



The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

Featuring:

Just like a circus: Guardianship in the age of #FreeBritney

New Rules: Updates to Florida Ethics Rule 4-1.14, now titled "Client with Diminished Capacity"

Challenges to aging in place in Florida: Part two – affordable housing and supportive services

Announcing the ELS Fellows Program



The Elder Law Advocate

Established 1991

A publication of the Elder Law Section of The Florida Bar

Officers

Howard S. Krooks, Boca Raton
Chair
Victoria E. Heuler, Tallahassee
Chair-Elect
William A. Johnson, Melbourne
Vice Chair, Administrative
Shannon M. Miller, Gainesville
Vice Chair, Substantive
Amy J. Fanzlaw, Boca Raton
Treasurer
Debra Slater, Coral Springs
Secretary
Carolyn Landon, West Palm Beach
Immediate Past Chair
Genny Bernstein, West Palm Beach
Editor
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 Sunset
Randy Traynor Photography

Contents

<i>Message From the Chair: Persistence.....</i>	<i>3</i>
<i>Report to the BOG on the Elder Law Section.....</i>	<i>5</i>
<i>Capitol Update: Looking ahead to 2023</i>	<i>10</i>
<i>Just like a circus: Guardianship in the age of #FreeBritney.....</i>	<i>12</i>
<i>New Rules: Updates to Florida Ethics Rule 4-1.14, now titled "Client with Diminished Capacity"</i>	<i>15</i>
<i>Challenges to aging in place in Florida: Part two – affordable housing and supportive services</i>	<i>16</i>
<i>Announcing the ELS Fellows Program.....</i>	<i>19</i>
<i>Times are changing: Three ALJ opinions allow claimant to fund pooled trust without SSI penalty.....</i>	<i>21</i>
<i>From the Joint Task Force for the Elderly & Disabled:</i>	
<i>Help build a database of Medicaid application problems.....</i>	<i>23</i>
<i>Joint Public Policy Task Force Medicaid Application Problems – Tracking Sheet.....</i>	<i>24</i>
<i>Mark your calendar</i>	<i>25</i>
<i>Committees keep you current</i>	<i>25</i>
<i>Practice Management: Successful year in review:</i>	
<i>The 5 key insights you need.....</i>	<i>27</i>
<i>Tax Tips: What is that LLC?.....</i>	<i>28</i>
<i>Tips & Tales: Mind your own business.....</i>	<i>30</i>

Submit Articles

The deadline for the SPRING 2023 EDITION: FEBRUARY 3, 2023. 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*

Persistence

Persistence. On the one hand, it's just a word. A word on a piece of paper like any other. And yet, it can be so elusive. Some people have it. And some don't. Some organizations have it. And some don't. So maybe it's more than just a word on a piece of paper. And when you see it in action, it becomes a living, breathing being that takes on a life of its own. It has meaning. It's tangible. And it produces successful results.

In this chair's message, I am proud to share with you a story about persistence—a word that defines our organization—The Florida Bar Elder Law Section.

The story begins with the section's retreat scheduled to be held in Boston in October 2020. We all know what happened there—the COVID-19 pandemic precluded that retreat from happening during Steve Hitchcock's year as section chair. A year later, we again attempted to go to Boston for our annual retreat in September 2021 during Carolyn Landon's term as section chair. What happened? You guessed it. It was canceled for a second year in a row due to COVID.

Carolyn called me at the beginning of my term to ask if we could try one more time to make Boston happen. I said yes, thinking we are emerging from COVID and the third time's a charm. What could happen? This time, I thought, we've got this!



The iconic Boston sign at City Hall Plaza

We had all of the plans in place for a late September retreat ... a reception and ghost tour of historic Boston to kick off the event ... an engaging CLE on Friday morning with Scott Squillace presenting "Tax and Estate Planning for Same-Sex Couples in a Post-Roe World" and Lisa Cukier and Judge Lee Peterson presenting "Late Life Romance, Sibling Rivalries, Good Neighbors Gone Bad, and the Recent Uptick in Financial Exploitation and Undue Influence in the Aging Community" before heading out for a Duck Boat Tour and dinner at The Daily Catch ... a Saturday of no business and all play with a guided Freedom Trail tour, lunch in the North End, and dinner at the Hampshire House to wrap up the retreat.

It looked like an amazing retreat was ahead of us, with really high attendee registrations. This time, we were finally going to make it to Boston. Nothing was going to stop us, or so I thought.

Hurricane Ian made its initial landfall in Cuba as a Category 3 storm on

September 27, 2022, leaving the entire island without power. Ian strengthened to a Category 4 storm as it made landfall just west of Fort Myers, Florida, on September 28. Our Executive Committee met on September 26 and again on September 27 to decide the fate of this seemingly ill-fated program. Of course, we were concerned about all of the people—including some of our own section members—who might fall within Ian's path.

We also were mindful of all the planning and travel plans others had in place to attend (seven attendees were already in the New England area in anticipation of the retreat starting on September 29). After much deliberation, we made our decision. The Boston retreat would go on! In making this decision, we saw persistence in action.

We saw persistence when our section administrator, Emily Young, not only had to get out of the state of Florida and travel to Boston in the midst of a Category 4 hurricane, but also deal with scores of vendors with changing numbers of attendees, altering reservations, and changing venues, all the while being responsive to all of us and disseminating updated information so we could all remain informed as things evolved. What an undertaking and what persistence—all I can say is Emily, you are grace under pressure. Thank you for all you did to make the Boston retreat a reality.

continued, next page

Chair's Message . . . from previous page

And to all of our attendees—your persistence in getting to Boston was remarkable. With canceled flights throughout our state, you stayed the course and demonstrated yet again how being persistent can pay off.

Maybe it was the group of people we had. Maybe it was because we all knew what it took to get there. Or maybe it was just meant to be. But let me tell you that the Boston retreat was AMAZING! The collegiality, getting to spend time with section members in more personal settings, and just being in one of the country's greatest cities made this retreat so very special. And in case anyone is wondering, contrary to the opinion of one section member, Mike's Pastries beat out Modern Pastries in a side-by-side taste test of the North End's top pastry shops! And for those of you already thinking about attending next year's retreat, our Chair-Elect Victoria Heuler has selected beautiful Asheville, North Carolina for the 2023 retreat. Mark your calendar for October 26-28. We hope to see you there!

P.S. A chair's message wouldn't be a chair's message without an update regarding our section's committee activities, all of which appear on the following five pages. Please contact me at hkrooks@cozen.com if you would like to be more involved in our committees!

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



Howard Krooks isn't afraid of this ghostly guide.



Led by a spooky host, ELS members enjoy a ghost tour of historic Boston.



An intrepid group gets ready to embark on a Duck Boat Tour of Boston.



Retreat participants gather for a group photo at the Friday morning CLE. Pictured are Nicollette Gonzalez, Cassandra Jelincic, Shannon Miller, Judge Lee Peterson (speaker), Howie Krooks, Todd Zellen, Lisa Cukier (speaker), Shelley Perry, Debra Slater, Joanne Fanizza, Collett Small, and David Weintraub.



A group selfie in front of the USS Constitution; pictured are David Weintraub, Robin Weintraub, Cassandra Jelincic, Kathleen Flammia, and Emily Young.

CHAIR
Howard S. Krooks
Cozen O'Connor Elder Law
1801 N. Military Trail, Ste. 200
Boca Raton, FL 33431
(561) 750-3850
hkrooks@cozen.com

CHAIR-ELECT
Victoria Elizabeth Heuler
Heuler-Wakeman Law Group, P.L.C.
1677 Mahan Center Blvd.
Tallahassee, FL 32308-5454
(850) 421-2400
victoria@hwelderlaw.com

ADMINISTRATIVE VICE CHAIR
William A. Johnson
William A. Johnson, P.A.
140 Interlachen Road, Ste. B
Melbourne, FL 32940-1995
(321) 253-1667
wjohanson@floridaelderlaw.net

SUBSTANTIVE VICE CHAIR
Shannon M. Miller
The Miller Elder Law Firm
2830 NW 41st St., Ste. M
Gainesville, FL 32606-6667
(352) 379-1900
shannon@millerelderlawfirm.com

TREASURER
Amy J. Fanzlaw
Osborne & Osborne, P.A.
PO Box 40
Boca Raton, FL 33429-0040
(561) 395-1000
ajf@osbornepa.com

SECRETARY
Debra J. Slater
Slater & Small, PLLC
5411 N. University Dr., Ste. 201
Coral Springs, FL 33429-0040
(954) 753-4388
dslater@slater-small.com

IMMEDIATE PAST CHAIR
Carolyn Landon
5707 Dixie Hwy., Ste. B
West Palm Beach, FL 33405-3693
(561) 588-1212
carolyn@landonlaw.net

BOARD LIAISON
Amy Farrior
Tampa, FL

PROGRAM ADMINISTRATOR
Emily Young
The Florida Bar
(850) 561-5650
eyoung@floridabar.org



The Elder Law Section cultivates and promotes expertise and professionalism in the practice of law affecting people as they age and individuals with special needs.

Report on the Elder Law Section

The Elder Law Section (ELS) continues to improve and recover from the worst of the pandemic. We have continued to advocate for Florida's most vulnerable residents and educate our members. We remain a vital resource for our members, The Florida Bar, the Florida Legislature, the Florida courts, and the residents of our state.

Continuing Legal Education

Last January we hosted our three-day Annual Update in virtual-only format due to the Omicron variant of COVID-19. This coming January we are looking forward to an in-person event. The first day will be our Essentials program covering the fundamentals of a broad range of topics for those new to the practice of elder law. The second and third days will provide a deeper dive into more advanced areas of elder law for the seasoned practitioner.

Our Elder Law Concepts and Board Certification Review Course, which is aimed squarely at promoting professionalism, expertise, and knowledge in the practice, is on track for completion this year. This project is to provide comprehensive legal and practical information on elder law for newer practitioners and those looking to take the board certification exam. Even through all the adversity of this past year and a half our dedicated members have given of their time to prepare and present these materials to educate our members and to promote board certification.

Our outstanding Continuing Legal Education Committee is preparing a program to be presented at The Florida Bar's Annual Convention in June.

After two years of postponements out of concern for the safety and well-being of our members, the ELS went to Boston in the fall for our Annual Retreat. Our Continuing Legal Education Committee prepared topics for the event. What follows is a summary report from each committee of this section.

Abuse, Neglect, & Exploitation Committee – The Abuse, Neglect, & Exploitation (ANE) Committee is a small but mighty committee of the ELS. Members represent a wide range of practice types and specialties, from civil legal aid and criminal prosecution providers to those who specialize in disability rights, vulnerable investor law, guardianships, estate planning, and long-term care issues. The committee's diverse areas of interest are reflected in the monthly meeting presentations on a broad range of topics; recent and upcoming meetings have focused on Florida's Long-Term Care Ombudsman Program, emerging research on the health care pipeline to guardianship dilemma, the proposed codification of an undue influence definition in Florida, and involuntary discharges from assisted living facilities. The ANE Committee works closely with the Legislative Committee,

www.eldersection.org

THE FLORIDA BAR • 651 EAST JEFFERSON STREET • TALLAHASSEE, FL 32399-2300 • (850) 561-5650

THE FLORIDA BAR

drafting and advocating for legislation to protect Florida's vulnerable and older adults (such as the critically necessary Elder Abuse Fatality Review Team Glitch Bill), as well as on creating new elder abuse prevention strategies and intervention tools (e.g., the recently updated elder exploitation injunction statute). Most recently, the ANE Committee partnered with the section's Guardianship Committee to create the first ever Statewide Exploitation Advisory Team—a panel of elder law attorneys who serve as pro bono consultants for law enforcement, adult protective investigators, and criminal prosecutors on general elder law questions that arise in the course of an exploitation investigation.

Bylaws Committee – The Bylaws Committee has concluded its recommendation of amendments to the section's bylaws. The document is now going through a grammatical review, and formatting based on the Bar's requirements. We anticipate releasing the draft changes to the ELS and the Executive Council at or before the January meeting.

Estate Planning Committee – We are working with the Guardianship Committee to compile a catalog of local administrative rules regarding probate case procedures among the 67 Florida counties. Also, we have reviewed and discussed Aid in Dying. We are excited to welcome new members.

Fellows Program – Upon the initiative of the section's Inclusion, Diversity, & Engagement Committee, the ELS is launching a Fellows Program designed to cultivate dynamic and diverse leaders of the section by attracting attorneys who are new to the practice of elder law, providing them with meaningful opportunities to develop leadership skills within the ELS through section activities, and encouraging their continued involvement in the section. To further this mission, the Fellows Program seeks to recruit attorneys from diverse backgrounds, whether geographically, racially, ethnically, or otherwise, who have demonstrated an interest in practicing elder law and who are interested in becoming more involved in the ELS and its committees. Fellows will be appointed to a two-year term, during which time they will be assigned mentor/leaders from the section and encouraged to learn more about the ELS and become actively engaged in its activities. Applications will become available in spring 2023, so if you are interested in applying, or if you know a great candidate for this program, stay tuned.

Law School Liaison/New Member Committee – Our Law School Liaison/New Member Committee is working on reaching out to law students to spark their interest in elder law and joining the ELS. Our committee has recently been joined by Professor Rima Nathan from Florida State University Law School, who is in charge of creating an Elder Law Clinic for the law school. We are working with her to help establish the clinic and continue introducing students to the practice of elder law. It is our goal that membership in our section will increase with more students learning about elder law while in law school.

Legislative Committee – The Legislative Committee has begun holding its regular meetings in anticipation of the beginning of the 2023 Legislative Session in March. The 50-plus members of the committee consist of leadership of the Elder Law Section and the Academy of Florida Elder Law Attorneys together with the chairs and vice chairs of the ELS's substantive committees. The committee is following several potential bills that were initiatives of other groups last session that did not advance but are expected to be reintroduced in this upcoming year. If you are interested in participating in the Legislative Committee reach out to Debra Slater – dslater@slater-small.com or Travis Finchum – travis@specialneedslawyers.com.

www.eldersection.org

THE FLORIDA BAR • 651 EAST JEFFERSON STREET • TALLAHASSEE, FL 32399-2300 • (850) 561-5650

THE FLORIDA BAR

Medicaid/Government Benefits Committee – The Medicaid/Government Benefits Committee, in partnership with the Veterans Benefits Committee, is working to encourage members to report any DCF application processing issues to the Joint Task Force via the online tracking form (<https://forms.office.com/r/0gYhrxEpUg>). Gregory Glenn has volunteered to collect information from the committees regarding the three most important administration issues we believe DCF should address and then provide this information to the Joint Task Force. The committee is also drafting a summary of law outlining the use of the spousal refusal or “just say no” in planning for the Home and Community Based Services SMMC-LTC in the assisted living facility. Each week we discuss issues faced by practitioners when dealing with DCF, MCOs, ACHA, and APD, and exchange best practices/pitfalls in planning, obtaining, and maintaining Medicaid and other public benefits.

Medicaid/Government Benefits Committee and Veterans Benefits Committee – These committees do the following:

1. Monitor and review decisions from the Florida Division of Administrative Hearings, Office of Appeal Hearings (Department of Children and Families), and Office of Fair Hearings (Agency for Health Care Administration).
2. Monitor and discuss changes and proposed changes in statutory and administrative law.
3. Review, discuss, and provide comments on proposed rules from DCF, AHCA, and APD.
4. Discuss issues faced by practitioners when dealing with DCF, MCOs, AHCA, and APD.
5. Exchange best practices and pitfalls in planning, obtaining, and maintaining Medicaid and other public benefits.
6. Discuss condonation of benefits with VA Aid and Attendance and Medicaid.
7. Discuss current changes in the law for VA benefits, to include pension and compensation benefits as they arise.

Mentoring Committee – The ELS Mentoring Committee held its first meeting on October 19, 2022, which featured a discussion on professional development in solo and small firms. We hope to continue to offer interesting lunch and learn meetings with a focus on new cases and statutes, tips and tricks, and simplifying complicated areas of the law.

New Practitioners Committee – Members of the New Practitioners Committee are identifying a substantive committee of the Elder Law Section to join and organizing a social event for the Essentials portion of the Annual Update in January. We are currently developing a one-hour boot camp CLE by strengthening the relationship with the YLD.

Past Chairs Committee – The Past Chairs Committee was organized by Past Chair Steve Hitchcock. Each year it will be chaired by the immediate past chair. The committee is primarily intended to be a social committee. As its name indicates, it is made up of past chairs of the Elder Law Section. We have Zoom meetings quarterly, with our last meeting on September 21 and our next meeting to be on December 21. We are also planning a Past Chairs Dinner to be held in conjunction with the section’s Annual Update in January.

Public Relations Committee Update

- Sachs Media drafted captions and shared Hurricane Ian resources on the ELS’s social media channels from The Florida Bar and the Attorney General’s Office in an effort to inform members and consumers about important resources during and following the storm.

www.eldersection.org

THE FLORIDA BAR • 651 EAST JEFFERSON STREET • TALLAHASSEE, FL 32399-2300 • (850) 561-5650

THE FLORIDA BAR

- Sachs Media continued to draft and post relevant content on the section's social media channels directed at both members and consumers about the important work of the ELS and elder law attorneys.
- Sachs Media continues to work with the section's lobbying team and Public Relations Committee in the planning of a future virtual roundtable on the exploitation of senior and vulnerable residents.
- Sachs Media drafted and designed several resources, targeting members of the public, for posting on owned and shared media channels:
 - Aging With Autonomy Q and A
 - A Conversation Guide
 - 6 Things to Know When Acting as an Agent in Florida
- Ongoing media pitching for ELS spokespersons.
 - Designed press kits for spokesperson to support media pitching efforts
- Sachs Media drafted and designed a rack card for members to display in their offices.
- Sachs Media worked with the ELS to continue to update the website with important resources and updates.
- Sachs Media drafted and pitched a press release for October's Long-Term Care Planning Month, encouraging consumers to know their rights when making decisions about long-term care for themselves or loved ones.

Public Relations Committee Summary

The Public Relations Committee, chaired by Victoria E. Heuler, B.C.S., of Tallahassee, Florida, consists of Sachs Media Group and Waypoint Strategies (Brian Jogerst and Greg Black, section lobbyists), both firms that are also in Tallahassee, and a combined group of leaders from the Elder Law Section and from the Academy of Florida Elder Law Attorneys who meet virtually every other week. The committee's work includes regular, positive messaging on social media and other forums about the important work of Florida elder law attorneys in addressing issues faced by consumers, such as long-term care facility contract issues and methods to prevent the exploitation of vulnerable, older and/or disabled adults. The committee creates and publishes surveys several times each year to understand how informed the public is about various elder law issues and also to obtain information from those surveyed about other potential issue areas. Finally, the committee members all have their "ear to the ground" and routinely discuss current events and issue areas for public awareness messaging and remain ready to connect with reporters who want an elder law attorney's perspective.

Special Needs Trust Committee – The Special Needs Trust Committee is working with and monitoring DCF to ensure that any changes to Florida Medicaid policy do not prohibit any individual's use of a special needs trust. The committee continues to work with the Social Security Administration's Regional Trust Lead on the ability of an SSI claimant to fund a pooled special needs trust at age 65 or older. We actively monitor changes in state or federal rules/laws that affect special needs trusts. We provide education and guidance to our members about special needs trusts.

Sponsorship Committee – The Sponsorship Committee focuses on recruiting sponsors for our various events, including our Annual Update, Retreat, and CLEs. These sponsorships enable us to present educational opportunities to enhance our members as well as our section. We are always looking for new sponsors, and we provide a host of opportunities for those sponsoring our events, from exhibitor tables to contact information to ad space in our publications. Please contact us to express interest in sponsoring our events or our section.

www.eldersection.org

THE FLORIDA BAR • 651 EAST JEFFERSON STREET • TALLAHASSEE, FL 32399-2300 • (850) 561-5650

THE FLORIDA BAR

Statewide Exploitation Advisory Team – The team held a virtual training in early October that was very well attended. We now have more than 30 ready, able, and willing ELS members poised to assist law enforcement, adult protective services, prosecutors, Florida Ombudsman, seniors versus crimes, and legal aid attorneys across the state with elder law issues such as interpreting trusts, reviewing durable powers of attorney, and assisting them with Florida statutes related to exploitation, the exploitation injunction, and a variety of other exploitation statutes that may apply. Once again, our section members are willing to provide pro bono services to protect the rights of vulnerable Floridians and seniors with disabilities.

Task Force Update

1. Continuing our legislative fundraising activities.
2. Working with DOEA regarding Medicaid CARES issues with Medicaid.
3. Monitoring Nancy Wright's public records request lawsuit regarding ACHA Medicaid appeal hearings.
4. Monitoring the pooled trust issue in Florida, including the unenforced provisions in the Medicaid Manual.
5. Continuing to monitor DCF Medicaid denial issues and collecting information.

Unlicensed Practice of Law Committee – Each month, the UPL Committee has a meeting to discuss the activities of non-attorney Medicaid planners and the attorneys who work with those non-attorneys. During the existence of the UPL Committee, a number of UPL complaints have been filed against Florida non-attorney Medicaid planners. To date, the only action taken by The Florida Bar against non-attorney Medicaid planners (that we are aware of) is that The Florida Bar has issued "Letters of Advice" (LOA) to a number of non-attorney Medicaid planners. A Sarasota attorney was disbarred, and an attorney in South Florida was suspended for 45 days by The Florida Bar.

Veterans Benefits Committee – The Veterans Benefits Committee in conjunction with the Medicaid Committee continues to work on the following issues:

1. Verification of VA Benefits within the system currently used by DCF for verification of other state and federal benefits.
2. Coordination of benefits for veterans eligible to receive VA Aid and Attendance and Medicaid.
3. Lack of consistency with how VA benefits are reviewed and what documentation is required by VA representatives.

Our Thanks

The Elder Law Section has more than 40 attorneys volunteering their time as chairs and vice chairs of various committees. Even through the pandemic we have seen committee membership expand and our members engage on a new level. We are very fortunate to have such active participation. We are looking forward to continued growth.

Howard S. Krooks
Chair, Elder Law Section

www.eldersection.org

THE FLORIDA BAR • 651 EAST JEFFERSON STREET • TALLAHASSEE, FL 32399-2300 • (850) 561-5650



Capitol Update *by Brian Fogerst*

Looking ahead to 2023

The 2022 elections are over, and the Legislature is preparing to return to Tallahassee for committee meetings and the 2023 Legislative Session.

The following is an overview of the elections as well as a preview of the 2023 Legislative Session.

Elections

Governor Ron DeSantis was reelected, defeating Charlie Crist by almost 20%. For historical comparison:

- In 2002, Jeb Bush defeated Bill McBride by 12%.
- In 2006, Charlie Crist defeated Jim Davis by 7%.
- In 2010, Rick Scott defeated Alex Sink by 1.2%.
- In 2014, Rick Scott defeated Charlie Crist by 1%.
- In 2018, Ron DeSantis defeated Andrew Gillum by .4% or 33,000 votes.

In addition to the governor, all three cabinet seats (attorney general, chief financial officer, and commissioner of agriculture) will be Republican. The current Cabinet includes two Republicans and one Democrat—Nikki Fried who ran for governor and lost to Charlie Crist in the Democratic primary.

In the Legislature, Republicans picked up four seats in the Florida Senate and seven seats in the Florida House of Representatives—and secured super majorities in both chambers. Specifically:

Balance of Power	2020-2022	2022-2024
Florida Senate	24 R – 16 D	28 R – 12 D
Florida House of Representatives	78 R – 44 D	85 R – 35 D

The Legislature convened in Tallahassee on November 22 for the Organizational Session and swearing in of all legislators for the 2022-2024 Florida legislative term.

Senator Kathleen Passidomo (R-Collier County), who is a two-time Elder Law Section Legislator of Year, was sworn in as the next Senate president, and Rep. Paul Renner (R-Flagler County) was sworn in as the next House speaker. In December, the House and the Senate announced new committee chairs and committee assignments.

House and Senate legislative committee meetings began in December 2022 and will continue for three weeks each in January and February 2023. The 60-day 2023 Legislative Session is scheduled to begin on March 7 and end on May 11.

Budget

As noted in media reports, Florida's economy is surging, which has significantly increased state revenues, and Florida continues to exceed monthly tax collection projections. For example, revenue collections in September were more than \$472 million above projections. Given the state revenues, coupled with federal funds, Florida is well positioned to weather future economic challenges

while also providing the financial support needed by communities affected by hurricanes Ian and Nicole.

Legislative issues

During the next several weeks, legislators will begin filing legislation for the 2023 Legislative Session. The Elder Law Section (ELS) Legislative Committee and substantive committees will be reviewing the bills to determine support or opposition, and possible amendments/revisions.

In addition, over the summer, the ELS Legislative Committee began reviewing potential legislation for 2023 as well as reviewing/responding to potential legislation that will be proposed by other groups. Working together, the Elder Law Section and AFELA (Elder Law) is a well-regarded resource, and their input is often requested by many interested parties.

The following is a brief overview of issues that we anticipate will be filed for the 2023 Legislative Session:

- Guardianship rewrite – Elder Law opposes any comprehensive rewrite of Florida's guardianship laws that does not include the substantial adoption of the Uniform Adult Guardianship Jurisdiction Act such that the state of

Florida would not be considered an adoptee of the Adult Guardianship and Protective Proceedings Jurisdiction Act.

- Public records exemption/elder abuse fatality review teams – During the 2022 Legislative Session, Elder Law supported the legislation, which *created* 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.
- Do not resuscitate orders (DNRO) – Several groups are proposing some revisions to the DNRO legislation adopted during the 2020 Legislative Session.

Legislative Committee

The Legislative Committee meets biweekly during the 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 that

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 facilitate an introduction with the legislator and/or their staff. Continued relationship-building with legislators, the state's policy makers, is a critical component of our advocacy efforts because the local relationships and outreach to legislators from trusted sources helps Elder Law be a trusted voice and improves our advocacy efforts.

***Brian Jogerst** and **Greg Black** are co-founders of Waypoint Strategies LLC, a Tallahassee-based governmental consulting firm. Waypoint Strategies, with more than 40 years' experience lobbying on health care and legal 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.



Just like a circus: Guardianship in the age of #FreeBritney

by Melissa Finley Williams

Before 2021, most people had no idea what guardianship was, let alone what the practice of elder law entailed. With the rise of the viral #FreeBritney movement, elder law attorneys have found themselves in the spotlight, and that light appears toxic.

Guardianship in Florida has been in the news over the years, but the spotlight has become brighter with Britney Spears fans, state legislators, and leading members of Congress questioning all aspects of guardianship law. Consider Florida guardianship law from the non-elder law attorney's perspective: Cases are often confidential to protect a ward's privacy, so disclosure of records and information is not the same as in criminal or civil cases, and the genuine exploitation cases truly are causes of concern. But we, as elder law attorneys, have an obligation to use our knowledge and experience to explain how cases like Britney Spears' guardianship can be distinguished from the typical guardianship cases we see in Florida. We must educate the public that "bad" guardians, whether family or professional, are exceptions to a genuinely good guardianship system in Florida. Rather than getting defensive, we should acknowledge the public's legitimate fears and explain how the Elder Law Section

has continuously advocated for more protections for Florida's most vulnerable population.

The first step to educating the public is to break down the facts of the Britney Spears case. While California guardianship laws may differ from Florida, one does not need to be familiar with California law to see true concerns if the same facts in the Spears case were to occur in a Florida guardianship case. This article breaks down the general concerns of the Britney Spears case and the safeguards we have in place under Chapter 744, Florida Statutes, and the Florida Rules of Probate Procedure that protect incapacitated persons in Florida from the issues that were raised in the Spears case. The primary issues in the Britney Spears case can be broken down as follows:

Right to hire private counsel

In the Spears case, Britney attempted to hire a private attorney prior to the court's incapacity determination. The private attorney believed Britney was capable of hiring him and that she understood the retainer agreement. However, the judge would not allow it and even refused to allow the private attorney to see the examining committee members' reports that outlined Spears' capacity

concerns. As a result, Britney was forced to accept representation by the court-appointed attorney.

In Florida, the court shall appoint an attorney for each alleged incapacitated person (AIP) in all cases involving a petition to determination incapacity. However, Section 744.331(2)(b), Fla. Stat., states that the AIP may substitute their own attorney for the attorney appointed by the court.

Objection to appointment of guardian

Britney objected to the appointment of her father, Jamie Spears, as her guardian. She told the court that she feared him and asked the court to appoint a professional guardian. The court ignored Britney's objection and request for a professional guardian and appointed Jamie as guardian. Section 744.312(3)(a), Fla. Stat., states that the court shall consider the wishes expressed by the ward as to who should be appointed as their guardian. In addition to considering the ward's wishes, section 744.446 requires the court to review conflicts of interest that the proposed guardian may have, such as the proposed guardian providing substantial services to the ward in a professional or business capacity. In the Spears case, Jamie had acted as Britney's



Florida Lawyers Helpline
833-FL1-WELL

manager since the 1990s, and he continued acting as her manager during the guardianship case despite a clear conflict of interest.

Ability to work = Capacity?

After the Spears guardianship was established, Britney performed concerts and had a lucrative Vegas residency. This caused many Britney fans to question how she could be considered incapacitated but still deliver great performances. Fans also alleged that since Britney started the Vegas residency after a hiatus in her performances, she must have regained capacity to work.

In Florida, section 744.331(6), Fla. Stat., directs guardianship courts to consider each ward's unique needs and abilities and only remove those rights that the court finds the person does not have the capacity to exercise. Britney supporters failed to realize that a person can be partially incapacitated and still require a guardian to be appointed. Therefore, it is possible that Britney's right to seek and retain employment was never removed in the court's determination of her capacity, and thus she never regained any additional rights when she began performing again in early 2008.

Guardian's fees

Jamie Spears received a fee through the guardianship equal to 1.5% of Britney's gross revenue from her Vegas residency. Co-guardian Andrew Wallace also sought court approval to receive a portion of the profits from Britney's performances. Jamie acted as Britney's manager prior to the guardianship being established, so there was likely a contract in place prior to the establishment of the guardianship that outlined how Jamie would be compensated in relation to Britney's performances. Under Florida law, Jamie would have been required to disclose to the court that he was providing substantial services to Britney in a business capacity prior to his appointment as guardian. Section 744.309(3), Fla. Stat., states that a person who is providing

substantial services to the proposed ward may not be appointed as guardian and retain the previous business relationship unless they are related to the ward and the court determines that the potential conflict of interest is insubstantial and that the appointment would be in the proposed ward's best interest. In Florida, guardians are prohibited by section 744.446 from receiving any form of remuneration without prior court approval or unless such relationship existed before the appointment of the guardian and the relationship was disclosed to the court in the petition for appointment of guardian.

It is unclear whether Jamie also received additional compensation for acting as guardian based on the services he performed for Britney. Section 744.108, Fla. Stat., directs all guardians seeking compensation for services rendered to the ward to submit a petition for approval of their fees and to include an itemized description of the services performed for the fees sought.

Attorneys' fees

Supporters of the #FreeBritney movement raised concerns that Britney paid for not only her attorney's fees, but also the guardian's attorney's fees. While this may seem unfair to a non-elder law attorney, Florida law authorizes the court to direct the assets of the ward to be used to pay for services rendered or costs incurred by the guardian's attorney and the court-appointed attorney for the ward when the services are for the benefit of the ward and costs are incurred on behalf of the ward.

Potential conflicts of interest are reviewed by the court, as outlined in sections 744.331 and 744.108, Fla. Stat., to ensure that all services rendered benefitted the ward and the fees for those services are reasonable under the circumstances. Additionally, if the ward is found to be partially incapacitated, all fee petitions and itemized descriptions of the services must be sent to the ward for their review as well.

Forced mental health treatment

Britney Spears alleged that during the guardianship, her father forced her into a mental health treatment facility against her will. Section 744.3215(4), Fla. Stat., states that in Florida a guardian may not commit a ward to a facility or an institution without a formal placement proceeding. The court may grant the guardian extraordinary authority to exercise this right only after following the procedure outlined in section 744.3725. The procedure requires the court to appoint an attorney to act on the ward's behalf, meet with the ward, present evidence, and cross-examine any witnesses at any hearing on the petition for authority to act. The court must receive independent medical evidence or appoint its own experts to assist in evaluating the ward, and the court must personally meet with the ward to obtain its own impression of the person's capacity. These requirements ensure that the ward has the full opportunity to express their personal views and desires with respect to the judicial proceeding and the issue before the court. Once the procedural requirements are met, the court must find by clear and convincing evidence that the person lacks capacity to make a decision about the issue before the court and that they are unlikely to regain that capacity in the foreseeable future and that the extraordinary authority being requested is in the best interest of the ward.

Restoration of capacity

Britney Spears stated that she did not know she could petition the court to end her guardianship because her court-appointed attorney never asked the court to restore any of her rights and only stated that Britney was a high-functioning ward. On July 14, 2021, Britney was finally allowed to hire her own private attorney and filed a petition to terminate her guardianship shortly thereafter.

continued, next page

Section 744.3215(1)(c), Fla. Stat., states that a person who has been determined to be incapacitated in Florida retains the right to be restored to capacity at the earliest opportunity. Furthermore, under section 744.361(13), guardians are directed to help the ward develop or regain capacity, when medically possible, and to notify the court if the guardian believes the ward has regained capacity to exercise any rights that were removed. Each annual guardianship plan must also address the issue of restoration of rights to the ward in accordance with section 744.3675(3). If it appears from the annual plan that the ward is qualified for restoration of some or all rights, the court shall set a hearing and grant the necessary relief under section 744.371.

The process for restoration of a ward's capacity in Florida is outlined in section

744.464, Fla. Stat. A ward, or any other interested person, may file a suggestion of capacity stating that the ward is capable of exercising some or all of the rights that were removed. The court must then immediately appoint a physician to examine the ward and complete a report. If there are no objections to the suggestion of capacity and the court finds the medical examination supports restoration of rights by a preponderance of the evidence, the court shall enter an order of restoration of capacity without a hearing. However, if objections are made or the medical examination suggests that full restoration is not appropriate, the court must set the matter for hearing and appoint an attorney to represent the ward if they do not have an attorney.

Despite the termination of Britney's guardianship in November 2021, the

Spears guardianship saga continues with new allegations of guardianship abuse against Jamie Spears. The #FreeBritney movement has pushed guardianship into the spotlight and will likely continue to be in the center of the ring, just like a circus.



Melissa Finley Williams, Esq., is the founder of *Finley Williams Law, PA* in St. Petersburg, Florida, with a satellite office in Lakewood Ranch, Florida.

She focuses her practice on guardianship, estate planning, probate, Medicaid planning, and VA disability appeals. Ms. Williams is vice chair of the section's Guardianship Committee.

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

New Rules: Updates to Florida Ethics Rule 4-1.14, now titled “Client with Diminished Capacity”

by Heather Boyer Samuels

Submitted on behalf of the Ethics Committee

As elder law attorneys, we consistently represent clients that are suffering from cognitive decline and diminished capacity. One of the first (and most important) duties we have from the outset of representation is to assess whether the client has the capacity to retain us and to make decisions about their case. For most elder law attorneys, friendly, informal capacity assessments are part of our initial meeting with clients; however, in most other practice areas, capacity is assumed—the purpose of Rule 4-1.14 is to instruct lawyers to make accommodations for clients with diminished capacity with the goal of keeping the representation as “normal” as possible and allowing the client to participate with help.

To illustrate this rule and how it works in practice, I want to introduce Mr. Jones. Mr. Jones was a CPA before he was diagnosed with early onset Alzheimer’s disease. When you meet him, he can identify his family and can easily name Polly, his significant other of 15 years sitting next to him, and his two daughters, Rachel and Jessica, and Jessica’s husband, Evan, whom he does not like. Mr. Jones struggles to name his grandchildren—but when Polly gives him clues, like the first grandchild’s name, he remembers the rest. When you ask who the president is, he tells you about the time he met Joe Biden on Amtrak and that he is glad President Biden is finally in charge. When you ask him what year it is, he says it’s a couple years after COVID came and destroyed his weekly poker game, but he cannot recall the date without looking at his watch—but then again, neither can I. Polly explains that she never leaves Mr. Jones alone and will not let him drive anymore. He gets easily

distracted and has left the stove on, the car running, and will not get dressed unless she lays out his clothes. But he knows the general amounts in his bank accounts and where they are, can tell you the institution that holds his retirement assets, and though he takes a while to find the words to express himself, he knows what he wants to say if you give him the time to think and some small clues. Polly says she has her own money, but Mr. Jones says he wants to make her a gift because she has been taking care of him so well. She says that you can certainly ask his daughter Rachel, who is his power of attorney, and provides you with the document.

When a client simply does not have capacity, we know that greater intervention, such as a guardianship, is needed if less restrictive means such as a durable power of attorney have not already been put in place. Once we determine that a client like Mr. Jones is generally oriented to person, place, and time, but accommodations are necessary for him to be able to meaningfully understand his case and make decisions about how to proceed, we have a duty to represent him in a way that respects his abilities as a person with “diminished capacity” but preserves the “normal” attorney-client relationship as much as possible. Often that means bringing in a family member or a close friend to help the client take notes and remember what we discussed—for Mr. Jones, that is his significant other, Polly—and it means giving him time to find the words he needs to express himself. For elder law practitioners, this type of “supported decision-making” is an important part of our practice, and is often made possible for other life events through our estate

and incapacity planning documents that allow a client to legally appoint a trusted agent for financial and medical decision-making in various capacities. Fortunately, as of May 2022, The Florida Bar’s Ethics Rules have finally caught up.

The amendment of Rule 4-1.14 to be more in line with the ABA Model Rule, with a couple of Florida-specific additions dealing with guardianship, and a commentary that explains the rule more specifically helps lawyers to understand how best to fulfill their ethical obligations to a client that may need some extra help from trusted family members or other persons to participate in discussions with the attorney. The new rule has three parts: maintenance of a normal relationship, protective action, and confidentiality. It also has a lengthy commentary that explains how the rule should be practically interpreted.

In maintaining a “normal” relationship, the rule commands the attorney to consider the client’s diminished capacity for decision-making in connection with the representation. This means that even if the client asks that their agent join them for the meeting, we ensure that we treat the client with attention and respect. For a meeting with Mr. Jones about applying for Medicaid so that he can get on the PACE program, we describe how it works to *him*, not only to the person accompanying him to the meeting. According to the comments, it means that we can accommodate the client by including other trusted family members or other persons in our meetings to assist with the representation without waiving the attorney-client

continued, next page

privilege. When the client wishes for the agent to speak up and help the client make an informed choice based on their participation, the attorney can allow it, but should make sure the conversation remains steered toward the client as the decision-maker.

What if the client's relationship with a family member or other agent is anything but normal and the attorney suspects undue influence? What if the client is at risk of substantial physical, financial, or other harm unless action is taken? Polly may say that she needs \$250,000 to continue to take care of him so she does not have to dig into her own money, and Mr. Jones says, "We can go to Wells Fargo, and I will give you my savings account." Under the previous rule, it was unclear whether an attorney was acting ethically if they did not seek a guardianship under such circumstances, but to do so, the attorney would likely need to reveal otherwise privileged information. Under the new rule, "a lawyer must make reasonable

efforts to exhaust all other available remedies to protect the client before seeking removal of any of the client's rights or the appointment of a guardian." This is in line with Chapter 744, Fla. Stat., which makes clear that a guardianship is a last resort. It also permits the lawyer to take measures to protect the client and reveal information necessary to take protective action. That's where the final part of the rule, confidentiality, is addressed.

The attorney is not breaking attorney-client confidentiality rules when she reveals information about the client reasonably necessary to protect their interests and take protective action. So, if Polly says she cannot continue to live with and take care of Mr. Jones without some compensation, should the attorney reach out to Rachel, the attorney-in-fact? According to the comments, in an emergency, even if the client does not have the capacity to establish an attorney-client relationship, an attorney can reveal just enough information to the tribunal and to another attorney involved to accomplish the intended protective action and protect the client's interests.

In general, the new rule is far more practical than the one formerly in place and gives lawyers the ethical tools to take additional measures to involve clients with diminished capacity in their case. But that does not mean a lawyer can let her guard down when it comes to undue influence and exploitation. It remains to be seen how it is interpreted in litigation, where a trusted person, like Polly, with no fiduciary duty to her significant other, Mr. Jones, might easily convince him to transfer assets to her in exchange for her continued devotion.



Heather Boyer Samuels, Esq., is a Florida Bar board certified elder law attorney with SAMUELS WOOD PLLC in Boca Raton, focusing her practice on Medicaid planning, estate planning, special needs planning, and probate. Ms. Samuels is the chair of the Ethics Committee of the Elder Law Section and is a Class VIII Fellow of the Wm. Reece Smith Jr. Florida Bar Leadership Academy.

Challenges to aging in place in Florida: Part two – affordable housing and supportive services

by the Karen C. Murillo

on behalf of the Abuse, Neglect, & Exploitation (ANE) Committee

*"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. (emphasis added).

Housing security is a social determinant to a person's health and well-being.¹ While *home* can have many different meanings and apply to a spectrum of settings, the concept of home is linked to a person's autonomy, security, self-identity, and social status.²

A recent study conducted by AARP found that at least 77% of adults 50 and older want to remain in their homes as they age.³ However, as Florida's real estate market continues to soar, many older Floridians living on fixed or low incomes are finding they can no longer afford to live in what they have long-called *home*. This is true for senior homeowners, those who rent, and, as discussed in "Part one" of this article series, even for residents of assisted living facilities. (See the Fall 2022 edition of *The Elder Law Advocate* for more information.)

Affordable housing is becoming an increasingly popular topic of concern for Florida's policymakers, and yet most of these policy discussions do not consider factors like age, let alone address the crucial concept of *aging in place*. As senior poverty rates continue to climb, Florida cannot afford to maintain a narrow view when it comes to affordable housing.

Seniors are acutely at risk of experiencing housing insecurity. The latest data from the U.S. Census Bureau reflects

continued, next page

that Americans age 65 and older were the *only* age segment to experience an increase in poverty between 2020 and 2021.⁴ Likewise, older adults experience a greater risk of experiencing the fallout from housing insecurity to their health and well-being.

Placing greater focus on seniors in the context of housing security discussions is not simply an ethical responsibility for policymakers; it is also the best practice from an economic standpoint. Housing security and other supports that allow aging adults to successfully remain in their homes and local communities reduce their likelihood of being moved into a higher cost institutional care setting (e.g., nursing homes, assisted living facilities, etc.).⁵

Considering aging in place in the planning and development of affordable housing development is also relatively straightforward with simple solutions to create housing that is both attainable and accessible by people of all ages.⁶ *Home-fitting* affordable housing from the outset by considering visitability and universal design (e.g., ensuring the dimensions of doorways are large enough for a wheelchair or other mobility assistance device to pass through) ensures that affordable housing is inclusive and safe. Home-fitting with aging in place in mind creates residential settings that may adapt to the ever-changing needs and abilities of every individual—whether such a change is age-related or caused by an injury, and whether the person’s abilities have been temporarily or permanently affected—home-fitting covers it all.

By keeping aging in place at the forefront of affordable housing discussions, Florida policymakers may also achieve the proverbial “two birds with one stone” solution to Florida’s senior housing and long-term services and supports (LTSS) dilemmas. States like Connecticut and New Jersey have successfully

demonstrated this concept of linking low-income LTSS beneficiaries with affordable housing by intentionally clustering care delivery services in and around affordable housing settings.⁷ This aging in place type of planning has demonstrated an ability to enhance care delivery services, to reduce the cost of overall long-term care, and perhaps most importantly, to maximize the limited direct-care workforce and funding resources, all while providing seniors with greater independence and dignity as they age.

Creating safe and affordable housing options with seniors in mind, as well as prioritizing aging in place will help older Floridians not only continue to reside in, but also *thrive* in, the Sunshine State, thus making Florida’s vision for *all Floridians to live well and age well*⁸ a reality.



Karen C. Murillo
is an associate state
director of advocacy
for AARP, Florida.
She serves as co-chair
with Ellen Cheek
on the Abuse, Neglect,
& Exploitation
Committee.

Endnotes

1 Rolfe, S., Garnham, L., Godwin, J. et al. Housing as a social determinant of health and wellbeing: developing an empirically-informed realist theoretical framework. *BMC Public Health* 20, 1138 (2020). <https://doi.org/10.1186/s12889-020-09224-0>.

2 *Id.*

3 Davis, Michelle R. “New AARP Survey Reveals Older Adults Want to Age in Place.” AARP, AARP, Nov. 1, 2022, <https://www.aarp.org/home-family/your-home/info-2021/home-and-community-preferences-survey.html>.

4 Combi, Simona. “Latest Census Bureau Data Shows Americans 65+ Only Group to Experience Increase in Poverty.” *NCOA*, National Council on Aging, Sept. 13, 2022, <https://ncoa.org/article/latest-census-bureau-data-shows-americans-65-only-group-to-experience-increase-in-poverty>.

5 Sanders, Alisha, et al. “Affordable Housing as a Key Piece of Older Adults’ Long-Term Services and Supports.” *Affordable Housing and LTSS*, AARP Foundation, The Commonwealth Fund, and The Scan Foundation, July 22, 2021, <https://www.longtermcarecard.org/publications/promising-practices/affordable-housing-and-ltss>.

6 See AARP Livable Communities. *AARP HomeFit Guide*, <https://www.aarp.org/livable-communities/housing/info-2020/homefit-guide-download.html>. Accessed Nov. 9, 2022.

7 Sanders, Alisha, et al. “LTSS Choices: Increasing Independent Living Choices through Coordinating Affordable Housing and Medicaid.” *AARP*, AARP Public Policy Institute, Oct. 28, 2022, <https://www.aarp.org/ppi/info-2022/lts-choices-affordable-housing-and-medicare-scorecard.html>.

8 “Mission Statement and Vision.” *DOEA*, Florida Department of Elder Affairs, Nov. 4, 2022, <https://elderaffairs.org/>.

Located in Central Florida, AGED, Inc. serves as trustee for the following types of Trusts throughout the State of Florida:

- ◆ D(4)(A) Disability Special Needs Trusts
- ◆ Third Party Supplemental Special Needs Trusts
- ◆ D(4)(C) Pooled Special Needs Trusts
- ◆ Irrevocable Trusts (non Special Needs)

QMB application assistance for income only Pooled Trusts

The AGED Difference

- ◆ Quarterly statements
- ◆ Online access to view trust account activity, balances, and statements
- ◆ Retained Funds may be used for another disabled beneficiary without payback to Medicaid
- ◆ Benefit Specialist

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®

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.



Announcing the ELS Fellows Program

by Chanté Jones

The Elder Law Section is excited to launch its Elder Law Fellows Program in January 2023!

The mission of the ELS Fellows Program is to cultivate dynamic and diverse leaders within the ELS by attracting attorneys who are new to the practice of elder law, providing them with meaningful opportunities to develop leadership skills within the ELS through section activities, and encouraging their continued involvement in the ELS.

To further this mission, the Fellows Program seeks to recruit attorneys from diverse backgrounds, whether geographically, racially, ethnically, or otherwise, who have demonstrated an interest in practicing elder law and who are interested in becoming more involved in the section and its committees.

To be eligible for selection as a Fellow, individuals must:

- Commit to a two-year program;
- Be an attorney member in good standing with The Florida Bar;
- Be a current member of the ELS;
- Be admitted to The Florida Bar for less than 10 years, or be new to the practice of elder law within the immediately preceding five years;
- Focus a substantial portion (at least 50%) of their practice to elder law; and
- Submit a completed application, including a current resume, personal statement, and two letters of recommendation. Letters should be from other attorneys and/or community leaders with whom you have had a professional dealing within the last five years.

Applications will be available on the section's website in January 2023 and will be due March 15, 2023.

For more information, please contact the section's administrator, Emily Young, at The Florida Bar at 850/561-5650 or eyoung@floridabar.org, or the chair of the section's Inclusion, Diversity, & Engagement Committee, Chanté Jones, at esquirejones19@gmail.com. Additional information can also be found on the section's website at www.eldersection.org.



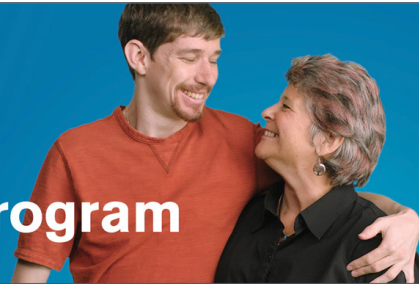
Chanté Jones, Esq., was appointed executive director of the Office of Public & Professional Guardians (OPPG) housed within the Department of Elder Affairs

in December 2019. Ms. Jones earned a JD from Barry University. She is the chair of the Inclusion, Diversity, & Engagement Committee of the Elder Law Section of The Florida Bar and the employment chair for the Tallahassee Women Lawyers.



ABLE United

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 | 888-524-ABLE (2253)

THE ELDER LAW SECTION OF THE FLORIDA BAR PRESENTS: ELDER LAW FELLOWS PROGRAM



MISSION OF PROGRAM:

...to cultivate dynamic and diverse leaders within the Elder Law Section by attracting attorneys who are new to the practice of elder law, providing them with meaningful opportunities to develop leadership skills within through Section activities, and encouraging their continued involvement in the Section.

WHO SHOULD APPLY:

- Attorneys that are
 - in good standing with The Florida Bar and members of the Elder Law Section;
 - admitted to The Florida Bar for less than 10 years or be new to the practice of elder law within the immediately preceding 5 years;
 - have a focus a substantial portion (at least 50%) of their practice to elder law.



APPLICATIONS WILL BE
AVAILABLE
JAN 2023



VISIT THE ELDER LAW
SECTION WEBSITE
FOR DETAILS



DEADLINE TO SUBMIT
APPLICATION IS
MARCH 15, 2023



THE FLORIDA BAR
ELDER LAW SECTION

<https://eldersection.org>

Times are changing

Three ALJ opinions allow claimant to fund pooled trust without SSI penalty

by Kole J. Long

Submitted on behalf of the Special Needs Trust Committee

Wouldn't it be wonderful if we never had to take the 65+ client on SSI to an ALJ hearing for funding a pooled trust? Or even have to file a request for reconsideration?

Florida is a §1634 state (Florida Statutes § 409.903), meaning that if a person is financially eligible for SSI benefits, they are financially eligible for Florida Medicaid. The state cannot seek to review any SNT or other elements of SSI financial eligibility to determine Medicaid eligibility.

Once a person is on SSI and determined to be financially eligible for Medicaid, the state is allowed to determine which medical assistance program they are eligible for—straight “community” Medicaid, Children’s Medical Services, long-term services and supports, home and community-based services (Medicaid waiver), etc., as long as the person meets the medical guidelines for that program.

The process of applying or reviewing eligibility for continued SSI after a change of circumstances begins with the initial determination. When a trust is involved, and particularly when a pooled special needs trust is involved, the local office claims specialist is directed to contact the SSA Regional Office in Atlanta. The consultation is also required for reconsideration determinations.

Everything in the Atlanta Regional Office goes through a designated “regional trust lead,” who for us in the Southeastern

U.S. is Lynn Henstenberg.

Historically, the Social Security Administration has taken the position that the transfer of resources from a claimant age 65 or older is a per se transfer of resources for less than fair market value. Therefore, the transfer of the claimant’s funds into a pooled trust would result in a penalty period. The penalty is calculated by dividing the amount transferred by the current federal benefit rate at the time of transfer. The quotient is the number of months the Administration would penalize the claimant, up to a maximum of 36 months.

Times are changing. There now exist three favorable Social Security administrative law judge (ALJ) opinions from three different Social Security ALJs that have allowed the claimant to fund a pooled trust without penalizing their SSI. Although these opinions are not precedential, they do show a trend and a possibility for the future.

Each of the three opinions varied in their analysis, but they all came to one similar conclusion: the transfer of funds by the claimant to the pooled trust resulted in the claimant receiving a fair market value benefit in return. The common element in all three cases was that the claimant (pooled trust beneficiary) showed Social Security and the ALJ how the funds were going to be used for the benefit of that claimant within their life expectancy.

The Special Needs Trust Committee

is actively communicating with Ms. Henstenberg. We have made her aware of these ALJ opinions. We have expressed our intention to submit numerous 65+ pooled trust joinders, she will most certainly consult with the regional chief counsel, and we are hopeful we will have paved the way for other attorneys. Members of our committee have submitted these joinders for claimants over age 64 and, so far, have had continued eligibility for their clients.

On a related topic, it is worth noting that although Florida’s Department of Children and Families recently tried to change its policy to align with SSA’s, the Elder Law Section and the Florida Joint Public Policy Task Force were successful in stopping them. There is currently no penalty for using a pooled trust, at any age, for Florida’s Medicaid programs. The Special Needs Trust Committee will continue to monitor the situation in Florida and on the federal level.



Kole J. Long, Esq., is a Florida Bar board certified elder law attorney with the firm *Special Needs Lawyers, PA* in Clearwater, Florida, where he practices elder and

special needs trust law. He also serves as co-trustee of the Guardian Pooled Trust.



LEGAL
The Practice Resource Center
of The Florida Bar

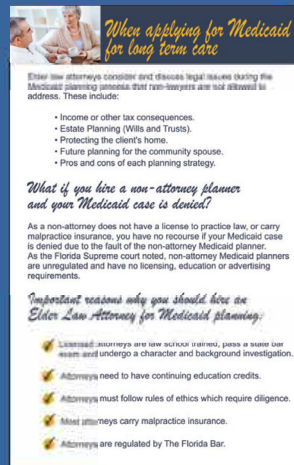
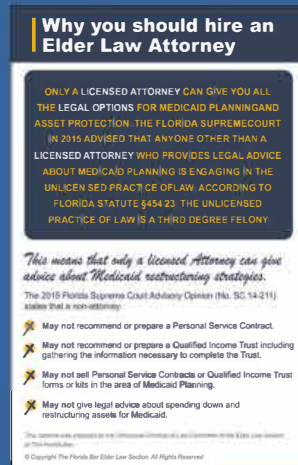
fuel

We know you're great, but now we need the rest of the world to know it, too.

Visit
LEGALfuel.com
to find out how.

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



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!

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

Pssst ... Don't forget to use the Medicaid Tracker to report issues with the Medicaid application process. The form was recently updated. Use the link or the QR code on this page to access it.

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/medicaidapplicationproblems1



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 <input type="checkbox"/> Failure to provide documentation but documentation actually was provided <input type="checkbox"/> CARES incomplete Notes: <div style="border: 1px solid black; width: 400px; height: 30px; display: inline-block; vertical-align: top;"></div>		
	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.

Mark your calendar!

January 12, 2023
Elder Law Essentials 2023
Orlando, Florida

Registration Link: <https://member.floridabar.org/s/lt-event?id=a1R1R0000083ep6UAA>

January 12, 2023
Executive Council Meeting
Orlando, Florida

January 13-14, 2023
Elder Law Annual Update 2023
Orlando, Florida

Registration Link: <https://member.floridabar.org/s/lt-event?id=a1R1R0000083eymUAA>

October 26-28, 2023
Elder Law Section Retreat
Asheville, North Carolina



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

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
Heidi M. Brown
Osterhout & McKinney PA,
Fort Myers
239/939-4888
heidib@omplaw.com

ETHICS

Chair

Heather Boyer Samuels

Samuels Wood PLLC,
Boca Raton
561/864-3371
heather@samuelswood.com

GUARDIANSHIP

Chair

Twyla L. Sketchley

The Sketchley Law Firm PA,
Tallahassee
850/894-0152
service@sketchleylaw.com

LEGISLATIVE

Co-Chair

Debra J. Slater

Slater & Small PLLC,
Coral Springs
954/753-4388
dslater@slater-small.com

Co-Chair

Travis D. Finchum

Special Needs Lawyers PA,
Clearwater
727/443-7898
travis@specialneedslawyers.com

MEDICAID/GOVERNMENT BENEFITS

Chair

Kandace E. Rudd

Waldoch & McConnaughay PA,
Tallahassee
850/385-1246
kandace@mclawgroup.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

Marjorie E. Wolasky

Lillesand, Wolasky & Hitchcock PL,
Miami
305/670-7005
mwolasky@wolasky.com

DISABILITY LAW

Chair

Jack M. Rosenkranz

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

INCLUSION, DIVERSITY, & ENGAGEMENT

Chair

Chanté Jones

Florida Department of Elder
Affairs, Tallahassee
850/414-2113
jonesch@elderaffairs.org

LAW SCHOOL LIAISON/NEW MEMBER

Chair

Enrique D. Zamora

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

LITIGATION

Chair

David Yergey

Yergey and Yergey PA,
Orlando
407/843-0430
dyergey@yergeylaw.com

MENTORING

Chair

Nicollette Gonzalez

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

NEW PRACTITIONERS

Chair

Max J. Solomon

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

PAST CHAIRS

Chair

Carolyn Landon

West Palm Beach
561/588-1212
carolyn@landonlaw.net

PUBLIC RELATIONS

Chair

Victoria E. Heuler

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

SPONSORSHIP

Chair

Jill R. Ginsburg

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

STRATEGIC PLANNING

Chair

Collett P. Small

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

TECHNOLOGY

Chair

Amy L. McGarry

Amy McGarry Law Office PL,
Cape Coral
239/945-3883
amy@amymcgarrylaw.com

UNLICENSED PRACTICE OF LAW

Chair

John R. Frazier

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

Successful year in review: The 5 key insights you need

by Audrey Gay Ehrhardt

Year after year you work *in* your practice, but how much time do you take to work *on* your practice?

When you work on your practice, instead of in it, you shift your mindset. Instead of focusing on getting the work done each day, reaching your goals for advocacy, and managing your law firm's daily needs, you are choosing to focus on the future of your law firm itself. This means you are completing a deep dive into knowing where your practice stands right now and the steps you need to take to reach the level of success you want.

The end of the year is an excellent time to gather this information. Just what, however, should you be looking for? Here is a quick list to consider:

- Where each potential new client comes from
- The value of each case
- The percentage of time you spend in each practice area or legal service
- Understanding which legal service generates the most revenue
- Identifying where bottlenecks occur in your legal services and how to improve them
- Leveraging data so you know which marketing campaigns deliver the results you need
- Careful analysis of each staff member's performance
- Origination fees for your clients for the year
- Reviewing your budget so you are well-versed in your costs versus efficiency

Gathering this information year after year is critical to maintaining a successful law practice and making informed decisions on strategic changes to move your practice forward. Where does this data come from? Let me share five key insights on the data you should be gathering at the end of each year to make sure you know where your practice stands.

1. Where did clients come from this year?

It is critical to know where your potential new clients came from this year. How did they find you? What percentage of them was referral-based? How many of them came from digital marketing efforts? With these numbers in hand, do these numbers reflect where you put your effort within your marketing campaign? Do you need to make adjustments in the new year? By contrast, do these numbers show that you need to invest more in one area over another to reach your goals for success?

2. What was your closure rate?

Your closure rate can tell us so much about your practice. The critical questions to be asking include: Did you have first appointments with the right potential client for you and your firm? Did you hit the ball out of the park each and every time? Did potential clients seem confused about what you do and the services you provide? Did you have the information you needed to work with your potential clients and guide them through the hiring process? Or, were you consistently disappointed with your closure rate and overall intake process?

3. What do your staff's time reports show you each quarter?

Were your staff members able to track time for more billable legal work than they did administrative time? Are you and your employees keeping track of time and capturing what happens each day? Are you using this information to make informed decisions on how long each case takes to reach a successful closure? Do you have the law practice management software tools you need to gather this information? If you do not, it may be time for a change as the ability to analyze this data allows you both to hire and to charge appropriately.

4. How is your firm's overall productivity and efficiency of each legal service?

Did one area of your practice significantly outpace another? Were you consistently looking at casework that was not timely completed? Were there challenges with your support staff, associates, or even yourself getting the work done? Were your clients consistently impressed, or at the very least satisfied, with the services they hired you to complete, or did you encounter challenges that show there is room for improvement?

5. Did you encounter significant challenges that demonstrate a need for capital improvements?

It's no question our law practice needs will evolve. Whether it is new technology, a new member on our law practice team, more legal training, or a marketing investment, we need to know what our practice requires of us to move forward.

continued, next page

This assessment should be based on thoughtful data review and not on a gut reaction to what improvements you think you need to make at this point in the year.

Perhaps an equally important practice point to make is that you need to store the data you gather year after year. Using this information, you can make well-informed decisions on your law firm as you end one year and move into the next one. These five key insights can help you gather the information you need for the continued success of your law firm this year, as well as in years to come.



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.



Tax Tips

by Michael A. Lampert

What is that LLC?

How many of us are told by the client, “I have an LLC”? (Actually, they often call it a Limited Liability Corporation—which it is not!) For tax purposes, that description is less than helpful.

The tax status of an entity is not always clear. Is a corporation taxed as a C corporation (taxed under subchapter C of the Internal Revenue Code)? Or did it properly make an S election to be taxed under subchapter S?

Is a trust taxed as a grantor trust? Simple trust? Complex trust?

Is the entity a Florida entity? Is it a U.S. entity? Is it a foreign (to the U.S.) entity?

So, back to the title of the article: “What is that LLC?”

The tax status of an entity has significant impact on both its and its owner’s tax treatment. The tax treatment impacts how you plan for that client. This article’s focus is not on the details of the tax treatment of specific entities, but rather on how to find out what the entity’s tax status is.

For entity tax purposes, with a focus on LLCs, what should we be asking the client? What do we want to know?

Question one: How is your LLC taxed?

There is a good chance your client will not know. Look on the income tax return. (Yes, ask for a copy!) If the LLC business is reported on the LLC member’s (client’s) Form 1040, it is likely a sole proprietorship/disregarded entity. If the entity files a separate income tax return, Form 1120, it is taxed as a C corporation. If the entity files Form 1120S, it is an S corporation for income tax purposes. If an S corporation, the entity should have provided a Form K-1 to the member/client for inclusion on their personal Form 1040 income tax return. (And yes, in many cases an LLC can make an S election.) If the entity files a Form 1065, it is a partnership for income tax purposes with the partner/client receiving a K-1. In summary, by looking at what income tax returns are, or are not, filed for an entity,

the tax status can often be discovered.

Question two: How many members/owners does your LLC have? If the answer is one:

An LLC can have one owner—a single member LLC (SMLLC). In a community property state, spouses can jointly own an LLC member interest and be considered a single member.

Tax wise, the LLC business is treated as a sole proprietorship for federal income tax purposes. This is often referred to as a disregarded entity. All of the SMLLC’s income and expenses are reported on the member’s Schedule C on their personal Form 1040 income tax return.

Note for an SMLLC:

- Rental income is generally reported on Schedule E and farming/ranching on schedule F.
- No separate income tax return is needed.

continued, next page

- The member can elect to treat the SMLLC as a C corporation or as an S election.

Practice tip: Electing S corporation status does not impact the general liability protection of the LLC (or of a corporation with an S election). The S election is solely a tax election.

Practice tip: An SMLLC defaults to a sole proprietorship for income tax purposes unless it has elected to be treated as a C corporation or has timely made an S election.

Practice tip: The member may be subject to self-employment tax on some or all of the LLC income, particularly if it is a disregarded entity, S corporation, or partnership for income tax purposes.

Practice tip: The answers to question one and question two should match. If, for example, the client reports 100% ownership, yet there is a partnership tax return, or there was an S election made and the entity's tax return reported more than one owner, further inquiry should be made.

Question three (well, a repeat of question two): How many members/owners does your LLC have? If the answer is two or more:

If there are two or more members, then the LLC defaults to being treated as a partnership. You still need to ask how the LLC is treated for income tax purposes. For partnership treatment, the LLC files

a Form 1065, and a K-1 is issued to each member. The K-1 information is placed on the member's personal income tax return. The partnership itself is referred to as a "pass-through" entity and generally does not pay federal income taxes. Remember that there are many types of entities. A state law partnership entity might be a general partnership, limited partnership, limited liability limited partnership, or some other partnership "version." Here we are referring to income tax status. So, an LLC can be an LLC for entity law purposes, but a partnership for income tax purposes.

The multimember LLC can elect to be treated as a C corporation. With a C corporation election, the LLC also files its own income tax return, Form 1120, but pays taxes on its income. LLCs with C corporation election are not particularly common due to the potential double tax (tax at the LLC level and again when distributions are made to the member).

The multimember LLC can also elect to be treated as an S corporation and have flow-through income taxation.

Practice tip: To elect C corporation status, file Form 8832. To elect treatment as an S corporation, either timely file Form 8832 and Form 2553 or simply timely file Form 2553.

Trap: There are specific requirements to elect S corporation status. These requirements include only one class of stock (ownership interest such as the member's partnership interest). One challenge with LLCs

is that the articles of organization and the operating agreement often have provisions in them that violate the S corporation eligibility rules.

Question four: In what state was the entity formed? Has the entity qualified to do business in other jurisdictions?

Practice tip: Remember to consider state law impacts. For example, Florida has a C corporation income tax. States may tax the flow-through income to the nonresident owner of the income earned by an in-state entity, or one that does business in that state.

Question five: Who started the entity? When? Have there been changes? These questions can help to determine if there were transfer of ownership interests, gifts, etc., that need to be addressed.

Closing practice tip: Do not assume the tax status of a client's entities—especially if that entity is an LLC. Ask enough questions and ask for sufficient backup so that the answer is, it is hoped, clear.

Another closing practice tip: After you have addressed the closing practice tip above, do not be surprised if the way the client is tax reporting (or not reporting) for the entity is not correct. You can hope that the client will be willing to get it fixed.

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.

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.



Tips & Tales by Kara Evans

Mind your own business

The tale: Mr. Smith died leaving ownership interests in ABC, INC, and XYZ, LLC. They were closely held companies, and he was the sole owner, member, and/or shareholder. His surviving spouse needs the funds in the corporate accounts to pay outstanding bills and taxes; however, the bank will not allow her to access the accounts. She has obtained letters of administration and has even shown the bank her husband's last will and testament to prove she is the only beneficiary. Still the bank will not allow her access. She has come to you for assistance.

The tip: Some closely held businesses, whether LLCs or corporations, have more than one member, manager, or shareholder. These businesses may have an operating agreement or bylaws that outline the procedure for transferring ownership should a member or shareholder die. There may also be a buy-sell agreement, again directing how a transfer of interest can happen. Always be sure you ask for these documents and search <https://dos.myflorida.com/sunbiz/> to see what information you can glean regarding other owners/members or shareholders.

Many people, including our Mr. Smith, simply go online, complete the forms, and voilà, a company exists. The individual may not even realize that

they have created articles of organization merely by completing the online form. In those cases, there will be no bylaws, operating agreement, or buy-sell agreement to direct the transfer of the company.

If there is a bank account titled in the name of the company, a personal representative may have some difficulty accessing funds held in that account. Even though Florida Statute 733.603 allows a personal representative to "proceed expeditiously with the settlement and distribution of a decedent's estate ... without adjudication, order, or direction of the court," a bank will still require more than just the personal representative's word that a corporate bank account is an asset of the estate. Florida Statute 733.612(22) specifically refers to continuing an unincorporated business or venture in which the decedent was engaged at the time of death, but makes no mention of an incorporated business.

When a business has been incorporated, the bank has no way of knowing whether that particular company is an estate asset. Fortunately, Florida Statute 733.603 further states that "a personal representative may invoke the jurisdiction of the court to resolve questions concerning the estate or its administration."

The answer to this problem lies in invoking the jurisdiction of the court. A

simple petition that requests the court to issue an order allowing the personal representative to access the bank account can solve this problem. Be specific when creating the petition and order. Evaluate exactly what the personal representative will have to do and include those duties in both the petition and the order. Include language such as "access the bank account located at Big Bank, 1234 Big Bank Lane, account #####, to pay the corporate bills, file tax returns, pay final taxes, wrap up the business, distribute the shares or proceeds to the appropriate beneficiaries, and close the bank account." You may even want to consult with the bank to see if there is specific language the bank or its legal department prefers. Anything that makes it easier for your client to gain access to the accounts should be included.

Mrs. Smith is very grateful and has generously agreed to allow me to share the forms we created that allowed her to gain access to the corporate bank accounts. Feel free to contact me if you would like an example of her petition and order.

***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 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

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

PRSRT-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 to the section's mission and its members. We hope our ELS members will **take time to thank them** for their support!

