years of state budgets, as passed by the Legislature:

FY 2021-2022: $101 billion

FY 2020-2021: $93 billion

FY 2019-2020: $91 billion

FY 2018-2019: $88 billion

FY 2017-2018: $82 billion

FY 2016-2017: $82 billion

FY 2015-2016: $78 billion

FY 2014-2015: $77 billion

FY 2013-2014: $74 billion

FY 2012-2013: $69 billion

While the Legislature adopted a record state budget, the governor exercised his line-item veto, continuing his "record setting line item vetoes." After the 2020 Session, Governor DeSantis vetoed $1 billion, $1.5 billion after the 2021 Session, and a staggering $3 billion from the current budget.

As noted in media reports, Florida's economy is surging, which has significantly increased state revenues. The latest Revenue Estimating Conference projected more good news. The state received $4.27 billion in May, which reflects economic activity in April, well above the $3.5 billion estimate, and that is the fourth month in a row that revenues have exceeded projections. For the first five months of 2022, Florida received $2.86 billion more than state economists expected—meaning Florida has collected 98.3% of the entire fiscal year estimate, with one month remaining in the fiscal year. Each month collections have beat economic forecasts by at least $475 million.

Given the state revenues, coupled with federal funds, Florida is well positioned to weather future economic challenges.

Elections

Now that the session is over, the legislators turn to the upcoming 2022 elections. As noted in previous updates, every 10 years the House and the Senate are constitutionally required to redraw all 160 House and Senate legislative seats and Florida's U.S. congressional seats to reflect shifts in population. Florida received one new U.S. congressional seat—in the Tampa Bay region—due to the increasing Florida population. Races for all 160 legislative districts, governor, attorney general, chief financial officer, commissioner of agriculture, and one U.S. Senate seat are also on the ballot this year—meaning all areas of the state will receive mailings and a blizzard of television ads over the coming months.

While all 160 legislative seats were up for election, a number of legislators were reelected without opposition when candidate qualifying ended on June 17. Specifically:

- Thirty-eight Florida legislative districts (nine Senate, 29 House) have just a single candidate filed and qualified for the ballot, meaning nearly one-fourth of the members of the 2022-24 Florida Legislature were elected without opposition.
- 23 House Republican and seven Senate Republican candidates have drawn no opposition in 2022, compared to just six House Democrats and two Senate Democrats who are unopposed.
- In addition to the 38 candidates elected without opposition, another 20 candidates/legislators (five Senate, 15 House) have only a primary, meaning their races will be finished after the August 23 primary.

In the race for governor, Governor DeSantis is unopposed in the Republican primary while Congressman Charlie Crist and Commissioner Nikki Fried are vying for the Democratic nomination.

Incumbent Attorney General Ashley Moody and CFO Jimmy Patronis have no primary opponents. On the

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Capitol Update. . . from previous page

Democratic side for attorney general, three people are running against each other to take on Attorney General Moody in the general election. CFO Patronis is running against former State Representative Adam Hattersley, who was the only Democrat to file for the CFO race. Lastly, current Senate President Wilton Simpson has a Republican primary opponent, and three people are running in the Democratic primary for the commissioner of agriculture seat.

2023 Legislative Session

After the elections, Senator Kathleen Passidomo (R-Collier County), who is a two-time Elder Law Section Legislator of Year, will be the next Senate president while Rep. Paul Renner (R-Flagler County) will be the next House speaker.

Two weeks after the November 8 General Election, the Legislature will return to Tallahassee for the Organizational Session. Legislative committee meetings will begin in December 2022 and then continue for three weeks in January and in February 2023—with the 2023 Legislative Session scheduled to begin on March 7 and end on May 11, 2023.

The Elder Law Section's Legislative Committee is actively reviewing issues for the 2023 Legislative Session. While the legislative agenda is under review, we anticipate the guardianship rewrite that RPPTL has been drafting and developing for several years will be introduced during the upcoming session. In addition, Uniform Guardianship Jurisdiction (granny snatching) and a potential "glitch bill" for the Clerks Data Base Bill are also under consideration.

Legislative Committee

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

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

Debra Slater
dslater@slater-small.com
Travis Finchum
travis@specialneedslawyers.com
Heather Kirson (AFELA)
hkirson@kirsonfuller.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 meeting 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

Emily Young is the contact person for publications for the Executive Council of the Elder Law Section. Please email eyoung@floridabar.org for information on submitting elder law articles to The Florida Bar Journal for 2022-2023.

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.**

Challenges to aging in place in Florida: Part one – assisted living

by Ellen L. Cheek

"Aging in place … the process of providing increased or adjusted services to a person … in order to maximize the person's dignity and independence and permit them to remain in a familiar, noninstitutional, residential environment for as long as possible." § 429.02(4), Fla. Stat.

For many older and vulnerable Floridians who need supportive services for their overall well-being and daily care, the home-like setting of an assisted living facility (ALF) provides a desirable option. However, for seniors with limited income and assets, finding a facility that is affordable has become a challenge; so has remaining in one, especially since Florida law mandates only 30 days' written notice to an ALF resident of what may be an unaffordable rate increase. Additionally, there is no clear administrative or judicial mechanism to challenge a notice of transfer or discharge from an ALF in any case. This combination of market forces and lack of legal protections poses a real threat to the housing security and safety of this very vulnerable group of Florida residents.

The ALF model is a familiar one: Residents live in apartment-like settings, typically with meals provided and a menu of supportive services and community activities available; the residence of each individual and the services to be provided are documented in a contract. § 429.24, Fla. Stat. Because of the services provided, ALF life is not literally "independent living" or a traditional Florida tenancy, but the type of services provided do not qualify an ALF as a medical or skilled nursing facility either. It's not surprising, then, that the legal framework for ALFs is something of a "mixed bag." For example, although ALFs are not classified as health care facilities, they are licensed and regulated by AHCA, the State's Agency for Health Care Administration. § 429.04, Fla. Stat. Additionally, like the residents in skilled nursing facilities, ALF residents are provided a "Resident Bill of Rights" (§ 429.28, Fla. Stat.) designed to safeguard a resident's autonomy, safety, privacy, and dignity as a member of the community. However, unlike the provisions that govern a resident's discharge and transfer from a skilled nursing facility (§ 400.0255, Fla. Stat.) or even the procedures provided for the eviction of a tenant (Chapter 83, Part II, Fla. Stat.), the statutory language regarding the discharge or transfer of an ALF resident (§ 429.28(k), Fla. Stat.) is minimal. This is where the mixed-bag status of ALFs is most apparent and problematic.

Even though ALF residents are entitled to at least 30 days' notice of a rate increase and at least 45 days' notice of relocation or termination of residency from the facility (with limited but notable exceptions), Chapter 429 does not provide the same basic protections afforded to *either* a nursing home resident or the average residential tenant. For example, a Florida nursing home resident faced with discharge or transfer from the facility is provided a timeline for appeal, an opportunity for a hearing, and the ability to remain in the facility pending a final hearing decision so long as the hearing was timely requested. § 400.0255, Fla. Stat. A residential tenant in Florida facing eviction is provided with due process and the opportunity to be heard in court. § 83.40 et seq., Fla. Stat. However, Chapter 429 provides scant detail regarding the substance of notices to be given to ALF residents and no right to request an administrative hearing to challenge a notice of discharge or termination of residency.

So how do we address the prospect of aging Floridians who struggle to afford assisted living but who have no other community options and who now face a very real threat to their housing (and consequently health-related) security? A coalition of concerned advocates has taken one step to address this issue by submitting a comment to AHCA regarding Florida's Statewide Transition Plan Home and Community Based Settings Rule (CMS 2249-F and CMS 2296-F). These advocates contend that as "Home and Community Based Services Waiver" settings, ALFs are within the federal mandate that requires the Statewide Transition Plan to include "protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law." 42 CFR S.441.530(a)(1)(vi)(A). They urge the amendment of Florida's existing policies and statutes to bring Florida into compliance with the federal regulations set out by the Centers for Medicaid and Medicare Services, U.S. Department of Health and Human Services.

Assisted living is just part of the aging-in-place picture. Issues such as those faced by Floridians whose ability to remain at home depends upon the Home and Community Based Services Waiver also merit serious consideration. Elder law attorneys should join in this important conversation and help to create a sustainable system that will allow Florida seniors and vulnerable adults to age in place with dignity and support.

Ellen Cheek *is a senior staff attorney on the Florida Senior Legal Helpline at Bay Area Legal Services in Tampa, Florida. She serves as chair of the Abuse, Neglect, & Exploitation Committee of the Elder Law Section. She has been admitted to the Florida, California, and District of Columbia Bar Associations and remains active with The Florida Bar.*

PACT Act—A win for veterans

by Teresa K. Bowman

on behalf of the Veterans Benefits Committee

As a military wife in another life, I recall my neighbor Holly telling me about her husband's strange illnesses after his return from deployment during the Gulf War. He had a variety of symptoms such as swollen joints, constant fatigue, and skin rashes. Although he sought treatment, no one could give him a diagnosis, leaving her to worry. The term *Gulf War syndrome* soon became the phrase used to describe his condition.

We now know that he, like many others, was exposed to various chemical agents, some used in warfare such as nerve gas, some given to soldiers to prevent exposure-related illnesses, and some used by soldiers during daily or routine repair and maintenance work. Gulf War Syndrome was later classified as chronic multisymptom illness (CMI), basically a medical condition with no medical explanation.

Along with physical symptoms, many veterans had mental health issues related to exposure. Complicated by the lack of understanding that although no two cases were the same, there were similar complaints and the symptoms were real, both active duty personnel and veterans, and their families were frustrated and afraid. The stress of a non-diagnosis, coupled with the stress of continued deployment and ongoing symptoms, resulted in many veterans leaving the service with post traumatic stress disorder (PTSD), adding a new level to the already complex medical problems they suffered.

The PACT Act, passed by the U.S. House and Senate and signed by President Biden, finally addresses the illnesses related to toxic exposure. The passage of the PACT Act confirms the nexus between exposure and service, opening up health care and VA disability benefits to those who previously were unable to prove a service connection between a health care issue and their military service.

The Act expands VA health care to all veterans who were exposed to toxic conditions and creates a presumptive service-related connection for veterans suffering from 23 different illnesses related to toxic exposure. Along with combat veterans exposed in Afghanistan, the Act expands presumptions related to Agent Orange adding Thailand, Cambodia, Laos, American Samoa, and Johnston Atoll as locations of exposure. There are an estimated 3.5 million toxic exposed veterans who prior to this Act were denied access to care for toxic exposure.

The Act also will fund expanded research into toxic exposure, provide toxic related exposure education and training for VA health care personnel, and offer every veteran a toxic exposure screening during VA medical appointments where toxic exposure might be a factor.

To provide the additional screening and services, the Act calls for the funding to add an additional 31 VA health care facilities across 19 states. Four additional outpatient clinics are scheduled to open in Florida, one in the vicinity of The Villages, another near Lecanto, one near Tampa, and another in Sarasota. The clinics will be opened pending budget approval and appropriations of funds in 2023.

PACT is formally known as the Sergeant First Class Heath Robinson Honoring Our *Promise to Address Comprehensive Toxics* (PACT). The PACT Act is named for Robinson, an Ohio veteran who spent time in Kosovo and Iraq as a member of the Ohio National Guard. He served in the Middle East from September 2006 to September 2007 and was exposed to fumes from the burn pits used by the military to burn and dispose of various materials and waste. He passed away in 2020 from lung cancer related to his toxic exposure.

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

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Medicare's home health benefit explained

by Jason Neufeld

As Florida elder care lawyers, our goal is to help our clients take advantage of every program available in a long-term care context. Many of our clients want to stay at home for as long as possible but need help to do so.

To achieve this goal, we immediately turn toward qualifying our clients for Medicaid Waiver, and perhaps VA Aid & Attendance, but it is important to note that Medicare has a home health benefit as well (albeit tougher to get).

To be eligible for Medicare home health services, a patient must have Medicare Part A and Part B; be confined to the home (home bound); be in need of skilled services; and be under the care of a doctor (MD, DO, physician's assistant, nurse practitioner, or podiatrist who is enrolled as a Medicare provider) who establishes a care plan after a face-to-face medical evaluation and who regularly reviews a 60-day plan of home care.

Home bound does not mean bed bound or never able to leave the house. You can be home bound and still go to a doctor's office, attend church, get a haircut, attend a grandchild's graduation, etc., so long as such outings are infrequent, of short duration, or for the purpose of receiving medical or day care.

Skilled services are defined as being inherently complex enough that they should be performed by, or under the supervision of, a qualified professional (to treat illness or injury, to maintain or prevent further deterioration, or to improve the patient's condition).

Importantly, restoration potential is *not* the deciding factor for deciding whether Medicare coverage should be made available. Per 42 CFR 409.32, "… even if full recovery is not possible, a patient may need skilled services to prevent further deterioration or preserve current capabilities."

Per Section 1861(m) of the Social Security Act, here are the Medicare-covered home health care services:

1. Skilled nursing services at home on a part-time or intermittent basis. Importantly, services such as occupational therapy, physical therapy, and speech therapy are also considered skilled, and therefore can be used to trigger the home health benefit.
2. Home health aides on a part-time or intermittent basis (intermittent basis means less than seven days a week or less than eight hours a day for a period of 21 days or less). Home health care is provided *only* if a skilled service is certified to be needed for up to 28 hours per week but for less than eight hours per day. Exceptional circumstances can increase Medicare's home care hours to 35 hours per week.

Medicare home care providers can provide hands-on personal care to include bathing, dressing, grooming, caring for hair and nails, oral hygiene to facilitate treatment or to prevent deterioration, changing bed linen of an incontinent patient, feeding assistance, and routine catheter and colostomy care. These items do not require skilled nursing care, but receiving skilled care or skilled therapy is a requirement to qualify for these limited non-skilled services.

Key provisions of Medicare home health care:

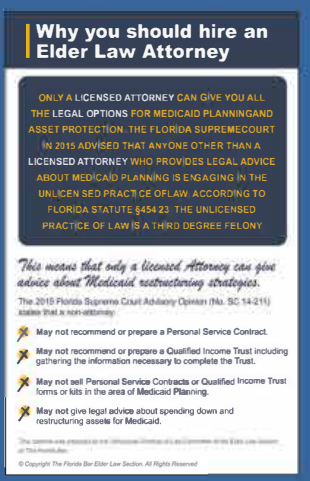
- Medicare home health care is always available so long as skilled care is needed as well and other threshold criteria are met (e.g., home bound, care plan recertifications are made, etc.).
- Far too often, Medicare home health agencies provide only one to three hours per week, usually for bathing only, and claim that services are not available if they are not expected to result in an improvement.
- There is no prior hospital stay, or 100-day limit, for Medicare home health care eligibility.

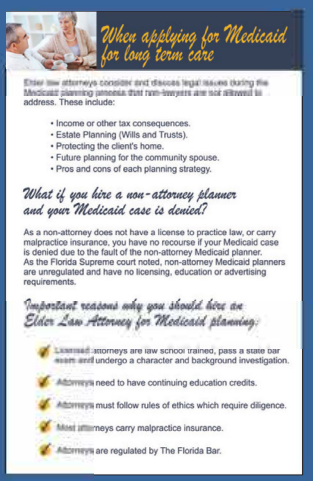
Thank you to the Center for Medicare Advocacy for their work in educating the public, providing much of the above information, and advocating on behalf of all Medicare recipients.

***Jason Neufeld, Esq.**, is the founder of Elder Needs Law PLLC with main offices in Aventura and Plantation, Florida (with additional satellite locations). He focuses his practice on Medicaid planning and estate planning. He is also affiliated with Neufeld, Kleinberg & Pinkiert PA, a personal injury litigation law firm with main offices in Aventura and Lakeland.*

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.





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

From the Joint Task Force for the Elderly & Disabled: Help build a database of Medicaid application problems

Elder law practitioners assisting their clients with Medicaid qualification have reported ongoing challenges in the Medicaid application process that arise in many different situations. As a result, the Joint Public Policy Task Force for the Elderly & Disabled (comprising both ELS and AFELA leadership) has initiated dialogue with the Florida Department of Elder Affairs and the Florida Department of Children & Families. A recent meeting arranged by task force lobbyists Brian Jogerst and Greg Black was held in Tallahassee with representatives of both DOEA and DCF, attended by task force members Emma Hemness, David Jacoby, Mike Jorgensen, and volunteer Angela Warren. This meeting was similar to prior meetings wherein the two departments requested examples of the issues we are experiencing. The task force believes we need to be prepared at all times to provide specific instances of any breakdowns in the application process.

In an effort to monitor and track ongoing challenges encountered in Medicaid case matters, we require your assistance in building a database of specific examples. Task force members Britton Swank and Jason Waddell have created the Medicaid Application Problems – Tracking Sheet. It is pictured on the next page for your information, and an interactive form is available to complete online. Please share this form with your staff members and encourage them to record issues encountered in the Medicaid application process as they occur. Once you or your staff members submit the form, it will be sent to the task force's database. When we see a trend developing, we can raise the issue. This effort will be successful only if everyone participates. This information will enable the task force to continue meaningful dialogue with DOEA and DCF as we work toward solutions to these challenges, assisting both your practice and the clients for whom you advocate.

Access the online form by clicking the link or the QR code:

bit.ly/medicaidapplicationproblems

The form is also included on the next page for your reference.

Is your EMAIL ADDRESS current?

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

Joint Public Policy Task Force
Medicaid Application Problems – Tracking Sheet

App Date:	Your File #:	Medicaid Case #:
Client last name, first initial:		
PROBLEM WITH: DOEA/CARES DCF AAA/ADRC		
Which DCF Region?	Which ADRC?	

Caseworker:

Was the name of the caseworker known? Yes No

Was the caseworker available by phone? Yes No N/A.

Where you able to leave a message for casework? Yes No N/A

How long on average did it take to receive a response from caseworker?

Did you contact caseworker by email? Yes No N/A

What dates did you call Caseworker?
What dates did you email Caseworker?

Agency Action:

Improper denial:	Improper calculation of patient responsibility amount ☐ Failure to provide documentation but documentation actually was provided ☐ CARES incomplete Notes:		
	No Agency Action for _____ days after application		Required request for fair hearing to resolve
	CARES contacted regarding screening but no response for _____ days		Required fair hearing to resolve and resolved in the applicant's favor

ACCESS website issue:

Website down/date down_____

"Before you can go to the next page, you must: Enter correct case information. Case information provided does not match" *Possible improper address entered by caseworker that prevents online access to account*

Other website issue

☐ OTHER ISSUE:

Case was open for how many days?

Please Note:Submission is made for the purpose of identification of trends. The information will be used by the Task Force to help state agencies improve their mission to help Florida citizens. It is not for the purpose of work on an individual case.

Committees keep you current on practice issues

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

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PRACTICE MANAGEMENT

Strategies for eliminating the top 3 support staff drafting mistakes

by Audrey Gay Ehrhardt

There is no question law practices are extremely busy places. Most successful attorneys are managing two competing interests on a daily basis. First, you want to get the work you are hired to do for your clients completed as efficiently and quickly as possible. Second, and simultaneously, you want to be able to reach your personal goals for profitability, advocacy, and success in your practice. This is a big-ticket order and, without strong management processes in place, can result in your firm running you instead of the other way around.

One of the most logical, and sustainable, ways to grow your firm is by hiring, developing, and managing law practice support staff to assist you in your practice. While it starts with getting the legal work you are hired to complete out the door, it doesn't end there. You need to be developing career employees who can work with you toward your goals for your firm. You need team players who prioritize their task list and are able to own a case from start to finish. This is the overall goal for almost every attorney we talk to, but how do they get there when they can't move forward because the work product they are hired to complete is riddled with errors?

We understand how frustrating that can be, especially when client-centric deadlines are concerned. Compound that with your drive to reach your business goals for your practice and an overall lack of efficiency, and it is no wonder you are working late nights and weekends.

That said, however, you can right the ship. Let's dive into three of the top legal support staff errors and a few solutions to correct them.

1. Drafting mistakes. We are talking about the small, repetitive mistakes that sink documents and cause frustration during

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Practice Management. . .
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your review times. When this happens, take a step back to think about the type of mistakes you are finding. There is a difference between finding the same mistake each week and a different mistake each time. With regard to the latter, do you find the mistakes are gone, corrected by your training, or do have to train again on the same mistake? By contrast, does the former occur and you find it is the same mistake over and over? How do you address it? How do you train forward to reduce the potential for future errors?

Both solutions start with communication. Consider these key takeaways when you find drafting mistakes:

- Set aside time to calmly discuss the errors you found.
- Do not rush through asking your employees what support they need from you.
- Do not shy away from mentoring in this space.
- Let them know why you need what you need and the time line associated with it.
- Develop time for them to fix their own error as well as time for you to review the document again.
- Look at your training and development materials to ensure you train on accuracy in drafting.
- Add sample "model" documents to your materials so there is no confusion on what you require.
- Develop videos that demonstrate a process of what you are looking for.

2. Missed deadlines. Most missed deadlines start with time management. Again, law firms are busy places and you need a support staff that understands this. It may be hard to understand the missed deadlines and the frustration therein when you don't know how long it actually takes to get the work out the door. Ask yourself, in a routine case, how much of your time do you need to devote to it? What about your paralegal? Your legal assistant? Your receptionist? Are you a true solo practitioner and find yourself always behind the eight ball because you don't how long it takes to get the work done?

Unfortunately, drafting is one of the legal deliverables that is often pushed to the back burner. You need to turn the tide and input all due dates into your practice area system to understand why deadlines are being missed. While the knee-jerk reaction of most legal employers is that an employee simply isn't working, that is often not the case. Instead, it is the lack of proper realization of how much time it actually takes to get the work completed for the client.

3. Under billing. Most lawyers still fail to bill the full value of their support staff's billable hours. Lawyers often fail to:

- Train employees on how to capture time correctly within the firm's ecosystem.
- Train employees on how to capture all time on a case, not just drafting a document.
- Utilize time-tracking tools, including in practice management software.
- Leave the week realizing all earned time.
- Capture time correctly.

Whether this is through lack of training on how to capture time within the firm itself or in each specific practice area system, you cannot reach your goals for profitability and success without capturing time. Even riskier, you may not be able to pay your legal support staff what you need to if you do not bill for them.

Of course, each of these issues and solutions encourages us to take a step back and look inward. Do the issues arise from a lack of training? Have you decided how you want your work done? Do your team members have a practice area system to follow? While it may seem counterintuitive to slow down and think through the processes your team needs to get the work done the right way, the first time, this may be exactly where you need to focus first. Take the time to invest in your processes, and you'll get the results you want for your law practice.

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.*

Tips & Tales
by Kara Evans

Could you, would you, should you act as a fiduciary?

The tale: Your sister-in-law's cousin, Michael, pulls you aside during Thanksgiving dinner to ask you a legal question. His Uncle Thomas has asked Michael if he would act as personal representative of his estate and trustee of his trust. Michael would like for you explain what that means and advise him on whether he should accept.

The tip: First, it would be helpful if Michael understood the term *fiduciary*. Florida Statutes 518.10 through 518.13 govern a fiduciary acting under last will and testaments as well as trust agreements. Florida Statute 518.10 defines a fiduciary as "an executor, administrator, trustee, guardian … or other person, whether individual or corporate, who by reason of a written agreement, will, court order, or other instrument has the responsibility for the acquisition, investment, reinvestment, exchange, retention, sale, or management of money or property of another." In English, it means that Michael will be holding and managing someone else's money.

This is a daunting responsibility and one that should not be taken lightly. When you agree to act as a fiduciary, you are taking on a job. A big job. A fiduciary has obligations and responsibilities. Most personal representatives are surprised to find that their first legal obligation is to creditors. Most trustees have no idea what a qualified beneficiary is. Why should they know such things? Because they are required to know such things. How will they know such things? While a personal representative is required by Prob. Rule 5.030 to be represented by an attorney, there is no such requirement in the Trust Code. Nevertheless, every trustee should be represented by counsel. The job of counsel is to inform the trustee of their obligations and duties.

First, there is a duty of fairness and impartiality. In this situation and under the trust agreement, Michael's wife is the lifetime income beneficiary while her deceased brother's useless son is the remainder beneficiary. Michael plans to generate high income for the spouse even if this depletes the remaining assets for the useless son. He is dismayed to learn that his plan creates issues. Florida Statute 736.813 establishes a duty to inform and account. A trustee must notify the beneficiaries of the trust's existence within 60 days of acceptance of the trust. A trustee must also provide an accounting at least annually. Note this is not just to the immediate beneficiaries but to all qualified beneficiaries as defined in Florida Statute 736.0103(16). Michael had not planned to inform the useless son of the existence of the trust until after the death of the lifetime beneficiary. He is dismayed to hear that he must. A trustee must invest the trust's assets in a prudent manner—as in investing thoughtfully, with a plan. This does not mean taking advice from your day-trading Uncle Skeeter. A trustee must not comingle assets, must not self-deal, and must make the trust's property productive.

A fiduciary who does not properly perform these duties will have to answer to the beneficiaries that have been harmed. A fiduciary can be sued, compelled to return property or pay back money, be removed, or any other relief a court may impose. With this information, Michael is starting to get nervous. He does not know a lot about investing. He is relieved to learn that a trustee can delegate this particular job under Florida Statute 518.112. While all of a trustee's duties and responsibilities require the exercise of reasonable care, judgment, and caution, this especially applies to the hiring of an investment advisor.

The job of trustee can be frustrating and tiresome. You are holding someone else's money. The beneficiaries want that money. Family members who are beneficiaries now view you with enmity and suspicion. They may become abusive, calling often to ask for or demand money. With all of this in mind, I would advise Michael to think long and hard before accepting such a position.

What advice would you give Michael? More importantly, what advice would you give a client seeking to appoint a friend or a family member as a fiduciary?

***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.*

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Tax Tips
by Michael A. Lampert

They took my Social Security – A tax attorney's perspective

The financial columnist Liz Wester recently published an article about a now deceased spouse who "did something wrong while working and collecting Social Security" so the Social Security Administration (SSA) is now withholding the surviving spouse's monthly Social Security payment. The response was that it sounds like the deceased spouse did not properly report their earnings such that the benefits should have been reduced by the preretirement age earnings test ($1 of every $2 earned over the threshold ($19,560 in 2022).

What is interesting is that if the SSA is not able to collect from the original payee, it can collect from anyone else receiving benefits based on that person's earnings record. The article noted the 60-day appeal rights. It also noted that a request can be made to reduce the holdback, with no financials required, if the overpayment can be fully repaid within 36 months, and with financials if more time is needed for the payback. There is even a Form SSA-632 Request for Waiver of Overpayment Recovery that can be used as needed. Further, the overpayment is potentially subject to bankruptcy discharge.

What does this have to do with taxes? Assuming the SSA is correct, then it is possible that the original payee, the decedent in this case, did not properly report their income. This can impact the administration of the decedent's estate, as the U.S. Treasury may be a creditor. If it was a joint return, the surviving spouse may be at risk of audit and collections activity. In addition, what if the surviving spouse is not otherwise liable for the decedent's tax, perhaps because separate returns were filed or the surviving spouse was able to successfully argue for "innocent spouse" tax relief? Even if that were the case, the recipient of the decedent's assets can be held liable to the extent of the value of the decedent's assets received.

But what about Social Security when your client owes federal taxes?

Under the Federal Payment Levy Program (FPLP), the IRS can levy 15% of the benefits paid under Title II as Old Age, Survivors, and Disability Insurance Benefits (OASDI).

Exceptions to the FPLP levy include:

- In October 2015, the IRS stopped systematically levying on SSA disability (SSD) insurance benefits through the FPLP; however, SSD can still be levied upon (see below).
- Lump sum death benefits and benefits paid to children
- Supplement Security Income (SSI) payments
- Payments with partial withholding to repay a debt owed to the SSA (see above)
- Certain taxpayers, if their income is at or below Department of Health and Human Services poverty guidelines.

So at least it is only 15%, right?

Not always. In addition to the FPLP, the IRS can use a manual levy. Manual levies do not have the 15% restriction. Manual levies are subject to exceptions to take into account the taxpayer's reasonable living expenses. Unfortunately, some clients become overwhelmed because they do not timely or properly respond to the IRS, do not open the mail, or are subject to overzealous IRS collections personnel.

What about Social Security benefits already paid?

The IRS can levy on bank and other financial accounts. These levies, which are often automated, do not take into account the source of the funds. Sometimes the IRS will release the levy when they are shown that the funds are Social Security benefits that otherwise would be exempt from levy.

But at least the first $750 is exempt?

Nope. The 1996 Debt Collections Improvement Act exempts the first $750 for *non*-tax debts. The 15% levy can apply even if the remaining benefit is less than $750.

Will my client receive some sort of notice before the levy?

The short answer is yes. The IRS is supposed to send the client a final notice of intent to levy *with* appeal rights. The IRS will normally send an additional notice before levy.

The longer answer is "maybe" or "they did, but…." It is not uncommon to

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Tax Tips..
from previous page

have a tax liability that has existed for a long time.

Many of the IRS dunning letters and formal notices, which are sent via certified mail, were sent to the client quite some time ago. Often the client simply does not open the mail. Some clients believe that if they do not pick up, or sign for, a certified mail letter, somehow they are protected. Of course, that is not true.

Sometimes the IRS will send the notice to the wrong address. Sometimes the client has recently moved without notifying the IRS of their new address (use Form 8822). This often happens when the client no longer files income tax returns due to their low income or because their address changes when moving to congregate housing or to be closer to family. A filed income tax return notifies the IRS of the taxpayer's current address. If, however, there is no return, a filed Form 8822, or other notification to the IRS, the client may not receive the notification.

What happens if the client does receive a notice, or the levy has already happened?

Care needs to be taken, and advice of tax counsel is advisable.

Depending on the client's income and assets, an installment agreement or even uncollectible status may be able to be arranged. Collections alternatives, such as bankruptcy and offers in compromise, can also be explored. Sometimes it is advisable to file for an appeal; however, certain appeals toll the statute of limitations on collection of the tax. If the client's tax assessment is aged enough, sometimes it is better to do nothing and let the statute of limitations run. Sometimes the clients are better off with the levy amount, rather than providing financial information to the IRS, if their assets and income indicate a greater ability to pay.

Calculation of income for Medicaid when there is a Social Security levy

This can be problematic. Sometimes the levy can be removed by showing the poor financial state and health of the taxpayer client.

What if there is true immediate hardship?

The overall case should be reviewed. With that said, you should first attempt to reach out to the IRS. Use the 1-800 number, which admittedly has exceptionally long wait times and courtesy disconnects, or call the revenue officer or other person handling the case, if any. If there are significant financial difficulties or the IRS is unresponsive, is taking too long to respond, or is threatening harm, the Taxpayer Advocate Service can be contacted (1-877-275-8271). Remember that you will need a Form 2848 Power of Attorney and Declaration of Representative to represent the taxpayer client if the client is not with you (in person or on a conference call line) when speaking with the IRS.

What else?

It is important to review the overall situation. Are there state and even local taxes that are also unpaid and at risk of levy action? Is the underlying tax assessment substantially correct, or can it be challenged? Does some type of innocent spouse relief apply? How much time remains on the statute of limitations on collections? Special rules may apply when a state or local taxing authority levies on an account containing Social Security benefits. All of these and other factors need to be addressed while taking into account the client's income, assets, health, and other aspects of their situation.

***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

Fees of trustee of testamentary trust and her attorney were properly paid from proceeds from sale of homestead devised to trust's beneficiary, but fees of personal representative and her attorney were not.

Lanford, Trustee of the Kirk Family Foundation v. Phemister, 47 Fla. L. Weekly D832 (Fla. 5th DCA April 8, 2022)

Issue: Whether proceeds from the sale of homestead property can be used to pay the fees of the personal representative, the testamentary trustee, and the fees and costs of the attorney who represented her in both capacities.

Answer: The fees of the testamentary trustee and the fees and costs of her attorney were properly paid from trust funds, but homestead proceeds could not be used to pay for the personal representative's fees and costs or for the fees and costs of her attorney.

The decedent's last will and testament left the residuary of her estate, including her homestead, to a testamentary trust under which the decedent's sister was the primary beneficiary. The Kirk Family Foundation Charitable Trust was the contingent remainder beneficiary. The probate court determined that the decedent's home constituted exempt homestead and that constitutional homestead protections inured to Phemister, the testamentary trustee (trustee), for the

sister's benefit and authorized Phemister, as personal representative (PR), to sell the homestead. The PR requested court authority to disburse the proceeds to pay for her PR and trustee's fees and her attorney's fees incurred in both capacities. The remainder beneficiary objected, contending that homestead sale proceeds could not be used for these purposes. The probate court granted authority for all of these fees to be paid.

Before reversing in part, the Fifth District held that the probate court erred in allowing payment of PR fees and costs from the homestead sales proceeds because Florida's constitutional homestead provisions forbade it. Since the homestead property passed outside the probate estate, it could not be used to satisfy probate fees and expenses. However, the trustee's fees and costs could be paid from the homestead sale proceeds as the proceeds constituted trust assets from which trustee's compensation and attorney's fees could be paid under section 736.0816(15), (20), Fla. Stat. (2021).

Practice tip: In designing an estate plan, consider whether the plan includes funds sufficient to pay the fees and expenses of administration and whether those funds will flow in such a manner that they will be available to the personal representative after the decedent's death. Also keep in mind that proceeds from the sale of the homestead may not be used to pay for estate fees and expenses.

Trial court properly imposed constructive trust over tenancy by the entireties marital assets given away to husband's mistress without wife's consent.

Wallace v. Torres-Rodriguez, 47 Fla. L. Weekly D1047 (Fla. 3d DCA May 11, 2022)

Issue: Whether a constructive trust was the proper remedy for recovering tenancy by the entireties (TBE) assets wrongfully transferred by the husband to the husband's mistress without the wife's consent during the marriage.

Answer: Yes.

After the death of his wife, the husband confessed to his son and trustee of his joint irrevocable trust that he had been paying his girlfriend for sex for about 14 years. In 2012 and again in 2015, the husband transferred $1 million in cash to his girlfriend from joint marital assets and disclosed the gifts on a gift tax return. The husband also bought the girlfriend two condominiums and gave her $975,000. The trial court found that all of these gifts were made with joint marital assets held as TBE property. The husband and wife had also entered into a marital agreement whereby each of them agreed that, upon the death of the first spouse, all joint marital assets would be conveyed by the surviving spouse to their irrevocable trust. The trial court found that the trustee had established a prima facie case of unjust enrichment and that the girlfriend had failed to satisfy her burden to prove that the wife had consented to the gifts. Therefore, it imposed a constructive trust on all the property transferred to the girlfriend. However, it allowed the girlfriend to keep part of the property because she showed that she had detrimentally relied upon the husband's promise to make the gifts and never took action to find employment or to go to school because of it. Therefore, the trial court reasoned, equity required that the girlfriend be allowed to keep a portion of the assets the husband had gifted to her.

After reviewing Florida law, which provides that TBE property is vested in the husband and wife as one person and that neither can alienate it without the consent of the other, the Third District held that the trial court properly imposed a constructive trust on all the property gifted to the girlfriend, but that its application of the detrimental reliance or "change in position" equitable principle to allow her to keep some of the property was improper as she had never pled that defense. The application of this principle was also rejected because the girlfriend was on notice that she was receiving marital property. The girlfriend was ordered to disgorge all assets given to her and give them to the trustee to be placed into the irrevocable trust.

Practice tip: Consider the character and nature of assets when designing an estate plan. If using a plan that requires one spouse to transfer assets to a trust after the death of the first spouse to die, consider the likelihood that the surviving spouse will comply with the plan. And, always ask about gifts when doing estate planning.

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