

# The Elder Law Advocate

*“Serving Florida’s Elder Law Practitioners”*

**Featuring:**

*Capitol Update: Session 2023*

*VA accreditation: Knowing when you need it*

*Dual-eligible special needs plans: A primer*

*Claude Pepper Elder Law Clinic promotes legal advocacy for low-income seniors*

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# The Elder Law Advocate

Established 1991

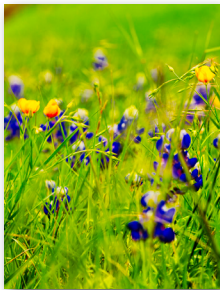
A publication of the Elder Law Section of The Florida Bar

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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

Wildflowers  
Randy Traynor Photography

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## Submit Articles

The deadline for the FALL 2023 EDITION is JULY 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

# Communication

Communication. It's a hallmark of successful relationships, whether personal or professional, and it is a value we promote in the Elder Law Section. Whether it's in-person meetings, livestreamed events, written materials such as this newsletter, or electronic communications including our website, emails, and listservs, our section is working to provide our members with helpful information they can use to benefit their elder law and special needs planning practices.

I write this message as I attend the Elder Law Essentials and Annual Update program in Orlando (held at the Loews Portofino Bay Hotel from January 12-14, 2023), and I could not be prouder of our Elder Law Section. We saw high attendance at our very first in-person Essentials/Annual Update program since January 2020. It was great to see so many long-standing members of the section and many newer (and younger) members that I enjoyed meeting and welcoming to our beloved section.

Our Elder Law Essentials and Annual Update program was chaired by ELS Chair-Elect Victoria Heuler, who along with her committee put on a spectacular program. The committee, consisting of Victoria Heuler, Danielle Faller, Debra Slater, Collett Small, Amy Fanzlaw, David Hook, Jason Waddell, Aubrey Posey, and Grady Williams, has been working very hard since June 2022, and it really showed.

Our Essentials day on Thursday, January 12, consisted of the following sessions:

- How to Navigate Between a Fairy Tale or Cautionary Tale in Trust Administration (Speaker – Stacey Schwartz)
- The Probate Journey (Speaker – Amy McGarry)
- Understanding and Enforcing Resident Rights at Nursing Homes and Assisted Living Facilities (Speaker – Twyla Sketchley)
- Essentials of Medicaid – How to Plan, Protect, and Preserve Your Client's Life Savings (Speaker – Danielle Faller)
- Best Practices and Ethical Issues in Representing Clients With Diminished Capacity (Speakers – Ed Boyer and Amy Boyer)
- Solving the Social Security Benefits Maze for People Living With Disabilities: SSDI, SSI, Medicare, and the Application Process (Speaker – Steve Hitchcock)
- Breaking Up Is Hard to Do: Leaving Your Assets When You Die (Speaker – Kara Evans)
- Exploring the Attorney/Guardian Relationship (Speaker – Enrique Zamora)
- Our two-day Annual Update consisted of a potpourri of hot topics, including:
  - Advanced Medicaid Planning Strategies (Speakers – Emma Hemness and Randy Bryan)
  - Panel: Medicaid Denials and Challenges (Moderator – Kandace Rudd, Panelists – Beth Prather, Mike Jorgenson, and Kole Long)
  - Major and Minor Updates to Social Security and Disability Law (Speaker – Steve Hitchcock)
  - Modern Planning Techniques for LGBTQ and Other Families (Speakers – Mary Wakeman and Debra Slater)
  - Exploitation Remedies and Issue Spotting (Speaker – Cara Singletary)
  - Consumer Protection Remedies Every Elder Law Attorney Should Know (Speaker – David Abrams)
  - Taxes and What Everyone Needs to Know for a Successful Elder Law Practice (Speaker – Stuart Morris)
  - Keynote Speaker: Ethics, Racial Diversity and Striving for Equal Justice Under the Law (Speaker – President-Elect Scott Westheimer, The Florida Bar)
  - Not Everyone Gets to Say Something – Understanding and Litigating Standing Issues in Guardianship (Speaker – Twyla Sketchley)
  - Panel: Inclusion, Diversity, & Engagement (Moderator – Collett Small, Panelists – Eugene Pettis, Hillary Bass, and Mary L. Wakeman)
  - 5 Ways to Improve Representation of Fiduciaries and Enhance Your Bottom Line (Speaker – Jason Waddell)
  - Capacity Issues – Planning and Litigation (Speaker – Lance McKinney)
  - Superheroes Unite! How to Rescue Irrevocable Trusts From Certain Disaster and Save the Day! (Speaker – Amy Fanzlaw)
  - And the venerable Case Law Update (Speaker – Eric Virgil)

continued, next page

If you were not able to attend the 2023 Elder Law Essentials and Annual Update program in person or via livestream, do not despair. We have recorded the entire program, and you can order either the Essentials day or the Annual Update program, or both, via the links below:

**Essentials CD/DVD/Course Book:**

[https://member.floridabar.org/TFB\\_CLECourseProdSearchResults?opPrms=5860&optType=2](https://member.floridabar.org/TFB_CLECourseProdSearchResults?opPrms=5860&optType=2)

**Essentials 24/7 On-Demand:**

<https://tfb.inreachce.com/Details/Information/874a8e29-ee96-497e-9363-655a707118f8>

**Annual Update CD/DVD/Course Book:**

[https://member.floridabar.org/TFB\\_CLECourseProdSearchResults?opPrms=5861&optType=2](https://member.floridabar.org/TFB_CLECourseProdSearchResults?opPrms=5861&optType=2)

**Annual Update 24/7 On-Demand:**

<https://tfb.inreachce.com/Details/Information/1905714d-a6e8-4b10-9fc3-deaa0ba84163>

And thank you to our sponsors! At this year's Essentials and Annual Update program, we had our annual section sponsors, Guardian Trust and ElderCounsel, as well as our break sponsors, EPIC Title Services and FND Trust Services, and our exhibitor sponsors, AGED, ABLE United, Comerica Wealth Management, Practice42, and Ehrhardt Law.

In other news, I am pleased to report that our section's legislative position on the state guardianship statute was voted on and approved by The Florida Bar Board of Governors at its meeting held on December 2, 2022. We successfully presented our position that a Section 745 rewrite of our state guardianship statute must include concepts of the Uniform Guardianship Jurisdiction Act given that Florida is one of a small minority of states (only three) that have not adopted some form of this legislation. Many thanks to Twyla Sketchley (chair, Guardianship Committee), Shannon Miller (vice chair, Substantive Committees), and Debra Slater (co-chair, Legislative Committee) for appearing at the meeting of The Florida Bar Legislation Committee held on December 1, where debate on the legislative position was held. Great job, everyone!

And finally, I am pleased to report that the section will at long last have its own listserv, as our Executive Committee approved a project that will result in our leadership being able to communicate directly with section members without first having to send a request through the Bar. All of our committees will have their own secure listservs with two-way communication capabilities, thus enhancing our ability to communicate as a section and among our members. Many thanks to Randy Bryan, Jason Waddell, and Amy McGarry for leading the way in researching and presenting a proposal that satisfies the needs of our section.

Please contact me at [hkrooks@cozen.com](mailto:hkrooks@cozen.com) if you have any questions or would like to be more involved in our section and its committees!

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



**Correction**

The Winter 2023 edition included an error in the caption of this photo taken during the section's retreat in Boston. The corrected caption reads: *A group selfie in front of the USS Constitution; pictured are David Weintraub, Robin Weintraub, Cassandra Jelincic, Joanne Fanizza, and Emily Young.* We regret the error.





# Session 2023

The 2023 Legislative Session runs from March 7 through May 5, 2023.

## Governor’s budget

On February 1, Governor DeSantis released his recommended budget for 2023-2024. The budget exceeds more than \$114 billion, and the governor has proposed more than \$2 billion in tax cuts. While the governor’s budget is given great weight, the Legislature will review and adopt the final budget during the Legislative Session.

Key items in the governor’s budget recommendations include:

- An additional \$9 million to expand services provided by the 17 memory disorder clinics and the Brain Bus to enhance diagnosis and prevention strategies for those impacted by Alzheimer’s disease and other related dementia
- An additional \$5 million to increase services through the Community Care for the Elderly Program and the Home Care for the Elderly Program
- \$1 million in funding for the Florida Alzheimer’s Center of Excellence (FACE)
- \$400,000 in funding for Hope Navigators to join seniors and caregivers in receiving services and resources to ensure enhanced quality of life
- \$79.6 million in funding to allow an additional 1,200 individuals in crisis to be served through the Agency for Persons with Disabilities waiver program
- \$3.4 million to support individuals who have both a development

disability and mental health diagnosis to receive evaluation and treatment in the most appropriate setting

## Medicaid redetermination

With the end of the public health emergency (PHE) from the COVID pandemic, the Agency for Health Care Administration and the Department of Children and Families will undergo a complete redetermination of Medicaid eligibility. Some estimates indicate that more than 1 million people will drop off the program in 2023 because they qualified during the PHE but no longer meet the Medicaid criteria. During the PHE, states could not remove anyone from the Medicaid rolls. With the ending of the PHE, the increased Medicaid match will slowly be reduced to “normal” levels.

In January 2020, more than 3.8 million Floridians were on Medicaid. In December 2022, the number had grown to more than 5.6 million. Medicaid is the largest part of the state budget, totaling more than \$36 billion.

## Committee assignments

After the House and Senate Organizational Session, Senate President Kathleen Passidomo (a two-time Legislator of the Year/Elder Law Section) and House Speaker Paul Renner announced their committee and subcommittee chairs. Appointments of interest include:

- Rep. Tom Leek, chair of the House Appropriations Committee
  - ◊ Rep. Sam Garrison, chair of the House Health Care Appropriations Subcommittee

- Rep. Randy Fine, chair of the House Health and Human Services Committee

◊ House Speaker Pro Tem Chuck Clemons, chair of the House Health Care Regulation Subcommittee

◊ Rep. Traci Koster, chair of the House Children, Families and Seniors Subcommittee (Note: During the 2022 Legislative Session, Rep. Kost filed the Uniform Jurisdiction Act on behalf of the Elder Law Section.)

- Rep. Wyman Duggan, chair of the House Insurance and Banking Subcommittee (Note: Rep. Duggan is a past Legislator of the Year/Elder Law Section.)
- Rep. Tommy Gregory, chair of the House Judiciary Committee.
- Rep. Will Robinson, chair of the House Civil Justice Subcommittee
- Senator Doug Broxson, chair of the Senate Appropriations Committee
- Senator Gayle Harrell, chair of the Senate Health and Human Services Appropriations Committee
- Senator Colleen Burton, chair of the Senate Health and Human Policy Committee and vice chair of the Senate Judiciary Committee. (Note: Senator Burton is a past Legislator of the Year/Elder Law Section.)
- Senator Clay Yarborough, chair of the Senate Judiciary Committee.

continued, next page

### Legislative issues

Legislators are filing legislation for the 2023 Legislative Session. As of this writing, almost 600 bills have been filed, and as has been mentioned in previous messages, more than 2,000 bills are filed each session. The Elder Law Legislative Committee and substantive committees will be reviewing filed bills to determine support or opposition, and possible amendments/revisions.

In addition, the Elder Law 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 have been filed or Elder Law anticipates 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.

- Guardianship – Said to be based upon Karilyn’s Law, the bill requires a jury trial for guardianship and a redetermination every three years with a different judge. Elder Law is actively reviewing the bill and will be discussing it with the bill sponsors.
- 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 revisions to the DNRO legislation adopted during the 2020 Legislative Session.

### Legislative Committee

The Legislative Committee meets bi-weekly 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](mailto:dslater@slater-small.com)

Travis Finchum

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

Mike Jorgensen (AFELA)

[mjorgensen@seniorcounselaw.com](mailto:mjorgensen@seniorcounselaw.com)

Finally, 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.*





# VA accreditation: Knowing when you need it

by Nivine K. Zakhari

on behalf of the Veterans Benefits Committee

Florida is home to almost 1.5 million veterans, the third largest veteran population in the country, with over half of them age 65 or older (Florida Dept. of Veterans Affairs Fast Facts, based on FY21 data). Odds are you may already have veterans as clients, even if veterans benefits have not been a focus area of your engagement.

With the recent passage of the PACT Act, many more Florida veterans may now be eligible for benefits based on their presumed toxic exposure during service, making the topic much more likely to come up with both new and existing clients. New practitioners in this area may not be aware that attorneys need to be accredited by the VA's Office of General Counsel to be able to represent clients within the VA claims and administrative appeals process:

Accreditation means the authority granted by VA to assist claimants in the preparation, presentation, and prosecution of claims for benefits. 38 C.F.R. § 14.627(a). Unaccredited individuals may provide other services to veterans so long as they do not assist in the preparation, presentation, and prosecution of claims for benefits.

The VA may consider any advice about

a specific claim to be "preparation," even if the veteran ultimately fills out and submits the claim themselves. Also keep in mind that providing services in a pro bono capacity has no bearing on the need for accreditation. The VA wants to make sure anyone assisting veterans is familiar with the claims process and has demonstrated the ability to provide qualified assistance, whether as an attorney, claims agent, or veterans service organization (VSO) representative.

If you have already started the process of assisting a veteran with a claim and submitted VA Form 21-22A for appointment as their representative,

[the] VA will advise the claimant that he or she may (1) seek other representation, or (2) proceed without representation until the attorney is accredited. VA will direct the claimant to [the] VA's Office of the General Counsel's accreditation search page, as a means to find an accredited attorney, accredited agent, or accredited representative of a recognized veterans service organization. VA will not return a claims application because it was accompanied by the VA Form 21-22A of an unaccredited attorney.

However, you do not need to be

accredited by the VA to appear before the Court of Appeals for Veterans Claims (CAVC). When a case has reached this stage of the appeals process, beyond the Board of Veterans' Appeals (BVA), your admission to the CAVC Bar will allow you to represent a veteran even if you are not accredited by the VA directly.

A recent review of CAVC Bar members found that less than half were both VA accredited and admitted to practice in the CAVC. Depending on your interests, there are opportunities to assist clients in appellate practice outside the VA claims process, where accreditation would not be necessary, since CAVC Bar admission determines your ability to practice there.

This is why it is important to be familiar with the accreditation requirements when advising clients on specific claims or appeals. Although you may not be filing those claims directly, specific advice could be considered preparation, requiring accreditation. If accreditation is not on your priority list, be sure to check the VA's Office of General Counsel site for the latest status of accredited attorneys, agents, or VSOs who can provide the qualified assistance your clients need.

## Resources

- VA PACT Act Guidance: [www.va.gov/resources/the-pact-act-and-your-va-benefits/](http://www.va.gov/resources/the-pact-act-and-your-va-benefits/)
- VA Accreditation: [www.va.gov/ogc/accreditation.asp](http://www.va.gov/ogc/accreditation.asp) and FAQs: [https://www.va.gov/ogc/accred\\_faqs.asp](https://www.va.gov/ogc/accred_faqs.asp)
- Board of Veterans' Appeals: [bva.va.gov/](http://bva.va.gov/)
- U.S. Court of Appeals for Veterans Claims: [www.uscourts.cavc.gov/](http://www.uscourts.cavc.gov/)
- Stetson University College of Law Veterans Programs: [www.stetson.edu/law/veterans/](http://www.stetson.edu/law/veterans/)
- The Veterans Consortium Pro Bono Program: [www.vetsprobono.org/](http://www.vetsprobono.org/)



*Nivine K. Zakhari is an attorney, consultant, and lifelong learner in Tampa, Florida. She is studying toward an LLM in elder law at Stetson University College of Law and is admitted to the Texas and Florida Bars and multiple federal courts.*

# Dual-eligible special needs plans: A primer

by Jason Neufeld

on behalf of the Medicaid/Government Benefits Committee

When President Lyndon B. Johnson signed the legislation that established Medicare and Medicaid as two distinct programs, he likely did not consider the challenges that would arise among those eligible for both—a group that happens to have a significant need for consistent and comprehensive medical, behavioral, and community social services.

Congress's attempt to bridge the gap in coordination of benefits (i.e., which benefits and when) came in 2003 with the creation of the dual-eligible special needs plan (D-SNP).<sup>1</sup>

Essentially, D-SNPs contract with Florida's Medicaid program to coordinate both Medicare and Medicaid benefits via a Medicare Advantage Plan. Every D-SNP must cover the same Medicare services that all Medicare Advantage plans are already required to provide—but will usually include additional supplemental services.<sup>2,3</sup>

Some examples of additional assistance that may be included with D-SNPs, which we do not always see with traditional Medicare Advantage plans, include: a monetary allowance for over-the-counter supplies and utility bills; allowance for the purchase of healthy foods (with more comprehensive diet and nutrition advice); allowance for fall prevention devices; additional social worker and behavioral services support; no referrals for providers/specialists in-network; expanded dental benefits; expanded hearing-aid and vision

benefits (e.g., allowance for brand-name hearing aids and glasses); expanded non-emergency transportation; and \$0.00 copay on prescriptions.

D-SNPs require the member to receive Part D benefits through their plan (they may not get a standalone Medicare prescription drug plan).

Obtaining (or losing) dual eligibility will trigger a special enrollment period to choose a plan. Once enrolled, the D-SNP plan has 90 days to conduct a "health risk assessment." It identifies the member's most urgent needs and creates an individualized care plan based on medical, functional, cognitive, psychosocial, and mental health. All D-SNP members will have a primary care physician and a care manager. But the care plan will incorporate an interdisciplinary team of specialists as needed.

After hospitalizations, members must receive a call within three days so the care manager can further explain and clarify the member's diagnosis and care instructions. In addition, the care manager will help coordinate follow-up appointments (including scheduling transportation), needed home care, and durable medical equipment.

The National Center on Law and Elder Rights (NCLER) reports that several evaluations of the program have showed that dually eligible Americans who are enrolled in a D-SNP plan have reduced hospitalizations, readmissions, and nursing home admissions. However, NCLER

admits that these evaluations are limited and that more data is needed.

Practically speaking, our clients who are eligible for the Qualified Medicare Beneficiary (QMB) program ought to consider enrolling in a D-SNP plan so they can access expanded benefits.

Remember, as elder law attorneys, those who do not immediately qualify for QMB can engage your firm for Medicaid planning. QMB does not have a gift penalty (although the possibility of the client needing long-term care services within five years should always be considered).

For those who do not meet QMB's income criteria, a pooled special needs trust (not a qualified income trust) can assist with eligibility.



**Jason Neufeld, Esq.,** is the founder of *Elder Needs Law, PLLC*, with its main offices in Aventura and Plantation, Florida (with additional satellite locations).

*Special thank you to Jack Rosenkranz, Esq., founder of Rosenkranz Law Firm in Tampa, Florida.*

## Endnotes

1 See Medicare Prescription Drug, Improvement and Modernization Act of 2003.

2 <https://www.medicare.gov/sign-up-change-plans/types-of-medicare-health-plans/how-medicare-special-needs-plans-snps-work>.

3 [https://ahca.myflorida.com/Medicaid/Finance/data\\_analytics/actuarial/docs/Medicare\\_Advantage\\_D-SNP\\_Medicaid\\_Covered\\_Services\\_July2021.pdf](https://ahca.myflorida.com/Medicaid/Finance/data_analytics/actuarial/docs/Medicare_Advantage_D-SNP_Medicaid_Covered_Services_July2021.pdf).

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Students participating in the Claude Pepper Elder Law Clinic gather in the Florida Capitol's rotunda in Tallahassee.

## Claude Pepper Elder Law Clinic promotes legal advocacy for low-income seniors

The Claude Pepper Elder Law Clinic at Florida State University College of Law is a holistic, interdisciplinary clinic focused on boosting the well-being and resilience of low-income older adults through legal advocacy and community education. Opened in spring 2023, the clinic gives law students, and other graduate students studying aging policy, the opportunity to learn the basics of elder law while also working directly on cases and policy issues.

Topics covered in the clinic include elder abuse and neglect, financial exploitation, advance planning, health care decision-making and autonomy, age discrimination, public benefits, Medicare and Medicaid, nursing homes and housing, caregiver rights and support systems, resilience and mental health, and elder populations in prison.

Under the supervision of clinical

professors, students work directly on drafting various advance directives for low-income seniors in Tallahassee and the surrounding areas. Throughout the semester, the clinic hosts community engagement events where students provide resources and information to older people in need of legal guidance. Students also participate directly in advocacy work. Students are engaged in everything from promoting the importance of SB 114/HB 29 (Tax Exemption for Diapers and Incontinence Products) to advocating for older incarcerated individuals who are in need of adequate health care to researching guardianship reform efforts.

An affiliate of the Claude Pepper Center, located on Florida State University's main campus, the Claude Pepper Elder Law Clinic honors Claude Pepper's legacy by staying committed to serving the needs of our growing elderly

population. In 1928, Senator Pepper began his distinguished career of public service in the Florida House of Representatives. In 1936, he was elected to the U.S. Senate, where he served for 14 years. Among other groundbreaking legislative efforts, Senator Pepper led the passage of an amendment creating state offices to prevent abuse of elderly persons and was an author of sweeping reforms to protect residents of American nursing homes. He held hearings on the need for national guardianship reform and was influential in the passage of Medicare and Medicaid.

If you are interested in learning more about the Claude Pepper Elder Law Clinic, please email Rima Nathan at [rnathan@law.fsu.edu](mailto:rnathan@law.fsu.edu). We love connecting our students with attorneys throughout Florida and are always looking to grow our partnerships across the state in an effort to continue paving the way for elder justice.

*Did you know?*

# Non-Attorney Medicaid Planners Cannot Give Legal Advice






*What to do?*








ONLY **A LICENSED ATTORNEY** CAN GIVE YOU ALL THE LEGAL OPTIONS FOR MEDICAID PLANNING AND ASSET PROTECTION. THE FLORIDA SUPREME COURT ADVISED THAT ANYONE OTHER THAN **A LICENSED ATTORNEY** WHO PROVIDES LEGAL ADVICE ABOUT MEDICAID PLANNING IS ENGAGING IN THE UNLICENSED PRACTICE OF LAW. ACCORDING TO FLORIDA STATUTE §454.23, THE UNLICENSED PRACTICE OF LAW IS A THIRD DEGREE FELONY.

*This means that only a licensed Attorney can give advice about Medicaid restructuring strategies.*

The 2015 Florida Supreme Court Advisory Opinion (No. SC 14-211) states that a non-attorney:

-  **May not** recommend or prepare a Personal Service Contract.
-  **May not** recommend or prepare a Qualified Income Trust including gathering the information necessary to complete the Trust.
-  **May not** sell Personal Service Contracts or Qualified Income Trust forms or kits in the area of Medicaid Planning.
-  **May not** give legal advice about spending down and restructuring assets for Medicaid.
-  **Is not** regulated and has no licensing, education or advertising requirements.

*Important reasons why you should hire an Elder Law Attorney for Medicaid planning:*

-  Licensed attorneys are law school trained, pass a state bar exam and undergo a character and background investigation.
-  Attorneys need to have continuing education credits.
-  Attorneys must follow rules of ethics which require diligence.
-  Attorneys are regulated by The Florida Bar.
-  As a non-attorney does not have a license to practice law, or carry malpractice insurance, you have no recourse if your Medicaid case is denied due to the fault of the non-attorney Medicaid planner.

*Elder law attorneys consider and discuss legal issues during the Medicaid planning process that non-lawyers are not allowed to address.*

**LEGALLY Protect Your Assets** *Hire an Elder Law Attorney*

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# 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](https://bit.ly/medicaidapplicationproblems1)



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

## 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](mailto: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.



## 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: <span style="border: 1px solid black; display: inline-block; width: 400px; height: 20px; vertical-align: middle;"></span>		
	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” <i>Possible improper address entered by caseworker that prevents online access to account</i> Other website issue <span style="border: 1px solid black; display: inline-block; width: 500px; height: 25px; vertical-align: middle;"></span>	
<input type="checkbox"/>	OTHER ISSUE: <span style="border: 1px solid black; display: inline-block; width: 550px; height: 40px; vertical-align: middle;"></span>
Case was open for how many days?	
Please Note: Submission is made for the purpose of identification of trends. The information will be used by the Task Force to help state agencies improve their mission to help Florida citizens. It is not for the purpose of work on an individual case.	



# Committees keep you current on practice issues

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

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# *Mark your calendar!*

**Laws Over Lunch: Corporate Transparency Act**

April 12, 2023 • 12:00 noon–1:00 p.m.  
CLE webcast

**Executive Council Meeting**

April 20, 2023 • 12:30 p.m.–2:30 p.m.

**Laws Over Lunch: Dual Eligibility Special Needs Planning – Laying Benefits for Care**

June 14, 2023 • 12:00 noon–1:00 p.m.  
CLE webcast

**Annual Florida Bar Convention**

June 21–24, 2023  
The Boca Raton  
Boca Raton, Florida

**Executive Council Meeting**

June 23, 2023 • 2:00 p.m.–4:00 p.m.  
Annual Florida Bar Convention  
(Date/time subject to change)

**Elder Law Section CLE at Annual Convention**

June 23, 2023 • 8:00 a.m.–12:00 noon  
Annual Florida Bar Convention  
(Date/time subject to change)



# Florida Supreme Court and The Florida Bar honor two elder law attorneys for their pro bono work

The Elder Law Section is proud to have Timothy Allen Moran and Harley Herman counted among its members. Both have dedicated themselves to serving those in need by providing their legal services pro bono, and now the Florida Supreme Court has recognized Moran with its highest honor for pro bono service and Herman is among the recipients of The Florida Bar President's Pro Bono Service Awards.

On January 26, the Florida Supreme Court presented Timothy Allen Moran with the 2023 Tobias Simon Pro Bono Service Award, recognizing his volunteer work with Community Legal Services for more than a decade. Since May 2009, Moran has dedicated more than 1,500 hours to more than 500 low-income cases.

Chief Justice Carlos Muñiz noted that Moran's extraordinary dedication and eagerness to give back has also earned him the 2022 Arthur von Briesen Award, the highest honor presented by the National Legal Aid and Defenders Association.

That was preceded by The Florida Bar Young Lawyers Division Pro Bono Service Award, the Florida Bar President's Pro Bono Service Award for the 18th Circuit, and a recognition in 2017 by the Ninth Judicial Circuit Pro Bono Committee for his pro bono contributions.

After Moran won every pro bono award Community Legal Services offers, including its Pro Bono Attorney of the Year



With his mother by his side, Timothy Allen Moran is presented the 2023 Tobias Simon Pro Bono Service Award.



Harley Herman

Award, all that was left to do was create a new one—the Timothy A. Moran Champion of Justice Award. The award recognizes young attorneys who follow in Moran's footsteps.

Eager to leverage limited legal resources, Moran is working with the Community Legal Services team to develop and launch a first of its kind "Peer Academy" to provide training to lawyers in areas of emerging need. The program coordinates mentors, expert case support, sample pleadings and documents, subject

matter-specific software and resources, CLE credit, and access to stakeholders and other professionals in the field.

The Florida Bar annually recognizes pro bono service in each of Florida's 20 judicial circuits. Harley Herman was the 2023 honoree for the 13th Judicial Circuit, Hillsborough County.

Herman's pro bono work started 44 years ago when he was a law student volunteering at the University of Florida's Civil Legal Clinic. By graduation, Herman had provided services to more than 30 clients, setting the

tone for an exemplary pro bono service career that includes years of work both at legal aid organizations and serving clients pro bono independently.

Among the highlights of Herman's service is his commitment to mentoring young lawyers, serving as a panel member of The Florida Bar's Lawyers Helping Lawyers program since 1990, and his tireless efforts made on behalf of attorney Virgil Hawkins. Herman has also worked with Volunteer Lawyers Program of Bay Area Legal Services (VLP) since 2008, where he has donated nearly 1,000 hours, 500 of which he donated in 2021 and 2022 alone. He has assisted a total of 17 clients for VLP and is currently working four open cases either as primary counsel or mentor. Herman was also the driving force behind the VLP's award-winning Frontline Heroes Pro Bono Project.

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# Are we setting our goals too small?

by Audrey Gay Ehrhardt

Writing down your goals, your plans, and your wishes for the future is the first step to making them a reality. As the second quarter of 2023 begins, you should evaluate your New Year's resolutions—or write them now! It is always a good time to put your goals down on paper.

Over the past few months, I have had the privilege of hearing the goals of family, friends, colleagues, and absolute strangers on planes (it never ceases to amaze me what people tell you when you're not wearing headphones), but these conversations have solidified for me the fact that, deep down, each of us holds a vision of the future we want. No matter what the motivation, be it financial or personal or health focused or otherwise, the goals we set now will set our course for the next 12 months to come.

One thing is keeping me up at night as I reflect on these conversations ... *Are we setting our goals too small?*

I've been reviewing my notes and research for the past three years and continue to see a trend that seems to have started with the pandemic. As early as midway through 2020, goals have seemed to shrink. Ideas, achievements, and plans that were achievable are now just a bit less so. There appears to be a shared lack of confidence in executing plans. Without the direction and motivation—and dare we say enthusiasm—that come from dreaming big, our full potential may not be reached.

This is not to say anyone's goals, large or small, are wrong, but it does beg the question: *Are we setting our goals too small?* And, moreover, how do we know? Let me share the checks and balances I am asking myself as I evaluate my own New Year's resolutions:

- Are my goals similar to ones I have reached before?
- Am I trying something new? Am I afraid to try something new?
- Am I afraid of past failure?
- Do I worry about marketplace changes?
- Am I present for the big conversations that lead to change?
- At the end of the day, have I asked myself what I really want?
- Have I looked at my data now? And data from the previous year, and years before that, to assist me setting my goals?
- When it comes to implementing my goals, new or existing, do I have the infrastructure in place that will allow me to reach them?
- Do I have the support staff necessary to implement my plans?
- If, at the end of the day, I decide my goals are too safe or too small or too comfortable, do I have the bandwidth to make a change?
- Am I comfortable with being uncomfortable this year?

- Do I have the hours in the work week, not necessarily in a given day, to put the work in to do the hard things?

No matter what goals you are setting, we all know an idea without a plan is just a wish. After you review your goals to make sure you are not unintentionally holding yourself back this year, it is critical you do not leave this month without putting a plan in place for implementing the goals you have set.

I'll leave you with one of the quotes that stays pinned to my desk year after year. I'm not sure who to attribute it to but it reads:

**If it's still on your mind  
it's worth the effort.**

I wish you all the success this year. If you need help or just someone to share your goals with, don't hesitate to let me know.



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

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





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## Tips & Tales by Kara Evans

# Spouses have rights

**The tale:** Sam Jones books a consultation appointment. He would like to know what his rights are. He has proposed to his significant other, and his significant other is requesting that a prenuptial agreement be executed prior to the marriage. Sam wants to know exactly what a prenuptial agreement is and what it would mean for him.

**The tip:** Spouses are granted many rights and priorities under the Florida Statutes. If you have been reading this column for any amount of time, you already know about the elective share. The elective share is the right of a surviving spouse to claim 30% of a deceased spouse's estate, and not just the probate estate because we all know how easy it is to avoid probate. The 30% is based on the "enhanced estate." The enhanced estate includes assets held in revocable trusts, joint tenancy property, gifts made within one year of death, retained life estates, retirement benefits, benefits that pass by beneficiary designations, and more. It also provides that non-probate assets held by third parties can be tapped to satisfy the elective share.

While the elective share is undoubtedly the major spousal benefit, there are other important rights. Article X, Section 4(2)(c) of the Florida Constitution provides that the "homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child." Should the homestead be improperly devised, the spouse automatically gets a life estate with the option to claim a one-half interest as tenants in common with the decedent's descendants in lieu of the life estate. Additionally, the surviving spouse is entitled to the entire

intestate estate unless there are surviving descendants of the decedent who are not also lineal descendants of the surviving spouse. In this case, the surviving spouse still gets 50%, and the descendant's children share the remainder.

The surviving spouse has the right to certain exempt property. Exempt property is covered in Florida Statute 732.402. This property is exempt from creditors' claims and consists of the following:

1. Household furniture, furnishings, and appliances in the decedent's usual place of abode up to a net value of \$20,000.
2. Two motor vehicles that were regularly used by the decedent and immediate family members.
3. All qualified tuition programs.
4. Benefits paid under Florida Statute 112.1915, which are death benefits for teachers and school administrators.

The exempt property is excluded from the value of the estate before residuary, intestate, pretermitted, or elective shares are determined.

Florida Statute 732.403 provides for a family allowance. A surviving spouse is entitled to a reasonable allowance from the estate during the administration of the estate. This allowance also applies to the decedent's lineal descendants that were being supported or were entitled to support from the decedent. In either case, this allowance cannot exceed \$18,000. Most attorneys assume an automatic allowance of \$18,000 if it is petitioned; however, case law has established guidelines for reasonableness, and it may be the family is not entitled to this amount. *DeSmidt v. DeSmidt*, 563 So. 2d 193, 194

(Fla. 2d DCA 1990) established that while the entitlement is there, the *reasonableness* of the award must be established. Factors that will be considered in granting a petition for family allowance include:

- Standard of living and other means of support;
- Amounts actually being contributed toward the support of the dependents; and
- Whether the decedent was actually supporting or was obligated to support the dependents.

If the decedent executed a will before marriage and is survived by the new spouse, that spouse will be entitled to the same share they would have taken had the decedent died intestate. This is true unless (a) provision was made for or waived by the spouse, (b) the spouse was provided for in the will, or (c) the will discloses an intention not to make provision for the spouse.

The spouse also has priority under a number of statutory provisions such as priority in appointment as personal representative of an intestate estate (F.S. 733.301), as guardian (F.S. 744.312), and as health care proxy (F.S. 765.401), and is the legally authorized person to direct disposition of bodily remains (F.S. 497.005 (43)).

You explain to Sam that these rights can be modified or waived in a prenuptial agreement. Sam thanks you for the consultation and makes an appointment with your office to explore his options further.

**Kara Evans, Esq.**, is a sole practitioner with offices located in Tampa, Lutz, and Spring Hill, Florida. She is board certified in elder law and concentrates her practice in elder law, wills, trusts, and estates.



## Tax Tips

by Michael A. Lampert

# Transfers of real estate with retained life estate (and then sold after death) A tax primer

I have received a number of questions regarding the basis after the death of the grantor of real estate transferred with a retained life estate that is now in the hands of the remainder tenants. Different than the style of my usual Tax Tips articles, this article is in the style of a point-by-point email response to a client. Of course, I have added a “few” extra notes and have lumped multiple emails to the client into one long “email.” The basic question is somewhat common. A parent transfers real estate to a family member or other beneficiary while retaining, in some way, a life estate. What happens taxwise when the remainder beneficiary(s) sells the property?

Dear Client:

Before I review the facts, ask some additional questions, and let you know my thoughts, I do need to say that the below is NOT a formal tax opinion. It is to give you guidance, based on the information provided, as to the reporting of basis/possible gain on the sale of the real estate you received as the remainder tenant of your parent’s real estate. A formal tax opinion would be very costly and is not binding on the IRS.<sup>1</sup> Please let me know if you have any questions.

1. My understanding is that your parent prepared and recorded a quit claim deed that transferred some interest in your parent’s real property at issue to you and your sibling, while retaining some interest (life estate).<sup>2</sup>
2. You provided me with a copy of that deed. Years after that deed was recorded, your parent passed. Subsequent to your parent’s passing, you and your sibling sold the property.
3. You provided me with a copy of the sale’s closing statement, the sale’s conveyance deed, and the 1099 issued to you from the sale by the title company/closing agent.<sup>3</sup>
4. I also want to confirm there was no consideration paid for the quit claim deed to you and your sibling from your parent.<sup>4</sup>
5. Your parent, you, and your sibling are all U.S. citizens and reside in the United States.<sup>5</sup>
6. What follows assumes there was no consideration for the quit claim deed and the above facts and information are correct. The result would or might be different if there was consideration paid for the deed or if there are different facts.
7. I also assume there was no business use, rental, etc., of the property since your parent’s passing. Please let me know if that is not the case.<sup>6</sup>
8. Further, neither you, your sibling, nor anyone dependent on either of you for support (e.g., spouses, children, etc.), used the property as a residence prior to or after the death of your parent. If any of this is the case, the result would or might be different.<sup>7</sup>
9. I also assume this was not your parent’s homestead. I see that at the time of the quit claim deed, your parent was married.<sup>8</sup>
10. Note that the quit claim deed from your parent was set up as a joint tenant with right of survivorship to your parent, your sibling, and you. Then, later in the deed, a life estate was reserved. The deed did not have the usual language regarding the transfer of a remainder interest with retention of a life estate.<sup>9</sup>
11. You also noted that your parent’s entire estate value (inclusive of real estate, financial assets, life insurance, whether in trust or otherwise, and regardless of if the assets were subject to probate) was approximately \$1 million. I also assume your parent made no significant predeath gifts (beyond the annual gift tax exemption amount and other annual gift exemptions). If this is not the case, please let me know as my guidance may change.<sup>10</sup>
12. I do not recommend filing a 1099 with the closing date hand changed, as is the case here. Emailing me the 1099 with the social security number redacted (versus uploading in a secure portal) is fine. I sometimes see handwritten addresses on 1099s. With that said, if you do not have a clean copy of the 1099, I suggest you ask the closing agent for one prior to timely filing your income tax returns. A copy should also

be given to the tax preparer. It appears the closing agent split the 1099 (and I assume the net closing proceeds) between you and your sibling.<sup>11</sup>

13. When having your income tax return prepared, do give a copy of the closing statement to the tax preparer. Certain of other expenses, such as the selling commission, can work to reduce any net taxable gain.<sup>12</sup>

14. Make sure your tax preparer realizes that the 1099 has split the net proceeds and that closing and related expenses may need to be allocated.<sup>13</sup>

15. If you had some renovation and related expenses to make the property ready for sale, let the tax preparer know as some of those expenses may also be able to be used to reduce any taxable gain. Again, the expenses should be properly allocated between you and your sibling. You and your sibling should also report the sale consistently on your respective income tax returns.<sup>14</sup>

16. Internal Revenue Code Section 2035 is clear regarding the inclusion in the gross estate (of the decedent) of transfers with a retained life estate (assuming no consideration and the like). A portion of this IRC provision is as follows:

#### **26 U.S. Code § 2036 – Transfers with retained life estate**

##### **(a) GENERAL RULE**

The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

(1) the possession or enjoyment of, or the right to the income from, the property, or

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

17. The above code section addressed the transfer with the retained life estate. What about the fact there also was a joint ownership in the deed? Arguably, the retained life estate would trump the joint ownership as it relates to your parent, but I will address the joint interests anyway. IRC Section 2040 addresses joint interests. The general rule is that the value of the gross estate (of the decedent) includes the value of joint tenancy property. There are exceptions if there was consideration and the like and special rules between spouses, which does not appear to apply here. An excerpt from IRC Section 2040 is as follows:

#### **26 U.S. Code § 2040 – Joint interests**

##### **(a) GENERAL RULE**

The value of the gross estate shall include the value of all property to the extent of the interest therein held as joint tenants with right of survivorship by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: Provided, that where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: Provided further, that where any property has been acquired by gift,

bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants with right of survivorship and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants with right of survivorship.

18. IRC Section 1014 addresses the basis of property received from a decedent. Specifically, it notes that the basis is the fair market value of the property, **AT THE DECEDENT'S DEATH**. An excerpt from Section 1014 is as follows:

#### **26 U.S. Code § 1014 – Basis of property acquired from a decedent**

##### **(a) IN GENERAL**

Except as otherwise provided in this section, the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent shall, if not sold, exchanged, or otherwise disposed of before the decedent's death by such person, be—

(1) the fair market value of the property at the date of the decedent's death<sup>15</sup>

19. As we discussed, it is important to determine the fair market value of the property as of the date of death as your starting basis. Any increase in value from the date of death through the sale is subject to income tax.

20. A full professional appraisal as of the date of death would be good evidence of the fair market value as of the date of death. Some clients will have a real estate broker write an opinion of value. This is certainly usable, but not as good as a formal appraisal. And, in any event, the IRS could challenge the value. It is usually easier to have valuations and appraisals performed

continued, next page



closer to the date being valued. Given the significant rise in values of much of the real estate in Florida over the last couple of years, having a full appraisal prepared would be a good choice, and will help defend the value placed on your income tax return in the event of an audit.

I hope you find this information helpful. Please let me know if you have any questions.

#### Comments

1. Reminder: Attorney and CPA tax opinions are not binding on the IRS. Sometimes they can be utilized to avoid certain penalties. However, in some cases, as a practical matter waiving the attorney-client/tax preparer-client privilege may need to occur due to the possible need to disclose aspects of the tax opinion as part of the effort to avoid penalties.

2. Make sure it is a retained life estate. Look at the deed. Do not just rely on what a client said. Sometimes what may be retained is a term of years or other rights retention. This can impact the tax result. The deed referred to here was from parent to parent and two children as joint tenants with rights of survivorship with a retained life estate. Again, read the deed!
3. The closing statement may show some items, such as sales commission, that can reduce the taxable gain on the sale. Remember that other items, such as “making ready to sell” expenses may also reduce the taxable gain even though those expenses are not shown on the closing statement. Make sure the client keeps good records. The 1099 information is reported to the IRS. Even if there is no taxable gain on a sale, the IRS does not know there is no gain. A tax return still should be filed showing no or more limited gain. Otherwise, the IRS will just assume the entire sale proceeds on

the 1099 is taxable gain. This issue has resulted in many tax controversy cases in my office.

4. If there was consideration actually paid, it is possible that the basis step up (or down) will not occur. In addition, the amount paid may increase the grantee/payor’s basis.
5. There are special rules, including complying with the Foreign Investment in Real Property Tax Act (FIRPTA) on certain real estate transfers. Withholding on a sale or transfer may be required when the seller/transferor is a non-U.S. person. This is true even if there is no taxable gain unless certain procedures are timely followed. Sometimes this issue is missed by the closing agent.
6. Why do we care if there was business use, etc., post death? Because if there was, the property should have been depreciated for income tax purposes. The tax law generally presumes that a property that can be

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- properly depreciated was depreciated for income tax purposes, even if the depreciation was not actually (or accurately) reflected on the income tax return. Depreciation will reduce the basis in the asset. This issue has also resulted in many tax controversy cases in my office. Note that the basis step up or down at death of a decedent generally occurs even if the asset was depreciated prior to death.
7. It is not uncommon for a family member remainder beneficiary to utilize the property, both before the grantor's (parent in this case) death and after. Sometimes, for example, a child resided with the parent for a year or more prior to the parent's death, with the property given to the child after death (whether outright, through homestead, remainder deed, or other retitling). The \$250,000 (single person)/\$500,000 (married person) gain exclusion for a primary residence under IRC § 121 requires that it both be used as the primary residence and be owned for two of the last five years. However, the two years of occupancy and the two years of ownership do not have to be concurrent. For example, if a child lives with their parent for two years, the parent dies and leaves the property to the child, the child moves out and the property is sold two years later, the two of the last five years rule for both ownership and residency is met.
  8. This was more of a title issue. I just wanted to be sure I had the facts correct.
  9. Read the deed. Do not rely on what a client says. The deed here was not an enhanced life estate (ladybird) deed. It is more of a title issue that is no longer an issue with the death of the parent.
  10. Remember, pre-death gifts in excess of the annual exclusion or other exemption can reduce the remaining lifetime exemption amount.
  11. The client provided various closing documents. One was a 1099 with a handwritten change of the closing date. I instructed the client to obtain a proper 1099.
  12. As noted above, the client needs to include the sale on their income tax return, with information on sale-related expenses and post-death improvements.
  13. Sometimes the closing agent will issue the 1099 to one of the "sellers" for the full sales amount. Sometimes the closing agent will issue a 1099 to both sellers for the full sales amount. Sometimes, as was the case here, the closing agent splits the 1099 between the selling owners. Be sure to remind the client to make sure the tax preparer properly shows the information on their income tax returns. (Remember, in this instance, there were two children who were the sellers.)
  14. More comments on expenses that may reduce the taxable gain. Remember also that the expenses may need to be allocated between the sellers.
  15. Make sure an estate tax return was not needed. If an estate tax return is filed, there should have been a basis allocation on Form 8937 filed by the estate. That basis allocation form will state the estate's position regarding the basis as reported (and ultimately as finally determined) for estate tax purposes. The income tax reporting needs to be consistent with that basis reporting.

*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.*

#### Endnotes

- 1 See comment #1.
- 2 See comment #2.
- 3 See comment #3.
- 4 See comment #4.
- 5 See comment #5.
- 6 See comment #6.
- 7 See comment #7.
- 8 See comment #8.
- 9 See comment #9.
- 10 See comment #10.
- 11 See comment #11.
- 12 See comment #12.
- 13 See comment #13.
- 14 See comment #14.
- 15 See comment #15.

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# Summary of selected case law

by Elizabeth J. Maykut

## **Court had no authority to require proceeds of sale of trustee's real property be deposited into restricted depository before judgment rendered.**

*Trombino v. Echeverria*, 348 So. 3d 1150, 2022 WL 4360182 (Fla. 4th DCA September 21, 2022)

**Issue:** Can the court require the trustee to deposit the proceeds of a sale of personal real property transferred to the trustee by the grantor prior to the grantor's death into a restricted depository before the beneficiary succeeds on his petition against the trustee for breach of fiduciary duty?

**Answer:** No.

Before her death, the grantor of a revocable trust executed a life estate deed as to a parcel of real property formerly held in her trust giving herself a life estate with remainder to her daughter, Suzanne. After the grantor's death, Suzanne put the property up for sale and her brother, Dale, who was a beneficiary under the trust, filed a petition against Suzanne, individually and as trustee, seeking damages for breach of fiduciary duty, arguing that Suzanne had mismanaged the trust's assets. Then, Dale moved the court to require that

Suzanne deposit the proceeds from the sale of the real property she had received pursuant to the life estate deed to a restricted depository, citing the restricted depository statute and the trust code as support. The trial court granted his petition.

In reviewing the case, the appellate court stated that, as a general rule, a court cannot restrict a defendant's assets solely to ensure collection of a potential money judgment even when it's alleged that they might be dissipated before any judgment is entered. In reversing the trial court, the Fourth District found that neither of the statutes the petitioner relied upon provided an exception to this rule. Section 69.031, Florida Statutes, the restricted depository statute, did not apply as the real property in question was not part of an estate. Section 736.1001, Florida Statutes, which allows a court to order a trustee, as a remedy for a breach of trust, to restore the assets of the trust (out of her personal assets) also did not provide any basis for the restriction of Suzanne's personal assets as it only described the type of judgment that could be entered if and when Dale prevailed on his claim.

**Practice tip:** Injunctions cannot be granted before a judgment is entered against a defendant to protect against the defendant dissipating his assets before judgment is rendered. Therefore, other options may need to be considered.

## **Trial court erred by freezing assets of the ward's spouse without requiring guardian to satisfy temporary injunction test and post a bond.**

*Leposky v. Ego*, 348 So. 3d 1160 (Fla. 4th DCA October 14, 2022)

**Issue:** Can the court require the ward's husband's bank accounts to be frozen in response to an emergency motion filed by wife's guardian alleging husband had transferred funds out of a joint account with his wife to hide and deplete them?

**Answer:** No, not unless the guardian can meet the four-prong test showing she is entitled to a temporary injunction and posts the requisite bond.

After a limited guardian was appointed for the wife, the guardianship court issued an order requiring the husband to produce information related to the parties' joint bank account. The husband objected, arguing he



closed the joint account shortly after his wife suffered the stroke that caused her partial incapacity. The guardian then filed an unverified emergency motion to freeze the husband's assets alleging he transferred them from the joint account to his sole account to hide and deplete them. The motion contained no factual allegations to support the four-part test for a temporary injunction.

At an emergency hearing on the motion, the husband's counsel was permitted to present argument, but the trial court refused to allow him to testify because it was not an evidentiary hearing. The trial court issued an order temporarily freezing all of the husband's accounts titled in his sole name at two financial institutions. The order contained no findings as to each prong of the temporary injunction test and failed to set a bond.

The Fourth District reversed because the guardian had neither pleaded nor proven the following four elements necessary to be entitled to a temporary injunction: (1) irreparable harm; (2) no adequate remedy at law; (3) substantial likelihood of success on the merits; and (4) entry of injunction serves public interest. The court also reversed because the trial court's refusal to allow the husband to present evidence violated his due process rights and because the order included no factual findings and no bond was posted.

**Practice tip:** A guardian of a married ward who has evidence the ward's spouse is depleting joint or formerly joint assets may be entitled to a temporary injunction freezing those assets if the guardian can satisfy the four elements for a temporary injunction and post a bond. A spouse

of a married ward is entitled to present evidence at any hearing on that petition and may object to the petition if it doesn't satisfy those elements.



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