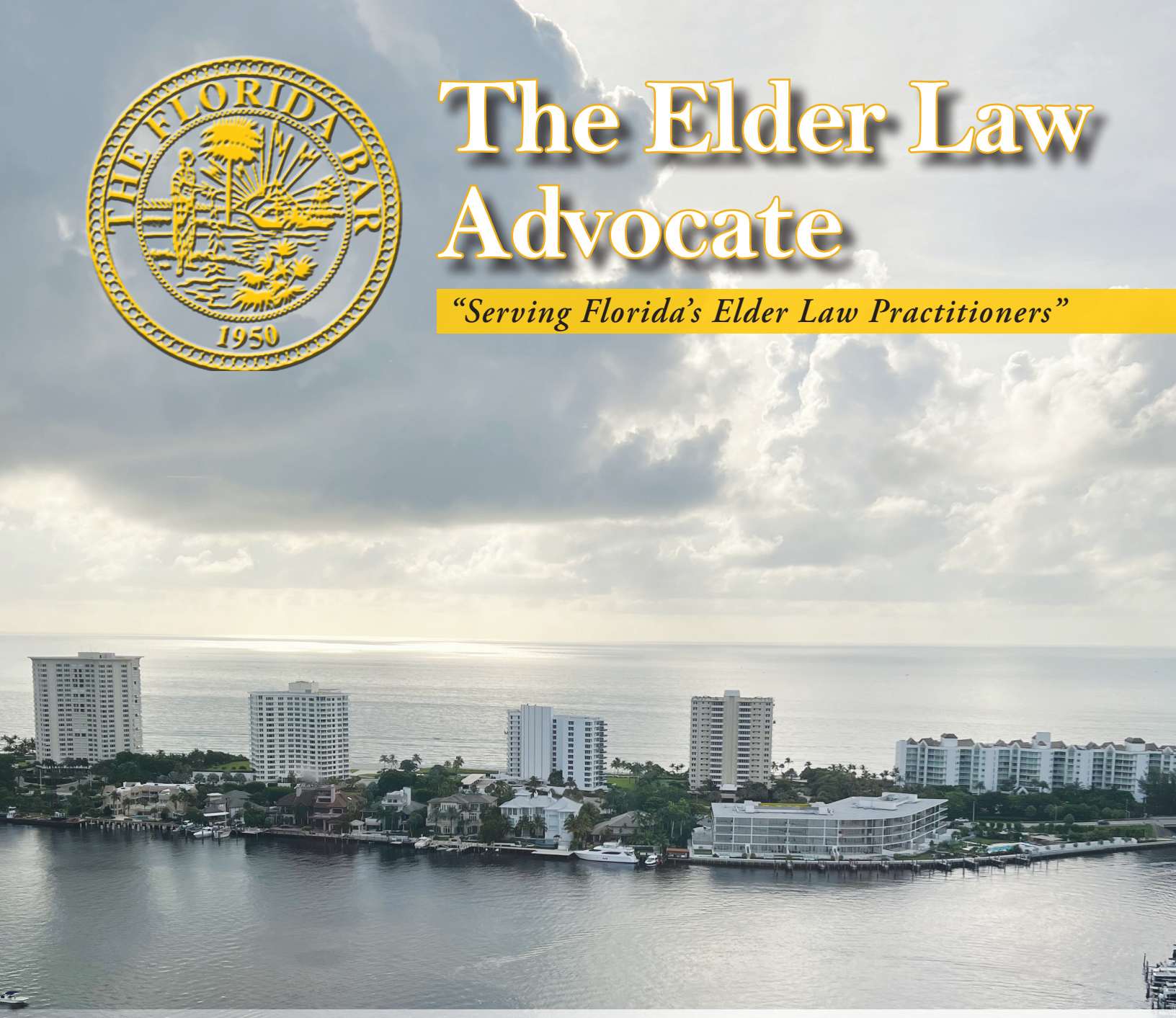
The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"



Featuring:

Increase to PNA for Medicaid skilled nursing facility residents

Unlocking the secrets of snowbird estate planning in Florida

Can Florida set its own PACE?

Take the Tax Quiz: 1, 2, 3—Go!

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Balancing parenthood and a law career … They can coexist

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The Elder Law Advocate

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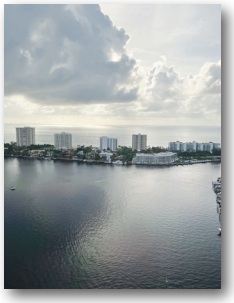

ON THE COVER
Boca Raton Skyline
Shannon Miller

8/2023

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Submit Articles

The deadline for the WINTER 2024 EDITION is OCTOBER 16, 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 Victoria E. Heuler

Enthusiasm, fun, and happiness drive the Elder Law Section!

Let's be honest—we elder law attorneys have heard some doozies from some of our clients! Just when we think we really have "heard it all," the next story we hear is even worse. Some stories about our clients and their lives are painful to hear, and we have to try to set that aside so we can listen to understand and formulate a plan to meet a client's needs. We feel compassion for our clients, and it's not unusual for us to be impacted by what happens to them. How, then, do we persist as elder law practitioners, and why do we love what we do so much?

The hallmark of being an elder law attorney is that we take a holistic view of the client's life, family dynamics, and needs so we can create a lasting, workable plan. We know that life does not happen in a vacuum. As people age, their situation can be complicated by challenges such as:

- determining how the client will pay for the care or housing they need and what private or public resources are available for that support;
- family members who are exploiting the aging or disabled person's vulnerabilities through financial exploitation, undue influence in creating an estate plan, or physical or chemical restraint in order to subdue the vulnerable adult;
- a client who has cognitive decline or mental illness but may still have the ability to create a solid estate plan that could protect them from vulnerabilities as they age;
- a cyberworld that is the way the world communicates but can be difficult to navigate and makes it difficult to avoid cybertheft; and
- sophisticated scammers whose sole occupation is convincing aging Floridians to part with their resources—whether large or limited—through ever-increasingly creative means.

The issues our clients face go to the core of their healthy and meaningful existence. Somehow, elder law attorneys have a vibrant spirit that soars above the frustrations and the negativity. Why is this, and what drives us to keep doing what we do, day in and day out? I have been a Florida attorney since September 1993 (Go Noles!) but did not start practicing elder law until 2000. Before my transition into elder law, I was an insurance defense attorney who was not getting much satisfaction out of my work. I learned plenty, tried cases, and engaged in multiple mediations. I even handled district court and Florida Supreme Court appeals for our clients, but it was not the type of work that fed my soul.

One day, at the courthouse, I ran into who would become my elder law mentor, former Elder Law Section Chair Lauchlin Waldoch. Lauchlin was a former insurance defense lawyer who told me about this cool new practice of law she was doing—elder law. I was immediately intrigued, as her joy was palpable when she was telling me about it! I was hooked and have never looked back. Thank you, Lauchlin, for sharing your joy and helping build an elder law community in Tallahassee and around the state that we are all extremely proud of!

So, in my 23rd year as an elder law attorney, I now have the privilege of being your chair for the dynamic Elder Law Section. The privilege arises from the passion, persistence, and collegiality of elder law attorneys. The desire to help each other succeed for the betterment of our clients' lives is patent in every meeting and event we have together. It is now a recurring compliment from various people we associate with who are not elder law attorneys that we are fun, we are happy, and we are a loving group. Is it O.K. to have fun when we know the immense challenges some of our clients and families face? How is it possible for us to be energized after some of the doozies we have heard?

At our core, elder law attorneys care deeply about people. We care about our clients, and we care about each other. My elder law colleagues routinely agree on the collegiality of our elder law bar. We thrive and depend on each other's support! It's nothing for me to call an elder law peer and ask for help because I would be there for my colleagues, and my colleagues have always been there for me. Sometimes our relationships are a mentor/mentee relationship, and other times it is just peer-to-peer to share conundrums and explore strategies. We elder law attorneys frequently exchange stories of our greatest worries and our biggest victories because it's what keeps

continued, next page

us engaged and passionate about our practice area. Time and again our members express how enriched they feel being around other elder law attorneys, sharing knowledge, and yes—laughing—and sometimes crying.

We held our executive council meeting recently at The Boca Raton at the annual Florida Bar Convention, and it was quite an engaging meeting. There were about 25 of us in the room, and another handful of attendees joined via Zoom. We had at least five prior Elder Law Section chairs represented at the meeting, which is a tribute to what we do and how we love what we do! We had some great laughs over Mike's Pastry versus Modern Pastry (both in Boston) and the blind "taste test" that our incoming treasurer, Debra Slater, failed after she boasted at the Boston retreat in October 2022 that Modern was the best! Thank you to our immediate past chair, Howie Krooks, and our administrator, Emily Young, for arranging to fly in pastries from both Boston shops and delight us with the pastry varieties and caloric depth!

During the council meeting, Howie presented awards to some of our passionate and hardworking members:

Amy Fanzlaw of Boca Raton – Member of the Year

Enrique Zamora of Miami – Lifetime Achievement

Randy Bryan of Oviedo – Charlotte Brayer Public Service Award (former section chair and board certified in elder law and in wills, trusts, and estates)

Max Solomon of Tallahassee – Exceptional Service Award

Chante Jones of Orlando – Exceptional Service Award

Each of these Elder Law Section members brought passion, dedication, intellect, and enthusiasm to the volunteer work they did for the section, and it paid off big in moving our section's goals forward and further developing the section as a thought leader on elder law and aging issues. When Howie presented Max's award, he said he wanted to bottle Max's enthusiasm for his work between our section and The Florida Bar's Young Lawyer's Division. Howie is right, and while that enthusiasm cannot literally be bottled, it sure as heck can be spread around to create the dynamism that motivates other section members to be involved and to *stay* involved in the section's mission.

Much of having fun and bringing passion to our continued mission happens in the section's committees. We have engaged chairs for each of our substantive and administrative committees (see a full list of your 2023-2024 committee chairs elsewhere in this publication), many of whom have returned for a second chair year because they have not yet accomplished all the goals they want to see fulfilled. Maybe we did bottle enthusiasm somehow and the committee chairs have been drinking it? As section chair, I told the committee chairs that I want them to drive the conversation and tell their Executive Committee what they want to see the section focus on and how our leadership can support the critical committee work being done. Some of our committees consist of only several members, but oh how hard those members work! It never ceases to amaze me how fierce some of our smaller committees are and the incredible product they create with only a handful of members.

Let's continue to have fun as we nurture our current members and seek new members to join our wonderful elder law bar! The fun starts when you get involved with our committees—reach out to a committee chair to join the committee. And do not hesitate to reach out to me at victoria@hwelderlaw.com or 850/421-2400. I look forward to a terrific year as your chair!

Victoria E. Heuler

Heuler, Wakeman, Solomon Law Group PLLC

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- Anne K., Beneficiary's Family

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Message From the Past Chair

by Howie Krooks

Why I am bullish on the Elder Law Section

As I write this, my last message to the Elder Law Section as the outgoing chair, I am beyond thrilled with the progress our section has made in the last year. What a year it has been!

We embarked on an ambitious plan to accomplish a wide range of objectives, many that were designed to enhance how the section functions internally. I am really proud to say we have made significant progress in all of the areas we targeted for improvement. So, with that said, here is a recap of some—and certainly not all—of the progress we made this year:

Public Relations Committee – Working with Sachs Media, the committee provided 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. Committee members keep their "ear to the ground" and routinely discuss current events and issue areas for public awareness messaging and are ready to connect with reporters who want an elder law attorney's perspective.

Section Listserv – Yes, you read that correctly! The Elder Law Section has joined the digital age with a brand new and first-ever listserv. We now have the ability to send one-way messages directly to our members without waiting in the larger Florida Bar cue. This means our communications will be sent in a timelier manner going forward. Please check your spam/junk folders to be sure the domain "eldersection.org" is added to your safe senders list. We also added two-way listservs at the committee level so our section committees can better communicate among their members. Our thanks go to Randy Bryan, who led this effort, our Technology Committee (chaired by Amy McGarry), and Past Chair Jason Waddell.

Section retreat – We actually made it to Boston in September 2022 (notwithstanding Hurricane Ian's attempt to thwart yet another attempt to hold our retreat in Boston for three consecutive years). An amazing time was had by all. If you have never been to a retreat, or it's been a while, consider attending this year's retreat scheduled for October 26-28, 2023, in Asheville, North Carolina at the Omni Grove Park Inn. You will be amazed at what this resort offers, and I promise you will connect with other section members in ways not possible during conventional CLE programs.

Executive Committee – To handle the anticipated increased workload from our ambitious agenda, the Executive Committee voted to approve more frequent executive committee meetings, which we held throughout the year. It made a huge difference in the Executive Committee's ability to remain nimble and address issues without delay.

Enhance relationships with Florida Bar Board of Governors and Florida Bar staff – We began sending section members to Board of Governors meetings held throughout the state. This gave us access to more timely and accurate information that could impact our section. We also invited Florida Bar staff to join our executive committee meetings from time to time in order to learn about the responsibilities of certain Florida Bar staff. This allowed us to become better informed on whom to contact in a time of need and also allowed us to develop relationships with key Bar staff.

Sponsorships – We have revamped our Sponsorship Committee (chaired by Jill Ginsburg) by adding new members (Kandace Rudd, Jennifer Akin) and by extending our outreach to potential new sponsors, all of which will result in new ways for the section to attract non-dues revenue. This will allow the section to do more for its members while having the financial security to address rising costs and to add new services without relying solely on dues revenue.

Fellows program – Upon the initiative of the section's Inclusion, Diversity, & Engagement Committee, the section launched 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. I am proud to announce that Sylvana Rosende is the first person to participate in our new Elder Law Section Fellows program! Read more about this new program in the article by the committee's chair, Chanté Jones, in this edition of the *Advocate*.

Section roundtable on scamming – Sachs Media conceptualized, produced,

and hosted a 60-minute virtual roundtable on preventing exploitation of senior and vulnerable residents. Key participants included Florida Attorney General Ashley Moody, neuroscientist Nathan Spreng, NPR host David Brancaccio (senior editor of Marketplace Morning Report), and elder law attorney Shannon Miller. The event drew 161 participants.

Continuing Legal Education – Our continuing legal education programming remains the very best way for section members to stay connected to current developments and network with others. The CLE Committee (chaired by Danielle Faller) recently began offering monthly Laws Over Lunch (LoL) webinars so as to offer members the opportunity to access CLE throughout the year. The April 2023 webinar of the LoL series featured Peter M. Knize, who presented on the Corporate Transparency Act. The July 2023 webinar of the LoL series was titled "Ethics & Estate Planning & Suspension, Oh My!"

Section awards – The following individuals received Elder Law Section awards at the section's executive committee meeting on June 23, 2023:

Randy C. Bryan – Charlotte Brayer Public Service Award

Amy J. Fanzlaw – Outstanding Member of the Year Award

Enrique Zamora – Rebecca C. Morgan Lifetime Achievement Award

Max J. Solomon – Exceptional Service Award

Chanté Jones – Exceptional Service Award

Don't miss the photos of our award winners on page 8 of this edition.

Strategic Planning Committee – In March, the section held its strategic planning meeting led by Past Chair Collett Small. Collett did a phenomenal job keeping our Strategic Planning Committee focused throughout the meeting, resulting in a finely tuned strategic plan focused on improving our Elder Law Section and the services the section provides to its members, and enhancing the work we do on behalf of our clients.

For all of the above reasons and more, I am more than bullish on the Elder Law Section, with as strong a "buy" recommendation as there can be. This is particularly the case because we have one of the strongest leadership teams I have seen. Please get to know, if you do not already, our Executive Committee for the coming year:

Victoria E. Heuler – Chair

William A. Johnson – Chair-Elect

Shannon M. Miller – Administrative Vice Chair

Amy J. Fanzlaw – Substantive Vice Chair

Debra J. Slater – Treasurer

Travis D. Finchum – Secretary

Howard S. Krooks – Immediate Past Chair

You will find their contact information on page 20.

It has been a pleasure to work with you all. I am in awe of each and every one of you for the work you do on behalf of the section and for the dedication each one of you brings to the section's leadership. We are very lucky to have the talented Victoria Heuler serve as our new section chair. She is simply awesome, and we can look forward to an amazing year under her leadership. Victoria and I have worked closely over the last year to be sure we can continue to achieve and improve on the section's goals and provide even greater value to you, our members. And we thank Carolyn Landon, our past chair, who rolled off our Executive Committee as of July 1, 2023. Thank you, Carolyn, for your many years of outstanding service to our section!

I also want to thank our section administrator, Emily Young, who carried our section through some very challenging times in the last year. Emily, we couldn't have done it without you, and we are all grateful for your hard work and for your dedication to our section.

It has been an honor and a pleasure to serve as chair of the Elder Law Section.

Until next time …

Howard S. Krooks

P.S. I could say so much more about the good work our section has been doing, and I did in my final report as chair to the Council of Sections. You can read all the details here: bit.ly/els-bogreport.

Elder Law Section installs new officers and awards members for exceptional service

Each year the members of the Elder Law Section gather during the Annual Florida Bar Convention to install new officers and to recognize members who have made exceptional contributions to the practice, the community, and the section. Here is the story in pictures …

Outgoing Chair Howie Krooks passes the gavel to incoming Chair Victoria Heuler. We are grateful to Howie for his years of service to the section and look forward to his continued involvement as immediate past chair. Victoria is ready to take the helm, and we welcome her vision and leadership.

Howie Krooks congratulates Randy Bryan, recipient of the Charlotte E. Brayer Public Service Award, who as a past chair has continued to serve the section and the clients we serve. Giving back to the elder community was the hallmark of Charlotte Brayer's legal career, and Randy epitomizes Charlotte's belief that "you will become prosperous only if you are trying to give more than you receive."

Howie Krooks thanks Max Solomon, recipient of the Exceptional Service Award. Max has enthusiastically volunteered to assist with whatever was asked of him to fulfill the section's needs with professionalism and dedication.

The Elder Law Section Lifetime Achievement Award is presented to elder law attorneys who have dedicated their lives to the practice and in recognition of their "dedication to professionalism and the promotion and advancement of the practice of elder law." For over 35 years, Enrique Zamora has always found time to give back to the Bar and the ELS. He has juggled being a lawyer, a professor, a magistrate, and a 10 out of 10 dad, which does not go unrecognized.

Howie Krooks recognizes Amy Fanzlaw, Member of the Year. Whenever an issue arose within the section, Amy always took the initiative to research the section's policies and procedures and assisted in finding solutions.

Howie Krooks recognizes Chanté Jones, recipient of the Exceptional Service Award, who has made many contributions to the section this year including assisting with initiating the section's new Fellows program.

Appropriations bill includes increase to PNA for Medicaid skilled nursing facility residents

by Kandace E. Rudd
on behalf of the Medicaid/Government Benefits Committee

The 2023-2024 Appropriations bill (Senate Bill 2500), signed by Governor Ron DeSantis on June 15, includes an increased personal needs allowance (PNA) for skilled nursing facility residents receiving institutional Medicaid (ICP, HCBS, hospice, ICP-MEDS-AD) benefits. Effective July 1, 2023, the monthly PNA will increase from $130 to $160 per individual and from $260 to $320 per couple. Skilled nursing facility residents whose only income source is supplemental security income (SSI) will receive an increased supplemental payment from $100 to $130 per month through the supplemental payments system. Updates will be made to the ACCESS Florida Program Policy Manual passage 2640.0118 (MSSI) and Appendix A-9 to reflect the increased PNA. Department of Children and Families Transmittal # 1-23-06-0011 includes information on recalculating patient responsibility amounts after August 1, 2023.

Kandace E. Rudd *is a partner attorney at Waldoch & McConnaughhay PA in Tallahassee, Florida, and chair of the Elder Law Section Medicaid/Government Benefits Committee.*

Can Florida set its own PACE?

by Ellen L. Cheek and Karen C. Murillo

on behalf of the Abuse, Neglect, and Exploitation Committee

The Property Assessed Clean Energy program (PACE) is a long-term, fixed-rate financing program that helps Florida homeowners fund energy efficiency and resiliency improvements to their homes without large up-front payments by adding a special (non-ad valorem) assessment to their annual property tax. You may remember PACE from an article in the Spring 2019 issue of *The Elder Law Advocate*, in which we discussed the unintended consequences of this program—namely how it enables unscrupulous contractors to prey upon low-income older adult and minority homeowners in the name of energy efficiency without accurately disclosing the risks involved.

Ellen L. Cheek

Karen C. Murillo

Commercial PACE programs are authorized in 30 states in the U.S.; however, *residential* PACE programs have only been authorized by three states (California, Florida, and Missouri).[1] Unfortunately, egregious consumer protection issues relating to PACE have emerged in all three states, prompting federal, state, and local governments to respond.

An unsustainable pace

In 2022, the Federal Trade Commission brought a class action lawsuit in California against a major PACE lender, Ygrene, for deceiving consumers about the potential impact of PACE financing. This year, the Consumer Financial Protection Bureau proposed a new rule that would implement a "homeowner ability to pay" requirement for PACE financing. Over the past 10 years the U.S. Department of Energy, the Federal Housing and Finance Administration, the U.S. Department of Housing and Urban Development, and the Department of Veteran Affairs have all expressed concerns or commented on the PACE financing program.[2]

The Florida Legislature has considered proposed legislation involving consumer protections and PACE every year since 2017. This year the Florida Legislature once again considered PACE legislation, along with proposals from consumer protection advocates, which generated considerable debate. Once again neither the filed legislation nor the consumer protection proposals survived the Florida Legislative Session.[3] The Florida Attorney General's Office continues to receive countless complaints from consumers across the state, triggering investigations into the many problematic and deceptive practices enabled by PACE.

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 2023-2024.

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.**

Unfortunately, without adding consumer protections to the existing PACE-enabling state statute, these investigations will likely continue to be a game of whack-a-mole, going after individual bad actors one at a time, instead of fixing the root cause (i.e., PACE).

In the absence of increased statewide protections, individual counties have stepped in to regulate PACE within their jurisdictions. For example, Pinellas County has limited PACE to commercial properties, and Palm Beach County enacted an ordinance requiring specific consumer disclosures be provided in PACE financing agreements.

Pace yourself! There's more …

The statute authorizing PACE programs in Florida provides that a "separate legal entity"[4] may administer the programs throughout the state with the permission of the local government through interlocal agreements.[5] Given that Florida law provides administration of the programs be *at the discretion of* each local government,[6] several Florida counties responded to the mounting number of consumer complaints by terminating or declining to renew their interlocal agreements with problematic PACE programs. Although these actions would not impact existing PACE-related assessments, these counties anticipated that terminating their interlocal agreements would prevent any new PACE-related assessments in the counties' jurisdictions.

Enter the Florida Pace Funding Agency (FPFA), a "separate legal entity" initially established through an interlocal agreement with two municipalities (Flagler County and the City of Kissimmee). At the end of 2022, during a successful $5 billion bond validation case heard in the Second Judicial Circuit,[7] FPFA asserted its authority to do business *anywhere in the state of Florida*, even in the absence of an interlocal agreement. And so it has … By its own account, FPFA has already posted an eye-popping 4,728[8] residential assessments across 56 counties in 2023 alone, including within counties that have refused to offer or revoked agreements to offer residential PACE financing.[9]

In response to this derogation of county and municipal home rule authority, the Florida Association of County Attorneys has formed a statewide task force; as of this writing, 17 counties are participating. Pinellas and Palm Beach counties have sued FPFA for injunctive and declaratory relief, and several county tax collectors have refused to include PACE-related assessments for transactions conducted in the absence of a valid interlocal agreement with the county.

Setting the pace for change

Perhaps the recent attention PACE has received at the county, state, and federal levels will finally make the case for increasing consumer protections in Florida. While advocates continue to fight for necessary legislative changes, we must also explore other ways to protect vulnerable Florida consumers. Something as simple as educating homeowners about the risks of conducting business with door-to-door solicitors who do not possess a home solicitation permit would be a start.

Ellen L. Cheek *is a senior staff attorney on the Florida Senior Legal Helpline at Bay Area Legal Services in Tampa, Florida. The focus of her current work is a federal grant-funded project that uses technology to facilitate elder abuse victims' access to civil legal services, as well as to increase the investigation and prosecution of criminal cases. A graduate of Mount Holyoke College and the University of Santa Clara School of Law, Ms. Cheek serves as co-chair with Karen Murillo on the Abuse, Neglect, & Exploitation Committee of the Elder Law Section of The Florida Bar.*

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 https://www.naseo.org/issues/energy-financing/pace

2 *Id.*

3 *See* Florida Senate Bill 950 and Florida House Bill 669 (2023).

4 § 163.01(7), Fla. Stat.

5 § 163.08 (6), Fla. Stat.

6 *Id.*

7 *Florida Pace Funding Agency vs. State of Florida*, 2022-CA-1562, 2d Judicial Circuit (Leon County).

8 Figure provided at the time of writing this article on July 5, 2023.

9 https://floridapace.gov/county-data/

Unlocking the secrets of snowbird estate planning in Florida

by Robyn L. Goldenberg

on behalf of the Estate Planning & Advance Directives, Probate Committee

Every year, snowbirds flock to Florida from all over the globe, including from many Northeastern states. They bring along their mahjong sets, pickleball rackets, and longer wait times at restaurants. Amidst the excitement of relocating and enjoying retirement, it is easy for them to overlook the importance of updating their estate documents. Many retirees mistakenly assume their out-of-state estate planning documents will remain valid in Florida.

For snowbirds with assets in multiple states, having a comprehensive estate plan is crucial. Wills and trusts play a vital role in determining how assets will be distributed upon one's passing. By establishing a trust, they can ensure a seamless transfer of properties and assets in multiple states, bypassing probate. This streamlined process allows beneficiaries to receive their inheritances more quickly, with fewer complications.

A question that frequently arises from snowbird clients is whether they need to update their estate documents when establishing Florida as their permanent domicile. While the technical answer is "it depends" (a typical lawyer answer that is sure to delight your clients), there are several reasons why out-of-state estate planning documents should be updated when a snowbird relocates to Florida.

Out-of-state wills: Beware of substantive issues

While Florida provides that any properly executed will by a nonresident of Florida is valid in Florida under the law of the state or country where it was executed, there are several reasons why an out-of-state will would not be valid in Florida. Fla. Stat. § 732.502 (2) (2021). Additionally, out-of-state holographic wills (handwritten) and nuncupative wills (oral wills) are prohibited in Florida.

Personal representative

Snowbirds who move to Florida with existing out-of-state wills may encounter unexpected complications, with one of the most frequent problems being the naming of the personal representative. Florida law mandates the personal representative be either a Florida resident or a direct lineal descendant of the testator or the spouse of said descendant. Fla. Stat. § 733.304 (2022). Neglecting to update one's will to comply with this requirement may result in the court appointing a personal representative the testator did not select or want. Additionally, it is worth noting that a non-Florida attorney also cannot act as the personal representative or executor in the will unless they are related to the testator.

Self-proved wills

Florida law allows wills to be self-proved, which involves the witnesses acknowledging they witnessed the testator sign the will and execute, along with the testator, a self-proving affidavit in the presence of a notary. Fla. Stat. § 732.503 (2022). While most states allow for self-proved wills, not all require it. For example, Ohio, Louisiana, and the District of Columbia do not offer the self-proving option. In California, Maryland, Indiana, and Illinois, a will can be self-proved without requiring an affidavit as long as it is signed and witnessed correctly. In situations where it is necessary to prove the validity of a will in Florida, the lack of a self-proving affidavit can add unnecessary complications to the estate administration.

Inheritance and estate tax

Apart from the differences in formalities of the will, estate and inheritance taxes provide another reason why a will or a trust drafted under Florida law may be more favorable than an out-of-state version. The below chart summarizes how estate and inheritance taxes in popular snowbird states compare to Florida.

Florida's lack of both inheritance and estate tax is unique and beneficial for both estates and beneficiaries. Where an individual lives, owns property, and holds assets is relevant to where they must probate an estate and the amount of taxes the estate and beneficiaries may have to pay. This benefit makes Florida an even more appealing place to claim domicile and another reason to update a snowbird's estate documents.

STATE	INHERITANCE TAX	ESTATE TAX
Connecticut	No	Yes
Florida	**No**	**No**
Maryland	Yes	Yes
Massachusetts	No	Yes
New Jersey	Yes	No
New York	No	Yes
Pennsylvania	Yes	No

Trusts

Florida recognizes the validity of any living trust created in another state, as long as it was properly executed according to the laws of the state where it was formed. Fla. Stat. § 736.0403(1) (2022). However, attorneys in other states may not utilize trusts as frequently as Florida lawyers do in their estate planning.

In general, Florida probate is a lengthier and more complicated process compared to other states. Florida probate administration also requires that every personal representative be represented by an attorney unless they are the sole interested person or they are an attorney. Fla. Prob. R. 5.030(a). This adds to the cost of probate, highlighting why a trust may be a better option in Florida. On the other hand, a New Jersey native may only have a will since probate is simpler and a less costly process. As a result, when a snowbird relocates to Florida, their estate planning documents should be analyzed to determine if a trust is needed to help minimize or avoid probate in Florida.

Income tax

There are several other reasons why snowbirds would want to update, amend, or restate their trust upon arriving in Florida. Since Florida does not impose a state income tax, income generated by the trust in Florida is generally not taxable, unlike the high tax rates in the Northeast. Many states tax the net gains or income derived through a trust at the beneficiary level and the undistributed income or gains of a trust at the trust level (*see* N.J.S.A. 54A:2-1, N.J.S.A. 54A:5-1(h), and N.J.S.A. 54A:5-3)(2022)).

Qualified special needs trust

Florida's qualified special needs trust provides a significant advantage for Medicaid planning. This trust allows a spouse to leave an elective share (or more) to his/her spouse in a special needs trust administered through the will. This type of trust is most useful where one spouse is on Medicaid and there is the possibility the community spouse could predecease the institutionalized spouse. In contrast, New Jersey and New York do not permit leaving an elective share to a spouse in a special needs trust. Instead, the spouse must receive the elective share (or more) outright, thus increasing his/her assets and the probability of them being kicked off Medicaid. As a result, is unlikely that an out-of-state trust will have this necessary provision, and the accompanying pour-over will certainly will not (*see* Fla. Stat.§ 732.2075(1)(e) (2022) and Fla Stat § 732.2025(8) (2022)). This provision is another important reason to update an out-of-state trust.

In terrorem clause

When deciding whether to update a snowbird's will and trust in Florida, it is important to consider the impact of an *in terrorem* clause to the client's estate. *In terrorem* clauses, also known as no contest clauses, are not enforceable in Florida. Fla. Stat. § 732.517 (2022) and Fla Stat. § 736.1108 (2022). In most other states, they are enforceable unless probable cause exists. Therefore, if it is important to the client to have this clause, amending or restating their wills or trusts in Florida may not be advisable.

Power of attorney

Superpowers

Failing to update an out-of-state power of attorney can be a significant mistake for snowbirds who make Florida their permanent home. Florida's power of attorney grants unique "superpowers" that must be initialed by the client for enforcement. Fla. Stat. § 709.2202 (2022). Out-of-state powers of attorney often do not align with these specific requirements, potentially rendering them defective. Therefore, it may be necessary to draft a new power of attorney for snowbird clients in compliance with Florida law.

Notarization

Finally, it is important to highlight the significance of notarization when it comes to the power of attorney, health care directives, and trusts. In New Jersey, attorneys are allowed to notarize documents with just their signature. However, if a snowbird takes their New Jersey power of attorney signed by the lawyer as notary to a Florida bank, there is a substantial likelihood it will be rejected due to the lack of a stamp or seal on the document. Therefore, it is imperative for snowbirds to have their powers of attorney and health care directives evaluated when they move to Florida to ensure compliance with local law.

As snowbirds return to the warmth and beauty of Florida, often without their estate documents, it is crucial to remember there are substantial differences between state laws concerning estate planning. When snowbirds fly south for the winter, they should be advised to have their estate documents and powers of attorney reviewed and updated as necessary.

***Robyn Goldenberg, Esq.**, is a member of the Florida, New Jersey, Pennsylvania, and New York bars. She practices elder law and estate planning in Florida at Friedman Elder Law Department and estate planning in New Jersey at Posternock Apell PC.*

Parenthood can coexist with a fulfilling career

by Genna Fasullo LaPeer

For some of us the privilege of parenthood and the opportunity to build a fruitful career present themselves in the same season of life. For all the attorney mothers and fathers who came before me, being a parent often meant juggling that invisible job behind the scenes of their legal practice. Children typically were not an accepted part of the work environment, and flexibility toward a healthy work-life balance was therefore not front of mind for employers.

Parenthood has been one of the most beautiful, challenging, rewarding, crazy roads I have ever walked. The path to becoming an attorney, then a prosecutor, and now growing into a career in elder law, has also been incredibly fulfilling and exciting. With my youngest child just turning one, I am reflecting on the last year as both a mother and an elder law attorney.

The phrase "it takes a village" is often thrown around when it comes to child rearing, and it is often used in the context of support with regard to child care. But I think the village is much broader than that. I am fortunate to be able to say that my village included not only my wonderful husband, family, and friends offering to babysit or cook, but also my employer, coworkers, judges, and the Elder Law Section.

For the last year, I worked primarily from my home, with Ava home with me. For the first six months of her life, I was able to flip between client calls, Zoom meetings and court, and document drafting or reviews during her two or three naps per day. During in-person court events, judges were extremely patient and accepting of my need to take a break at the two-hour mark in a hearing to nurse Ava, and they often shared anecdotes of their time as a parent of young children.

Genne Fasullo LaPeer with daughter Ava

When she was four months old, I had the opportunity to bring her with me while I assisted with facilitating and speaking at our firm's Exploitation Injunction Bootcamp. The village there consisted of my husband, boss, office staff, and gracious participants who enabled my jobs as a nursing mother and an attorney to coexist. A few months later, Ava also accompanied me to the Elder Law Section's Annual Update. I was nervous to bring her since this was one of my earliest times attending the event. I knew she would need to be with me during parts of the conference while my husband was busy trying to entertain our three-year-old, and I had no idea if this was going to be acceptable to my fellow elder law attorneys. Well, it was worry wasted. Each and every attorney was accepting and encouraging. I felt like maybe I really could "do both"—build a career and a family simultaneously.

Now, don't get me wrong—although this past year has been incredibly fulfilling, it has also been immensely challenging personally. Trying to work full-time and nurse exclusively and care for a baby is tough to say the least. There is no perfect solution. One week, the balance scale may tip in favor of job focus. The next week, with a sick child, the scale may tip in favor of family obligations. Either way, my takeaway from the last year is that our legal community has evolved. As parents, we no longer need that job to be invisible. In fact, we can continue to normalize being a parent and having that coexist with our career goals. I am forever grateful for the flexibility and accommodation from my employer and our elder law community and for the village, including my husband, that enabled me to have a full year at home with my baby and also continue to grow as an attorney.

Genna Fasullo LaPeer *is an associate attorney at the Miller Elder Law Firm, with a passion for litigation and making a difference in the lives of the elderly. Ms. LaPeer is originally from Toronto, Canada, and now lives in Gainesville, Florida with her husband, Scott, and two children, Jackson and Ava.*

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Capitol Update
by Brian Jogerst

2023 Legislature adopts governors' priorities, passes record budget

When Governor DeSantis opened the 2023 Legislative Session on March 7 with his State of the State address, he outlined several of his key initiatives including reforming pharmacy benefit managers (PBMs), civil justice/tort reform, illegal immigration, transgender care for minors, and preventing union dues from being automatically deducted from teachers' paychecks. Each one of these priorities—along with several other initiatives—was adopted by the Legislature.

Session statistics

Bills and proposed committee bills filed:	1,873
Amendments filed:	2,674
Votes taken:	3,229
Floor sessions:	46
Bills passed both chambers:	356

Source: LobbyTools

Budget and budget summary

The governor's recommended budget was $113 billion, and the budget adopted by the House and Senate was $117 billion. By way of background, the following is the size of the state budgets over the past 10 years:

FY 2022-2023: $112 billion
FY 2021-2022: $101 billion
FY 2020-2021: $93 billion
FY 2019-2020: $91 billion
FY 2018-2019: $88 billion
FY 2017-2018: $82 billion
FY 2016-2017: $82 billion
FY 2015-2016: $78 billion
FY 2014-2015: $77 billion
FY 2013-2014: $74 billion

The Senate Appropriations Committee provided an overview of key funding items in the General Appropriations Act (GAA/state budget):

Health and Human Services appropriations

Total budget: $47.3 billion [$15.2 billion general revenue]

Agency for Health Care Administration

- Nursing home reimbursement rates - $125 million
- Personal needs allowance increase - $20.3 million
- Program of All-Inclusive Care for the Elderly (PACE) - $60.3 million

Department of Elder Affairs

- Electronic client information and registration tracking system project - $3.5 million
- Memory disorder clinics and Alzheimer's projects - $8.5 million
- Aging resource centers - $1.7 million
- Home care for the elderly and community care for the elderly programs - $5 million
- Alzheimer's disease initiative - $4 million

Department of Health

- Primary care health professional loan repayment program - $10 million
- Florida cancer innovation fund - $20 million
- Florida cancer center funding - $27.5 million
- Healthy Start coalitions - $9.6 million

Do not resuscitate orders

House Bill 1119 by Representative Kimberly Berfield (Senate Bill 1098 by Senator Colleen Burton) addressed do not resuscitate orders (DNRO) and advanced directives. The Elder Law Section and AFELA (Elder Law) worked closely with the House and Senate sponsors, House and Senate committee staff, and the Florida Public Guardianship Association to address concerns with the initial draft of the bill. Governor DeSantis signed the bill into law on June 23, 2023 (Chapter 23-287, Laws of Florida).

House Bill 1119 ensures that advanced directives and DNRO are honored after discovered—even after the guardianship has begun.

- When discovered, must be filed as soon as possible but no later than the earlier due date for the initial guardianship plan, the annual guardianship plan, or any petition seeking its use

House Bill 1119 also addressed when public guardians must receive court approval for a DNRO.

- Public guardian must receive court approval for a DNRO, with the following exceptions:
  - ◊ Advanced directive pursuant to Chapter 744.3115
    - » As long as no objection from ward, ward's attorney, next of kin (if known)
    - » Health care surrogate
    - » Ward is in an end stage condition, terminal condition, or

persistent vegetative state and resuscitation will cause the ward physical harm or additional pain

Elder Law is grateful to Senator Burton and Representative Berfield for adopting this legislation, which will protect seniors and guarantee that a DNRO and advanced directive are honored.

Special thank you to ELS members Twyla Sketchley, Deb Slater, and Michelle Kenney for their tireless effort working with the House and Senate committee staff and the Florida public guardians on this bill.

Residential loan alternative agreement/MV Realty

Elder Law supported Senate Bill 770 by Senator Jennifer Bradley (and House Bill 861 by Representative Will Robinson), which addressed issues raised regarding real estate company MV Realty, a Florida-based company doing business in several states. Governor DeSantis signed the bill into law on May 24, 2023 (Chapter 2023–117, Laws of Florida).

By way of background, a homeowner paid a one-time up-front fee in exchange for the exclusive opportunity for MV Realty to list the consumer's home on the realty market if the consumer sells at any time in the next **40 years**. Unfortunately, when consumers tried to withdraw from the program, they were at risk of substantial penalties to be paid to MV Realty or the homeowner had a lien placed against their property.

Several state attorneys general, including Florida Attorney General Ashley Moody, have filed suit against MV Realty.

Under the new law, a residential loan alternative agreement:

- Is prohibited from authorizing a person to place a lien or otherwise encumber any residential real property
- Cannot constitute a lien, an encumbrance, or a security interest in the residential real property
- May not be assigned and becomes void if the listing services do not begin within 90 days after the execution of the agreement by both parties
- That does not meet these requirements is unenforceable in law or equity and may not be recorded by the clerk of the circuit court

Elder Law congratulates Senator Bradley and Representative Robinson for their diligent leadership to stop this practice and to protect Florida's vulnerable seniors.

Elder and vulnerable adult abuse and fatality review teams

Senate Bill 1540 by Senator Iliana Garcia (House Bill 1567 by Representative Fred Hawkins) defined the role of fatality review teams, and the Legislature also passed Senate Bill 1542 to specifically require that 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. Governor DeSantis signed the bill into law on June 19, 2023 (Chapter 2023–260, Laws of Florida).

The vulnerable adult abuse and fatality review teams review incidents of abuse, exploitation, or neglect of elderly persons and vulnerable adults believed to have caused or contributed to a fatal incident.

- A review team be initiated by one of the following entities:
  - ◊ A state attorney's office
  - ◊ A law enforcement agency
  - ◊ Department of Children and Families
  - ◊ Office of the Attorney General
  - ◊ Agency for Persons with Disabilities
- A representative of the initiating entity serves as a co-chair of the review team.

This legislation has been filed for the past three years; Elder Law supported the bill and congratulates Senator Garcia and Representative Hawkins for the adoption of the bills.

Special thank you to ELS member Karen Murillo for her tireless effort with the House and Senate sponsors and committee staff throughout the legislative session.

Looking ahead: 2024 Legislative Session

The 2024 Legislative Session is the early session, meaning committee meetings will be held September through December 2023, with the session beginning January 9 and ending March 8, 2024.

The Legislative Committee, led by Travis Finchum, Michelle Kenney, and Mike Jorgenson, has already begun reviewing issues for 2024 (and some for 2025). Preliminary discussions include:

- Guardianship rewrite
- Increasing funeral priority creditor claim from $6,000 to $12,000
- Adding professional guardians to power of attorney
- Clarifying definitions of qualifying diagnoses under Chapter 393
- Require FDLE to collect data on crimes of abuse, neglect, and exploitation of elders and persons with disabilities

Your help is needed.

The Legislative Committee reviewed more than 54 bills and countless amendments and revisions during the 2023 Legislative Session.

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

Travis Finchum

travis@specialneedslawyers.com

Michelle Kenney

michelle@gapsattorneys.com

Mike Jorgenson

mjorgensen@seniorcounsellaw.com

The Legislative Committee meets biweekly during the legislative committee weeks and *every* Friday at 8:00 a.m.

continued, next page

during session to discuss issues reviewed by the ELS substantive committees.

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 *is the founder of BH & Associates, a Tallahassee-based governmental consulting firm. Recently recognized as a Health Care Influencer in Florida Politics'* INFLUENCE *magazine, he has more than 30 years' experience lobbying on health care and related legal issues. He 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.*

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

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

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

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.

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.

Did you know? Non-Attorney Medicaid Planners Cannot Give Legal Advice

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.

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THE FLORIDA BAR
ELDER LAW SECTION

Meet the new Fellow of the Elder Law Section

by Chanté Jones

The Elder Law Section is pleased to announce Sylvana Rosende is the first Fellow to participate in the section's new Fellows program.

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

"The section is thrilled to launch this new Fellows program, and I grateful and humbled to be entrusted with the responsibility to oversee the program in its inaugural term, which started July 1, 2023. I am looking forward to the diversity and talent this program will bring to the section," said Chanté Jones, chair of the section's Inclusion, Diversity, & Engagement Committee.

Sylvana Rosende earned her law degree from St. Thomas University School of Law and has been a member of The Florida Bar in good standing since 2020. She is the founding attorney of the Law Offices of Sylvana Rosende PA, where the practice is focused on elder law, probate, and guardianship matters.

Sylvana shared, "I am honored and elated to be chosen the first Fellow of the Elder Law Section of The Florida Bar. I look forward to working with the amazing group of attorneys that encompass the leadership of the section."

You may direct any questions about the Fellows program to Chanté Jones at cejjones@aarp.org or Emily Young at eyoung@floridabar.org.

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:

Amy L. McGarry
239/945-3883
amy@amymcgarrylaw.com

THE FLORIDA BAR
ELDER LAW SECTION

Elder Law Section debuts Announcements

On May 4, 2023, the Elder Law Section (ELS) sent the first edition of Elder Law Section Announcements to all members of the ELS.

The Elder Law Section is using emails from announcement@eldersection.org as the main platform of communication to section members. Although we may still utilize The Florida Bar's platform for sending emails, the Elder Law Section will utilize the email address announcement@eldersection.org and the ELS-Announcement platform as our priority method for leadership to communicate regular and time sensitive information. Each of the messages will have [ELS - Announcement] in the subject line to make it easier to identify. Although the ELS-Announcement platform will be a one-way communication to allow leadership to get information out to our members, we will also be rolling out traditional listserv options for each of our substantive and administrative committees in the very near future that will allow two-way communication between and among committee chairs and committee members to carry out section business more efficiently and effectively, as well as allow substantive discussions of issues. If you are interested in joining any of our committees, please visit our website at www.eldersection.org, click on the "Committees" tab at the top, and then navigate to the committee(s) you would like to join and reach out to the chair(s) to express your interest.

Please add the email address announcement@eldersection.org to your contacts, and add the domain "eldersection.org" to your safe senders list to avoid messages being blocked by spam filters and to make sure you receive future notifications about the committee listservs that will be rolling out shortly.

Should you have any questions or issues with this announcement platform or any of the future listservs, please contact the section's program administrator at help@eldersection.org for assistance.

We are very excited about this new communication platform and look forward to more effectively communicating with all section members.

Please note: Florida has very broad public records laws. Many written communications to or from The Florida Bar regarding Bar business may be considered public records, which must be made available to anyone upon request. Your email communications may therefore be subject to public disclosure.

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Committees keep you current on practice issues

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

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CLE 7856

Laws Over Lunch: Effective PR for Legal Professionals and Law Firms
September 13, 2023
12:00 noon–1:00 p.m.
CLE 7828 webcast

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

Is QuickBooks Desktop sunsetting?

by Audrey Gay Ehrhardt

Intuit, creator of the widely used accounting software QuickBooks, discontinued the 2020 versions of QuickBooks Desktop (QBD) on May 31, 2023. News of this decision sparked various inquiries, causing law firm users to question the implications of Intuit's action.

Many of the firms we speak with are wondering about the future of QuickBooks Desktop and whether it is being phased out entirely. For those currently utilizing QBD, alternative options are being sought for the way forward. Additionally, there is a curiosity about the distinctions between QuickBooks Online and QuickBooks Desktop, prompting law firms to explore their choices in detail.

When deciding what to do as a current user of QuickBooks Desktop 2020, there are important factors to consider.

First, although QuickBooks Desktop 2020 is no longer supported, there are newer versions available. QuickBooks Desktop 2023 was released in September 2022 and will continue to receive support for the foreseeable future. While Intuit does not actively promote this edition, interested users can contact their sales team for more information. QuickBooks Desktop 2023 will operate on a subscription-based model, unlike the one-time purchase option of the 2020 edition. Intuit has been gradually transitioning to subscription models for its applications.

Second, it is important to note that QuickBooks Desktop 2023 is more expensive compared to QuickBooks Online (QBO). The annual cost for the desktop edition is $549 while QBO plans start at $180. Additionally, adding users to the desktop edition comes at a higher cost. This suggests that Intuit is actively encouraging users to consider migrating to an online version of QuickBooks.

Many of our clients are asking us if they can continue using QuickBooks Desktop 2020. Technically, yes; however, it is strongly discouraged for several reasons. As part of the sunsetting process, Intuit has ceased live support for QuickBooks Desktop 2020. If any issues arise, you will be left to resolve them without assistance. In the worst-case scenario, you may encounter difficulties migrating your data, requiring you either to start anew or manually transfer everything, which can be time-consuming and inconvenient.

Moreover, QuickBooks Desktop 2020 will no longer receive security updates, leaving your system more susceptible to potential vulnerabilities. Whether you choose to transition to a newer desktop version or consider moving to QuickBooks Online, it is highly recommended to discontinue the use of QuickBooks Desktop 2020 for the sake of optimal functionality and security.

Here is a quick summary of the main differences between the two offerings. QuickBooks Online operates as a cloud-based service, enabling users to access the software through a web browser or application rather than relying on an installed application. This web-based approach necessitates an internet connection, but it offers the advantage of accessibility from any location. There is also a tremendous level of security built into the cloud-based software. In contrast, QuickBooks Desktop functions as a locally installed application, limiting access to the computer on which it is installed. Users can expand access points by installing the software on multiple computers; however, there is an additional cost.

Unsurprisingly, one of the major advantages of QuickBooks Online lies in its cloud-based infrastructure. This feature provides unparalleled mobility compared to the desktop version. Rather than being tied to a particular computer, you can access QuickBooks Online from any device equipped with a browser. Of course, as noted above, an internet connection is necessary to utilize QBO. In today's era, however, it has become commonplace for individuals to have constant access to the internet in various settings.

We know this article raises more questions than it answers. Don't hesitate to let me know if you have any questions.

***Audrey Gay Ehrhardt, Esq., CBC**, builds successful law firms and corporations across the country. A former Florida elder law attorney, she is the founder of Practice42 LLC, a strategic development firm for attorneys. She focuses her time creating solutions in the four major areas of practice development: business strategy, marketing today, building team, and the administrative ecosystem. Join the conversation at www.practice42.com.*

Tips & Tales
by Kara Evans

Spouses have rights, Part 2

The tale: Mr. Paul has come to your office for a consultation. He is planning to remarry but has heard he will be obligated to leave assets to his new spouse. He is quite concerned about that, as he is an older gentleman and he and his first wife intended that all their money should be left to their children. He would like to ensure their wishes are carried out. However, his fiancé, Robin, is reluctant to sign a prenuptial agreement. Mr. Paul still wants to marry her and is in your office to discover if what he heard is true and, if so, what his options may be.

You assure Mr. Paul he is correct and, without action, he will indeed have legal obligations to his new spouse at his death should she survive him. You review the elective share law and other statutory entitlements with him.

First up is homestead. The couple is living in the home Mr. Paul owned with his first wife. His intention is that the home go to his children after his death, but he would like to give his new wife the option to live there for up to one year. That would give her time to make other living arrangements. He is dismayed to hear that without some kind of waiver from his wife, he will be unable to do this. You gently explain that under Article X, Section 4 of the Florida Constitution and Florida Statute 732.401, he can leave the home to his wife outright, or she will automatically receive the right to live there for the rest of her life. Alternatively, she will have the option to release the life estate and instead claim a one-half ownership of the home.

You go on to explain the elective share. The elective share is the right of the surviving spouse to claim 30% of a deceased spouse's estate—not just the probate estate, but 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. Fortunately for Mr. Paul, there are several ways to satisfy the elective share. Mr. Paul could simply include Robin as a beneficiary of the amount of his estate necessary to satisfy the elective share. However, Mr. Paul does not like this answer. Robin and Mr. Paul are both in their later years and any money left for Robin would likely end up benefiting Robin's "lazy and ungrateful" children. While he does not necessarily want to disinherit Robin, he wants some modicum of control over what is left at Robin's death.

The drafters of the elective share law understood that not every married individual would want to leave their surviving spouse funds outright. There is a certain amount of flexibility allowed in planning to satisfy the elective share. The Florida Statutes specifically provide for the use of trusts in satisfying the elective share.

Florida Statute 732.2025(2) defines the elective share trust as a trust under which:

(a) The surviving spouse is entitled for life to the use of the property or to all of the income payable at least as often as annually;

(b) The surviving spouse has the right under the terms of the trust or state law to require the trustee either to make the property productive or to convert it within a reasonable time; and

(c) During the spouse's life, no person other than the spouse has the power to distribute income or principal to anyone other than the spouse.

The challenge comes in deciding how much access you would like your surviving spouse to have. The less access given, the smaller the percentage of the trust is counted toward satisfying the elective share. You outline three options for Mr. Paul: (1) If the spouse has the power to invade the principal for health, support, and maintenance and a general power of appointment, then 100% of the money in that elective share trust will count toward satisfying the elective share. (2) If the spouse can invade the principal for health, support, and maintenance but no general power of appointment is granted, then 80% of the value of the trust will count toward satisfying the elective share. (3) In all other cases only 50% of the trust will count toward satisfying the elective.

Mr. Paul does not like option one as it does not preclude the possibility that Robin's kids would end up with whatever funds remain at Robin's death. He is less opposed to option two but worries that much of the money may be spent on facility costs should Robin become ill. He realizes he will have to place twice as much money in a trust under option three but that is his best chance of preserving the principal of the trust to pass on to his children.

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Tax Tips
by Michael A. Lampert

Time for a quiz

I have been writing this column for many years. Time for a quiz. Try not only to answer the questions but to understand the questions' nuances!

1. A single member LLC is taxed as a:
   a. Sole Proprietorship
   b. Partnership
   c. "S" Corporation
   d. "C" Corporation
2. A multi-member LLC is taxed as a:
   a. Sole Proprietorship
   b. Partnership
   c. "S" Corporation
   d. "C" Corporation
3. The general rule for determining if a trust is U.S. situs is:
   a. A U.S. court can exercise primary jurisdiction over the trust.
   b. If one or more U.S. persons have the power to control all substantial decisions of the trust.
   c. Formed under the laws of the U.S.
4. For federal levies of Social Security benefits, which of the following are exempt from levy:
   a. SSI payments
   b. Payments that are already partially withheld to pay back Social Security.
   c. Generally, when income is below poverty guidelines.
   d. SSDI benefits
   e. OASDI (SS) payments beyond 15% of the payment
5. Exceptions to the IRC §121 $250,000 (single), $500,000 (married) gain on sale exclusion request (two-year ownership and two-year use as primary residence) include:
   a. Not reporting the sale to the IRS if there is no gain after the exclusion amount.
   b. The taxpayer is in a care facility.
   c. Surviving spouse
   d. Proration of the exclusion
   e. New job
   f. Health
   g. Unforeseen circumstances
6. The maximum age under the SECURE Act to begin IRA distributions is ___ and to contribute is ___.
7. The due date for most federal tax filings is the due date as computed on the immediately following day, that is not a Saturday, Sunday, or holiday. If the due date is on a Saturday, Sunday, or holiday the holiday needs to:
   a. Be recognized in the District of Columbia if the taxpayer resides there.
   b. Be recognized in the District of Columbia.
   c. Be recognized in any state.
   d. Be recognized in the state of filing.
8. Can you back date final medical payments and deduct them?
9. The client has some very high value but very low basis stock. Knowing about the basis step-up (or down) at death rules the client proposes to gift the stock to a family member with a very short life expectancy with the expectation of the basis step-up at death. Will this plan work?
10. Fill in the blanks with the correct title:
    a. The primary IRS field auditors are _____.
    b. The primary IRS field collections personnel are _____.
    c. The IRS "cops" are _____.

ANSWER KEY

How did you do? Check your answers here, and see the referenced edition of *The Elder Law Advocate* for more details about each topic.

1. Answer: It depends on if an election(s) is made. It is a sole proprietorship if no election is made. This is the default treatment. It can elect to be taxed as a C Corporation, or the member can make an "S" election. Two or more members are needed for the LLC to be treated as a partnership. Vol. XXX, No.1, Winter 2023

2. Answer: Again, it depends. It cannot be a sole proprietorship as there is more than one owner (member). The default treatment is a partnership. Much like a single member LLC a "C" election can be made. In addition, an "S" election can be made *if* (careful here) it meets the "S" election requirements. This includes all members being U.S. persons, no more than 100 owners (spouses count as one), and especially only one class of "stock" (one class of ownership interest). Be careful that the operating agreement does not effectively create two classes of ownership (even if it is not called that). Differences in voting and non-voting rights are allowed. Vol. XXX, No. 1, Winter 2023

3. Answer: Trick question. For U.S. *income tax* purposes (Title 26), the answer is a *and* b (need both). However, for FBAR purposes (Title 31), the answer is c. Therefore, there can be a trust that is foreign for U.S. *income tax* purposes yet not foreign for the purposes of being required to file an FBAR. Vol. XXIX, No. 2, Spring 2022

4. Answer: SSI payments are federally exempt, as are payments already reduced for Social Security payback, as well as when the taxpayer is below certain poverty levels. But then it gets tricky. Generally, the IRS will not levy beyond 15% of Social Security benefits; however, a larger levy can be manually entered at a higher amount. Likewise, Social Security Disability payments can be manually levied. Levies may also occur on accounts with already paid Social Security benefits. In that case, sometimes the levied amount can be reduced or eliminated with proof to the IRS that the funds in the account are Social Security benefits. Vol. XXIX, No. 3, Fall 2022

5. Answer: Each of these may cause or allow all or at least some of the exclusion even if the general time period requirements are not met. For example, if in a care facility, it is one-year rather than two and the time in the licensed facility counts. In some cases, the widow can use the first to die's ownership and residence time (and the basis step-up at death). Further, if less than the two- or one-year time period, often the exemption amount can be prorated. There are also certain employment changes, health, and unforeseen circumstances that may allow part of the gain-on-sale exemption. In any event, the sale should be reported on a timely filed federal income tax return. Otherwise, the IRS will not know that the gain exemption applies. Vol. XXIX, No. 1, Winter 2022

6. Answer: d. The SECURE Act raised the distribution age to 73 and eliminated any age limit on contributions (IRC § 219 (d)(1). Vol. XXVIII, No. 1, Winter 2021

7. Answer: b and d. 26 USC § 7503 has the basic requirements regarding due dates as well as what holidays apply. Vol. XXVIII, No. 2, Spring 2021

8. Answer: IRC § 213(c) allows final medical expenses to be deducted on the estate tax return or, if paid within one year of the date of death, on the final income tax return. If there is an estate tax it is almost always advisable to deduct the payment on the estate tax return as the marginal estate tax rate is generally higher than the income tax rate. However, if there is no estate tax due, the medical expenses can be a valuable income tax deduction. If the medical expense is deducted and insurance later reimburses, the reimbursement is income taxable (as income in respect of a decedent (IRD)). Vol. XXIII, No. 2, Fall 2016

9. Maybe. Under IRC § 1014(e), if the gifted property is then reacquired by the giftor from the decedent giftee within one year of the gift, the basis does not adjust. Hopefully the family member will survive at least one year post gift, in which case the plan can work. Remember that the one-year exception rule only applies to a transfer back to the original giftor. If the person receiving the asset transfers it upon their death to someone else, the basis step-up will apply even if the death is sooner than one year from the date of the gift. Remember to consider estate and gift tax ramifications if trying this basis planning. Vol. XXII, No. 3, Fall/Winter 2014

10. Answer: Revenue agents are the primary auditors. Revenue officers are the primary field collections personnel. They have significant power but do not carry firearms or have the power to arrest. Special agents are federal law enforcement officers with the primary jurisdiction over criminal tax law enforcement. When dealing with any IRS employee, it is helpful to know the employee's exact title. Vol. XX, No. 3, Winter 2012

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TIPS & TALES. . .
from page 25

You remind Mr. Paul that it is called the "elective share" because the surviving spouse actually must make an election and claim these funds. They have to act; they must do something. The election must be filed on or before the earlier of the date that is six months after the date of service of a copy of the notice of administration or within two years after the date of death. Mr. Paul could set up his estate so that the elective share trust is only created if Robin makes the election.

You explain to Mr. Paul that parties to a prenuptial agreement do not have to waive all rights. They can simply modify or waive some rights. He and Robin may be able to work out a solution satisfactory to both of them and create an agreement to put those wishes in place.

The tip: You also discuss commitment ceremonies or religious ceremonies without the benefit of a state license. Such a ceremony can be a sign of formal commitment without all the legal entanglements. After all, spouses have rights.

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Summary of selected case law

by Elizabeth J. Maykut

Court had no authority to order ward's homestead transferred to guardian without notice to joint owner-wife or to order proceeds from sale of a jointly owned condominium be transferred to guardianship account.

Hudkins v. Hudkins, 360 So. 3d 446, 452 (Fla. 4th DCA 2023)

Issues: (1) Was the appeal of the order determining incapacity timely? (2) Did the court have authority to order the wife to transfer title to homestead owned as tenants by the entirety to the guardian for the sole benefit of the ward? (3) Were the wife's due process rights violated by the order requiring proceeds from the sale of the condominium to be transferred to the guardianship account without notice to the wife who was a joint owner?

Answers: (1) No. (2) No. (3) Yes.

A husband (the ward) and wife married in 2017, and the ward named his wife as attorney-in-fact. The ward then transferred title to his condominium (condo) and his homestead (home) to himself and his wife as tenants by the entirety. After suffering an accident, the ward was placed in a facility. As part of Medicaid planning, the wife transferred title to the home and the condo into her individual trust and put the condo up for sale. As a result, the ward's son (the guardian) filed petitions for incapacity and appointment as guardian. After being appointed as emergency temporary guardian, the guardian sought permission pursuant to section 744.441(1)(k), Florida Statutes, to invalidate transfer of the home and enjoin the wife from selling it, but the court never ruled on that motion. At the evidentiary hearing on incapacity and appointment of guardian, which spanned three months, the court initially entered an order determining incapacity in August. Although the parties discussed the wife's entitlement to her interest in the proceeds from the sale of the condo at the hearing, it was decided this issue would be heard at a future date and there was no discussion as to disposition of the home. Subsequently, the court entered an order appointing plenary guardian that included a finding that the wife's actions were not in the ward's best interest and ordering the wife to transfer title to the home and proceeds from sale of the condo to the guardian.

On appeal, the Fourth District held as follows: (1) the order determining incapacity issued in August was a final appealable order, and therefore, the wife's appeal filed in December was untimely; (2) although a guardian may take possession of pre-guardianship assets of a ward under section 744.361(12), Florida Statutes, the allocation of the home to the guardian violated section 744.457(1)(a) as it was done without the wife's consent and should have been handled in a separate proceeding; and (3) the wife was denied procedural due process when the court ordered proceeds from the sale of the condo to be placed in the guardianship account because she was not provided adequate notice and a meaningful opportunity to be heard, which was required by *Zelman v. Zelman*, 170 So. 3d 838, 839 (Fla. 4th DCA 2015).

Practice tip: As a spouse must always receive notice and have an opportunity to be heard on the transfer or sale of all or part of jointly owned property before any steps can be taken for a transfer to a guardianship, it's best to take such actions after careful consideration of the spouse's rights and consultation with the spouse and his or her counsel, if possible.

Son was not entitled to the funds held in a joint account with right of survivorship as clear and convincing evidence showed account was a convenience account only.

Larkins v. Mendez, 2023 WL 3485303 (Fla. 3rd DCA May 17, 2023)

Issue: Whether clear and convincing evidence established the deceased holder intended for the account to be a convenience account even though he marked "with right of survivorship" on the bank's signature card when he added his son as joint owner.

Answer: Yes.

In 2006, the decedent, who had three sons, added his eldest son, Larkins, to his bank account and updated the signature card by checking the box marked "multiple-party account with right of survivorship." Importantly, he did not check the box for the account to be designated a "convenience account." After the decedent passed away, Larkins spent all the money in the joint account. The decedent's personal representative, one of his other sons, challenged the account designation, arguing the funds in the account belonged to the estate and requesting the imposition of a constructive trust over them. After a trial, which included evidence from another son and a neighbor that the decedent intended for the account to be split between his three sons and that Larkins was only added to help pay bills, the court found that, notwithstanding the bank signature card, the account was a convenience account and therefore an asset of the estate. The probate court ordered Larkins to return the funds to the estate. When Larkins failed to do so, it found him in direct civil contempt of court.

On appeal, Larkins argued the bank's

signature card established an irrebuttable presumption that the account was a joint account with right of survivorship. In analyzing this argument, the Third District reviewed section 655.79(1), Florida Statutes, which provides that a joint deposit account "shall be *presumed* to have been intended . . . to provide that, upon the death of one of the [account holders] all rights . . . in . . . the account . . . vest in the remaining person." (emphasis added). However, subsection (2) of this statute provides that this presumption may be "overcome" by "proof of fraud or undue influence or clear and convincing proof of a contrary intent." Hence, the probate court's inquiry was not limited to the four corners of the signature card. After finding that the personal representative had established, by clear and convincing evidence, the decedent's intent was to create a convenience account, the Third District affirmed the trial court's order. However, it reversed the contempt order, holding that the court had not exercised independent judgment in issuing it because it had delegated to the personal representative's attorney its preparation and it contained detailed factual findings not issued by the court at the hearing.

Practice tip: Estate planning clients should be advised to review the signature card for any joint accounts to ensure the card reflects their wishes and to include in their will those individuals they'd like to receive funds held in joint accounts in case the designation of such an account as joint with right of survivorship is challenged or overturned after the account holder's death.

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