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Featuring:

Florida State Veterans' Nursing Homes

Case law regarding deed conveyance and spousal waiver in Thayer v. Hawthorn

Conflicts in Medicaid planning

What is that nonprofit organization?

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The Elder Law Advocate

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



ON THE COVER

Looking Glass Rock, Blue Ridge Parkway
Victoria E. Heuler

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Submit Articles

The deadline for the SPRING 2024 EDITION is FEBRUARY 2, 2024. 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

The power of remembering – Life after the pandemic

I write this chair's message from the Hartsfield International Airport in Atlanta, Georgia, while waiting for my flight home to Tallahassee after a phenomenal section retreat in Asheville, North Carolina. Or, as Danielle Faller (our CLE committee chair) says it: Fu-nomenal!

Phenomenal is not a word I use lightly. I try to reserve it for times when other words cannot capture the true experience. A few important things made our Asheville retreat fu-nomenal. First, it was the first retreat post-COVID without any impediments. The first post-COVID retreat was in Boston last October. I was unable to attend because of a little weather event called a hurricane that stopped me and some others from being able to fly safely to our destination. For those able to attend the Boston retreat, I know it was an amazing gathering. For those of us who could not attend, it was an upsetting loss. The second important thing that came out of the Asheville retreat was the remedy of getting out of the office, getting away from the desk and the computer, breathing in fresh mountain air, and getting immersed in a beautiful, natural surrounding—the Smoky Mountains of North Carolina. Finally, being in Asheville was an important reminder of the power of in-person human interactions.

Through the pandemic and after missing Boston, I forgot how much a retreat brings fellowship and interpersonal connections I can't get through a Zoom meeting. I see a lot of you at different times on Zoom, but it is *just not the same*

as being in person with you! I am a hugger and I got a lot of hugs at the retreat, filling my soul! Maybe hugging is not your thing, but there were also plenty of high fives and fist bumps being handed out, too! Human contact is good—very good—and part of me forgot that after we all withdrew during the pandemic. Remembering the power of personal togetherness invigorates me and leads me to challenge all of us to make time for each other as often as possible.

The retreat is special and unique because it is part business and part “letting go.” Our other programs tend to concentrate on continuing education and conducting the section's business. If you have never been on a section retreat, please attend one! The next retreat, under the leadership of Chair-Elect Bill Johnson, will be in London! I am hoping powdered wigs will be offered—picture time!

Let's not forget the immense power of taking a break from our routines. Exploring new places, making new friends, sharing ideas with others, learning new practice tips, and exchanging war stories in a fun setting can help fill up your emotional gas tank. We had a terrific presentation about compassion fatigue at the Asheville retreat from a North Carolina attorney, Robynn Moraites, executive director of the North Carolina Lawyer Assistance Program. Robynn helped us identify when we are taking on our clients' problems and what we can do to keep ourselves mentally and physically healthy. We also had a wonderful yoga and meditation session

led by Shannon Miller, our administrative vice chair, which was new for some people, but allowed time for thoughtful reflection and provided new self-care tools for future use.

Of course, the section's business still has to be done, and we are in budget season. Your Executive Committee is working diligently to bring a final budget to the full Executive Council (and ultimately, The Florida Bar) that everyone has confidence in. During the past few years, the section ran a deficit budget, and all attempts are being made to bring that budget into the black as soon as possible. Toward this end, many changes have been made to help increase revenue and decrease expenses. One of the big revenue-side changes is in our sponsorship opportunities. We have room for more annual sponsors, so long as annual sponsor categories are not duplicative. We are so pleased that Guardian Trust and WealthCounsel (formerly ElderCounsel) are back as two of our annual sponsors! We want other annual sponsors, too, such as brokers, realty companies, title companies, marketing groups, care management, and IT specialists, to name a few categories. Many of you reading my message will instantly think of friends and business connections that would want to support the section and be part of our network. Please reach out to Jill Ginsberg, jill@ginsbergshulman.com, chair of the Sponsorship Committee, her vice-chair,

continued, next page

Chair's Message. . . from previous page

Kandace Rudd, kandace@mclawgroup.com, or me, and tell us who you know that might want to be a sponsor. We also have many more categories of available sponsorships, such as sponsoring the work of a committee (Medicaid, SNT, Guardianship, Estate Planning & Advance Directives, Probate, and Abuse, Neglect, & Exploitation, for example), and we have advertising opportunities in *The Elder Law Advocate*.

We have done a lot of work to reduce our expenses, refining the budget to tighten up categories of expenses that might have been bloated in the past. One important category where we are now successfully managing expenses is our annual retreat. Past retreats ended with a revenue loss, but the Asheville retreat is expected to break even and could end up with a slight profit. The next retreat will be planned similarly, and we will maintain that goal for future retreats.

The section is in the process of investigating membership needs and benefits. Please reach out to the chair of our Membership Committee, Max Solomon, max@hwelderlaw.com, and let him know what you value about your section membership and what we can do better to enhance your membership. Of course, never hesitate to reach out to me, too, victoria@hwelderlaw.com or 850/421-2400. My goal for our section is to provide value and meaning. Your input is critical. Our committees, both administrative and substantive, continue to work hard in their meetings and in bringing additional continuing education opportunities. Join a committee and provide *your* input and *your* voice to *your* section. It would be my pleasure and honor to see you at our next in-person event, our Essentials and Annual Update, February 1-3, 2024, in Orlando! Look for e-blasts coming soon from our section administrator, Emily Young, with registration and hotel information. Until then, my best wishes to all of you for peace as we move into the holidays and wind down the year.

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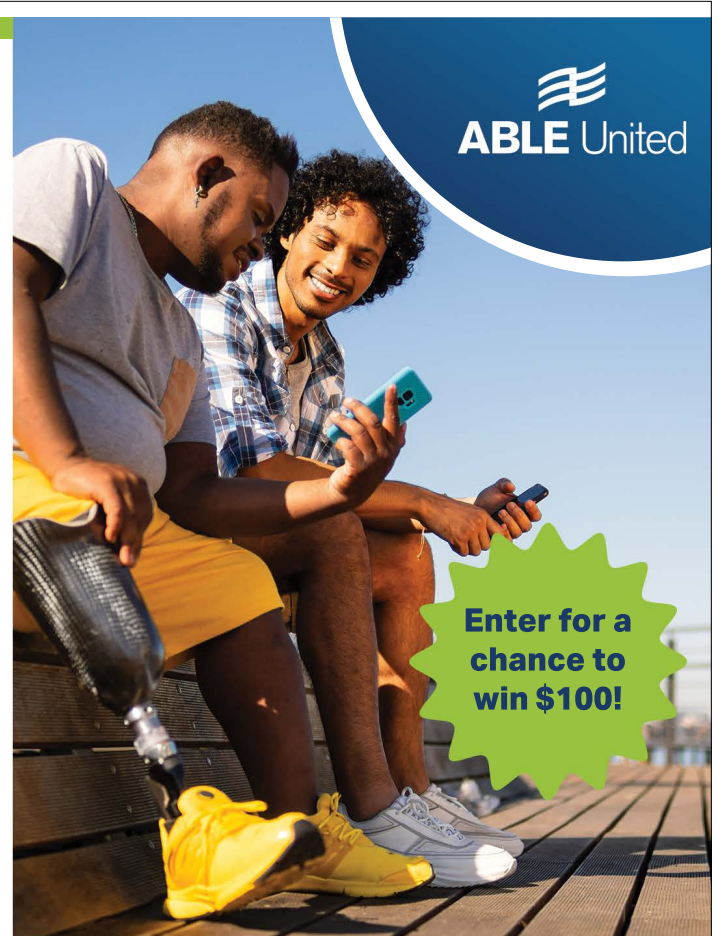
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Elder Law Section Retreat

October 26-28, 2023

Asheville, North Carolina



"Before" on the brewery crawl

Back: Max Solomon, Freddy Williams, Travis Finchum, Ailish O'Connor, Jason Waddell, Amy Waddell, Victoria Heuler, Emily Young
Front: Melissa Williams, Debra Slater, Anné Cartwright-Desormer, Randy Bryan, Laura Bryan, Jack Rosenkranz, Kate Vom Steeg



Log Hollow Overlook on the Blue Ridge Parkway

Freddy Williams, Melissa Williams, Max Solomon, Sally McLane, Victoria Heuler, Danielle Faller, Debra Slater, Ailish O'Connor, Travis Finchum, Anné Cartwright-Desormer, Lourdes Corvo, Jerry Jelincic, Stacey Schwartz, Emily Young



On the way to the Blue Ridge Parkway tour

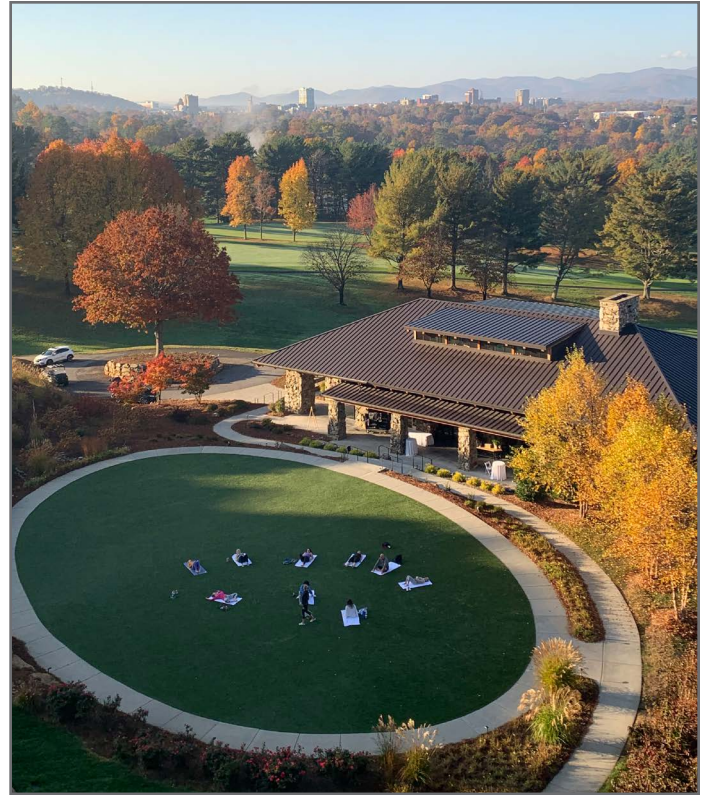


Graveyard Fields Trail

Back: Emily Young, Ailish O'Connor, Sally McLane, Victoria Heuler, Jack Rosenkranz, Debra Slater, Travis Finchum, Stacey Schwartz, Lourdes Corvo, Jerry Jelincic **Front:** Max Solomon, Danielle Faller, Emma Hemness, Anné Cartwright-Desormer



Jerry Jelincic, Lourdes Corvo, Emily Young, Ailish O'Connor, Emma Hemness, Victoria Heuler, Lawrence Hayden, Jr., Amy Waddell, Jason Waddell, Max Solomon, Kate Vom Steeg, Jack Rosenkranz, Debra Slater, Shannon Miller, Danielle Faller, Amber Zeuner, Melissa Williams, Freddy Williams



Saturday morning yoga



Brewery tour

Amy Waddell, Jason Waddell, Debra Slater, Anné Cartwright-Desormer



Stacey Schwartz at the Biltmore Estate with Amber Zeuner, Danielle Faller, Anné Cartwright-Desormer, Victoria Heuler, Max Solomon, Freddy Williams, Melissa Williams



"And, you know I'm not doing yoga with you, Shannon!"
Jason Waddell



Welcome reception

Danielle Faller, Max Solomon, Emma Hemness

Florida State Veterans' Nursing Homes provide advantages over private nursing homes

by Leonard E. Mondschein

on behalf of the Medicaid/Government Benefits Committee

There are approximately 700 nursing homes in the state of Florida. Only a very small percentage of these nursing homes are state owned and operated as state veterans' nursing homes. Since elder law attorneys may be called upon by their clients and their families for advice as to the best nursing home placement, understanding the advantages and admission practices regarding Florida State Veterans' Nursing Homes is an essential part of the practice of elder law. This article will give a brief history of veterans' nursing homes and then explain some of the advantages, admission requirements, and quality control between Florida State Veterans' Nursing Homes and other private nursing homes in Florida.

In 1864, the first state veterans' home was established without federal assistance during the Civil War in Rocky Hill, Connecticut. Congress first provided funds to the states, appropriating \$100 per veteran per year, under the Act of 1888.¹ In 1964, the construction grant program was established authorizing \$5 million in matching funds to the states in appropriations.² The Veterans' Administration (VA) provides 65% of the cost of construction, acquisition, remodeling, or modifying state homes to participating states that pay the difference. Florida participates in this program. The VA's authority to set standards for these facilities is found in the Code of Federal Regulations.³

Florida has eight state veterans' nursing homes. They are located in Daytona Beach, Land O' Lakes, Pembroke Pines, Panama City, Port Charlotte, St. Augustine, Port St. Lucie, and Orlando. As of 2022, the average occupancy rate for Florida State Veterans' Nursing Homes in operation two years or longer was over 80%.⁴ The Florida State Veterans' Nursing Home Program has its own director. The applicable state law governing Florida State Veterans' Nursing Homes can be found in Chapter 296 Veterans' Homes, Part II, Veterans' Nursing Home of Florida Act.⁵ In 2022, the Florida Legislature approved \$55 million to support the costs of the Florida State Veterans' Nursing Homes, plus an additional \$5.6 million for salary incentives for nursing home staff. These funds are allocated to the eight Florida State Veterans' Nursing Homes and are not used to subsidize any particular veteran. The VA provides financial assistance to these nursing homes on a per diem basis.⁶ As of April 1, 2023, the per diem rate was \$129.97.⁷ Veterans with a 70% to 100% service-connected disability and, in some cases, other veterans with

service-connected disability, as determined by the secretary, are fully funded by the VA. In 2022, the VA provided \$1.7 billion to state veterans' nursing homes throughout the United States for care of 20,000 veterans.

There are certain advantages for a veteran to be in a Florida State Veterans' Nursing Home versus a private nursing home. Florida State Veterans' Nursing Homes are generally highly rated. Both the Florida Department of Veterans' Affairs and the VA set standards and conduct inspections to ensure the highest quality of care for their residents. The rating system used by the VA Community Living Centers (CLC) adapts the Star Rating System from Medicare's "5 Star Rating" methodology. This rating system takes into account health surveys, staffing, and quality of resident care measures. In addition, many veterans have a feeling of camaraderie toward other veterans and prefer to spend the last years of their lives with others who share common experiences. Since these Florida State Veterans' Nursing Homes are exclusively for veterans, many of the activities are centered on veterans, such as celebrating Memorial Day, Veterans Day, and the 4th of July. They also have special celebrations for centenarians.

The requirements for admission to one of the eight Florida State Veterans' Nursing Homes can be found in section 296.36, Fla. Stat., and are as follows:

(1) The person must be a veteran as provided in s.1.01 (14) or have eligible peacetime service as defined in s. 296.02 and must:

- a. Be in need of nursing home care.
- b. Be a resident of the state at the time of application for admission to the home.
- c. Not owe money to the department for services rendered during any previous stay at a department facility.
- d. Have applied for all financial assistance reasonably available through governmental sources.
- e. Have been approved as eligible for care and treatment by the United States Department of Veterans Affairs.

Section 296.36 (3)(b) describes admittance priority for service-connected disability or non-service-connected disability under certain financial circumstances.

Generally, the financial requirement for admission to a state veterans' nursing home is for the applicant to contribute all of

his or her income less \$160 per month to the nursing home. This amount cannot exceed the actual cost of operating and maintaining the home.⁸ Applicants with a 70% to 100% disability rating do not have to contribute their income or assets to the share of cost. In addition, they are not required to file an application for Medicaid. Veterans with a service-connected disability below 70% have to contribute their income less \$160 per month to the share of cost. They are not required to contribute or spend down their assets. However, these veterans are required to apply for all other government programs for which they are entitled, such as Medicaid. That said, if their application for Medicaid is denied, they can remain in the nursing home. Anecdotally, and contrary to section 296.36 (1)(d), two Florida State Veterans' Nursing Homes have stated that if the family does not apply for Medicaid, the nursing home will not deny admission. In these cases, the VA pays the per diem rate. If a veteran has no service-connected disability, he or she is treated the same as a veteran with less than 70% service-connected disability. However, a veteran with any service-connected disability will usually receive preference for admission. If the veteran does apply for Medicaid due to his or her having a spouse, and income diversion is approved or a court order of support is granted to the community spouse, the director will review and, in all likelihood, approve the reduction in the veteran's income contribution in favor of the community spouse. Lastly, if a veteran applies for Improved Pension, it will not be reduced to \$90 per month, as in a non-veteran nursing home, even if the veteran is eligible for Medicaid. However, the payment may go to the nursing home to be used toward the veteran's care.

The process involved in gaining admission to a Florida State Veterans' Nursing Home involves obtaining and completing an application package, which includes both the Florida State Veterans' Nursing Home forms as well as forms from the Agency for Health Care Administration (AHCA). Since all nursing homes in Florida come under the jurisdiction of AHCA, the admission requirements must be in compliance with both the Florida Department of Veterans' Affairs and AHCA.

Typically, when a person needs nursing home care, he or she cannot wait months for admission. Unfortunately, it takes weeks or months before a veteran is admitted to a Florida State Veterans' Nursing Home. This is due to the application process, priority admission requirements, and the number of available beds in the eight facilities in Florida. As a result, most applicants seek admission to a private nursing home first, apply for Medicaid, and then file the VA application packet. When a bed is available, the veteran can then transfer to the Florida State Veterans' Nursing Home.

Oversight and inspections for all nursing homes in Florida are under AHCA's jurisdiction. When federal funds such as

Medicare and Medicaid are involved, the Centers for Medicare and Medicaid (CMS) have jurisdiction as well. In addition to inspections by AHCA and CMS, the VA hires private contractors to conduct annual inspections of Florida State Veterans' Nursing Homes. While all deficiencies are noted, they are not reported on the VA's website. A GAO report to Congress in 2022 noted this fact along with other comments and recommendations.⁹ The Florida Auditor General released a report in 2023 detailing Florida State Veterans' Nursing Home staffing and procurement issues.¹⁰ All of the above oversight helps to improve the quality of Florida State Veterans' Nursing Homes.

In conclusion, Florida State Veterans' Nursing Homes offer an option to veterans who are in need of nursing home care and are looking for the highest standards, rehabilitation, counseling, and camaraderie found in a setting with other veterans. This is especially the case for male veterans, as they make up 92% of all residents in Florida State Veterans' Nursing Homes. The stated goal of the VA, as well as the Florida Department of Veterans' Affairs, is to offer the veteran in need of nursing home care the best experience possible.



Leonard E. Mondschein is a past chair of the Elder Law Section and a past president of AFELA. He is board certified in elder law and in wills, trusts, and estates. He is also a CELA.

Endnotes

- 1 Act of August 27, 1888, 25 Stat. 40.
- 2 P.L. 88-450.
- 3 38 CFR. Part 59.
- 4 FDVA Annual Report, Fiscal Year 2021-2022.
- 5 ss. 296.31-296.41.
- 6 38 CFR 51.40.
- 7 VA.gov (State homes per diem program).
- 8 F.S. 296.37 (1).
- 9 GAO-23-105167. Report no. 2023-089.
- 10 Report No. 2023-089.



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(www.FLORIDABAR.org) and go to the Member Profile" link
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Capitol Update by Brian Fogerst

2024 Legislative Session: The work has begun

The 2024 Legislative Session is the “early session”—meaning session begins on January 9, 2024, and ends on March 8, 2024. The 2025 Session will begin in March 2025 and end in early May 2025. As such, absent a special session, the Legislature will not be in session for a full year when it adjourns in March 2024.

On December 5, Governor DeSantis announced his budget recommendations for the upcoming fiscal year. The total recommended budget comes in at \$114.4 billion. As noted in previous updates, tax collections continue to exceed projections, which is reflected in the robust budget proposal. However, state economists have cautioned that revenues will begin to level off in the next few years—not a reduction but a potential slowdown in revenue growth.

Items of interest in the governor’s budget include:

- An increase of \$6 million, for a total of \$69.2 million, to serve seniors as part of the Alzheimer’s Disease Initiative (ADI).
- More than \$2 million in additional funding for the Florida Alzheimer’s Center of Excellence (FACE).
- An increase of \$15 million, for a total of \$119 million, to serve additional seniors through the Community Care for the Elderly Program and the Home Care for the Elderly Program.

New leaders designated

In September the House Republicans formally designated Representative Danny Perez (R-Miami Dade County) speaker of the House for the 2024-2026 term. In October, the Senate formally designated

Senator Ben Albritton (R-Polk County) Senate president for the 2024-2026 term. Updates on their priority issues for their respective tenures will be provided in future updates.

2024 Legislative Session

Looking ahead to the upcoming session, as in most sessions, more than 2,000 bills and appropriations bills will be filed. As of early November 2023, approximately 300 House and Senate bills had been filed—which means many bills will be filed during the final two months of the calendar year prior to the opening day of session.

Legislative issues

The Legislative Committee has begun reviewing several filed and expected bills for the 2024 Session, including the following:

- Guardianship rewrite – The Elder Law Section and AFELA (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 – With the proposed bill said to be based upon Karilyn’s Law, Elder Law has concerns with the legislation as it will require visitation, increase risk of exploitation, and increase the burden on the courts, including requiring a jury trial for guardianship and a redetermination every three years with a different judge. Elder Law will be

meeting with the bill’s sponsor, Senator Ileana Garcia (R-Miami Dade County), to discuss the issues in more detail.

- Physician Orders for Life Sustaining Treatments (POLST) – This legislation has been filed in previous sessions, and Elder Law was asked to review the bill prior to the 2024 Session. Providers in Florida are familiar with the DNRO (the yellow) form. The POLST form goes beyond the DNRO to include orders for a level of medical intervention and whether and how artificial nutrition will be used. Elder Law is actively reviewing House Bill 219 by Representative Susan Plasencia (R-Orange County).
- Supportive Decision Making – Representative Allison Tant (D-Leon County) has again filed House Bill 73, Supportive Decision Making. The legislation seeks to provide an alternative to guardianship for individuals with disabilities. Elder Law has worked with Representative Tant on the bill over the past two years and supports the bill in its current form.

Your help is needed.

This past session, the Legislative Committee reviewed more than 50 bills and countless amendments and revisions.

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

Travis Finchum

travis@specialneedslawyers.com

Michelle Kenney

michelle@gapsattorneys.com

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.

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. An interactive form is available to complete online. Please share this form with your staff members and encourage

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.

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:

<https://bit.ly/medicaid-tracking>



Disability Law Committee has aggressive goals

by Jack M. Rosenkranz

on behalf of the Disability Law Committee

Elder law is an integral component of the broader disability community. However, there's a tendency within this field to focus predominantly on understanding the government benefits landscape for elders, often at the expense of a more holistic approach to disability. Many elder law attorneys, while adept at creating special needs trusts or modifying estate plans for beneficiaries requiring trust adjustments, may not fully realize their potential role in guiding clients through the disability realm. This scope goes beyond mere care options like homes, assisted living, or nursing facilities. In fact, elder law attorneys can significantly impact the care quality and life quality of disabled individuals.

Recognizing this potential, the Disability Committee of the Elder Law Section has established four key goals for the year. These goals focus on the mission of the committee, which is to deepen the understanding and integration of disability law within elder law practices. Please be sure to find the parting gift from the Disability Committee at the article's end, a link to a comprehensive manual of the world of disability benefits.

Goal 1: Increase awareness of disability law in the elder law community

Disability law and elder law are intrinsically linked, and a comprehensive grasp of disability law is indispensable. This knowledge encompasses an array of legal rights, health care considerations, vocational supports, and financial planning strategies crucial for this demographic. By deepening Elder Law Section members' understanding, legal professionals can offer more effective guidance and support, ensuring the rights and needs of those with disabilities are fully addressed and protected.

Goal 2: Provide an educational resource on the new support statute

The introduction of a new support statute for adult children who cannot support themselves marks a significant development in elder law. This statute directly affects elder law and family law practitioners. Parents of disabled adult children may find that less support is needed if proper government benefits are utilized. The support statute plays a crucial role in elder care planning and offers legal protection for families navigating these complex scenarios. As such, educating legal professionals about this statute is vital, enabling them to provide informed advice and support to their clients. The Disability Committee is seeking those interested in presenting on the new support statute and is planning a CLE for members of The Florida Bar.

Goal 3: Monitor progress on Managed Care Pilot Project

The Managed Care Pilot Project introduces a novel approach to care for disabled elders, especially those awaiting services from the Agency for Persons with Disabilities. This project represents a significant attempt to shift how care is administered, to managed care organizations, and could offer substantial benefits to those languishing on the Agency for Persons with Disabilities waitlists. The Disability Committee will be studying the development, how legal rights are protected, as well as the implementation challenges faced by the managed care organizations. Understanding this pilot project is crucial for elder law practitioners because it is likely to be offered as a managed care alternative by the Agency for Persons with Disabilities.

Goal 4: Promote awareness of transition services for disabled students

The transition from high school to post-secondary education is a critical phase for disabled students. Transition services play a vital role in this process, influencing the students' future legal and financial circumstances. The federal government and State of Florida increase funding on an annual basis to fund post-secondary transition education for students with disabilities. Research has shown that 80% of those who have attended a college certificate program are able to obtain a part-time or full-time job. The Division of Vocational Rehabilitation and the Agency for Persons with Disabilities are key to funding this process. The elder law community must be cognizant of these services to effectively advise and support individuals transitioning into adulthood. Awareness of these services can significantly impact the chance of an independent or supported living plan for these young adults.

Members of the Disability Law Committee believe this area of law is integral to the advancement of their elder law practice. At the next Elder Law Section meeting, look for the smiley face lapel pin and you will have found a disability law committee member. And here is the tiny link to the big resource: <http://bit.ly/Disability101>



Jack Rosenkranz, Esq., established Rosenkranz Law Firm in 1991. He focuses his practice on elder law and estate planning. Mr. Rosenkranz is chair of the

Disability Law Committee of The Florida Bar Elder Law Section.

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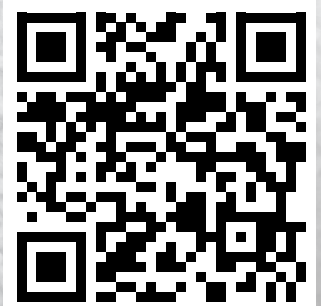


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Mark your calendar!

Elder Law Essentials

February 1, 2024

Orlando, Florida

Elder Law Annual Update

February 2, 2024

Orlando, Florida





Practice Management

by Audrey Ehrhardt

Are you unintentionally adding to your workload each day?

Most of us share a similar goal: *Work smarter, not harder*. But are we actually setting ourselves up to work longer and longer hours with no end in sight?

Believe me, we are not alone in this belief. Today, according to a new report from the International Labour Organization (ILO) the average American works an average of 1,750 hours per year, which is tremendously higher than other developed countries. Add to that the dismaying research that most attorneys only capture 2.5 billable time per eight-hour day. When you put those together you may be working more hours than you should.

So, what can we do? Luckily, there are actions we can take right now to take back our time and our sanity.

1. Develop a law practice system. A law practice system is how you want your firm to operate on a daily basis. Overall, your law practice system should enhance your casework efficiency, improve organization, and automate routine tasks. The journey starts with what you want to see happen in your practice to effectively assist your clients and potential clients on a daily basis. Before you utilize software, you want to think through what you want. This will allow you to develop your law practice management system so you can streamline administrative processes and be able to focus more on doing what only you

can do in advocating for your clients and managing your law firm.

2. Invest in using the tools and software you purchased to the fullest.

That law practice management software that is supposed to take back hours of your time each day? Build it out so it works. That organizational board that will keep your case progress on track? Learn to adapt it to your practice model. That snazzy tablet you could bring into client meetings to streamline the meeting process? Invest the time you need to train yourself to use it.

3. Do what only you can do. This means you have to learn, first, what only you can do. Second, you have to train yourself to delegate. Keep a pad of paper on your desk this week and start a list to write down everything you are doing on a daily basis. At the end of the week, set aside time to review this list and candidly assess what you should (and should not) be doing.

4. Get accountable with your delegation. Just because you assign it doesn't mean it will get done. You need to train your legal team members and then follow through with them so they know how to operate independently, in other words, without you. You won't be able to help them grow as professionals and leverage their success if you are always holding their hand or, worse, looking over their shoulder.

5. Stop doing everything. Just stop. While it seems easy to say, it is much harder to accomplish. Identify where you need help. Rome wasn't built in a day. You've heard that one, right? It also wasn't built by one person. What help do you need to reach your Rome?

I know your practice needs to work for you, not against you. More importantly, I know you do not need the added stress of doing everything for your firm. In order to stem the hemorrhaging of your time, though, you need to take action. But where do you start? Make time to think intentionally about your practice and end the year strong! Of course, if you have questions, don't hesitate to let me know.

Audrey 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. Join the conversation at www.practice42.com.

Endnotes

1 Pete Grieve, *Americans Work Hundreds of Hours More a Year Than Europeans: Report*, Money, Jan. 6, 2023, <https://money.com/americans-work-hours-vs-europe-china/#:~:text=In%20the%20U.S.%2C%20workers%20clock,U.S.%2C%20according%20to%20the%20report,> last accessed Oct. 13, 2023.

2 2023 Legal Trends Report, Clio, available at <https://www.clio.com/resources/legal-trends/>.

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.

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THE FLORIDA BAR
ELDER LAW SECTION



Tips & Tales by Kara Evans

Conflicts in Medicaid estate planning

The tale: Betty is bereft. Her husband, Bret, is in the rehabilitation facility and cannot get out of bed by himself. He can be situated in a wheelchair using a lift but then cannot get out of the wheelchair to use the bathroom, change his clothes, or anything else. His Medicare days are ending, and while she wants to take him home, she is unable to care for him herself. She is desperately afraid the government will take all her money leaving her impoverished.

Of course you can help her. But beware. Betty and Bret have a prenuptial agreement. All of Bret's assets are directed to his daughter at his death. Betty's assets are directed to her daughter. Bret has named Betty as his primary agent under his durable power of attorney, with Betty's daughter as the successor agent. His daughter, while not estranged, is definitely difficult.

Betty is in her 80s and is daunted by the strategies you propose. She throws her hands up and declares that Bret's money will be used to pay for the nursing home until his money is depleted. She will then use spousal refusal to preserve her assets.

The tip: Lately, we have been seeing a rash of Medicaid clients in second or third marriages. Many have prenuptial or postnuptial agreements in which each party's last will and testament names that party's children as his/her beneficiaries. Some clients have mirror image last will and testaments where the children of both parties are included as beneficiaries. Sometimes these wills are backed up with contracts. Other couples just have an "understanding" that the survivor will leave all assets to both sets of children. As we are all aware, these arrangements may or may not work as intended.

But what happens when someone's estate plan is upended due to Medicaid planning? Much of the planning for a married couple involves simply moving all the countable assets to the healthy spouse's name. To do this, the healthy spouse often acts as agent under a durable power of attorney.

As the attorney, what are your obligations and ethical duties in these cases? What is your client's exposure to liability? What is your exposure to liability?

Section 709.2114, Fla. Stat., addresses the duties of an agent under a power of attorney. Your client should be paying particular attention to the following:

Section 709.2114 (1)(a)1., which states that the agent "may not act contrary to the principal's reasonable expectations actually known by the agent."

Section 709.2114 (1)(a)4., which states that the agent "must attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:

d. Eligibility for a benefit, a program, or assistance under a statute or rule[.]"

Can this statute be interpreted to say that Betty has an obligation to use her position as agent to plan for Medicaid? Will Betty have some liability to Bret's daughter if she does not plan? I suspect she will.

Combine the above with section 709.2114(3), which states: "An agent who acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan."

Would Betty be acting in good faith if

she just spends Bret's money and then uses a planning technique to preserve her assets? I suspect that is not "good faith."

You also must consider Rules of Professional Conduct. Rule 4-1.7 addresses conflicts of interest between current clients. In this case, are you representing adverse interests? Definitely yes. Betty is concerned about protecting her assets. She is less interested in how her actions will affect Bret's estate plan. But Bret wants to provide for his daughter. Is it possible that this conflict will materially interfere with your duties to your other client? The answer is yes and for the same reasons. Betty may have hired you, but you are also planning for your other client, Bret, and his money.

As the planning attorney, I would be reluctant to use any techniques that would potentially divert or eliminate Bret's daughter's expected inheritance. In Betty's case, I would plan for Bret as if he were a single individual, ensuring that upon his death, any assets such as IRAs and income property were directed to his daughter. I might even consider having Betty resign as Bret's agent and trustee, have Betty's daughter accept her appointments, and hire separate counsel to represent Bret's interests. If Bret had named his daughter as his agent and trustee, then clearly separate counsel would be preferable.

These situations are becoming more common. It is incumbent upon you, as the planning attorney, to protect not only your client, but yourself as well.

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

What is that nonprofit corporation?

When reviewing a client's assets, have you ever had a client say they "own" a charity or other nonprofit entity? Much like the client who says they have an LLC—and you don't really know what that means (see "What is that LLC?" *The Elder Law Advocate*, Winter 2023, Vol. XXX, No. 1)—a client saying they own or have a charity or nonprofit entity can lead to similar questions. This article will provide an overview of exempt organizations to assist in information gathering and planning for your clients.

To begin, much like LLCs and other entities, there are two aspects to nonprofit organizations. First is how they are created and the related operating rules. Second is how they are taxed.

Most exempt organizations are created by statute. In many respects governmental and quasi-governmental agencies are also "exempt organizations." Some entities are created under federal or other laws. For example, the American Red Cross is chartered by Congress (<https://www.redcross.org/about-us/who-we-are/>

[history/federal-charter.html](https://www.redcross.org/about-us/who-we-are/)). Perhaps one of the more common nonprofit entities in Florida is the various iterations of homeowner/condo associations and even co-operatives. Nonprofit country clubs are yet another type.

Florida Statute § 617 is the Florida corporations not-for-profit statute. The statute is very broad, addressing creation and governance in much the same manner as the general Florida corporations statute (F.S. § 607). Florida Statute § 617.01401 (5) defines a Florida corporation not-for-profit as a corporation no part of the income or profit of which is distributed to its members, directors, or officers. So, arguably at least, the entity is not "owned" as such. It can have members, even different classes of members (F.S. § 617.0601). Depending on how the entity is established with its articles and bylaws, members may or may not have voting rights or even the ability to transfer their membership interest. Florida law does provide that there must be three or more *individual* directors (F.S. § 617.0803).

You will hear terms such as exempt organization ("exempt org"), not-for-profit entity, nonprofit entity, etc. Some of these terms simply do not track the exact wording of the applicable statute (such as nonprofit entity versus the Florida corporations not for profit statute). Some are more focused on tax. This article will explore terms such as "exempt org" and how they are treated for tax purposes. More on that below.

Typically, when a client says they have or own a not-for-profit, it means they control the board such that the board (and its members, if applicable) essentially do as they are told. And, at least in Florida, a not-for-profit entity may have a self-perpetuating board of directors, where the directors elect the members of the board. Technically, the interest of a client in a residential co-op, condominium association, etc., is a type of ownership, but rarely does a client refer to such an ownership as "owning a nonprofit." They are generally referring to a charitable organization.

continued, next page

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Further, none of this tells us the entity's tax treatment. Don't believe me? I once was retained to help someone and their lawyer with a zoning issue. The client was trying to open a strip joint (aka, an adult entertainment facility). The municipality said it was not permitted per the local zoning ordinance. After reviewing the local ordinance, I discovered that private clubs were allowed within the zoning ordinance. I created a Florida not-for-profit corporation as a private social club. It entered into a contract with a clearly for-profit entity to lease all of the equipment and to provide for management of the not-for-profit corporation. The client even left a little of the "profit" in the not-for-profit entity. The not-for-profit owned the new members-only social club. (It was not difficult to join!)

At the end of the year, the "members" got to vote on a charity to receive the

profit as a donation. Did the IRS care? No. Why? The not-for-profit filed a regular corporate income tax return showing very little profit, and it was donated to charity. The for-profit management company had the real profit and reported its correct income.

Remember that while a not-for-profit entity can also be a charity, it often is not. Social clubs, membership-owned country clubs, condominium and homeowner associations, cooperatives, and other groups may be not-for-profit, yet each have strikingly different tax treatment.

Note also that not-for-profit entities may also be established as trusts, LLCs (careful there!), and other entities. For example, it is not uncommon to see very high net worth individuals controlling private foundations and having various charitable trusts. Each of these arrangements needs to be explained and addressed.

This leads to the tax treatment, which poses the question:

Why be exempt?

There are numerous reasons why an organization may want to qualify as an exempt organization. These include:

A. Exemption from federal income tax

1. The most important advantage of an organization's qualification for exemption from federal income tax is that the organization's income will not be subject to federal income tax. There are exceptions to the exemption, such as:
 - Income from an unrelated trade or business is subject to federal income tax. Internal Revenue Code §511, et seq.
 - Certain political expenditures by the organization may result in taxation. Section 527 (e)(2)
 - Excise taxes may also apply to an organization's activities. Sections 4911, 4912, 4940-45, as examples.
2. The exemptions rules can vary somewhat depending on the type of

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exempt entity. For example, the rules vary for a homeowner association versus a charity versus a private foundation.

B. Exemption from state and local taxes

1. If an organization has established exemption from federal income tax, it may also qualify for exemption from a variety of state and local taxes.
2. In Florida, exempt organizations may be exempt from sales and use taxes, income taxes, intangible personal property taxes (from the days when we had them), and real and personal property taxes. The scope of the exemption will depend, in part, on the nature of the federal tax exemption, although the exemption was expanded in tax year 2000 and further expanded in tax year 2001.

Practice tip: Eligible exempt organizations need to apply to the Florida Department of Revenue to be exempt from sales and use tax in Florida.

Practice tip: Remember that if the organization is not properly income tax exempt, in Florida it may be treated as a corporation. As a reminder, Florida has a corporate income tax.

C. Eligibility for income tax deductible contributions

2. Section 170(c) allows individuals and corporations to deduct contributions to the following organizations, subject to certain limitations. Some of these with limited detail include:
 - The United States, a state, the District of Columbia, a U.S. possession, or a political subdivision of a state or possession, if the contribution is for exclusively public purpose;
 - Organizations described in Section 501(c)(3) that are organized in the United States or a possession; in the case of a contribution by a corporation to a trust, community chest, fund, or foundation, but not to another corporation, the contribution must be used within the United States or a possession for a proper charitable purpose;

- Organizations of war veterans and related organizations organized in the United States or a possession, no part of the net earnings of which inures to the benefit of a private individual;
- Domestic fraternal societies operating under the lodge system, if the contribution is by an individual and is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children and animals; and
- Cemetery companies owned and operated exclusively for the benefit of members, and cemetery corporations chartered solely for burial purposes, the charter of which does not permit the corporation to engage in any business not necessarily incident thereto, which are not operated for a profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

Reminder: This eligibility is for charitable exempt organizations. While a condo association may be exempt from *certain* income taxes, it certainly does not qualify as a charity, and payments to it do not qualify as a charitable deduction.

D. Eligibility for estate and gift tax deduction

Sections 2055 and 2522 generally permit a federal estate tax deduction and a federal gift tax deduction, respectively, for transfers to the above organizations, with the exception of cemetery companies.

E. Nonprofit organizations are eligible for a variety of preferential postage rates.

F. Section 501(c)(3) organizations may obtain the benefit of private and public grants for funding the organization's activities and the use of proceeds of tax-exempt financing.

Reminder again: Some of these only apply to certain categories such as charities.

Overview of qualifying tax-exempt organizations

A. General rules

Nonprofit organizations—that is, those organized for charitable or mutual benefit purposes—may be exempt from federal income taxation. (IRC section 501); however, those organizations may be taxed on income from unrelated businesses they conduct. To have the benefit of the exemption, there is usually the requirement that no part of the net earnings of the organization inures to the benefit of any private shareholder or individual.

The following is a list of general exemptions (with limited detail) from income tax under section 501(c) and Reg. section 1.501(c)(2)-1 through Reg. section 1.501(e)-1:

- (c)(1). Corporations organized under an Act of Congress as a U.S. instrumentality, provided they are declared exempt under the Internal Revenue Code or organizing legislation enacted before July 18, 1984. (IRC section 501(c)(1))
- (c)(2). Corporations organized for the exclusive purpose of holding title to property, collecting income from the property, and turning over the entire income, less expenses, to an exempt organization (IRC section 501(c)(2); however, there are limits on the unrelated business income corporations organized solely to hold title to property may receive and still maintain tax-exempt status.
- (c)(3)
 - ◊ Corporations and community chests, funds, or foundations, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes; or to foster national and international amateur sports competition; or for the prevention of cruelty to children or animals. There is the requirement that no part of the net earnings inures to the benefit of any private shareholder or individual; no substantial part of the activities relates to carrying on propaganda

continued, next page

or otherwise attempting to influence legislation; and there is no attempt to participate or intervene in any political campaign. (IRC section 501(c)(3))

◇ Religious or apostolic associations, even though they carry on business activities that disqualify them from exemption under section 501(c)(3). The organization must have a common or community treasury to qualify, and its income, whether or not distributed, is taxed pro rata to its members as a dividend received for the organization's tax year ending with or within the member's tax year. (IRC section 501(d); Reg. section 1.501(d)-1) Contributions to religious or apostolic associations are not tax-deductible.

Note: The "typical charity" is a 501(c)(3) charity.

- (c)(4). Nonprofit civic organizations operated exclusively for social welfare, and local employee associations whose net earnings are used solely for charitable, educational, or recreational purposes. (IRC section 501(c)(4)) No substantial part of the organization's activities may consist of providing

commercial-type insurance. (IRC section 501(m)(1))

- (c)(5). Labor, agricultural, or horticultural organizations. (IRC section 501(c)(5))
- (c)(6). Chambers of commerce, business leagues, real estate boards, boards of trade, or professional football leagues, not organized for profit. (IRC section 501(c)(6))
- (c)(7). Social and recreational clubs—that is, those organized for pleasure, recreation, and other nonprofit purposes. (IRC section 501(c)(7)) No exemption may be taken for a club with a governing instrument or other written policy that discriminates against a person on the basis of race, religion, or color. There are technical requirements addressing what percentage of the organization's gross receipts (including investment income) must be from its members, and how that nonmembers' income is constituted.
- (c)(8). Fraternal beneficiary societies, orders, or associations operating under the lodge system or for the exclusive benefit of the members of a fraternity that is itself operating under the lodge system, and providing

for the payment of life, accident, or other benefits to its members or their dependents. (IRC section 501(c)(8)) In a related vein, a tax exemption is available to domestic fraternal societies or associations operating under the lodge system that don't provide benefits if net earnings are devoted exclusively to religious, charitable, scientific, or fraternal purposes (IRC section 501(c)(10))

- (c)(9). Voluntary employees' beneficiary associations (VEBAs) providing for the payment of life, sickness, accident, or other benefits to members, their dependents, or beneficiaries. (IRC section 501(c)(9)) VEBAs will not qualify for tax-exempt status unless they meet participation and antidiscrimination requirements that are similar to those for qualified pension, profit-sharing, and stock bonus plans. (IRC section 505)

Note: When you hear a client say they have a VEBA benefit relating to work, this is the Internal Revenue Code provision allowing it.

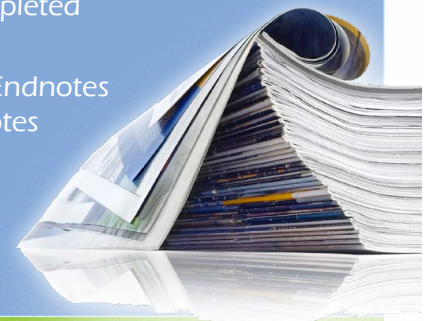
- (c)(10). See (c)(8).
- (c)(11). Local teachers' retirement fund associations. (IRC section 501(c)(11))

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.



- (c)(12). Local benevolent life insurance associations, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or similar organizations, if 85% or more of their income is collected from members solely to meet losses and expenses. (IRC section 501(c)(12))
- (c)(13). Nonprofit cemetery companies and burial corporations. (IRC section 501(c)(13))
- (c)(14). Credit unions without capital stock that are organized and operated for mutual purposes without profit, and corporations or association without capital stock organized before September 1, 1957, to provide reserve funds and to insure shares or deposits in building and loan associations, cooperative banks, or mutual savings banks. (IRC section 501(c)(14))
- (c)(15). Nonlife insurance companies or associations whose net written premiums (or direct written premiums, if greater) for the tax year do not exceed \$350,000. (IRC section 501(c)(15))
- (c)(16). Farmers' cooperatives that are crop financing corporations. (IRC section 501(c)(16))
- (c)(17). Trusts forming part of a nondiscriminatory plan providing for the payments of supplemental unemployment compensation benefits. (IRS section 501(c)(17))
- (c)(18). Certain nondiscriminatory employee pension trusts created before June 25, 1959. (IRC section 501(c)(18))
- (c)(19). Domestic veterans' organizations provided that no part of net earnings benefits any private shareholder or individual. (IRC section 501(c)(19))
- (c)(20). Repealed.
- (c)(21). Black lung benefit trusts. (IRC section 501(c)(21))
- (c)(22). Withdrawal Liability Payment Fund. (IRC section 501(c)(22))
- (c)(23).

◊ Veterans organizations (created before 1880). (IRC section 501(c)(23))(c)(24)

◊ Trusts established by the Pension Benefit Guaranty Corporation in connection with a plan that has been terminated. (IRC section 501(c)(24))

◊ Cooperative service organizations that perform one or more special services for two or more tax-exempt hospitals, including hospitals owned and operated by the federal, state, or local government. Services include data processing, billing, food, personnel, and purchasing (including purchasing insurance on a group basis). (IRC section 501(e))

- (c)(25). Certain pooled real estate investments of exempt organizations. (IRC section 501(c)(25))
- (c)(26). State-sponsored membership organizations for tax years beginning after 1996 providing high-risk individuals with health coverage. The organization must, in addition to other requirements, provide medical coverage on a not-for-profit basis through either insurance issued by the organization or an HMO under an arrangement with the organization. (IRC section 501(c)(26))
- (c)(27)

◊ State-sponsored workers' compensation reinsurance organizations established before June 1, 1996. (IRC section 501(c)(27))

◊ Qualified state tuition programs. (IRC section 529)

◊ On election, associations for the management of residential real estate and condominiums (but not co-ops) that meet organizational, operations, and income tests. (IRC section 528(a))

B. Certain feeder organizations

Certain feeder organizations subject to very specific requirements, where the main purpose is to run a trade or business and pay the profits to one or more tax-exempt entities. (IRC section 502(a))

C. Private foundations (IRC section 509)

Technically all 501(c)(3) foundations are private foundations unless they are not. The list of entities not considered a private foundation *very* briefly includes:

- Maximum (50%) charitable deduction donees (IRC section 509(a)(1));
- Organizations that receive more than one-third of their annual support from members and the public, and not more than one-third from investment income and unrelated business income (IRC section 509(a)(2));
- Supporting organizations operating exclusively for the benefit of one or more of the above organizations and that are not controlled by disqualified persons, other than foundation managers (IRC section 509(a)(3)); and
- Organizations involved in public safety testing (IRC section 509(a)(4)).

Note also that most charities need to actually apply to the IRS and become tax exempt.

So, now what?

Find out about the client's exempt organization.

- When and how was it established? Request the articles, bylaws (or other organizational documents), a copy of the application for exempt status with the IRS along with any supporting documents, and the IRS approval letter. Typically, there will be a Form 1023 application for exempt status for a charity and a Form 1024 application for most non-charities.
- How does it operate (officers, directors, members, and activities)?
- Is it filing its information return (Form 990 or Form 990-EZ) with the IRS? If the organization fails to file for three consecutive years, it can lose its federal tax exemption.
- If it is a charity, is the client really trying to do good things? Or is the client just trying to make a profit

continued, next page

while masquerading as a not-for-profit charity?

- Who are the donors? Is it treated as a private foundation?
- Is the client doing transactions with the organization that can be deemed private inurement or self-dealing? If so, the exempt status can be lost, and significant penalties/excise taxes can be imposed on the client and the entity.
- Has the client properly registered with the Florida Department of Agriculture and Consumer Services to solicit donations? There are significant penalties if it does not. Other states have similar rules and registration requirements, with harsh penalties for noncompliance.
- Have they taken proper advantage of state and local property tax and other tax exemptions?

And, assuming it is all on the up and up:

- How does the client want to make sure the organization continues after the client's passing? In some ways the conversation is similar to the ones for business continuity—except that the asset is not part of their taxable estate. In addition, there is no interest to probate or place in a revocable trust.
- What can be done to enhance its ability to deliver services and fulfill its mission?
- What can be done to keep it fully operating cleanly?
- Does it do what it told the IRS it would do in its exempt organization application and filings?
- Is it undertaking lobbying in ways it is not permitted?
- Is it properly acknowledging nondeductible donations (if not eligible to receive tax-deductible donations)? (26 USC § 6113)
- Does it properly acknowledge donations and the value of any quid pro quo received for the donation?
- Are the appropriate records available for public inspection? (If a small charity, does the client really want someone stopping by their house to review records?)
- Is the organization a private foundation? This generally goes to how the organization is supported and can impact the percentage of gross income allowed as a charitable deduction. There are scary rules governing private foundations and investments and other rules beyond that of “public” charities. Typically, a public charity derives the bulk of its income from a broader base of sources and donors. A private foundation typically has few donors. There are exceptions to these rules.

***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.*

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Case Law

by Elizabeth J. Maykut

Descendants of decedent's great-grandparents (second cousins) do not constitute heirs of intestate estate.

State v. Estate of Bruening, 48 Fla. L. Weekly D1867 (Fla. 4th DCA September 20, 2023)

Issue: Whether the estate of an intestate decedent who died leaving no spouse, children, parents, grandparents, aunts, uncles, or cousins should pass to the decedent's second cousins.

Answer: No, the estate escheats to the State as second cousins do not constitute intestate heirs.

Kyle Bruening died leaving a substantial estate. Upon his death, he was not married, had no children or siblings, and had no surviving parents, grandparents, nor maternal or paternal aunts, uncles, or cousins. Kyle's second cousin, who shared a common great-grandparent with Kyle but otherwise had no familial relationship with him, filed a petition for administration of his estate claiming that she and her niece and nephew had an interest in the estate as beneficiaries. The State of Florida disagreed, arguing that no class of heirs existed under Florida law and that the estate must escheat to the State.

The trial court found the second cousins to be heirs, but the Fourth District reversed. After reviewing section 732.103, Florida Statutes, the court found that second cousins (who only have great-grandparents in common with a decedent) are not in a class of heirs identified by the controlling statute of an intestate decedent's estate. There is no category included to encompass such distant relatives with no otherwise familial relationship. Further, the court rejected an argument that the second cousins were included in the general language in subsection (4)(c) of the statute that refers to "other kindred who survive." This limitation on heirs has been referred to as the "laughing heirs" rule as heirs such as second cousins

are so remotely related to the decedent that they suffer no sense of loss at his passing.

Practice tip: This case points out the importance of having a will, especially for those with little to no family.

Deed executed by husband and wife was insufficient to waive homestead rights because it lacked language specifically releasing inheritance rights.

Thayer v. Hawthorn, 363 So. 3d 170 (Fla. 4th DCA June 21, 2023)

Issue: Whether a surviving spouse had waived her right to one-half interest in the homestead when it was conveyed to her husband's trust using a deed that contained neither specific waiver language nor a release of any hereditaments.

Answer: No.

As part of their estate planning, Doris and James each executed a revocable living trust and then executed a deed (the "Deed") conveying a one-half interest of their jointly owned homestead property to each of their respective trust. The spouse was the primary beneficiary under each trust. The contingent beneficiaries of Doris's trust listed her five children from a previous relationship as her contingent beneficiaries differing from James's contingent beneficiaries which listed his brother at 70% and Doris's children with the remaining 30%.

James disappeared in 2014 and was declared presumptively dead in 2017. Doris died in 2018 survived by her children. After her death, James's brother filed a petition to determine homestead status, arguing that James's one-half of the homestead should pass to him because Doris had waived her right to it in the Deed. Doris's children argued that James's attempted devise of his share of the homestead failed because Doris never waived her constitutionally protected homestead rights in the property.

The trial court ruled that the language in the Deed, along with testimony from the estate planning attorney as to intent, was sufficient to show that the parties had waived their homestead rights to the property. The Fourth District disagreed.

In analyzing whether Doris had waived her homestead rights, the Fourth District reviewed the Florida Constitution, which provides that the homestead is not subject to devise if the owner is survived by a spouse or minor children, but it acknowledged that a spouse can waive such protection pursuant to section 732.702, Florida Statutes. Finding that the Deed contained no language of release or conveyance of a hereditament (a right to inherit), the court held that the Deed was insufficient to constitute a waiver of homestead rights. External evidence such as the estate planning attorney's testimony was not relevant to supplement the writing where the language was clearly insufficient.

Practice tip: Any waiver of a spouse's homestead rights should be specific. Although a spousal waiver of "all rights" is sufficient to waive homestead under section 732.702, Florida Statutes, it is always best to be specific and explicitly waive rights when preparing agreements or deeds. In 2018, the Legislature enacted section 732.7025, Florida Statutes, which now provides that a deed containing definitive waiver language would constitute a waiver of homestead rights.

Elizabeth J. Maykut is a Florida Bar board certified elder law attorney who focuses her practice on guardianship, Medicaid planning, estate planning, and probate, and is of counsel with the law firm of King & Wood PA in Tallahassee, Florida. Her prior experience includes several years practicing Florida administrative law with a large multinational firm that represented the Florida secretary of state in the 2000 presidential election litigation.

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