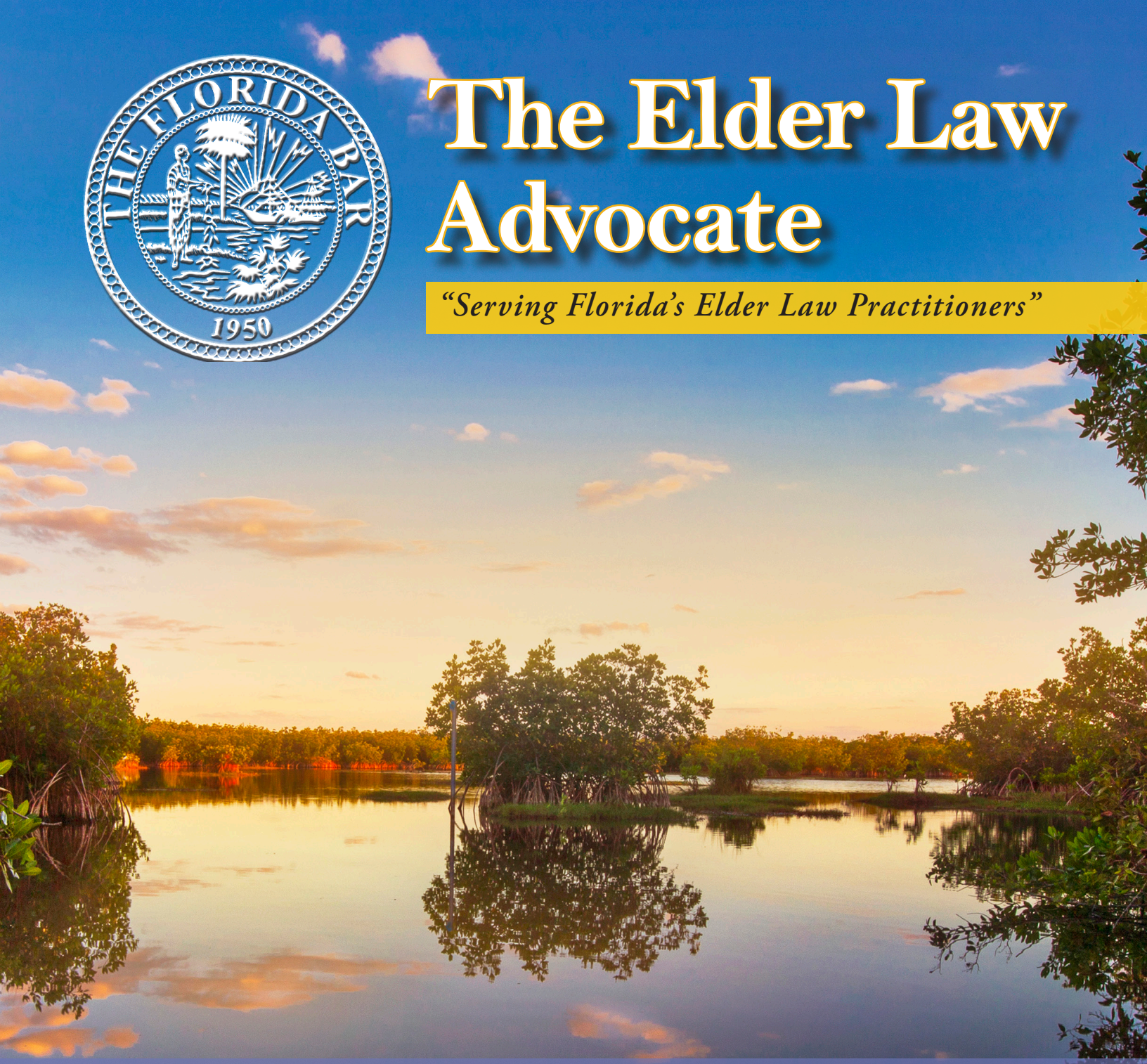
The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"



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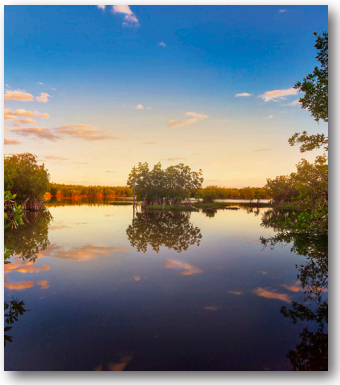
Officers



ON THE COVER
Florida Everglades
Randy Traynor Photography

3/2024

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Submit Articles

The deadline for the SUMMER 2024 EDITION is JUNE 15, 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

Elder law attorneys and leadership—Our strength

Are leaders born or are they made? The answer can be both, but I believe, more often than not, leaders are made. Why do I believe that? Because people are diverse and their skill sets so varied that most leaders do not start leading in a vacuum. Rather, most leaders I encounter have *become* leaders through interpersonal development, listening to understand, practicing efficiency, and making a daily commitment to the tasks involved in the leadership position. Because I believe most leaders are made, I also believe that everyone in our section has the ability to be a leader. In fact, many in our section are already leaders and may not even realize it!

What is interesting to me about leadership is that leaders do not have to be "stars." Of course, some leaders are stars and are well known and well liked. But the true art of leadership involves leading at a one-on-one level and may not involve anything considered remarkable. Our section prides itself on our mission to protect vulnerable adults from risk and harm and to take steps to provide resources and remedies to vulnerable adults, particularly adults as they age. When each of us undertakes to protect a vulnerable adult, we are leading. We are establishing that human lives and human dignity matter, and we are in a position to lead our clients out of being prey to perpetrators. If you helped someone today—or this week or this month—avoid being exploited, abused, or harassed by someone else, then you are a leader.

Here is what is even more interesting—when you lead by protecting someone else, you set the standard for one or more other people to follow your example. It could be another attorney who does not have the knowledge you do, it could be a family member you helped educate, or it could be a care provider in a medical setting who is now more informed about the rights of the vulnerable adult. Without your leadership, imagine the result. Not only would the vulnerable adult be even more vulnerable without your protection but those around the vulnerable adult who do not possess the knowledge you do would not learn from you and be able to protect themselves or others through that knowledge. Sit with this thought for a moment. Sit with it.

This is truly the hallmark of a leader. We in the Elder Law Section do not know the meaning of "no." We push forward. We move impediments. We create solutions. We resource everything and anything to find a solution. Because we are leaders.

Now that you know *you* are an elder law leader, think about the ways you help lead the Elder Law Section. If you participate in a section committee, you are leading. Believe it or not, there is always more room on committees for participants! Committees are nimble and drill down on substantive practice issues, problem-solving, current events, and subject matter trends. If you are part of one of our substantive committees, your engagement helps lead that committee. We also have wonderful administrative and special committees, such as our CLE Committee and our Technology Committee. Those committees are unique and fun because they interact with all of the substantive areas in order to accomplish the bigger section goals. The CLE Committee considers and steers the various continuing education opportunities for our section members, quite a few of which are free as a member benefit. I have been part of the CLE Committee for several years, and it really is a fun committee because of the creativity in planning meaningful educational events. Technology is another administrative committee that is critical in leading in the era of artificial intelligence and our increasing virtual presence. The administrative committees are sometimes silent leaders because they are not as glitzy or well known, but their power is immense. Much of our section's strategic plan depends on our administrative or special committees to strengthen our infrastructure to meet increasing demands for information and resources.

When you take someone's hand or you speak up about an injustice, you are leading. Never underestimate how important your leadership is. As you read this, think about where you are leading and other opportunities you would like to have within the section. Would you like to participate in a committee when you have not done so before? Would you

continued, next page

Chair's Message. . .
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like to take responsibility for a task on a committee you have joined? Would you like to be a vice chair or a chair of a committee? Where do you see yourself in section leadership, and what are you doing to challenge yourself as a section leader? I remember when I stopped practicing as an insurance defense attorney and started practicing elder law and how different the two practice areas seemed. I had little interest in leading in the insurance defense area, but when I became an elder law attorney, I felt like I was home and wanted to learn as much as I could and be the best elder law attorney I could be. Part of that desire led me to follow my mentor like a puppy and absorb everything she knew and could teach me, including watching her as a leader and surrounding myself with other people like her. When I surrounded myself with elder law attorneys who daily sought to help vulnerable clients and collaborated with other elder law colleagues, the energy toward leadership was contagious.

You are a leader. Continue to listen and learn. Surround yourself with other elder law attorneys and be curious! Ask to join and participate in more than one Elder Law Section committee. Collaborate with your elder law peers and never let the ideals of our practice area fade. Our collective leadership makes a huge difference in the lives of others. Never doubt that. Always pursue the protection of others. Don't quit! You might be the only hope a vulnerable adult has. Be proud of your leadership and be a leader amongst your peers. No greater privilege exists.

Reach out and let me know your thoughts on leadership and opportunities you would like to explore. My email is victoria@hwelderlaw.com, and my phone number is 850/421-2400. I would love to hear from you!

Keeping HCBS Medicaid via deemed SSI benefits

Or how "deemed SSI" qualifies the client for HCBS Medicaid waiver in spite of claimant's $85,000 in annual salary as a software engineer

by David Lillesand
on behalf of the Disability Law Committee

The issue

The client calls, referred by ELS member attorney Nancy Wright who successfully represented him securing HCBS Medicaid waiver personal attendant benefits for the full 24 hours per day and 365 days per year. In spite of his severe impairments and with the physical assistance of his full-time care attendants, he graduated from the University of Florida as a computer engineer and secured a job with a major international company as a software engineer making $85,000 per year. How can he keep his SSI-related Medicaid benefits when he is substantially over income? Without his aides, he cannot function at work to keep his job. Yet his $85,000 per year salary is not enough to privately pay the $175,000 per year estimated cost. Neither private health insurance nor Medicare provides comparable HCBS services.

Florida Medicaid programs insufficient

The Medicaid Manual's Appendix A-9 has a relatively new program, "HCBS/ Working People w/Disabilities – Individual," with an income limit of $5,187 per month ($62,244 per year) calculated as 550% of the federal benefit rate. The claimant's monthly salary of $7,083.33 per month is almost $1,900 over the monthly income limit in the State Medicaid Manual appendix.

Use of a QIT was discarded because of the limitation on spending excess income on medical expenses alone.

Could the client put the excess income into a pooled special needs trust? The first requirement to have a pooled trust is that the person be "disabled." That term is defined in the Medicaid Manual at Section 1440.1203: "Disability is … The inability to engage in any substantial activity due to any medically determinable physical or mental impairment… ." The client's 40 hours per week corporate employment is clearly engaging in "substantial activity," so he is not "disabled" and not eligible to have a pooled trust.

Further research in the federal Medicaid regulations did not turn up any additional Medicaid answers.

The answer: Section 1619b of the Social Security Act

In 1986, Congress required all states to extend Medicaid coverage to certain "qualified severely impaired individuals." Section 1905q (42 USC 1396d) defines the term and assigns the responsibility to determine eligibility for continued Medicaid to the Commissioner of Social Security. That's why it is not listed in Appendix A-9 even though mandatory "1905q coverage" does appear in the Florida State Medicaid Plan. The benefits for qualified severely impaired individuals are further codified in Section 1619b of the Social Security Act.

Implementing the federal Act, SSA issued POMS SI 01202.010 "Policy Principles" noting that "SGA determinations are required to establish initial disability for SSI but are not required for continuing SSI eligibility purposes." To qualify for continuing Medicaid coverage, a person must:

- Have been eligible for an SSI cash payment for at least one month;
- Still meet the disability requirement;
- Still meet all other non-disability SSI requirements;
- Need Medicaid benefits to continue to work; and
- Have gross earnings that are "insufficient to replace SSI, Medicaid and publicly funded attendant care services."

First 1619b alternative – meeting the "charted threshold"

This means that former SSI beneficiaries who have earnings too high for an SSI cash payment may be eligible for Medicaid if they meet the above requirements. SSA uses a standard threshold amount for each state to measure whether a person's earnings are high enough to replace his/her SSI and Medicaid benefits. This threshold is based on the:

- Amount of earnings that would cause SSI cash payments to stop in the person's state, called the "base amount" of $23,652; and
- The average Medicaid expenses in that state (different for every state).

Each calendar year SSA establishes and publishes a "charted threshold test" for each state. It is calculated by adding the standard annualized gross earned income that would reduce SSI cash benefits to zero (the 2024 "base amount" of $23,652) plus "the State's average annual per capita Medicaid expenditures." Of the 50 states, Florida has the fourth

lowest average annual Medicaid expenditure for persons with disabilities: $36,734. Added together, the 2024 charted amount for Florida is $60,386.

If the individual earns less than the charted amount, the individual would be automatically eligible for Medicaid. Our client's income of $85,000 is substantially above that. So, there is no automatic eligibility via the charted threshold.

Second 1619b alternative – the individualized threshold amount

If an SSI beneficiary has gross earnings higher than the threshold amount for his/her state, SSA can figure an individualized threshold amount if that person has additional expenses including:

- Impairment-related work expenses;
- Blind work expenses;
- A plan to achieve self-support;
- Personal attendant whose fees are publicly funded; and
- Medical expenses above the average state amount.

Fortunately, Section 1619b also provides an "individualized threshold calculation" in POMS SI 02302.050, that begins with the minimum for Florida ($60,386) and adds in any impairment related work expenses (IRWEs) that the client is paying out of pocket, plus income excluded under an approved PASS, plus "the value of publicly funded personal/attendant care which the individual receives."

Upon an individual's application for determination of 1619b, SSA staff are directed to contact the agency providing or funding the personal care services and determine the cost. For a client needing 24-hour per day care, 365 days per year, that equates, at a minimum of $20 per hour, to a cost of $175,200 per year, plus the Florida charted $60,286, for a total of $235,586. Thus, the client's $85,000 salary is well below the cost to replace it on the private market without even considering the other elements that can be added in to the individualized threshold amount. Unless the client is earning more than $235,586, his HCBS benefits continue.

For computation purposes, SSA provides at POMS SI 02302.300, an "Individualized Threshold Calculation Worksheet – Exhibit" showing the elements and the method of calculation to arrive at the individualized threshold amount of earnings allowed. Various POMS sections preceding the worksheet define each of the worksheet terms. To effectuate the law for your clients, have them file with SSA an application for a determination of Section 1619b status.

Basically, the result is an SSA-established "deemed" eligibility for SSI. The claimant no longer gets an SSI check, but they are deemed eligible for SSI payments via 1619b.

Florida Statutes at Section 409.903(2) incorporates the deemed SSI eligibility concept into persons automatically eligible for SSI-related Medicaid:

> **409.903 Mandatory payments for eligible persons.**—The agency shall make payments for medical assistance and related services on behalf of the following persons … (2) A person who receives payments from, who is determined eligible for, or *who was eligible for but lost cash benefits from the federal program known as the Supplemental Security Income program* (SSI) (emphasis added).

Being deemed eligible for SSI benefits puts the individual on the State Data Exchange (SDX) list—a list of all persons eligible for SSI sent monthly by SSA to Florida AHCA, which requires, under the state's Section 1634 agreement, mandatory eligibility for Medicaid for such individuals beginning with the first month of SSI eligibility, which does not have to be the SSI cash benefit check. See Medicaid Manual Section 0640.0502.

When HCBS Medicaid waiver review comes up, the Medicaid caseworker will see that the claimant is deemed financially eligible for SSI benefits, and HCBS Medicaid waiver benefits will continue.

Conclusion

Medicaid's Appendix A-9 does not include all the ways to maintain eligibility for HCBS Medicaid waiver services. Note that the "qualified severely impaired individual" will receive Medicaid waiver services whether the claimant works or does not work. But by working, the individual contributes his labor to society, participates in the economy, and pays federal income tax and state sales taxes. Our society reaps the benefit of the claimant's talents. Who knows? The 1619b program may give us the next brilliant astrophysicist like Stephen Hawking.

***David J. Lillesand, Esq.**, is founding partner of Lillesand, Wolasky, Waks & Hitchcock, PL, with offices in Miami and Clearwater, Florida. He represents clients in Social Security disability appeals, SSI claims, and Medicaid and other public benefits financial planning, and assists individuals and their families in maintaining eligibility through special needs trusts.*

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The author is indebted to Steve Hitchcock, who first found the 1986 statute defining "qualified severely impaired individual" in Section 1905q of the statute, and to Jack Rosenkranz, who fleshed out the concept and confirmed its current viability, leading to the search in the POMS for the administrative implementation of the individualized threshold amount calculations that saved the client's continuing eligibility for HCBS in spite of his $85,000 per year salary.

D-SNP benefits both Florida Medicaid and SNT beneficiaries

by David Lillesand

on behalf of the Special Needs Trust Committee

D-SNP benefits

Duel Eligible Special Needs Plans (D-SNP) are not only available when doing special needs planning for disabled people. Retired and disabled individuals receiving Title 2 or Title 16 concurrent benefits are also eligible for D-SNP benefits, which combine Medicare Advantage plans and Medicaid managed care plans. D-SNP is the fastest-growing insurance benefit in the country.

Florida AHCA has opted to make D-SNP benefits a required Fully Integrated Duel Eligibility (FIDE SNP) plan in 2023 by requiring that the Medicare Advantage private insurer also be approved as a Medicaid managed care organization. The combination of one insurer providing both Medicare and Medicaid health insurance benefits is designed to promote the maximum coordination of services. No longer will insureds have to question whether a particular service is provided by one or the other separate insurance company.

Private insurance companies have huge television budgets to attract individuals to their Medicare Advantage plans and, within the last couple of years, also advertise for D-SNP clients. Industry reports show exponential growth in D-SNP plans.

In Florida there are more than 180,000 people whose Title 2 retirement or SSDI check was less than the SSI federal benefit rate, thus entitling the person to receive two checks each month, the Title 2 retirement or disability check plus the Title 16 Supplemental Security Income check.

Receipt of each check triggers two separate health insurance programs. Experience had shown that having two

separate insurance plans—one for Medicare and one for Medicaid—often led to missed opportunities to provide the best care due to lack of coordination between them.

With Florida's Fully Integrated Duel Eligibility (FIDE-SNP), lack of coordination should be eliminated. In addition, D-SNP insureds receive a social worker and a care manager who make sure that annual physicals, lab work, and immunizations are done to spot and address minor medical issues before they become major ones. For example, if A1C results indicate potential diabetes, the best course of action is to provide simple medications before the diabetes affects an end organ, like peripheral neuropathy requiring expensive amputation, or heart disease. The private insurance companies make more money by keeping their insureds healthy.

What benefit does the State of Florida receive from promoting D-SNP?

The answer lies in the difference in the State's funding responsibilities for Medicare versus for Medicaid.

Medicaid potentially requires the State of Florida to pay up to a maximum of 50% of the insured's claims under the federal/state joint federal medical assistance percentage (FMAP) for Medicaid. Florida, being relatively poorer than the majority of states, is currently under a 57% federal, 43% state split. Before Medicaid managed care, the Medicaid fee-for-service costs could be astronomical to the State, as they were due at death of the SNT beneficiary to repay the Medicaid lien.

By encouraging maximum participation in Medicare Advantage, and with Medicare being primary, the state's financial responsibility shifts dramatically in its favor.

Medicare Advantage plans are funded 100% by payment by the federal government at a premium of approximately $950 per month to the private Medicare Advantage insurance companies that agree to provide all the services the insureds would receive if they maintained their Medicare Parts A and B. The State pays nothing for Medicare coverage.

Under the D-SNP program, the State pays a much smaller additional premium of approximately $200 per month to provide Medicaid services to the same insurance company providing Medicare.

The State's contribution each month does NOT depend on the patient's actual medical expenses at all. The private insurance company provides all the mandatory Medicare and Medicaid services needed by the individual. The State's total outlay is $200 per month.

The result is shifting the responsibility for some insureds from Medicaid, where the State pays a portion to Medicare, to where the State pays nothing for Medicare coverage.

What is the advantage of D-SNP for SNT beneficiaries?

The answer lies in the expected Medicaid lien at death, an important consideration

by some clients before they agree to put excess resources/assets into an individual special needs trust.

Before Medicaid managed care, neither beneficiaries nor their attorneys had any idea what the client's Medicaid lien would be at death.

Now, under a FIDE-SNP, the attorney can advise the client that the lien at death is repayment to Florida of the $200 monthly premium from the date of funding the d4A SNT until their death. That's it. It is not the repayment of the medical services used, but the cost to the State of Florida to purchase the additional insurance to cover the Medicaid component. That's a known and finite number.

How does the attorney apply for D-SNP?

The attorney doesn't have to! Google D-SNP in your county. Competent clients can directly contact the various private insurers offering D-SNP plans. The insurance companies have staff complete the Medicaid applications necessary for those eligible. If the client wants to compare various insurance company plans in any county, but doesn't want to contact them individually, they should be directed to contact an independent insurance broker for assistance.

***David J. Lillesand, Esq.**, is founding partner of Lillesand, Wolasky, Waks & Hitchcock, PL, with offices in Miami and Clearwater, Florida. He represents clients in Social Security disability appeals, SSI claims, and Medicaid and other public benefits financial planning, and assists individuals and their families in maintaining eligibility through special needs trusts.*

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 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:

https://bit.ly/medicaid-tracking

Capitol Update
by Brian Jogerst

Key issues of the 2024 Legislative Session

The 2024 Legislative Session ended on time on March 8, 2024. The following is a "snapshot" of key issues from the past session, and a detailed update will be provided in the next Capitol Update.

As previously reported, the 2024 Session was the "early" session, meaning the session began in January and ended in March. The 2025 Session will be the "late" session, with session starting in March and ending in May. As such, absent a special session, the Legislature will not be in session for almost a year.

2024 Legislative Session

Legislative statistics

- 1,957 bills and proposed committee bills filed
- 2,196 amendments filed
- 325 bills passed both chambers

Legislative issues

The following are key issues from the 2024 Session:

- 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. While no bill was filed for the 2024 Session, we anticipate the bill may be filed for the 2025 Session.
- Guardianship – Two bills were filed this session dealing with guardianship: Senate Bill 48 by Senator Ileana Garcia (R-Miami) and House Bill 887 by Representative Rita Harris (D-Orlando). The legislation is said to be based upon Karilyn's Law, and Elder Law had concerns with the bill as it will require visitation, will increase risk of exploitation, and will increase the burden on the courts, including requiring a jury trial for guardianship and a redetermination every three years with a different judge. Neither bill received a committee hearing, but they are expected to return for the 2025 Session.
- Supportive Decision Making – Representative Allison Tant (D-Leon County) and Representative Traci Koster (R-Hillsborough County) again filed House Bill 73, Supportive Decision Making. Senator Corey Simon (R-Leon County) filed the Senate companion bill. The legislation seeks to provide an alternative to guardianship for individuals with disabilities. Elder Law has worked with Representative Tant and Representative Koster on this legislation over the past years—and supported the bill throughout the session. The bill was unanimously approved by the Legislature and was sent to the governor for his review and signature.
- Protection of Specified Adults – Representative David Silvers (D-West Palm Beach) and Senator Daryl Rouson (D-St. Petersburg) filed House Bill 515 and Senate Bill 556, which provide that if a financial institution reports suspected financial exploitation of a specified adult, the financial institute can freeze the transaction for a specific period of time. Modeled after the Vulnerable Investors legislation from the 2020 Session, the issue was raised by a Hillsborough County deputy sheriff because of the exploitation he saw in a local retirement community. The bills were different—the Senate bill provided liability protection to financial institutions if they meet the criteria in the bill and freeze the transaction while the House bill did not include the liability protection. Senate Bill 556 passed the Legislature on the final day of session. Elder Law is thankful to Representative David Silvers, Senator Daryl Rousson, and Senator Jim Boyd for the adoption of this bill—and more importantly another tool to help prevent exploitation of our elders and vulnerable adults.
- Schemes to Defraud – Representative Kevin Steele (R-Hudson) and Senator Jonathon Martin (R-Fort Myers) filed House Bill 1171 and Senate Bill 1220, which reclassify the penalty for committing specified offenses of schemes to defraud against a person 65 years of age or older, or against a person with mental or physical disabilities. In addition, the bill provides that a person whose image or likeness is used without his or her consent in a scheme to defraud may file a civil action in a court of competent jurisdiction to recover damages caused by the use of his or her image or likeness. Late in the session, Elder Law actively worked with the sponsors of the bills to amend their bills. By way of background, the financial exploitation industry is getting more sophisticated in their methods to exploit victims. By hiding behind internet walls or apps, the exploiters have become quite adept at

avoiding detection, identification, and prosecution—and are able to avoid being served with an injunction petition. An amendment was proposed to serve the alleged exploiter via the same communication style the respondent used to correspond with the victim. Once served in this manner, the respondent would have 30 days to appear to assert the non-exploitive nature of the transaction. Because of the limited amount of time remaining, the amendment was not offered this session. Elder Law is grateful to Senator Martin and Representative Steele for their staunch support and their willingness to pursue this legislation to ensure additional protections are provided to our vulnerable adults. We look forward to working with them during the 2025 Session.

Your help is needed

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

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.*

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/FloridaBarElderLaw-Section/*.

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

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.

LEGALLY Protect Your Assets *Hire an Elder Law Attorney*

Find an Elder Law Attorney: www.eldersection.org & www.afela.org

AFELA advocate educate action
The Academy of FLORIDA ELDER LAW ATTORNEYS

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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Practice Management
by Audrey Ehrhardt

Is there a way to unlock seamless communication in your law practice? Or is it just a fairy tale?

by Audrey Ehrhardt

Life would be a whole lot easier, right?

Imagine a world where your legal team knows exactly what needs to be done, when, and how, without you having to micromanage every detail. It's not about developing psychic abilities so they can read your mind (although it may seem like it) but all about harnessing the power of workflows in software and streamlining automation to ensure they represent exactly what you want done, every step of the way.

This concept isn't just a futuristic fairy tale; it's a realistic strategy that can significantly enhance efficiency, reduce errors, and save countless hours. But how do you do it? How do you make sure the process you create is followed? I completely understand your concerns and want to delve into how you can create a "mind-reading" team through harnessing the power of the law practice technology you have (or that you want to invest in for the future of your practice).

Let's start with the power of building predictive workflows. Workflows are the backbone of any well-organized legal team. They are the predefined paths you create where work follows, ensuring consistency, quality, and timeliness. By setting up these workflows in your practice management software, you create a virtual map that guides your team through tasks and responsibilities, as if they could read your mind. We all know there is no one way to run a law practice, or we would all be doing it that way. Workflows can tell your legal team exactly what you want every step of the way.

To build your legal workflows for your practice areas and legal services, you may wonder where to start. I hear you! Let me share just a few of the things you want to be sure to include:

- **Case initiation.** Define the steps involved from the moment a new case is accepted. Who needs to be notified? What documents need to be prepared? What are the immediate next steps? A well-designed workflow ensures everyone knows their role without direct intervention.
- **Document management.** Automate the creation, approval, and storage of documents. Ensure the right templates are used and final versions are stored correctly. With these workflows, your team can produce accurate, professional documents efficiently.
- **Streamlining automations for efficiency.** Automation takes the guesswork out of daily tasks. It's about setting up systems that automatically handle routine, repetitive tasks, freeing your team to focus on the complex legal work that requires a human touch.
- **Scheduling and reminders.** Automate appointment scheduling and reminders. Ensure everyone knows their commitments and deadlines without needing constant reminders.
- **Email sorting and response.** Use automated rules to sort incoming emails and even provide standard responses to common queries. Your team can concentrate on messages that require personal attention.

These are your first steps to creating the "fairy tale" legal team that you dream is out there and you know you desperately need. When your workflows and automations are set up effectively, your team operates seamlessly, almost as if they can read your mind. If you haven't made your first hire yet, this strategy is not only going to help you hire and onboard quickly but ensure you get what you need the first time.

The idea of a legal team that gets it done right the first time, every time, might sound like a stretch, but with the right workflows and automations, it's closer than you think. By harnessing the power of technology, you can create an efficient, cohesive team that understands exactly what needs to be done and when. The result is a smoother, faster, and more enjoyable way to work, not just for you, but for everyone involved. So, take the first step today, and start transforming your legal team into the mind-reading powerhouse you know it can be.

***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. 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.*

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Tips & Tales
by Kara Evans

Personal service contract with a trust or an escrow agreement A complex mission*

The tale: Ms. Sarah has a problem. She has been her mother's caregiver for the past several years. Mother's needs have been increasing, and Ms. Sarah needs assistance to keep her mother at home. She has heard that Medicaid has a long-term care program that will provide help at home for zero out-of-pocket cost. But Mother has $226,236 in a savings account. That money, along with Mother's and Sarah's small income, is used to pay the home expenses, including taxes and insurance. If that money is lost, Mother and Sarah will eventually become homeless. If she puts the money in a pooled trust, the funds will be lost at Mother's death and then Sarah will lose the home she is supposed to inherit. Sarah needs you to find a way for her to get help for her mother and preserve those funds.

You suggest a personal service contract. After all, Sarah has been providing care all along. She can and should be paid for her services. Once the funds are in Sarah's name, she can use them to maintain the home. But Sarah is disabled and unable to work. She has extensive medical needs herself. She receives SSI and Medicaid. If she loses the SSI, she will lose her Medicaid. Then the home would be the least of her worries.

Your mission, should you choose to accept it, is to find a way to get the mother long-term care benefits under Medicaid and preserve the funds so Sarah can keep her home, without interfering with Sarah's own benefits.

The tip: You want to recommend a personal service contract with some kind of trust or escrow agreement to hold the funds and pay them out as the services are provided but keep the income low enough so that Sarah keeps her SSI and Medicaid. You must navigate several obstacles on your way to completing this mission.

There are no real guidelines on how to create an escrow/trust arrangement for a personal service contract. However, there are Fair Hearings denying these agreements that should be taken into consideration.

The Fair Hearings cited here are from between 2011 and 2016, but the laws and rules the denials are based upon have not changed and should be carefully reviewed when attempting to use this technique. Highlights from select hearings are summarized below, with mostly red flag emojis (🚩) and one thumbs up emoji (👍) for emphasis.

Appeal No. 11F-03529

- Care trust was established by Medicaid applicant's children and stated that the Medicaid applicant was the "Life Beneficiary." The trust also included disbursements for "supplemental nursing care, physical therapy care, rehabilitative care and similar care." 🚩
- At the hearing, testimony was given that the funds were not used to pay for personal service but were used to pay for the nursing facility, home maintenance, taxes, and insurance. 🚩
- Language (dicta?) in the hearing transcript states that the respondent (DCF) has "no issue with the existence of the Trust or the Contract for Personal Services. Both trusts and contracts have a reasonable place in accommodating ICP eligibility at times." 👍
- Ultimately, it was the fact that the trust allowed the funds to be used for the Medicaid applicant's expenses that made the trust an available resource.

Appeal No. 12F-08233

- In this case, the personal service contract stated that the care provider "will pay all costs and expenses of Client's care entertainment, household, housing, personal needs and obligations out of Client's funds to the extent such funds are available to Provider." In addition, the escrow/trust agreement stated, "any portion of the Escrow Account may be applied for Client's 'Supplemental Needs,' which includes without limitation unreimbursable dental care, unreimbursable medical expenses, nonmedical equipment, unreimbursable rehabilitative therapy, supplemental nursing care, personal care and assistance." 🚩
- This contract and escrow agreement read more like a supplemental needs trust than an escrow arrangement to compensate for personal services. DCF agreed, citing F.S. 409.910, which provides "It is the intent of

the Legislature that Medicaid be the payor of last resort for medically necessary goods and services furnished to Medicaid recipients. All other sources of payment for medical care are primary to medical assistance provided by Medicaid." Again, the trust was deemed an available resource due to the language allowing the funds to be used for the benefit of the Medicaid applicant.

Appeal No. 16F-03799

- The Medicaid applicant is listed as the grantor of the trust. The trust document defined the services to be provided as "personal care, support and maintenance."
- The trust also stated, "The Grantor intends that he or she be treated as the owner of the Trust. Estate (both income and principal) for the income tax purposes ... Accordingly, at any time, the Grantor may borrow the income or corpus of the Trust without adequate interest or security ... The Grantor shall have a substitution power or right to reacquire any assets of the Trust by substitution of other assets of equivalent value."
- Citing "1640.0312.01 Availability of Trusts (MSSI, SFP). The availability of funds held in a trust depends on the conditions (wording) of the trust and whether the individual is the trustee or beneficiary of the trust." The conclusion stated that because the trustee had "the ability and responsibility to use the money in the Trust to pay for support and maintenance services," the trust was an available resource under both 42 USC 1396p(d)(3) and POMS SI 1730.048, which state, "If there are any circumstances under which payment from an irrevocable trust could be made to or for the benefit of the individual, the portion of the principal from which (or income on that principal) payment to the individual could be made is considered resources."

The availability of the trust assets to pay for support and maintenance coupled with the rights reserved by the grantor in the trust principal made this trust an available resource.

If the purpose of the arrangement is to provide for the Medicaid applicant's home expenses, personal care, support, and maintenance, as the above cases illustrate, the proper strategy is a pooled trust or a self-settled supplemental needs trust. A personal service contract, used with or without an escrow arrangement, is the wrong tool for the job.

The purpose of a personal service contract is to compensate the individual providing services. Any language directing the funds to be used to provide for the Medicaid applicant will violate the intent of this valuable tool. And yet, there are situations where a personal service contract is the right tool as well as situations where an escrow arrangement is not only desirable but necessary. So, how can we help Ms. Sarah?

The above cases rely heavily on the law cited below to determine that the assets in the trust/escrow agreements were available resources to the Medicaid applicant:

- F.S. 409.910 provides the intent of the Legislature that Medicaid be the payor of last resort.
- 20 CFR 416.1201(a) counts assets an individual owns and could convert to cash to be used for their support and maintenance.
- 42 USC 1396p(d) discusses funds transferred to a trust. (c) Funds transferred into a trust, other than a trust specified in 42 U.S.C. § 1396p(d)(4), by a person or entity specified in 42 U.S.C. § 1396p(d)(2) on or after October 1, 1993, shall be considered available resources or income to the individual in accordance with 42 U.S.C. § 1396p(d)(3) if there are any circumstances under which disbursement of funds from the trust could be made to the individual or to someone else for the benefit of the individual. If no disbursement can be made to the individual or to someone else on behalf of the individual, the establishment of the trust shall be considered a transfer of resources or income.

All of the above cases were denied because DCF was able to prove that the assets in the trust were countable to the Medicaid applicant by virtue of language in the documents that directed the funds be used to pay the Medicaid applicant's expenses. Not one of the decisions discusses an uncompensated transfer. We know that personal care trusts, properly written, are considered to be a transfer for value. That is not where the problem lies. The problem is the direction to use the funds for the benefit of the Medicaid applicant.

Elder law attorneys are using escrow/trust arrangements. The question is, what are they doing (or not doing) that was done (or not) in the above instances?

Again, there are no real guidelines on how to create an escrow/trust arrangement for a personal service contract. However, here are four things to be taken into consideration when attempting to complete this mission.

1. The grantor should not be the Medicaid applicant.
2. The lump sum should be paid directly to the escrow holder or trustee.
3. The language in the trust/escrow agreement should prohibit the Medicaid applicant from accessing the income or principal of the trust for any reason; from being a trustee, becoming a trustee, or changing the trustee; and from amending or revoking the trust or having any reversionary interest in the trust.
4. The document should provide for a schedule of payments to the caregiver based on the terms of the personal service contract, or require invoices for disbursement of funds.

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Tips and Tales. . .
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It is always possible that DCF will interpret the words from 42 U.S.C. § 1396p(d)(3) "if there are any circumstances under which disbursement of funds from the trust could be made to the individual or to someone else for the benefit of the individual" to mean that payment for a caregiver is a direction to use the funds for the benefit of the Medicaid applicant. However, the Fair Hearings cited above give no such indication. I take heart from the language in Appeal No. 11F-03529 that states, "trusts and contracts have a reasonable place in accommodating ICP eligibility at times." But it is a fine line.

Even if we manage to write a perfect contact and escrow/trust arrangement that satisfies DCF, we still must navigate around Ms. Sarah's benefits.

Ms. Sarah receives her full SSI of $942 each month. She is allowed some earnings. The first $20 received each month is ignored. The first $65 of earnings is ignored. After that, only half of the income earned over the first $65 is counted. Ms. Sarah only needs one dollar of SSI to keep her Medicaid eligibility.

Mother is 78 years old. Her life expectancy is 11.09 years. She has $226,326 in the bank. Ms. Sarah provides 80 hours of services to her mother each month. She can reasonably be paid $21.25 per hour. This will result in a monthly income of $1,700.

SSI benefit.....$943
Less first $2 ..... ($20)
Less next $65 ..... ($65)
Less 1/2 earnings over $65.....($850)
SSI benefit..... $8

If Ms. Sarah can retain $8 of SSI benefit each month, she can increase her earnings from $943 to $1,700 and still retain her Medicaid benefits.

Mission accomplished!

**There is no guarantee that an escrow/trust agreement written in accordance with the information in this article will be successful. In addition, there are numerous income tax issues not addressed herein that need to be considered. Please see Michael Lampert's article in this edition for more insights on this complicated topic.*

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Tax Tips
by Michael A. Lampert

Taxation of escrow agreements with Medicaid personal service contracts

I was asked to write a companion article to be published at the same time as Kara Evans' article on the use of escrow agreements with personal service contracts (PSC). Like many topics, it is first necessary to have a basic understanding of the underlying transaction, as well as a basic understanding of how the underlying transaction is taxed, before moving on to the more complex issue of the taxation of escrow agreements used in conjunction with personal service contracts.

Medicaid planning often involves utilizing various "spend down" and other techniques to meet certain qualification tests to qualify for Medicaid. Care is needed to ensure these techniques do not create transfers that inadvertently violate certain "look back" periods that could disqualify the applicant from receiving government financial needs-based benefits, in this case, Medicaid.

One technique sometimes used is a personal service contract. The person planning to apply for benefits (let's call them the client) enters into a contract with one or more people to provide certain services for them. Typically, the services are supplemental to what government benefits would cover, such as beyond what a skilled nursing facility might provide. Some examples of services commonly included in a PSC are coordinating medical care; coordinating, and often handling bookkeeping and bill paying; laundry; coordination and oversight of the residential setting, etc.

The amount to be paid under the PSC takes into account life expectancy of the client, services to be provided, a reasonable rate, and other factors to determine a reasonable amount to pay for what is typically a lifetime service agreement. The client pays the service provider a set amount—for value—such that the amount paid is no longer part of the client's assets in determining Medicaid eligibility yet is not deemed to be an impermissible transfer. Why? Because when properly drafted, the client is receiving fair value for the paid-for services.

And yes, the payment under the PSC is taxable income to the service provider. IRC § 61 defines gross income as "all income from whatever source derived including (but not limited to) the following items: (1) compensation for service, including fees, fringe benefits, and similar items…."

Remember, not receiving a W-2 or 1099 does not mean the income received is not taxable. While there are certain exceptions, such as for gifts, it is hard to argue that a payment under a PSC, a binding contract that is being presented to a government agency to obtain government benefits, is a gift to the payment recipient from the client.

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Two challenges sometimes arise. One is that the receipt of the payment is taxable income to the service provider. Second is the client's concern that the service provider will not provide the service, keeping in mind the service provider is often, but not always, a family member.

Enter the escrow agreement. With an escrow agreement, a third party holds the funds and pays them to the service provider over a period of time. This can provide the client with some assurances the services actually will be provided. It can sometimes also provide deferral of the income tax to the service provider.

Timing of income

So, how and when are payments under the personal service contract taxed? More specifically, when is an item of income included in the recipient's taxable income? (Note that this article is not addressing deductibility of the payment by the client.) Let's explore.

Cash versus accrual

Taxpayers are either cash-basis or accrual-basis taxpayers. Many businesses are accrual-basis taxpayers, and individuals are generally cash-basis taxpayers. While there are exceptions, and exceptions to the exceptions, Treasury Regulation § 1.451-1 addresses when an item of income is includable as taxable income for accrual-basis taxpayers. It is often referred to as the fixed and determinable rule.

The regulation states in § 1.451-1 that if the liability for the amount to a taxpayer of a specific amount of income is fixed, if the amount thereof can be determined with reasonable accuracy, and if such taxpayer is an accrual-based method taxpayer, the requirement for income inclusion has been met, regardless of whether the payment has been received. The critical point is that once an accrual-method taxpayer has a right to receive income, there is no real opportunity to defer taxation.

Therefore, for deferral of income purposes, once there is a right to receive the income that occurs, an attempt to defer the income is generally too late.

But for cash-basis taxpayers, the rule is a bit different. Cash-basis taxpayers generally only include the income when it is actually or constructively received.

Reg. §1.451-2(a) addresses "constructively received" as follows:

> (a) General Rule. Income, although not actually reduced to a taxpayer's possession, is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions.

How do we apply this to the taxation of personal service contracts, and more specifically, escrow agents? Clearly, simply entering into a PSC is not enough to cause taxation to the service provider. This assumes the service provider under the PSC is a cash-basis taxpayer, which is virtually always the case. And once the funds are paid to the service provider, the taxable income event has occurred.

It is the middle ground where the funds are not yet received that is the source of both case law and disputes with the IRS. (And do not forget state and local income tax implications too!)

How can the service provider defer the receipt of the income? The result is facts and circumstances dependent. What is clear is that the intended recipient cannot have constructive receipt of the funds. The recipient cannot simply not cash the payment check, for example, as they have constructive receipt of the funds.

Where does an escrow agreement come in? It creates a scenario where a third party controls when the service provider receives the funds. No actual or constructive receipt equals no taxable income at that point.

Rule 1

An escrow cannot defer income where it is self-imposed by the taxpayer (*See Reed v. Com* 723 2d. 138 (1st Cir. 1983).

This means the service provider cannot take the funds and then create an escrow agreement. It must be done before the intended recipient has any control over the funds.

Caveat: This article does not address the special reporting and other rules regarding household and other employees.

Most of the time, such rules do not apply in the common intra-family personal services contracts.

Caveat: Do not forget state and local income taxes. Sometimes service providers are residents of a jurisdiction with a state and even a local income tax.

Interestingly, in the event the payment to the service provider would otherwise be deductible by the client, it appears that the payor might be able to deduct the payment made into the escrow account when it is made, if certain conditions are met. IRC 461(F) deals with disputed liabilities.

Rule 2

The service provider should have little to no dominion or control over the amounts in escrow. Remember the Internal Revenue Code requires cash-basis taxpayers to include taxable income in the year actually or constructively received.

(Suggested) Rule 3

Consider placing only cash into the escrow account. If securities or other payments are utilized, care must be taken not to give the service provider constructive control over the asset placed in escrow.

In *U.S. v. Fort*, 107 AFTR 2d 2011-739 11th Cir. 2011, the court addressed various factors in holding that the stocks placed in escrow were treated as constructively received. (This case was not a Medicaid planning case. It involved stock from a partner in a business and other details. However, the lessons hold true.)

In *Fort*, factors included:

- The account for which the broker held the escrow was in the taxpayer's name.
- The taxpayer had dividend and voting rights to the stocks.
- The taxpayer bore the risk in the stocks going up or down in value.
- The stocks would only be forfeited if the taxpayer quit (employment), violated the contract, or was fired for cause.

The court went on to note that the taxpayer had control over performance, so even the being fired restriction exhibited control over the escrow account.

Rule 4

The service provider must not be the escrow agent for all the reasons included in Rule 3. And of course, the client must not be the escrow agent because it may defeat the point of the Medicaid planning in properly removing the asset from the client's Medicaid controllable assets.

Is that all?

Sorta, kinda. If the escrowed funds are in a non-income bearing account, there is one challenge removed: reporting the income.

If the escrowed funds are invested, then the income will need to be reported. Typically, the escrow agent will open an account, obtain an Employer Identification Number (EIN), file an income tax return, and pay from the escrow account any income tax due.

***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.*

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.**

Case Law

by Elizabeth J. Maykut

Daughter-successor trustee who lived in trust property without paying rent breached fiduciary duty.

Kersey v. Abraham, 49 Fla. L. Weekly D110 (Fla. 6th DCA January 5, 2024)

Issue: Whether the daughter who served as successor trustee of her deceased mother's irrevocable trust breached her fiduciary duty by failing to distribute trust real property and instead occupying it without paying rent to the trust.

Answer: Yes.

Becky Kersey was the sole successor trustee of her mother's trust, which became irrevocable upon her mother's death. The only trust property relevant to this appeal was the Boggy Creek Property (BCP), the grantor's former residence. The trust directed the trustee to distribute the BCP two-thirds to Kersey and one-third to her brother, Kenneth Abraham. The remainder of the corpus was to be distributed evenly amongst them. Instead of distributing the BCP, Kersey moved into the main house on the BCP, but never paid rent to the trust.

Abraham sued Kersey for breach of fiduciary duty for engaging in self-dealing, squatting on trust property, and failure to distribute trust assets. He also moved to remove Kersey as trustee for breach of fiduciary duty, self-interest, and failure to provide an accounting. Kersey eventually resigned, and the parties agreed to the appointment of a professional trustee.

The trial court found Kersey violated her fiduciary duties by failing to pay rent for occupying the BCP. After accepting the testimony of Abraham's expert witness as to the reasonable rental rate, it entered a money judgment for the amount of rent Kersey should have paid and the amount of rent Kersey collected from the tenant who lived in the guesthouse on the BCP.

After finding that the trust continued to hold title to the BCP, the Sixth District held Kersey had breached her fiduciary duty by occupying the BCP without compensating the trust. While it affirmed the amount charged against Kersey for her occupation of the main house and for the amount of rental income she had collected from the guesthouse tenant, it reversed the trial court's award of rent for the portion of time after Kersey resigned as trustee, finding that the new trustee had never demanded compensation from her for that period, and also held that the rental income should be divided two-thirds to Kersey and one-third to Abraham.

Practice tip: Counsel for a trustee should specifically advise the trustee of his or her duties and follow up with the trustee to make an effort to ensure his or her advice is being followed. Even a beneficiary who lives in property held by a trust must pay rent to the trust, unless there is a contrary agreement with the other beneficiaries.

Amendments to trust that were not delivered to co-trustee were invalid where trust language required delivery to trustee and required two trustees who must act unanimously.

Grassfield v. Grassfield, 48 Fla. L. Weekly D2317 (Fla. 2d DCA December 13, 2023)

Issue: Whether amendments to the trust that were not delivered to the co-trustee, which was required by trust language, satisfied the "substantial compliance" requirement of the Florida Trust Code, which provides that a settlor may amend a revocable trust by "substantial compliance" with a method provided in the terms of the trust.

Answer: No.

In opening this opinion, the Second District states: "[t]he history of this case is long and winding[.]" In 2003, Bruce Grassfield created a revocable trust that required a "unanimous act" of two trustees for "all decisions." It also included the following power: "The Donor reserves the power . . . to . . . amend . . . this Trust . . . by an instrument, in writing, signed by the Donor, acknowledged before a Notary Public, and delivered to the Trustee during the Donor's lifetime."

In 2003, Bruce nominated himself and his financial advisor as co-trustees. In 2016, Bruce amended the trust to remove the financial advisor and to name himself and his son, Paul Grassfield, as co-trustees. In August 2018, Bruce amended the trust again to remove Paul as co-trustee, leaving Bruce as sole trustee. Bruce also named his then-girlfriend, Violetta, as primary beneficiary of the trust. After marrying Violetta in late 2018, Bruce amended the trust again in 2019 to transfer additional assets to Violetta as beneficiary and to name Violetta as successor trustee.

When Bruce passed away in August 2019 at the age of 92, Violetta filed a probate action. Paul opposed the probate action and filed an action seeking to invalidate the 2018 and 2019 amendments alleging neither of them had been delivered to him as co-trustee, which was

required by the trust instrument. The trial court ruled in Paul's favor finding the 2018 and 2019 amendments invalid thereby establishing the 2016 trust as valid and enforceable.

Section 736.0602(3)(a), Florida Statutes, provides that a settlor may amend a trust by "substantial compliance with a method provided in the terms of the trust." The issue here was whether Bruce had substantially complied with the terms of the trust when he executed the 2018 and 2019 amendments. Although Violetta argued that the requirement that any trust amendments be delivered to a trustee was a nonessential requirement, the Second District disagreed, citing the fact that the plain language of the trust required that there always be at least two trustees and that any trustee who was being removed by the grantor must be notified of removal. Clearly, it was the grantor's intent to always have two trustees and his method of amending the trust required both a written, signed, notarized instrument and delivery to the trustee. Finding that Paul was never provided written notice of the 2018 and 2019 amendments, the Second District affirmed the final judgment invalidating the 2018 and 2019 amendments to the trust.

Practice tip: Read the trust language when amending a trust and then comply with it; do not simply follow your "usual procedure" to do so. If the trust requires delivery of the amendment to a current trustee, always provide notice in such a manner that you can prove it was accomplished.

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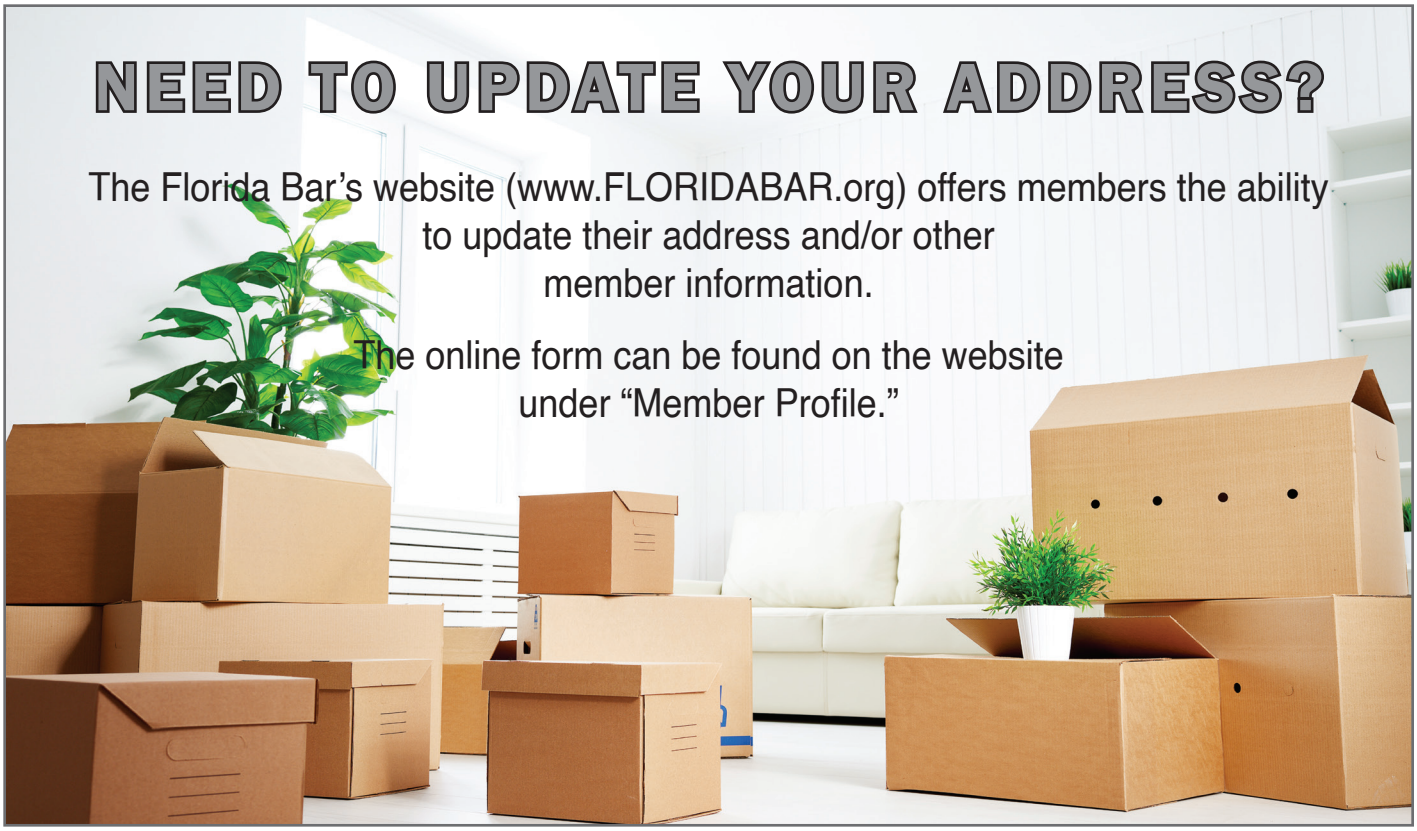

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