

The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

Featuring:

- *Supported decision-making: Florida's alternative to guardianship*
- *Breaking the weld: Guardian's attorney fees*
- *Rule of Judicial Administration 2.215(g) and languishing guardianship matters*
- *Two homes … homestead tax traps*
- *Case study: Intestate probate with a half-blood heir*

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The Elder Law Advocate

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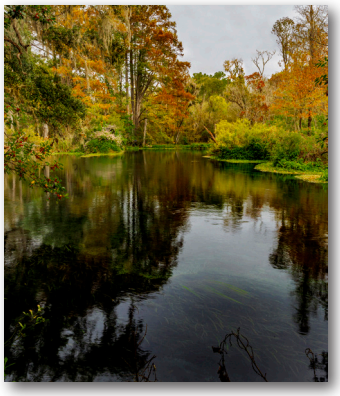
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The Elder Law Advocate will be glad to run corrections the issue following the error.



ON THE COVER
The Suwannee River
Randy Traynor Photography

12/2024

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Submit Articles

The deadline for the SPRING 2025 EDITION is FEBRUARY4, 2025. 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 Shannon M. Miller

Finishing strong in 2024 and looking ahead to 2025

First, to our members who have suffered the trauma associated with hurricanes Helene and Milton, we hope you are recovering—sadly, we had some in our elder law family lose homes, suffer damage to businesses, and other serious losses. Our hearts are with you during these challenging times.

As you may be aware, Bill Johnson has stepped back from his duties as chair of our section due to health reasons. Pursuant to the bylaws, those of us in the Executive Committee will finish out our current terms, with me serving as both chair and chair-elect. We will continue our leadership succession next year, with section members' approval.

We have just returned from an amazing Elder Law Section Retreat in London. We visited the Middle Inn of Court, where being a lawyer all began in the 1100s, viewed the Magna Carta, and had lunch with the barristers and judges in a Harry Potter style hall. It was amazing. We also learned a lot about what elder law looks like in Great Britain, and honestly, it made me realize how lucky we are to practice elder law in Florida.

Save the date for our next Elder Law Section Retreat October 2025 in Sedona, Arizona … think energy vortexes, breathwork journeys, yoga sunset hikes, and food that will take you beyond the veil. This one will be a mindfulness/self-care journey for the senses, and our continuing education will be centered on best practices for healthy living for us and for our clients. Not to be missed!

We enjoyed our ELS virtual open house in early November, which highlighted all the section committees and general activities of the section. This open house provided an opportunity for people who are interested in our section to learn more about us and for those in the section to become more involved.

The Elder Law Section Annual Update will be February 13-15, 2025, at the Renaissance Orlando Resort and Spa in Lake Buena Vista (not by SeaWorld). It will be a mixture of cutting edge topics, mentoring, practice exit strategies, and the usual stuff. We will also spend some time dialing into some of the resources available through the Bar for members in struggle.

The Essentials day, Thursday, February 13, will consist of intensive mentoring in the first half of the day and an afternoon session reserved for practitioners entering the sunset of their practices. We are hoping to get you off the couch to participate and meet up with your collegial friends IN-PERSON—yes, there will be trivia, and did someone say karaoke meetup? We will also have updates on legislative issues, what to do with guns, what is life care planning, and a special presentation on the psychology of undue influence. You do not want to miss it this year. Plus, bring your sweetie for a different type of Valentine's Day …

On the legislative front, our **Stop the Scammers** legislation has sponsors and will be filed shortly, probably by the time you read this. RPPTL has taken a position of no comment and will not be opposing the bill, which is very good news. We adopted a lot of their suggestions for changes to the bill, including the official name, "Serving the unascertainable respondent." Take a look at the White Paper on the bill to learn more. **We are once again the first in the entire nation to create legislation that addresses unknown scammers.** Our section is truly innovative, driven, and amazing. I am so proud to be part of this group that actually makes a real difference in the lives of seniors and those with special needs.

On a less happy note, we terminated our contract with Sachs Media due to budget constraints. We are really feeling the difficulty of limited social media exposure. We are hoping to engage a new marketing and social media committee and are looking for a committee chair and a committee—this will be a great committee for people interested in learning how to create social media content and expand their marketing exposure. The PR committee will be "as needed" to address issues that are brought, and Britton Swank and Heather Kirson have agreed to stay on as our spokespeople. Thanks, friends!

Finally, one of the principles of the yoga practice (niyamas) is the practice of self-study/examination. This is called svadhyaha. My wish for you as you center and reflect on your life and career journey is that you find santosha (contentment) in knowing the good work you are doing in the world and for yourself. Yes, I am hoping to lead a yoga class and maybe a yoga nidra journey before bed at the Annual Update … stay tuned.

Namaste,

Shannon

ELDER LAW SECTION OF THE FLORIDA BAR

WHITE PAPER ON SUBSTITUTE SERVICE ON UNASCERTAINABLE RESPONDENT

"STOP THE SCAMMERS" BILL

I. SUMMARY

The proposed amendment to the exploitation injunction statute (825.1035) submitted by Elder Law permit victims (Vulnerable Adult--elders and persons with disabilities), or his or her representative, to file an injunction to stop and prevent the transfer of their money even if the scammer/exploiter is unidentifiable or cannot be located. This bill does not have a fiscal impact on state funds.

II. CURRENT SITUATION

Currently, Fla. Stat. 825.1035 requires identification and personal service pursuant to Ch. 48 of all pleadings filed in the Exploitation Injunction petition.

The current problem:

1. Scammer targets Vulnerable Adult (Adult over 65 or Adult with specified disabilities), and succeeds in having Vulnerable Adult transfer funds using untraceable technology, like What's app, Facebook Messenger, dating app messenger, or other methods.

2. Using strategic algorithms and shared intelligence, a Bank identifies the transaction as a scam, and pauses the transaction pursuant to their internal fraud investigation procedure. Bank reaches out to account owner and may pause the transaction pending contact, and reach out to a named trusted contact.

3. The Vulnerable Adult often has attached to the scammer/delusion and believes it is real and There is often insufficient time to obtain an emergency guardianship or other court intervention prior to the bank lifting any pause on the transaction, as they have no authority to continue holding the transaction.

4. There is often insufficient time to obtain an emergency guardianship or other court intervention prior to the bank lifting any pause on the transaction, as they have no authority to continue holding the transaction.

5. The Exploitation Injunction Statute (825.1035) was created to apply a temporary freeze on a Vulnerable Adult's assets in these emergent situations; however, the Respondent/Scammer/ Exploiter must be named in the Court filing and be served with the temporary injunction Order in order for the Vulnerable Adult to prevent the funds from being sent to the Scammer/Exploiter.

6. Without being able to name the Scammer/Exploiter and serve him/her, the filing is dismissed, or is not filed due to the inability to name the Respondent/proper party.

III. EFFECT OF PROPOSED CHANGES

Under the proposed exploitation injunction amendment, we create a new opportunity for the use of the Exploitation Injunction statute to address the unidentifiable Scammer/Exploiter, or Scammer/Exploiter avoiding service of the initial Injunction Order, meaning we can prevent transactions from leaving Banks and other financial institutions even if we do not know the name of the scammer/exploiter, and do not have a known location to serve them.

How the Scam Scenario would work under the new amendment:

1. Same scenario as above; however, when the Trusted Contact learns of the Scam, they can file the Exploitation Injunction with the Court (the statute does not require a filing fee or that an attorney be retained to assist with the filing), and when they file the initial Temporary Petitionthey submit an affidavit detailing the Scam/Fraud, and information about the Scammer, attempts made to contact the Scammer, method that Scammer has contacted Vulnerable Adult.

2. Then the Trusted Contact/Petitioner must provide the Temporary Order of Injunction and the original Petition to the Scammer through the same means that they contacted the Vulnerable Adult, giving them notice of the asset freeze and the final hearing on the exploitation injunction matter.

3. Unlike a normal Exploitation Injunction where the Court would immediately enter an Order returning the funds to the Vulnerable Adult or fiduciary for the victim, in these Substitute service cases, the Court will hold the disputed transaction funds Order for thirty days, giving any legitimate Respondent/ Transaction recipient time to enter an appearance in the matter to address the fund transfer. This additional layer of protection for legitimate transactions addresses any concerns related to due process.

SECTION-BY-SECTION ANALYSIS

A. The provisions that have been changed are in 825.1035, which provides a quick and effective means to protect Florida's vulnerable adults from exploitation, without the intervention of state agencies, law enforcement, or privately paid lawyers. The proposed provision explained below will continue to grow the existing exploitation injunction statutes effectiveness.

B. (7)(a) Carves out an exception to traditional service of process to accommodate modern scams and frauds perpetrated against Vulnerable Adults.

C. (8)(a) Defines the scammer or fraudster as an unascertainable respondent and why they cannot be served by traditional means of service of process.

D. (8)(b) Sets forth the requirements that a Petitioner must meet to obtain this limited exception to traditional means of service of process. It is impossible for law enforcement to effectuate service of process on an unascertainable respondent due to limitations of traditional means of service and jurisdictional limitations placed on law enforcement.

E. (8)(c) Defines the limited alternative means of service upon the unascertainable respondent. It limits the application of this alternative means of service to a specific situation and specifies the exact service requirements necessary to serve an unascertainable respondent. This requires a court order before alternative service can be utilized.

F. (8)(d) requires a Petitioner to provide proof that the alternative service utilized has been carried out in accordance with the court's order authorizing the alternative service.

G. (8)(e) Requires that any transaction paused or frozen due to the presence of an unascertainable respondent or the need for the alternative means of service must be held for 30 days before the court can order disposition of disputed transfer. This will allow for a respondent that has been identified as an unascertainable respondent to come forward and present evidence of a defense in the injunction proceeding.

H. (8)(f) Instructs the judiciary to interpret this subsection to benefit and protect vulnerable adults.

IV. FISCAL IMPACT

A. ON STATE AND LOCAL GOVERNMENTS

The proposal may have a positive fiscal impact on state or local governments by eliminating the need for law enforcement to expend resources attempting to serve an unascertainable respondent by traditional means of service of process.

B. ON PRIVATE SECTOR

We believe this will have a positive fiscal impact on the private sector by preventing scammers from taking money from seniors through scams. We believe it will have an additional positive impact on banks, by preventing scammers and fraudsters from taking money from Vulnerable Adults (elders and persons with disabilities) and reducing the bank's liability for freezing accounts or stopping fraudulent transactions.

V. CONSTITUTIONAL ISSUES

The proposal has no Constitutional issues.

VI. OTHER INTERESTED PARTIES

- RPPTL Section
- Business Law Section
- Public Interest Law Section

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
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THE FLORIDA BAR
ELDER LAW SECTION

Supported decision-making: Florida's newest alternative to guardianship

by Caitlyn Clibbon

submitted on behalf of the Legislative Committee

In an election year, few things feel uncontroversial. Supported decision-making (SDM) is a refreshing change; the bill (HB 73) creating this new statutory alternative to guardianship received unanimous support from the Legislature and was signed into law this summer after years of advocacy efforts. Despite being a simple concept, it is an important new tool for preserving the rights of our clients.

The basics

SDM is a formalization of the decision-making process many of us use when making a big decision. We seek information and advice, we weigh the risks and benefits, make a decision, and then implement the decision. For some, including those with cognitive impairments, this process may not come naturally. Codified in Florida statute as a non-durable power of attorney, SDM can be used to shore up those skills and prevent the need for substitute decision-making.

SDM as an alternative to guardianship

Envision a ladder that represents a continuum of supported and substitute decision-making. If the top rung is plenary guardianship, involving a removal of all delegable and non-delegable decision-making rights, SDM would be the bottom rung. The least restrictive alternative, it allows for no substitute decision-making but does allow the supporter to assist the decision-maker in relaying their decision.

The non-durable nature of SDM agreements is their superpower. Because they do not survive incapacity, there is no role for substitute decision-making in the context of SDM. And because of their non-durable nature, it is best to include SDM as a package of guardianship alternatives.

For a client who expects their capacity to decline over time, an SDM agreement can be the first line of defense against removal of rights. Once the client lacks the capacity to engage in SDM, a previously executed durable power of attorney, health care surrogate form, and/or representative payee agreement can take its place. Then, only if all these alternatives prove insufficient, a guardian advocacy, limited guardianship, or plenary guardianship may be pursued.

SDM in conjunction with guardianship

Advocating for the rights of our clients should not end with the implementation of guardianship or guardian advocacy. Florida law clearly and repeatedly requires guardianship practitioners and courts to allow incapacitated individuals to participate as fully as possible in all decisions affecting them and, if assistance is required, to implement the form of assistance that least interferes with the legal capacity of a person to act on their own behalf. Guardians must also work toward restoration of rights and must report on their efforts to achieve this statutorily mandated goal.

Used appropriately, SDM is an excellent tool for learning and practicing decision-making. Decision-making is a skill that can be practiced and improved. Consider a client incapacitated after a stroke but recovering through rehab. They may have needed guardianship initially but have the ability to regain capacity. An SDM agreement could be used in conjunction with an existing guardianship to help the individual practice their decision-making skills in the same way you might practice walking or swallowing while in rehab. This exercise will also help measure decision-making capacity to provide evidence to interested individuals that restoration of rights is appropriate. In this way, SDM benefits both the individual under guardianship and the guardian charged with assisting them toward a goal of rights restoration.

What about abuse?

While SDM is not a new concept (with the passage of Florida's law it is now recognized in the statutes of 28 states and the District of Columbia as well as internationally), many have concerns about whether it can be used as a vehicle for abuse of vulnerable individuals. Unfortunately, people with nefarious intent will likely continue to victimize all types of individuals. But an SDM agreement is no more ripe for abuse than a durable power of attorney. In fact, since it does not convey any substitute decision-making authority, it is less prone to abuse. And because SDM agreements are powers of attorney, all the protections that apply to durable powers of attorney under Chapter 709 apply to SDM agreements.

Ultimately, SDM is a powerful new rights preservation tool, the least restrictive of the least restrictive alternatives, and guardianship practitioners should add it to their legal toolboxes.



Caitlyn Clibbon *is the director of the Community and Health Care Services team at Disability Rights Florida. Her work is informed by the belief that all individuals deserve to enjoy equal rights and to live independently in the community of their choice.*

Endnotes

1. For purposes of this article, references to guardianship refer to both guardianship and guardian advocacy unless otherwise noted.

2 § 709.2209, Fla. Stat.

3 This article uses the term "decision-maker" as opposed to "principal" and the term "supporter" as opposed to "agent" because this is the terminology preferred by the disability rights advocates who spearheaded the promotion of SDM across jurisdictions.

4 § 744.1012(1)-(3), Fla. Stat.; §393.12(3), (7) & (8).

5 § 744.3675(3).

6 A.B.A. Comm'n on Law and Aging, Supported Decision-Making: A Statutory Chart (2023), https://www.americanbar.org/content/dam/aba/administrative/law_aging/2022-sdm-lst-rstctd-altntvs.pdf.

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Breaking the weld: Guardian's attorney fees should not solely depend on a benefit to the ward

by Enrique D. Zamora

submitted on behalf of the Guardianship Committee

Guardian and attorney fees are governed by section 744.108 of the Florida Statutes. This section outlines nine different criteria that a court should consider in determining the amount of compensation awarded to the guardian or the guardian's attorney. One of the criteria in the section is "the results obtained." However, the word "benefit" does not appear in section 744.108 of the Florida Statutes. Yet, courts throughout Florida have required a benefit to the ward before awarding attorney fees, but have no such requirement for the guardian.

In *Thorpe v. Myers*, the Second District held that "a guardian is not required to demonstrate that his or her services conferred a benefit on the ward or the ward's estate as a prerequisite for obtaining a compensation award." It is peculiar the court states that: "[t]he clause in section 744.108(1) requiring the demonstration of the beneficial nature of the services rendered applies to attorneys, not guardians" since there is no clause in section 744.108 that requires a demonstration of a benefit to the ward for either guardian **or** attorney fees. Thus, it is unclear what clause the court refers to in its ruling.

In *Thorpe*, the court analyzes attorney fees differently than it analyzes guardian fees. The court cites the First District Court of Appeal in *Price v. Austin,* 43 So. 3d 789, 790 (Fla. 2d DCA 2010), which states that "[u]nder section 744.108(1), an attorney is entitled to receive a reasonable attorney's fee for professional services rendered, and reimbursement of costs incurred for the benefit of the ward; payment of reasonable compensation is mandatory." However, even in the 2011 version of 744.108, Fla. Stat., there was never a mention of the word "benefit" in the statute. The statute also does not distinguish between attorney and guardian fees when it outlines the criteria for a court to consider in awarding these fees.

Simply put, the "benefit" requirement for attorney fees was judicially created. It is surprising that the Second District in *Thorpe* noted that there is no requirement for the guardian fees yet has maintained the requirement for the attorney fees. Until Judge Luck's concurring opinion in *Schlesinger v. Jacob*, 240 So. 3d 75, 78 (Fla. 3d DCA 2018), no case had ever explicitly addressed this judicially constructed requirement. In his concurring opinion, Judge Luck acknowledges for the first time that the benefit requirement had been "welded" into section 744.108 of the Florida Statutes. Judge Luck compellingly described the harm this judicial imposition can cause, not only in its usual sense of the judiciary acting as the legislature, but also in the specific impacts it can have on guardianship proceedings. Wards are vulnerable and are frequently subject to exploitation and abuse. Guardianships serve as a tool in our society to prevent the exploitation of its most vulnerable members. Even unsuccessful guardianship proceedings can protect the alleged incapacitated person from those trying to exploit them. As Judge Luck points out, requiring a benefit to the ward could have unintended consequences, such as attorneys being less likely to represent family members and interested parties concerned about how the ward is being treated.

Judge Luck's concurring opinion has resonated with at least one sister circuit. In 2022, the First District Court of Appeal found that "our sister districts have erroneously conflated the separate and distinct subsections of 744.108 and imposed a judicially created "benefit to the ward" standard to fee entitlement, which is not supported by the plain language of the statute." The First District further emphasized that the statute already accounts for "the results obtained" as a criterion for the court to consider. However, the statute plainly does not require a "benefit" to the ward. The First District Court of Appeal fully adopted and embraced Judge Luck's concurring opinion and declined to "weld" the benefit standard into section 744.108. The First District Court of Appeal in *Sanders* further certified the conflict with the decision in the other district courts of appeal in *Losh v. McKinley*, 106 So. 3d 1014 (Fla. 3d DCA 2013); *In re Guardianship of Ansley*, 94 So. 3d 711 (Fla. 2d DCA 2012); *Thorpe v. Myers*, 67 So. 3d 338 (Fla. 2d DCA 2011); *Butler v. Guardianship of Peacock,* 898 So. 2d 1139 (Fla. 5th DCA 2005); and *Zepeda v. Klein*, 698 So. 2d 329 (Fla. 4th DCA 1997). *Guardianship of Sanders v. Chaplin*, 334 So. 3d 723, 729 (Fla. 1st DCA 2022).

Section 744.108 of the Florida Statutes already directs the courts to consider "the results obtained" when awarding attorney fees; however, this cannot be the sole criterion. Indeed, the statute provides eight others! Requiring a "benefit" to the ward can lead to unintended consequences. Additionally, it is not the court's role to modify a statute concerning fees. As Judge Luck opined, "the legislature knows how to write attorney's fees statutes that require the lawsuit to end successfully." Section 744.108 of the Florida Statute was not intended to be one of those statutes. This issue is ripe for the Supreme Court to rule on. Practitioners should monitor this issue moving forward and take note of the position of their district when it comes to whether their services must benefit the ward.



Enrique D. Zamora *is a partner at Zamora Hillman & Villavicencio whose practice focuses on litigating and administering guardianships, probate, and trusts, as well as estate planning. He holds a degree in finance from the University of Florida and a JD from Vanderbilt University Law School. Mr. Zamora is an adjunct professor of law at St. Thomas Law School where he teaches guardianship law and elder law. He has been a member of the Elder Law Section for over 10 years and currently serves as chair of the Law School Liaison and Guardianship committees.* *Mr. Zamora thanks St. Thomas University School of Law students Arletis Pupo, Jaime Franco, Hannah O'Donnell, and Nicholas Albertson for their assistance with preparing this article.*

Endnotes

1 744.108(f), Fla. Stat.

2 *Thorpe v. Myers*, 67 So. 3d 338, 343 (Fla. 2d DCA 2011).

3 *Id.*

4 *Id.* at 345.

5 *Schlesinger v. Jacob*, 240 So. 3d 75, 78 (Fla. 3d DCA 2018).

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Guardianship of Sanders v. Chaplin*, 334 So. 3d 723, 727 (Fla. 1st DCA 2022).

13 *Schlesinger v. Jacob*, 240 So. 3d 75, 80 (Fla. 3d DCA 2018).



Rule of Judicial Administration 2.215(g) and languishing guardianship matters

by Twyla Sketchley

Judges are required to render timely orders and appropriately document cases under advisement pursuant to Fla. R. Jud. Admin. 2.215. At least one judge has been disciplined by the Florida Supreme Court for failing to adhere to these duties. *Inquiry Concerning a Judge (Beamer)*, 385 So. 3d 1032, (Fla. 2024). This rule is significant because prolonged delays between the conclusion of a hearing and issuing an order cause "needless anxiety and expenses" and "undermine confidence in the judicial system." *Duncan v. Brickman*, 233 So. 3d 477, 482 (Fla. 2d DCA 2017).

Across the state, guardianship matters such as guardianship reports, fee or compensation petitions, or petitions seeking authority to act can languish for months or even years. One example is the stubborn problem of the languishing guardianship reports. Guardians often have to wait months and even years before receiving their initial or annual guardianship reports. Help may be as close as the new Rules of Judicial Administration 2.215(g) and 2.604.

On July 1, 2024, new amendments to Florida Rules of General Practice and Judicial Administration took effect. Among these amendments are changes to Rule 2.215, governing trial court administration, and the addition of several forms, including Rule 2.604 Notice of Pending Matter. These changes have the potential to help solve the problem of the languishing guardianship reports, as well as other languishing guardianship matters.

The previous Rule 2.215(f) required judges to rule upon and announce an order or judgment on all *cases* within a reasonable time. The presumptive reasonable time was and still is 60 days. The judge also had to report all their *cases* that languished beyond 60 days to the chief judge, who has administrative supervision over all judges and court personnel within the judicial circuit. Fla. R. Jud. Admin. 2.215(b)(2). However, the rule only applied to *cases*, not *matters*. Since guardianship cases can last for years but have matters that need to be resolved every year, there was no requirement for judges to track languishing guardianship matters and no mechanism for parties to alert courts to prolonged delays in concluding these matters.

Rule 2.215(g) now requires every judge to enter, within a reasonable time, an order or judgment on every *matter* submitted to that judge, pursuant to Rule 2.215(g)(1). Judges must also maintain a list of all *matters*, not just cases, held under advisement for more than 60 days, and notify the chief judge of their circuit each month of all *matters* that have been held under advisement for more than 60 days. Fla. R. Jud. Admin. 2.215(g)(1).

Parties can now notify the court of languishing guardianship matters, pursuant to Rule 2.215(g)(2). "A party may file with the clerk a notice using form 2.604 that a matter has been held under advisement or is ready for disposition and remains pending without judicial action for more than 60 days." Fla. R. Jud. Admin. 2.215(g)(2). This notice must be filed with the clerk and served on the presiding judge and all parties. Presumably, this will assist the presiding judge in maintaining an accurate list of all matters that are under advisement and ensure they are added to their required list of matters pending more than 60 days.

The Supreme Court even created a specific form for the parties to use when notifying the presiding judge of matters held under advisement beyond 60 days—Form 2.604.

(CAPTION)
NOTICE OF PENDING MATTER

(NAME) gives notice under Fla. R. Gen. Prac. & Jud. Admin. 2.215 that judicial action in the above captioned case remains pending on (NAME OF MOTION) filed on (DATE MOTION FILED) (ADD DOCUMENT IDENTIFICATION NUMBER HERE IF AVAILABLE).

CERTIFICATE OF SERVICE I certify that on (DATE) this document has been furnished to (insert name(s) and service addresses) by (insert method of service such as e-portal, email, delivery, or mail).

(signature)
(printed name)
(email address)
(address)
(phone number)

Rules 2.215 and 2.604 could be used by guardianship attorneys to bring languishing matters to the attention of the court. For example, if a petition for guardianship fees is submitted without objection, or if the fee hearing has been held, and more than 60 days has passed, then a party may filed a Notice of Pending Matter. In another example, if a guardian files her annual plan on March 1, but still has no order of approval or denial by September 15, the guardian's attorney could file a Notice of Pending Matter. The clerk is required to complete its audit report of the annual plan within 30 days after the date the plan is filed, or by April 1 in this example. F.S. 744.368(2). The court must then review the annual guardianship report within 30 days after the filing of the clerk's report of findings to the court, or by May 2. F.S. 744.369(1). From May 2, the court has 60 days to enter an order on the guardianship report, or the presiding judge should report the pending annual guardianship plan matter to the chief judge. Fla. R. Jud. Admin. 2.215(g)(1). After the 60 days expires, the guardian should also be able to file a Notice of Pending Matter. Fla. R. Jud. Admin. 2.215(g)(2) and 2.604.

While there may be variables that disrupt Florida Guardianship Law's statutory timelines, including a clerk's demand for records following the filing of a report or difficulty scheduling hearings due to hurricane closures or other emergencies, parties should assume that the clerks and courts are fulfilling their statutory duties. If the clerks and courts are not fulfilling their duties, and depending on the circumstances, the guardian has the option to file a writ of mandamus, pursuant to rule 9.100(e), Florida Rules of Appellate Procedures.

As courts in Florida have found, prolonged delays in resolving matters cause unnecessary anxiety and expense and erode confidence in the judicial system. This is especially true in guardianship matters. By utilizing rules 2.215(g) and 2.604, guardianship attorneys will be promoting the timely resolution of matters and assisting courts in ensuring that guardianship matters are resolved, which reduces the costs and burdens of guardianship on wards and guardians. They are also helping courts collect vital data that can be used to seek additional funding for the clerk and court staff to ensure the courts are able to timely and appropriately resolve guardianship matters.



***Twyla Sketchley, JD, BCS**, is a board certified elder law attorney and founder of The Sketchley Law Firm, PA. She is a past chair of The Florida Bar Elder Law Section and a past president of the Academy of Florida Elder Law Attorneys.*

Section News



Mark your calendar

Elder Law Section Annual Update

February 13-15, 2025

Renaissance Orlando Resort and Spa

Lake Buena Vista, Florida

Elder Law Section Retreat

Save the Date: October 2025, dates TBD

Sedona, Arizona

Case study: Intestate probate with a half-blood heir

by Teresa K. Bowman

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

As attorneys, we know how important it is to have a will. I tell clients that making a will allows them to determine who receives their assets, not those listed in the statutory pecking order of heirs under intestate succession. After all, not everyone wants to leave their assets to family, and sometimes the very thought of family getting their hard-earned assets is the driving force behind putting a will in place.

Generally, most of my clients do want to leave their assets to family, particularly when they have children and grandchildren. The others leave assets to siblings, cousins, nieces, nephews, and sometimes close friends or favorite charities.

Recently a family member of a prior client passed away after a sudden illness, leaving behind only a surviving brother and sister. Knowing this family, I thought probate would be easy. After all, he had no surviving spouse, child, or grandchild. I'd known this family for years, did estate planning for both parents, trust administration at the last to die, and knew a lot about the family and the family dynamics. As far as I knew, he only had a brother and a sister surviving.

Imagine my surprise after we filed the probate to get a notice of appearance filed by an attorney representing a half-blood child of a deceased half-brother. When asked, the sister said she knew about the half-brother, but had never had contact with him, even when their father passed away 10 years ago. Now, out of the blue, here comes his son, asking for a portion of his half-blood uncle's estate.

The sister, serving as the personal representative for the estate, was upset. Who is this person? Where does he live? How does she know he is entitled to a share of her brother's estate? Is he really a relative? These were all valid questions and ones that were soon answered.

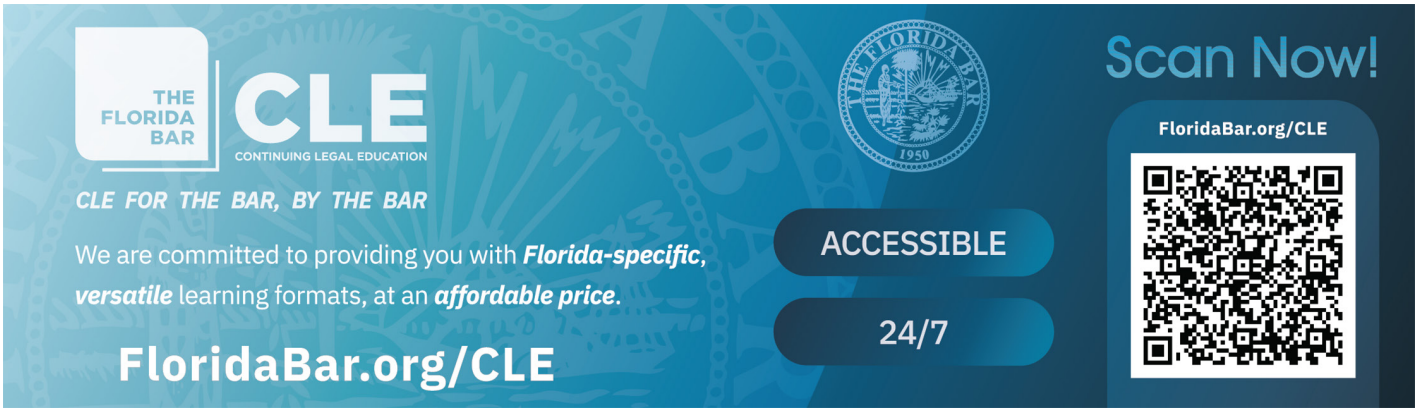
Through his attorney we received proof of kinship, which included marriage and death certificates, and a birth certificate. Yes, this man was the child of their half-brother from their father's first marriage over 60 years ago. But wait, she asked, even so, why is he entitled to part of the estate? What's fair about that, she asked? Well, it may not seem fair, but under the intestate statute, he has a claim we can't ignore.

When property descends to the collateral kindred of the intestate and part of the collateral kindred are of the whole blood to the intestate and the other part of the half blood, those of the half blood shall inherit only half as much as those of the whole blood; but if all are of the half blood, they shall have whole parts. Fla. Stat. § 732.10

So, after running the numbers and his attorney requiring appraisals on all real property, the half-blood heir will receive a one-half share of a one-third distribution, the same share his father would have received if he were alive. Is my PR happy? No, but she said she will be getting her own will in place very soon.



***Teresa K. Bowman, Esq.**, is an elder law attorney and sole owner of Teresa K. Bowman PA, practicing in Sarasota, Florida. She focuses her practice on long-term care planning to include Medicaid planning and VA Aid and Attendance, estate planning, special needs planning, probate, and trust administration. Ms. Bowman is a Certified Elder Law Attorney (CELA) certified by the American Bar Association as an expert in the area of elder law.*



Redefining elder care: The urgent need for LGBTQ+ inclusive assisted living

by Gabriella Behar

As the population ages, the need for specialized care for diverse groups becomes more pressing. A particularly underserved demographic is older adults within the LGBTQ+ community, who face unique challenges in finding supportive living environments. This need has driven leaders like G. Allan Hendricks, a notable CEO and LGBTQ+ rights activist, to create a future where aging is accompanied by dignity, acceptance, and a sense of belonging. Under his leadership, The Connie House, one of the few LGBTQ+ inclusive assisted living facilities in the country, was established in Boynton Beach, Florida, offering a space where residents' identities are valued and a sense of chosen family thrives.

Historically, elder care in the United States has not always been inclusive of the LGBTQ+ community. The stigma and discrimination many LGBTQ+ seniors have faced throughout their lives often persist into their later years, manifesting as alienation in mainstream assisted living facilities. The result is isolation for many LGBTQ+ elders, who may already feel estranged from families and friends. Hendricks recognized that inclusivity in elder care is not merely an option—it is a necessity. Hendricks understands the deep significance that "chosen family" holds within the LGBTQ+ community. For many, this network of family serves as a substitute for biological family members or peers who may have rejected them. In LGBTQ+ assisted living facilities, the emphasis on chosen family is pivotal. Here, residents find companionship and mutual support rarely found in mainstream facilities. This environment fosters emotional well-being and enhances physical health by providing a social network that encourages resilience.

Despite the success of these initiatives, LGBTQ+ inclusive elder care remains critically limited. Presently, only one other known facility caters specifically to LGBTQ+ seniors, located in California. This scarcity leaves many LGBTQ+ seniors across the country without access to supportive environments. The need for expansion is clear, and Hendricks' organization continually seeks funding opportunities to broaden its reach. Their goal is to establish more facilities in diverse locations, offering safe spaces for LGBTQ+ seniors regardless of where they live.

A key component of their model is the implementation of SAGE training, a nationally recognized program aimed at improving the cultural competency of those working with LGBTQ+ older adults. SAGE (Services & Advocacy for GLBT Elders) provides caregivers with the skills to understand the unique needs of LGBTQ+ seniors. This training covers critical areas such as respectful communication and creating an inclusive environment. By integrating SAGE training, Hendricks' organization ensures that staff members are equipped to provide compassionate care. This approach not only improves the quality of life for residents but also sets a high standard for inclusivity in elder care.

The impact of LGBTQ+ inclusive assisted living facilities is profound. These spaces not only address the immediate needs of older adults but also symbolize a shift toward greater acceptance in society. They provide a model for how elder care can adapt to meet the diverse needs of our aging population, offering a path forward that is both compassionate and equitable. However, the journey is far from over. The demand for more facilities continues to grow, and support from policymakers, community advocates, and donors will be essential. Hendricks' dedication to expanding access to inclusive elder care is a testament to the importance of these initiatives. As he works to create a future where LGBTQ+ seniors can age with dignity, his call for action serves as a reminder that inclusive care should be the standard, not the exception. Creating spaces where LGBTQ+ elders can live authentically and thrive is not just a goal—it is a moral imperative.



***Author Gabriella Behar with G. Allan Hendricks**, CEO and LGBTQ+ rights advocate, at The Connie House in Boynton Beach, Florida. Hendricks, known for his groundbreaking efforts in fostering inclusive communities, continues to inspire with his leadership and dedication to empowering marginalized groups. Ms. Behar is a student of Rima Nathan, clinical professor and director of the Claude Pepper Elder Law Clinic, Florida State University College of Law.*

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 a continued 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.

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

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

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Capitol Update
by Brian Jogerst

2024 elections end with Republicans retaining super majorities in Florida Legislature

I am writing this update days after the General Election and prior to the Organizational Session of the Florida Legislature on November 19. The Republican Party will maintain their super majorities in both the Florida Senate and the Florida House—which increased its Republican majority by one seat.

Two Senate races of note include the following:

- In the sprawling North Florida Senate seat covering 13 counties, Senator Corey Simon (R-Tallahassee) defeated his Democratic opponent, Daryl Parks.
- In an open Central Florida Senate Seat, Representative Kristin Arrington defeated her Republican challenger by two points to keep the seat in the Democrat column.
- Three House races of note include the following:
  - ◊ Democrat Leonard Spencer defeated incumbent Representative Carolina Amesty (R-Windermere).
  - ◊ Republican Erika Booth unseated Representative Tom Keen (D-Orlando) in a rematch of a January 2024 special election.
  - ◊ Republican Anne Gerwig narrowly defeated Representative Katherine Waldron (D-Wellington).

The Legislature is required to return to the Capitol 15 days after the General Election for its Organizational Session, during which legislators are sworn in, and the House and Senate officially select their presiding officers for the next two years.

Senator Ben Albritton will be the next Senate president, and Representative Danny Perez will be the next House speaker. In early December President Albritton and Speaker Perez will announce the committee chairs and new committee assignments.

2025 Legislative Session

The 2025 Legislative Session is the "late session," meaning it begins on March 4 and ends on May 2. Committee meetings will begin in the House the week of December 2 while the Senate returns the week of December 9.

Both the House and the Senate will hold two weeks of committee meetings in January and three weeks in February.

Budget and revenue

For the past few years, Florida has realized record growth in revenue—oftentimes the revenue collections each month have exceeded the revenue forecast from the previous months. As we approach the 2025 Session, many are cautious. While the revenue continues to grow, the pace will not be as robust, which could impact funding for new programs and local projects.

The governor is expected to release his proposed budget on or before February 2, 2025, which will set the stage for budget discussions and also outline the future revenue and expenses for the state.

Hurricanes

Another key issue affecting the budget discussions will be the impact of Hurricanes Debby, Helene, and Milton. According to Office of Insurance Regulation in late October, more than 250,000 homeowner insurance claims were filed and the total impact to homeowners exceeded $4 billion. The impact to the state's budget due to the funds expended for hurricane relief and recovery may also impact the revenue available during the 2025 Session.

2025 legislative issues

The Legislative Committee, led by Michelle Kenney and Travis Finchum, is actively reviewing legislative proposals for the 2025 Session.

- Stop the Scammers/Substitute Service – During the final weeks of the 2024 Session, the Elder Law Section and AFELA (Elder Law) actively worked with the legislators drafting an amendment to further strengthen protections for vulnerable seniors and adults. We are well aware that 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. The amendment permitted serving the alleged exploiters 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 during the session, the language was not finalized and not offered. However, Elder Law is pursuing the issue

for 2025 and has begun meeting with stakeholders.

Elder Law is grateful to Senator Jonathon Martin and Representative Kevin Steele for their willingness to sponsor the bill during the upcoming legislative session.

- Special Needs Trust – In early 2024, the Center for Special Needs Trust Administration filed for bankruptcy protection. Based upon public reports, the owner/manager of the trust borrowed more than $100 million in funds, which were to provide care for the disabled. Like many, Elder Law was both shocked and saddened by the reports and is actively monitoring the bankruptcy proceedings. In addition, we are looking at legislative solutions to ensure the beneficiaries are protected in the future.
- Guardianship Rewrite – At this time we are not aware if this bill will be filed during the 2025 Session. By way of background, 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 – Legislation was filed during the 2024 Session making significant revisions to Florida's guardianship laws. Said to be based upon Karilyn's Law, Elder Law had significant concerns with the bill as it would 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 reached out to the sponsors of the bills and expressed their concerns. The bill likely will return for the 2025 Session.
- Patient Directed Doctors Orders (PDDO) – Similar to Physician Orders for Life Sustaining Treatments (POLST), legislation was filed for the 2024 Session creating PODD and authorizing EMTs and certain health care professionals to withhold or withdraw cardiopulmonary resuscitation or other medical interventions if presented with a PDDO form that contains an order not to resuscitate. Elder Law had concerns with the bill, which did not receive a hearing in the House or Senate. The proponents of the bill reached out to Elder Law to discuss concerns, and a revised bill is expected prior to the 2025 Session.

Your help is needed

This past session, the Legislative Committee reviewed more than 54 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 leadership of the ELS Legislative Committee:

Michelle Kenney

michelle@gapsattorneys.com

Travis Finchum

travis@specialneedslawyers.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 it 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.*

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Committees keep you current on practice issues

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

Committee chairs share the goals and work of their committees and invite you to join them!

Abuse, Neglect, & Exploitation

Ellen L. Cheek and Karen C. Murillo, Co-Chairs

The Abuse, Neglect, & Exploitation (ANE) Committee is a small but mighty committee of the Elder Law Section. Members represent a wide range of practice types and specialties, from civil legal aid and criminal prosecution to those who specialize in disability rights, vulnerable investor laws, guardianships, estate planning, and long-term care issues. The committee's diverse areas of interest are reflected in the monthly meeting presentations on a broad range of topics. The ANE Committee works closely with the Legislative Committee, drafting and advocating for legislation to protect Florida's vulnerable and older adults (such as the incredibly important Transaction Delay Law for Financial Institutions, which passed earlier this year).

Estate Planning & Advance Directives, Probate (Premortem & Postmortem Planning)

Lisa A. DiFranza, Chair

The Estate Planning & Advance Directives, Probate Committee reviews, evaluates, assists, and provides planning strategies regarding estate planning alternatives. In addition, the committee also studies and makes proposals regarding health care advance directives. That is our official mandate. In a nutshell, our subcommittees keep us up-to-date on trends relevant to the committee, new cases that have come out, new laws being proposed or enacted, and discuss issues in our practices to enhance all our services to our clients to achieve best practices.

Ethics

Cassandra Jelincic, Chair

The Ethics Committee's purpose is to review, study, and recommend legislative, agency, and other actions to address and improve ethical issues in our practice, including how to best assist elderly and vulnerable adults. We strive to work with the different committees to discuss ethical issues arising in their practice area. This provides the Ethics Committee with the opportunity to assist and educate Bar members (and other professionals) on how to best address, assist, and/or confront ethical issues should they arise.

Guardianship

Enrique D. Zamora, Chair

The Guardianship Committee reviews, studies, and recommends legislative, agency, and other actions to address the problems arising under the Florida guardianship statutes. This year I want to cultivate a community of elder law practitioners that can support and help each other as they practice guardianship throughout the state of Florida. That includes sharing tips and tricks of practicing in different counties as well as discussing how the ever-changing laws affect our practice.

Legislative

Michelle R. Kenney, Chair

The Legislative Committee studies and makes recommendations to the Executive Council to adopt legislative positions and responds to legislative positions made by other Bar sections, individuals, or entities. The committee disseminates news and opinions of proposed or enacted legislation on elder law matters among the various committees of the section. For the 2025 Legislative Session, we will be proposing legislation to provide additional protections from exploitation to "Stop the Scammers."

Medicaid/Public Benefits/VA

Kandace E. Rudd and Teresa K. Bowman, Co-Chairs

The Medicaid/Public Benefits/VA Committee discusses the availability of and eligibility for Medicaid, VA, and other government benefits. Committee members actively review changes in state and federal law and policy related to eligibility criteria and techniques used to develop and maintain benefit eligibility. The committee provides members with education, collaborative problem solving, and tools to help members become better practitioners to assist those seeking eligibility for public benefits.

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Special Needs Trust

Kole J. Long, Chair

The Special Needs Trust Committee meets the second Tuesday of every other month at noon via Zoom. Our committee is responsible for monitoring anything and everything special needs trust related. During our meetings we discuss any news, issues, or pending changes regarding special needs trusts. If you are interested in learning more about SNTs from some of the brightest minds in the business, I welcome you to join us.

Continuing Legal Education

Heather Boyer Samuels, Chair

The CLE Committee is responsible for arranging legal seminars and similar programs for the education of attorneys in the field of elder and special needs law. We hold the popular Laws Over Lunch monthly CLE webinars and assist with all CLEs put on by the section. One of our goals this year is to come up with a CLE style and content manual for the Elder Law Section.

Inclusion, Diversity, & Engagement

Chanté Jones, Chair

The Inclusion, Diversity, & Engagement Committee strives to increase inclusion, diversity, and engagement within the section among those who have been historically marginalized. We are committed to having a diverse and inclusive section with representation from every background to be able to better serve the increasingly diverse community as people age or face special needs. Through this committee, the Elder Law Section seeks to promote inclusion, foster a sense of belonging, and empower a diverse group of professionals to meet the needs of our elderly and special needs individuals.

Mentoring

Nicollette Gonzalez, Chair

The Mentoring Committee is dedicated to pairing new attorneys or new-to-elder-law attorneys with those who have more experience in order to foster a sense of community and provide a safe place for questions to be asked and answered. We also provide CLEs on the basics of elder law, including guardianship, estate planning, and probate, as well as on more practical matters such as "how to fire a client" and "how do I know how much I should charge?" This year, the Mentoring Committee is continuing to work on pairing mentors with mentees. If you are an experienced elder law attorney who is willing to share your knowledge with someone else or if you are new to this area of law and are interested in being paired with a mentor, please contact our chair, Nicollette Gonzalez.

Unlicensed Practice of Law

John R. Frazier and Leonard E. Mondschein, Co-Chairs

The purpose of the UPL Committee is to have a forum to discuss the unlicensed practice of law (UPL) as it impacts elder law. It encourages our section members to report instances of UPL so that recommendations can be made to address those cases the committee deems UPL. The committee is also involved in educating our section members on UPL and the consequences of being involved as an unwitting accomplice. We are always seeking ways to reach the public on UPL issues, such as writing books, creating brochures, and proposing legislation. In 2024-2025, the committee will continue vetting all reported cases of UPL as it impacts elder law and advise on the best course of action. In addition, the committee has written proposed legislation, with an accompanying White Paper, for which we will work on obtaining sponsors to introduce the proposed legislation in the 2026 Legislature. A webinar, either on the proposed legislation or another topic, will be part of our agenda.

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ADVERTISE in The Elder Law Advocate!

The Elder Law Section publishes three issues of *The Elder Law Advocate* per year. The deadlines are February 1, 2025; June 1, 2025, and October 1, 2025. Artwork may be mailed in a print-ready format or sent via email attachment in a .jpg or .tif format for an 8-½ x 11 page.

Call Emily Young
850/561-5650
for advertising rates and additional information.

Committees. . .
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Visit https://eldersection.org/calendar/ for committee meetings information.

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 2024-2025.

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.**





Practice Management
by Audrey Ehrhardt

Are you keeping your personal life out of your law firm's finances?

by Audrey Ehrhardt

Let's start by discussing why you need to …

There is no question that managing a law firm comes with its own set of challenges, and one of the most critical aspects to handle correctly is your financial management. As an attorney, it's imperative to maintain a clear distinction between your personal finances and your law firm's finances. Failure to do so can lead to significant legal and ethical issues, particularly when it comes to handling trust accounts. Let's take a minute to discuss why you need separate books for your personal life and your law firm, and some tips and tricks to help you stay on track.

First and foremost, keeping separate books for your personal and business finances ensures each set of accounts is clear and organized. This distinction helps you track your firm's financial performance accurately and prevents the commingling of funds, which can create confusion and complicate financial management. Additionally, maintaining separate financial records is not just a best practice; it's often a legal requirement. As you know, mixing personal and business funds can lead to ethical violations and potential disciplinary actions for attorneys. There is no question that ensuring your business transactions are recorded separately can help you stay compliant with financial regulations and ethical standards.

Further, when your personal and business finances are intertwined, tax filing can become a nightmare. By keeping separate books you simplify the process, making it easier to identify deductible business expenses and accurately report income. This distinction can also help you avoid potential tax penalties and audits, giving you peace of mind and a clearer financial picture.

Your trust account should only contain funds that belong to your clients. Any personal or operational funds must never be deposited into this account. This separation is crucial for maintaining your clients' trust and adhering to ethical obligations. Mismanaging a trust account can lead to severe consequences, including loss of your license to practice law. Therefore, it's essential to maintain meticulous records of all transactions related to your trust account. This includes documenting the source of the funds, the amount, and the purpose. Accurate record-keeping ensures transparency and accountability, which are essential for managing clients' funds responsibly.

Regularly reconciling your accounts is also vital to ensure that your records match the actual account balance. This practice helps identify any discrepancies early and allows you to address them promptly. Regular reconciliation is a critical step in safeguarding clients' funds and maintaining financial integrity. By following these practices, you can ensure that your trust account is managed correctly and ethically.

But are there tips and tricks for effective financial management in your law practice? There are!

1. Consider using QuickBooks Online and integrate it with your law practice management software. QuickBooks Online is a reliable accounting software that can help you manage separate books for personal and business finances, track expenses, and generate financial reports. When you integrate it with your law practice management software, you can streamline your financial management processes and ensure compliance with ethical standards.

2. Work with an experienced bookkeeper in your law firm. An experienced bookkeeper, who works internally or is outsourced, can help you take back so much of your time and avoid issues that can destroy firms. They understand the unique financial needs of law firms and can ensure your books are accurate and compliant with all regulations. This professional support allows you to focus on your legal practice while maintaining financial integrity.

3. Establish clear policies and procedures in your firm. When you develop clear policies and procedures for handling financial transactions within your firm, you can ensure you are handling your finances the way you want to. Be

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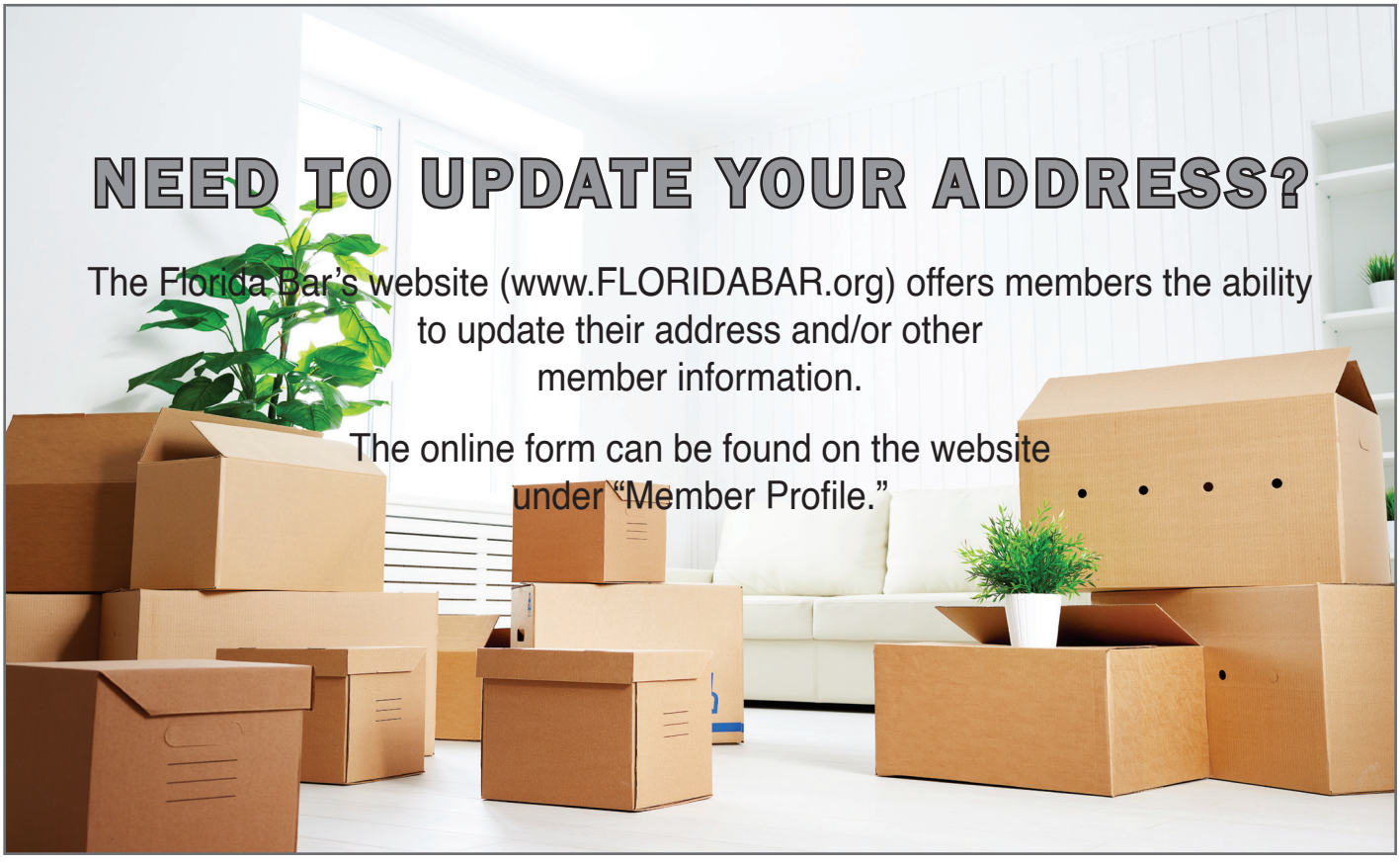
Practice Management. . .
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sure all team members who are involved in your law firm's finances understand and adhere to these guidelines. This practice can help maintain consistency and prevents the commingling of personal and business funds.

4. Monitor cash flow. You want to regularly monitor your firm's cash flow to ensure it remains healthy. Understanding your cash flow patterns can help you make informed financial decisions and plan for future expenses. Your bookkeeper can help you understand this practice and ensure you are working not only to reach your monthly goals but also your savings and profitability goals.

At the end of the day, there is no question that maintaining separate books for your personal and business finances is essential for the success and integrity of your law firm. By taking special care with your trust account and following best practices for financial management, you can ensure that your firm operates smoothly and ethically, allowing you to focus on providing excellent legal services to your clients.

***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.*





Tips & Tales
by Kara Evans

Revocation of testamentary clauses in estate planning documents

The tale: Donna calls you from Michigan. Her mother, a resident of Florida, had a Florida last will and testament and a revocable trust. In her last year, Donna's mother marked up the documents, crossing out names and bequests. Donna showed the documents to the drafting attorney who declared that the markings and scribblings served to revoke the documents. Although the mother's bank account was titled in the trust, there are other assets titled only in the mother's individual name. Donna wants to know what to do.

The tip: You explain to Donna that if both documents were revoked, and no new documents were created, then an intestate proceeding will be required. Furthermore, the bank that holds the trust account will most likely require a legal document, such as a court order, declaring the trust has been revoked and the assets are payable to the estate. But first, you tell Donna that you need to review the actual estate planning documents. You have a sneaking suspicion that perhaps the documents were not revoked at all.

Upon review, you notice that the last will and testament has only the names of the nominated personal representatives crossed out. No other provisions of the will have been touched, and the personal representatives' names can still be seen.

To proceed, you start by reviewing the Florida Statutes dealing with the revocation of wills. F.S. 732.505 explains that a revocation of a will can be in writing. A written revocation can be made by a subsequent inconsistent will or codicil. If the subsequent will or codicil does not "expressly revoke all previous wills or codicils," the revocation will be valid only to the extent of the inconsistency. Alternatively, the will can be revoked by a subsequent will, codicil, or other writing executed with the same formalities required for the execution of wills that expressly revokes all previous wills or codicils.

A will can also be revoked by act. F.S. 732.506 describes a revocation by act as the "burning, tearing, canceling, defacing, obliterating, or destroying it with the intent, and for the purpose, of revocation." This must be done by the testator or by another person at the testator's direction and in the testator's presence. An electronic will is revoked by "deleting, canceling, rendering unreadable, or obliterating the electronic will or codicil, with the intent, and for the purpose, of revocation," also by the testator or by another person at the testator's direction and in the testator's presence.

Based on Florida Statutes, Donna understands that the crossing out of the personal representatives' names did not revoke the will even if that was the opinion of the drafting attorney. She wonders if she is still the nominated personal representative. After all, it is clear that her mother changed her mind about her appointment.

Fortunately, there are cases on point to help you answer Donna's question. In *Taft v. Zack*, 830 So. 2d 881 (Fla. 2d DCA 2002), the decedent's will had been altered in a manner similar to Donna's mother's will, by crossing out a name and initialing next to the markings. The court stated that "At best, the evidence reflects an attempt to partially revoke the will. That attempt failed because Florida law does not allow the partial revocation of a will in the absence of compliance with the statutory requirements for revocation. The requirements were not met because the decedent did not sign the altered will at the end; her name was not subscribed at the end of the will by another person in her presence and at her direction; and there were no attesting witnesses to the altered will." The same conclusion was made in *Cioeta v. Estate of Linet*, 850 So. 2d 562 (Fla. 4th DCA 2003) with the court ordering the admission of the will and codicil as if they were unaltered because the partial revocation or alteration did not comply with the statutory requirements.

The trust document has more extensive markings. Most of the specific distributions have been crossed out, dated, and initialed with the word "deleted" written next to them. The drafting attorney insists that this document, too, has been revoked.

Once again, it is a good idea to start by reviewing the Florida Statutes. F.S. 736.0602, entitled "Revocation or amendment of revocable trust" states in part:

(3) Subject to s. 736.0403(2), the settlor may revoke or amend a revocable trust:

(a) By substantial compliance with a method pro vided in the terms of the trust; or

(b) If the terms of the trust do not provide a method, by:

1. A later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or

2. Any other method manifesting clear and convincing evidence of the settlor's intent.

The trust states that it is "subject to revocation, change or amendment, in writing by the Grantor from time to time." Donna's mother did write on the trust, changing the terms. However, note the "Subject to s.736.0403(2)" in F.S. 736.0602(3). F.S.736.0403(2)(b) states "The testamentary aspects of a revocable trust, executed by a settlor who is a domiciliary of this state at the time of execution, **are invalid unless the trust instrument is executed by the settlor with the formalities required for the execution of a will in this state** (emphasis added). For purposes of this subsection, the term "testamentary aspects" means those provisions of the trust instrument that dispose of the trust property on or after the death of the settlor other than to the settlor's estate. If we need further proof, *Kelly v. Lindenau*, 223 So. 3d 1074, reiterates that the testamentary devises in a trust must comply with the portion of the Florida Probate Code that addresses the execution of wills.

Donna's mother did not change her documents after all. Whether in a last will and testament or a trust document, testamentary devises must strictly comply with the statutory execution requirements of the Florida Statutes.

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Tax Tips

by Michael A. Lampert

Does your client have two homes? Homestead tax traps

Does your client claim a homestead and have two homes? There is a question to add to your checklist to help your clients avoid a very expensive trap, a question regarding property taxes.

Homestead. In Florida, the word brings excitement. Yet, often the client, and even the attorney, are not clear on which homestead is being referred to. And after the explanation is given, the discussion often does not address the one critical question that needs to be asked when your client, or your client's spouse, has two residences: *Is your client, or your client's spouse, claiming any sort of homestead type exemption on more than one residence, no matter where the residences are located?*

This question should be asked whenever the client, or client's spouse, has more than one residence, and even when the client owns one residence and the client's spouse owns another residence.

This article will briefly review the main categories of Florida law regarding types of homestead. It will then provide an overview of the homestead property tax exemption. Finally, it will address why the above question is so important to ask.

The concept of homestead in Florida tends to fall into three categories. They are, in no particular order:

Creditor protection

The creditor protection of homestead in Florida is very strong and is enshrined in the Florida Constitution. Remember that there are certain property size limitations and the property needs to be owned by a human being (most revocable trusts are OK), and not in an entity such as an LLC. And, of course, it actually needs to be the client's primary residence. There are even some special rules when it is a dependent family member who is residing in the home, and even partial ownership is enough to claim creditor protection.

This creditor protection is not absolute. Mechanics liens, to some extent condominium/homeowners association assessments, and property taxes are common exceptions to the protection. Another exception I often see in my tax controversy practice is federal tax liens. Yes, the IRS can levy a Florida homestead. In fact, a federal tax lien on one spouse can impact a jointly owned homestead.

Descent, distribution, and conveyance

The second category of homestead is descent, distribution, and the ability to convey. Entire seminars are given addressing the intricacies of Florida homestead and its impact on conveyances during life as well as on descent and distribution at death. It often surprises clients that a spouse's signature is needed to sell or mortgage a solely owned homestead, even one owned prior to the marriage.

But it is a third category of Florida homestead that is the focus of this article, actually, just a subset of this third category.

Property tax

The property tax homestead exemption in Florida applies to the taxpayer who owns the property and is using it as their primary residence as of January 1 of the filing year. There are some helpful provisions if, for example, a dependent of the taxpayer is using the property as their primary residence rather than the taxpayer.

This homestead property tax provision provides a $25,000 exemption from the actual fair market value of the property for all property taxes. There is an additional $25,000 exemption for non-school taxes applied to the assessed value between $50,000 and $75,000. *See* F.S. 196.031.

The Florida Department of Revenue DR-501 application form addresses what is needed to show Florida residency. Many of the usual residency factors apply. Florida vehicle registration, Florida ID or driver license, deed, address on an income tax return, voter registration (if a U.S. citizen), etc., are some of the items to demonstrate Florida residency for homestead property tax purposes.

There is an additional $50,000 exemption for low-income persons 65 or older. There are other exemptions for certain veterans and deployed military. There is also a widow/widower exemption that needs to be applied for when applicable. Certain medical disabilities also qualify for additional exemptions.

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While this exemption is nice, for many of our clients, the more critical benefit is the Save Our Homes cap as provided in Article VII of the Florida Constitution. This limits the increase in assessed taxable value on the Florida homestead by the lesser of 3% or the consumer price index (CPI). While no application is needed, it does not apply to new construction or property improvements (in the year of construction) and only applies to the owner-occupied portion of the homestead property.

For non-homestead real property, the cap is 10%, and it does not apply to school taxes.

Trap: A change in ownership or control of a property subject to the 10% cap causes a reassessment of the property. Therefore, transfer of real estate into an LLC for asset protection and other purposes can cause a reassessment, which may lead to higher property taxes due to the higher assessed value.

Trap: Some clients have had a second home in Florida for many years. That home may have been protected by the 10% cap such that the fair market value may be much greater than the assessed value for property tax purposes. The client then decides to make Florida their primary residence. They make a homestead election. Expect the property appraiser to reassess the property to fair market value as part of the homestead election process. In some cases, taxes may actually increase.

Trap: If ownership or control changes without recording a deed or other instrument, and if the property appraiser is not notified, that may result in a lien for back taxes plus 15% interest and a 50% penalty on the improperly obtained tax benefit.

Remember: Transfers to a trust may still qualify for the homestead property tax exemption, depending on the rights granted to the beneficial owners. Some property appraisers ask for a full copy of the trust. Others accept an affidavit reciting the name of the trust with the owner's signature and social security number.

Remember: A property might be homestead for one homestead "category" and not for another. For example, just because the property tax exemption is not claimed does not necessarily mean the property is not homestead for creditor protection or for transfer purposes.

So far, we have reviewed the various homestead categories and have taken a small dive into the homestead property tax exemption. We have even addressed some traps and items to remember.

But what about the reason for asking the question: *Is your client or your client's spouse claiming any sort of homestead type exemption on more than one residence, no matter where the residences are located?*

Recently, a client was referred to me. She was widowed several months prior after a long marriage. It was a second marriage for both my client and her late spouse, and for the most part, while clearly residing together and clearly not estranged, they kept their finances and real property ownership separate. The Florida "homestead" was purchased and solely owned by my client (the surviving spouse). She used her own independently acquired funds to purchase the home.

There were no other Florida residences, and my client owned no other real estate. The problem? The now deceased spouse owned a home "up north" that was acquired decades ago. Unbeknownst (or long forgotten), there was an equivalent of a homestead exemption on the non-Florida property. The tax savings were relatively nominal. The surviving spouse never had any ownership in the non-Florida real estate. Her now deceased spouse would provide some support for the Florida expenses.

The result? The Florida property appraiser demanded payment of over $130,000. Why? F.S. 196.031(5) Exemptions of homesteads reads:

> (5) A person who is receiving or claiming the benefit of an ad valorem tax exemption or a tax credit in another state where permanent residency is required as a basis for the granting of that ad valorem tax exemption or tax credit is not entitled to the homestead exemption provided by this section. This subsection does not apply to a person who has the legal or equitable title to real estate in Florida and maintains thereon the permanent residence of another legally or naturally dependent upon the owner.

F.S. 196.161 then addresses claiming the homestead when not entitled to do so. F.S. 196.161(1)(b) reads:

> In addition, upon determination by the property appraiser that for any year or years within the prior 10 years a person who was not entitled to a homestead exemption was granted a homestead exemption from ad valorem taxes, it shall be the duty of the property appraiser making such determination to serve upon the owner, a notice of intent to record in the public records of the county, a notice of tax lien against any property owned by that person in the county, and such property shall be identified in the notice of tax lien. Such property which is situated in this state shall be subject to the taxes exempted thereby, plus a penalty of 50 percent of the unpaid taxes for each year and 15 percent interest per annum. However, if a homestead exemption is improperly granted as a result of a clerical mistake or an omission by the property appraiser, the person improperly receiving the exemption shall not be assessed a penalty and interest. Before any such lien may be filed, the owner so notified, must be given 30 days to pay the taxes, penalties, and interest.

The provision continues by addressing what happens if the property is transferred. If it is sold to a purchaser for value prior to the lien filing, the lien does not apply to the property. But if it is not transferred to a purchaser for value, the lien does attach to the property. The lien can also be filed in other Florida counties where the taxpayer owns Florida real estate.

Did I fight the $130,000 assessment? Of

course. I stressed the separate ownership, finances, and even the filing of separate tax returns. I noted attorney general opinion AGO 2008-13 as well as *Endsley v. Broward County*, 189 So. 3d 938 (4 DCA 1016).

I stressed that unlike *Endsley*, there was no commingling of finances. Yet, I could not argue that the client and her spouse were estranged prior to death. They were not.

The property appraiser took the position that they did not care that neither spouse ever owned the other's real estate. They did not care that they maintained separate finances and that those separate funds were used to acquire each property. Their simple position was that the spouses collectively received tax savings on each property. Period. Full stop. I could not argue true separate households as that was not a fact.

We could have paid the tax and litigated. Too expensive and time consuming, with no guarantee of prevailing. So, what did we do instead? First, with the client's permission, we committed in writing to the property appraiser not to sell the property while we were working to resolve the matter (or to hold the proceeds in escrow until the matter was resolved if closing occurred). As agreed to by the property appraiser, this bought us some additional time without a lien filing and additional penalties. Then we got creative. We went to the non-Florida jurisdiction and repaid nine years (there was no exemption claimed in Florida for the immediate prior year; hence only nine instead of the 10 look-back years). It took some effort, but my client paid under $15,000 in total to return the northern benefit (tax plus interest). Proof of repayment was provided to the Florida county property appraiser.

The result? The Florida appraiser withdrew the proposed levy. We resolved a $130,000 obligation with under $15,000 paid. The client may try to get reimbursed from the deceased spouse's estate, but that is a story for another day.

And we are now back to the beginning. If the client and/or client's spouse own more than one residence, ask: *Are you claiming any sort of homestead type exemption on more than one residence, no matter where the residences are located?* And perhaps also ask: *Are you sure?*

Often clients will not remember or say that they think there is no exemption on the additional property. It does not matter what it is called, homestead, STAR, or something else. If the client is not sure, have them check. It can save a serious amount of tax, interest, penalties, and aggravation.

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Case Law
by Elizabeth J. Maykut

Summary of selected case law

by Elizabeth J. Maykut

Bank account held by husband and wife not held as tenants by the entireties unless it satisfies six unities of title required under common law.

Loumpos v. Bank One, 49 Fla. L. Weekly D1636 (Fla. 2d DCA August 2, 2024)

Issue: Whether a bank account held jointly by the debtor and her husband was exempt from garnishment by the debtor's creditor because it was held as tenants by the entireties.

Answer: No. It did not satisfy all six unities of title required by the common law, which were not abrogated by Beal Bank or by a banking statute.

In this appeal from an order allowing a creditor of one spouse to garnish a bank account held in the name of both spouses, the Second District was asked whether *Beal Bank v. Almand & Associates*, 780 So. 2d 45 (Fla. 2001), abrogated the common law requirements for creating a tenancy by the entirety (TBE) if the signature card designated the account as a TBE or whether a banking statute created a presumption that a spousal account is held as TBE.

Here, the husband opened the subject account in February in his sole name. In October, he added his wife's name and checked the box for "joint tenants by entirety." In opposing the creditor's efforts to garnish the account, the debtor-wife argued the account was exempt as TBE property. The creditor argued it did not qualify as TBE because the wife's name was not on it when it was originally opened and thus, the common law unities of time and title were not present. The wife argued that, under *Beal Bank* and section 655.79(1), Florida Statutes, which she argued codified it, the "TBE" designation on the bank's signature card was sufficient to show the account was held as TBE even in the absence of the unities. The trial court rejected the wife's claim of exemption, finding that the unities, which were not satisfied, were still necessary to create a TBE account.

In affirming the trial court's ruling that the account did not constitute a TBE account, the Second District reviewed the following holdings of Florida law:

- A TBE account is held by husband and wife and each is seized of the whole or the "entirety," not just a share. Thus, the creditor of one spouse cannot reach it.
- Under the common law, a viable TBE can only be achieved if six characteristics are present: (a) unity of possession (joint ownership); (b) unity of interest (identical interests); (c) unity of title (interests originated in the same instrument); (d) unity of time (interests commenced simultaneously); (e) survivorship; and (f) unity of marriage (the "Six Unities").
- Florida law previously held that, with regard to a spousal bank account, courts must look to the intention of the parties to determine whether it is held as TBE. If the spouses expressly designated it as TBE on the signature card, it was presumed that reflected the parties' intention. In the absence of a designation, the spouses' intention must be proven. In *Beal Bank*, the district court initially receded from the requirement that the court must determine the spouses' intention and held that an account held by spouses was presumed to be TBE.
- When *Beal Bank* reached the Florida Supreme Court (the "Court"), the Court rewrote the certified question to ask whether a spousal account was presumed to be TBE if the Six Unities were present such that the burden was shifted to the creditor to prove it was not held as TBE. After specifically referencing the Six Unities, the Court answered the question in the affirmative.
- Section 655.79(1), Florida Statutes (the "Banking Statute"), states that any account held by husband and wife shall be considered as TBE unless otherwise specified.
- In *Versace v. Uruven, LLC*, 348 So. 3d 610, 613-14 (Fla. 4th DCA 2022), the Fourth District held that a signature card alone—without reference to the Six Unities—determines whether a spousal account is held as TBE because the *Beal Bank* court had said this "ends the inquiry" and because the language in the Banking Statute appears to be conclusive on this issue.

Here, after this review, the Second District held that neither *Beal Bank* nor the Banking Statute eliminated any consideration of the Six Unities from the analysis that applies when determining whether a spousal account constituted a TBE account. It rejected the argument that *Beal Bank* abrogated the common law by noting that "the inquiry" statement made in *Beal Bank* referred only to an inquiry

related to discerning the parties' intent as to the form of ownership. It further stated that, when the Legislature enacted the Banking Statute, it noted no specific intention to abrogate the Six Unities and that statutes should not be interpreted as changing the common law unless they do so expressly.

In closing, the Second District affirmed the trial court's denial of exemption here and certified conflict with *Versace*.

Practice tip: When doing estate planning for clients who have asset protection concerns, you should always inquire into the history of any account that is held jointly by spouses. In doing so, first, you should examine the signature card for any TBE accounts, but unless the client lives in the jurisdiction of the Fourth District, you must also analyze the spousal account to determine whether it also satisfies the Six Unities. If the account does not satisfy the Six Unities, you may want to counsel your client to reopen a new account with his or her spouse in such a manner as to satisfy the Six Unities. *See Pardo v. State*, 596 So. 2d 665 (Fla. 1992) (when two district courts have conflicting opinions, trial courts should follow the decision of the district court that has jurisdiction over their area).

Trial court erroneously granted summary judgment on an undue influence claim where evidence showed the existence of four *Carpenter* factors

Leitner v. Leitner, 391 So.3d 1023 (Fla. 5th DCA August 2, 2024)

Issue: Whether evidence that the grantor's son was active in procuring a deed that benefitted him gave rise to a rebuttable presumption of undue influence that precluded summary judgment in probate action related to the validity of the deed.

Answer: Yes.

The decedent, who had two sons, George and Philip, executed a will disposing of 70 acres of real property (the "Property"). Shortly thereafter, she deeded the Property to Philip. In response to a petition for administration filed by George as nominated personal representative, Philip filed a motion for partial summary judgment alleging the Property was not a probate asset as it had been deeded to him. Along with the motion, Philip filed deposition transcripts showing that, before the deed was prepared, he had visited with his mother and, when she told Philip she wanted him to inherit the Property, he contacted an attorney who recommended she deed the Property to Philip. In his deposition, Philip testified he was present when the attorney met with his mother and when the deed was executed at Philip's home and that he paid the attorney. The attorney disputed some of these facts. The trial court granted summary judgment for Philip.

In *In Re Estate of Carpenter*, 253 So. 2d 697 (Fla. 1971), which has been extended to deeds, the Florida Supreme Court held that where a beneficiary occupies a confidential relationship with the grantor and is active in procuring a document such as a deed, the presumption of undue influence arises. *Carpenter* listed seven non-exhaustive factors courts should consider when determining whether "active procurement" by a beneficiary occurred.

After reviewing the record evidence, the Fifth District found that the deposition testimony was sufficient to raise a presumption of undue influence as to at least four of the *Carpenter* factors, and therefore, the trial court erroneously granted summary judgment in favor of Philip because, in order to resolve the claim, the court needed to make credibility determinations and weigh the evidence, which are not proper at summary judgment.

Practice tip: In an undue influence case, if there is a dispute as to whether a beneficiary engaged in active procurement of the instrument at issue, that question constitutes a material fact that must be resolved after an evidentiary hearing, not on summary judgment.

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