The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

Inside:

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Vol. XXVIII, No. 1 • Winter 2021
eldersection.org

The Elder Law Advocate

Established 1991

A publication of the Elder Law Section of The Florida Bar

ON THE COVER

Spider Lilies
Randy Traynor Photography

11/2020

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The deadline for the SPRING 2021 EDITION: FEBRUARY 5, 2021. 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 Leslie Reithmiller at 850/561-5625 for additional information.

Message from the Chair

Steven E. Hitchcock

New initiatives for a new year Part 2

As I said in my last chair's message, this is not a typical year. It is late October, the presidential election is only days away, the Rays are in the World Series, and unfortunately COVID-19 has gone full swing into its second wave. Thankfully, as of now, Florida has been relatively spared in the second wave. When this edition of the *Advocate* hits your desk a few weeks from now, we can only pray that the results of the election are known, the Rays have won the series, and the COVID-19 vaccine is ready for distribution. We all hope there is some peace, prosperity, and certainty in our lives once again, and soon we can meet in person and ask Jason Waddell to personally recommend which bourbon to order …

Unfortunately, certainty may or may not be the case for the Elder Law Section and our clients. In this extremely atypical year, we in the Elder Law Section must be ready to meet the new problems and challenges that our clients face. One way the section can address these challenges is to be more diverse in our thinking and to make use of the different experiences and knowledge of our members. For some time, we as a section have been striving to become more diverse in our membership, including ethnic diversity, gender diversity, age diversity, and also diversity of knowledge and experience.

This year we have worked to be more diverse and inclusive, welcoming members of many different backgrounds. Collett Small, section liaison to the Diversity & Inclusion Committee of The Florida Bar, is working with others in the section on developing strategies to enhance minority participation. I hope to have a lot more details on Collett's and the section's efforts to increase minority participation and inclusion in the next edition of the *Advocate*.

The New Practitioners Committee is working on creating a "home" for younger practitioners or those "seasoned attorneys" who are new to the practice of elder law. The Litigation Committee is working on cultivating knowledge in the area of litigation for elder law attorneys. The Disability Law Committee is working on expanding the Elder Law Section's reach into areas such as Social Security disability claims, increasing the opportunities for Social Security and SSI attorneys to participate in the section and also educating more traditional elder law attorneys in that growing practice area.

Rather than give a long summary of the other happenings of our section, I wanted to share with you some information that was brought to my attention by Karen Murillo, vice chair of the Abuse, Neglect, & Exploitation Committee. Karen is an example of what I refer to as diversity of knowledge, as she is an active member of the Elder Law Section but is not a traditional elder law attorney. Karen is an assistant statewide prosecutor with the Florida Office of the Attorney General in Tallahassee, bringing us not only a perspective that is vastly different from the traditional elder law attorney, but some valuable information as well.

The following article is provided on behalf of the Abuse, Neglect, & Exploitation Committee.

Helpful Florida regulatory and enforcement agencies you might not know about

submitted by the Abuse, Neglect, & Exploitation Committee

You've heard of the Office of Public and Professional Guardians and the Florida Department of Children and Families, but did you know about these other state enforcement agencies and regulatory authorities? Below is a list of some other state agencies that may be able to assist you when you're looking for the "right" place to lodge a complaint.

Florida Department of Agriculture and Consumer Services (FDACS)

The FDACS investigates fraud, theft, other crimes, and unfair and deceptive trade practices occurring within certain regulated industries, including:

1. Violations of the Do Not Call List
2. Motor vehicle repair shop complaints
3. Charity scams and questions about the legitimacy of a charity
4. Illegal sweepstakes and sweepstakes fraud
5. Telemarketing complaints and fraud

FDACS tools include both criminal and civil enforcement in appropriate cases. The agency also provides consumer resource guides and tips. For example, the FDACS website offers a *Business / Complaint Lookup* tool, which allows consumers to check the registration and complaint status of any business engaged in activity within the state, even when the company is located in another state. For more information on search options and databases maintained by FDACS, please visit https://www.fdacs.gov/Consumer-Resources/Business-Search.

The FDACS acts as the state's consumer complaint clearinghouse, so consumers can file complaints through the *Consumer Complaint Form* online against any business (even if it is not a business or industry regulated by FDACS). The FDACS consumer complaint forms and reporting tools can be found online at https://www.fdacs.gov/Contact-Us/File-a-Complaint.

Florida Department of Business and Professional Regulation (DBPR)

You've probably heard about DBPR before, but did you know that the agency offers an easy online search tool to verify that persons performing services in certain regulated industries are licensed and eligible to legitimately perform such services? The list of regulated industries and licensures is long and diverse, ranging from construction services to auctioneers and from certified public accounting to timeshares and real estate. The search tool covering these diverse fields and industries can be found online at https://www.myfloridalicense.com/wl11.asp.

The DBPR *Licensee Search* tool is one of the resources available to verify that a contractor for home repair or remodeling is licensed by the State of Florida. Keep in mind that some counties provide limited local certifications for specified trades, which allow work without a state license; be sure to check both DBPR and the county's website to make a definitive determination in your case.

The DBPR is itself an administrative compliance agency that works closely with criminal law enforcement and prosecutors when the complaints against professionals in an industry constitute criminal conduct. The DBPR website offers an online complaint tool where consumers can file complaints against businesses and individuals for violations of professional standards; this tool can be located at https://www.myfloridalicense.com/entercomplaint.asp?SID=.

Why file a complaint involving criminal conduct to DBPR? First, a DBPR investigation typically takes less time than a criminal investigation and prosecution. Next, DBPR is authorized to suspend or revoke a license, which can prevent a perpetrator from threatening or harming additional consumers. Also, DBPR itself may make a referral to law enforcement and the state attorney for criminal prosecution in appropriate cases.

Florida Department of Financial Services (DFS), Division of Consumer Services

This division of DFS focuses on educating and assisting Florida consumers with most of their insurance needs and complaints. DFS offers a toll-free Insurance Consumer Helpline to assist in answering consumers' everyday insurance-related questions, as well as to assist consumers in filing a complaint against an insurance company. DFS offers different forms of mediation and complaint assistance to help consumers resolve their insurance needs outside of the courtroom, and also safeguards the public against insurance fraud.

To file an insurance complaint regarding insurance products, consumers can submit their complaint electronically through the online complaint tool, by submitting an email to Consumer.Services@myfloridlacfo.com or by contacting a specialist on the hotline at 1-877-MY-FL-CFO (1-877-693-5236).

Florida Department of Financial Services (DFS), Division of Funeral, Cemetery, and Consumer Services

Did you know that Florida has an entire division dedicated to the regulation of the death care industry, in accordance with Chapter 497 of Florida Statutes? The division protects preneed purchasers' rights and also regulates and maintains professional standards and licensure requirements.

This division of DFS primarily handles the administrative enforcement through professional disciplinary actions against licensed death care industry providers; however, Florida Statutes section 497.159 does provide for criminal investigation and prosecution under certain circumstances. In such instances, DFS will either work in connection with local law enforcement in the course of their investigation or in certain cases may independently conduct such criminal investigations through its Division of Investigative and Forensic Services.

A Microsoft Word template of the division's complaint form can be found at https://www.myfloridacfo.com/Division/funeralcemetery/.

Florida Department of Financial Services (DFS), Division of Investigative and Forensic Services (DIFS)

The DIFS handles all law enforcement and forensic needs of DFS with a broad range of criminal investigative and enforcement jurisdiction, including thefts and fraud in the following categories:

1. Insurance fraud
2. Theft/misuse of state funds (including retirement and employment benefits, as well as state contract and grant fraud)
3. Unclaimed property fraud

The category insurance fraud is very broad and inclusive, including fraud pertaining to medical and health insurance, life insurance, vehicle insurance, homeowner's insurance, and professional liability insurance. Keep this agency in mind if you encounter a client who has been defrauded by a contractor in connection with assignment of homeowner's insurance benefits for home repairs.

Consumers can submit their complaint electronically through the online complaint tool, by submitting an email to Consumer.Services@myfloridacfo.com, or by contacting a specialist on the hotline at 1-877-MY-FL-CFO (1-877-693-5236).

Florida Department of Highway Safety and Motor Vehicles (DHSMV), Bureau of Dealer Services

The Bureau of Dealer Services is a component of the Florida DHSMV, which issues and regulates motor vehicle dealer licensing. The bureau handles complaints involving violations of law by licensed dealers, as well as the conduct of dealing in motor vehicles without a license.

The bureau accepts and investigates all of the following types of civil and criminal complaints:

1. Complaints against motor vehicle dealers
2. Complaints against mobile home dealers or manufacturers
3. Complaints against RV dealers or manufacturers

To file a complaint with the DHSMV, visit https://www.flhsmv.gov/resources/forms/ to download and complete a complaint affidavit, also listed as Form No. 84901. The form should be filed with the appropriate DHSMV Field Operations Regional Office, depending on where the crime or activity occurred; the contact information for all of the field offices is provided on the third page of Form No. 84901.

Florida Department of Highway Safety and Motor Vehicles (DHSMV), Motor Vehicle Fraud Unit

The Motor Vehicle Fraud Unit is another branch of Florida's DHSMV, which accepts and investigates consumer complaints pertaining to forms of motor vehicle fraud involving the vehicle or vehicle's identifying information. The three primary forms of motor vehicle fraud include:

1. Odometer fraud
2. Title fraud
3. Vehicle cloning (i.e., use of stolen/counterfeit VIN information)

To file a complaint with the DHSMV, visit https://www.flhsmv.gov/resources/forms/ to download and complete a complaint affidavit, also listed as Form No. 84901. The form should be filed with the appropriate DHSMV Field Operations Regional Office, depending on where the crime or activity occurred; the contact information for all of the field offices is provided on the third page of Form No. 84901.

Florida Office of the Attorney General (OAG), Consumer Protection Division

The Consumer Protection Division is the civil enforcement authority of the OAG for individuals and entities that violate the Florida Deceptive and Unfair Trade Practices Act, found in Chapter 501 of Florida Statutes. The OAG has specializations in many areas including, but not limited to:

1. Price gouging complaints
2. Mortgage and foreclosure problems
3. Social media identity theft complaints
4. Military and veteran assistance
5. Fraudulent business practices targeting seniors (60 years old and above)

The OAG accepts consumer complaints on all of the above-described issues and more through its Office of Citizen Services; complaints may be submitted over the phone at 1-866-9-NO-SCAM (1-866-966-7226), by printing and mailing the online complaint form, or

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by using the online complaint submission tools found at http://www.myfloridalegal.com/pages.nsf/Main/E3EB45228E9229DD85257B05006E32EC.

Florida Office of the Attorney General (OAG), Medicaid Fraud Control Unit (MFCU)

The OAG's MFCU investigates fraud, abuse, neglect, and exploitation committed by or in the care of certain Medicaid-funded health care and residential care providers. If a victim patient receives Medicaid benefits for his or her care or if the facility accepts Medicaid for any of its patients' care, the MFCU may review some cases of abuse, neglect, and exploitation. The MFCU does not investigate Medicaid fraud allegations against patients.

The MFCU has both criminal and civil enforcement capabilities and focuses on the following two categories of misconduct:

1. Medicaid fraud through fraudulent billing by health care providers
2. Patient abuse, neglect, or exploitation occurring in a facility receiving Medicaid funding (ALFs, SNFs, rehab facilities, etc.)

MFCU complaints can be submitted through the OAG Office of Citizen Services; complaints may be submitted over the phone at 1-866-9-NO-SCAM (1-866-966-7226), by printing and mailing the online complaint form, or by using the online complaint submission tools found at http://www.myfloridalegal.com/pages.nsf/Main/E3EB45228E9229DD85257B05006E32EC.

Additionally, consumers who report Medicaid fraud may be entitled to share in any funds recovered by the State in accordance with the Florida False Claims Act.

Florida Office of Financial Regulation (OFR), Bureau of Financial Investigations

OFR regulates financial services, financial institutions, and compliance with the Florida Securities and Investor Protection Act. The OFR website offers a *License Verification Search* tool to confirm that an individual or a business purporting to offer services pertaining to finances, investments, or securities is appropriately licensed by the State to offer such services.

The OFR Bureau of Financial Investigations handles investigations involving fraud in lending or securities, as well as other forms of crime or unfair practices occurring in the financial industry, which may result in administrative, civil, or criminal enforcement dispositions. This investigations unit is relatively small in size, but there are teams located throughout the state that specialize in financial accounting and records review.

Common scams appropriate to report to OFR include:

1. Payday loans/lending scams
2. Investment fraud

Consumers are encouraged to submit their complaints online at https://www.flofr.com/sitePages/FileAComplaint.htm, but may also download, complete, print, and mail a copy of the complaint form.

Visit the Elder Law Section on Facebook

We are happy to announce that the Elder Law Section has created a Facebook page. The page will help promote upcoming section events as well as provide valuable information related to the field of elder law.

Part of the section's mission is to "cultivate and promote professionalism, expertise, and knowledge in the practice of law regarding issues affecting the elderly and persons with special needs…" We see this Facebook page as a way of helping to promote information needed by our members.

We need your help. Please take a few moments and "Like" the section's page. You can search on Facebook for "Elder Law Section of The Florida Bar" or visit *facebook.com/FloridaBarElderLawSection/*.

If you have any suggestions or would like to help with this social media campaign, please contact:

Alison Hickman
904/264-8800
alison@ floridaelder.com

THE FLORIDA BAR
ELDER LAW SECTION

Capitol Update

by Brian Jogerst

Budget to dominate 2021 Legislative Session

In mid July when the last Capitol Update was written, Florida, like the country, was in the midst of the "first wave" of the COVID-19 pandemic. The resulting impact to personal income for residents as well as to the state budget was being felt—and many were bracing for an uncertain future.

Over the past few weeks, Florida has entered Phase 3, meaning the businesses have fully reopened and students have returned to school—either virtually or in person—but businesses and tourist attractions continue to feel the fallout from COVID-19.

While much remains unknown for the upcoming Legislative Session, including the November elections and safety protocols in the Capitol, the following is a brief overview of the 2021 Session.

Budget

Bracing for revenue shortfalls, Governor DeSantis vetoed a record-breaking $1 billion-plus in state funding programs. Using the state reserves and federal funding, along with the governor's vetoes, provided the necessary funds to prevent a special session before the end of the calendar year. When the Legislature returns to Tallahassee in January and February for committee meetings in preparation for the 60-day Legislative Session beginning in March, the Legislature could be facing more than $4 billion in budget cuts. As noted by key legislators, health care and education comprise approximately 90% of the state budget, and both areas could experience significant budget cuts to balance the state budget.

Legislative Session

Each year thousands of Floridians descend on Tallahassee for their "day in the Capitol." Given the ongoing concerns with COVID-19, many believe that fewer people may be in the Capitol this year.

On November 17, the newly elected and the reelected members of the Legislature will return to Tallahassee as part of the constitutionally required Organizational Session. At that time, each chamber will elect their presiding officers for the next two years. Senator Wilton Simpson (R-Pasco County) will be sworn in as president of the Senate while Representative Chris Sprowls (R-Pinellas County) will be sworn in as speaker of the House of Representatives. A few weeks later, the committee chairs and the committee appointments will be released in preparation for the committee meetings, scheduled to begin in January.

Elder Law is actively reviewing the following legislative proposals:

- Guardianship rewrite proposed by RPPTL
- The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act/granny snatching
- Exploiter disinheritance
- Exploitation injunction revisions from the 2018 Legislative Session

Legislative Committee

The Legislative Committee meets *every other* Friday at 8:30 a.m. prior to session and then *every* Friday during session. Last year, the Legislative Committee reviewed more than 90 bills.

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

Debra J. Slater, Chair
dslater@slater-small.com
Travis D. Finchum, Vice Chair
travis@specialneedslawyers.com
Grady H. Williams, Jr., Vice Chair
grady@floridaelder.com

Finally, we have enjoyed success on legislative issues by working with legislators and providing feedback to them, as well as by testifying at committee hearings. We are grateful for the grass-roots support we have received and for the difference it makes when working with legislators.

You can also help by working with your local legislators and being a local resource to them. If you do not know your legislator, we remain willing to help facilitate an introduction with the legislator and his or her staff. Continued relationship building with legislators, the state's policy makers, is a critical component of our advocacy efforts because the local relationships and outreach to legislators from trusted sources helps Elder Law be a trusted voice and improves our advocacy efforts.

***Brian Jogerst** and Greg Black are co-founders of Waypoint Strategies LLC, a Tallahassee-based governmental consulting firm. Waypoint Strategies, with more than 40 years' experience lobbying on health care and legal issues, is under contract with the Academy of Florida Elder Law Attorneys and the Elder Law Section of The Florida Bar for lobbying and governmental relations services in the State Capitol.*

Use and limitation of the MMSE in determining capacity

by Donna R. McMillan

Part of the evaluation in incapacity cases centers on the Mini Mental Status (or State) Exam, more commonly known as the MMSE. The test was originally developed as a simplified cognitive mental status exam for elderly patients who, particularly when cognitively impaired, cooperate for only short periods of time. Consisting of 11 questions, it requires only five to ten minutes of testing as opposed to other cognitive tests, which often take longer. A total of 30 points can be scored on the MMSE. One point is given for each correct answer; an incorrect answer scores zero points. The test is a snapshot of a person's mental state at a particular point in time, measuring orientation, short-term memory (retention and recall), and language, and requires verbal responses as well as following verbal and written commands. It measures cognitive status but not executive function, which includes organization (gathering and evaluating information) and regulation (assessing your surroundings and changing your behavior in response).

The MMSE was never meant to replace a complete clinical evaluation. An accurate assessment requires analysis of physical history, a full mental status examination, physical status, and pertinent laboratory data. While the MMSE may be a general indicator of cognitive function, some of its true value is as a baseline screening that can be used to analyze the score over time, determining improvement from treatment or worsening of a condition.

The MMSE also has a set of inherent assumptions in that it requires the person being tested to give verbal responses and to respond to verbal and written commands.

First, the person taking the test should be able to speak and should be fluent in the spoken language of the exam administrator. Consider how the score might be impacted if English is a second language or if the person taking the test is not fluent at all. The test can be administered in a variety of languages, but only if you have a test administrator who can speak the person's natural language.

The second assumption is that the person can see and is able to read and write in the language of the test. People with less than an eighth grade education have been more likely to test positive for dementia or mild cognitive impairment when there is none, and conversely, highly educated people tend to score higher on the test even when they have a cognitive impairment. A raw score of 24, one of the common but not universal cut-off scores between mild dementia and normal cognition, may very well mean normal cognition in someone with less than an eighth grade education, or mild to moderate dementia in a highly educated person.

The third assumption is that the person can hear. What might the impact be on the score for a person who has a sensory or language disorder, such as aphasia, but not a cognitive impairment? Is it noted on the test as a contributing factor? Not usually. Similarly, a hearing problem may be listed in another area on the form, but it is typically not noted as a factor to consider in the raw MMSE score.

Finally, cut-off scores, the scores at which the clinician determines mild, moderate, or severe cognitive impairment, vary. It may be by as little as a point or two, but when you are looking at no cognitive impairment to mild, moderate, or severe, the difference can be significant, especially when you start to factor in the assumptions listed above. Caution is warranted when evaluating a raw MMSE score. Fairness requires, at a minimum, that we consider the limitations of the test and whether any of the above assumptions are being factored into the score, which may be better, or worse, than it appears at face value.

***Donna R. McMillan, Esq.**, graduated from Barry University, received her Master of Social Work from Barry University and her JD summa cum laude from Nova Southeastern University. Prior to law school she spent almost nine years as a hospice social worker. She is an associate at McCarthy Summers, et al in Stuart, Florida, practicing exclusively in elder law and estate planning. She is chair of the Membership Committee of the Elder Law Section.*

Understanding restoration of rights in a guardianship advocacy

by Catherine Davey

I received a phone call from Jim's parents, and they were crying. When Jim, who has a developmental disability, was 18, his parents petitioned the court to have some of his rights removed and were appointed his guardian advocate. Among the rights removed from Jim was the right to marry. Jim was now 25 and had fallen in love with Jennifer, who also had a developmental disability, and the families were thrilled. But Jim did not have the right to marry. His father immediately called their attorney, and that well-meaning attorney told him there was nothing that could be done. Jim could not marry Jennifer. Fortunately, that was not the end of the story as Jim's father reached out to his local disability support group, who referred him to me. I was so happy to tell this family that not only could Jim's right to marry be restored but that the process was relatively simple and straightforward. The photos from the wedding were heartwarming.

Guardian advocacy under section 393.12, Florida Statutes, is the right solution for some individuals with developmental disabilities (DD). Certain circumstances demand some measure of protection for an individual with DD; however, some of these measures can become too restrictive, and rights may need to be returned to the person with DD. Guardian advocacy should be considered a fluid solution that ebbs and flows with the protected person's growth and development throughout his or her life.

The process to restore a person's rights under guardian advocacy is similar to that of restoring the rights of a person under limited or plenary guardianship. The most significant difference stems from the fact that in guardian advocacy, a person with DD was never determined incapacitated by the court. Therefore, instead of a Suggestion of Capacity, which is used in limited or plenary guardianship, a Suggestion of Restoration of Rights is filed with the court by any interested person, including the person with a DD. *See* Fla. Stat. § 393.12(12).

The Suggestion of Restoration of Rights must state that the person with a DD is currently capable of exercising some or all of the rights that were previously delegated to the guardian advocate, and evidentiary support for the filing of the suggestion, such as a medical report from a professional who evaluated the person, must be provided. *See id.* When a Suggestion of Restoration of Rights is filed, the court notifies the various parties and appoints an attorney for the person under guardian advocacy if he or she is not already represented. *See* Fla. Stat. § 393.12(12)(a). The court then reviews the evidence, which may include reports, data, and other evidence from individuals familiar with the person under guardian advocacy, to determine if the person is able to act in his or her own best interest and manage his or her affairs. *See* Fla. Stat. § 393.12(12).

In the courts in which I have practiced, the court may, without a hearing, immediately restore the rights requested and issue amended orders and letters based on the rights that remain delegated to the guardian advocate. *See* Fla. Stat. § 393.12(12). In some instances, the court may suggest an examination by a physician and set a hearing to decide if some or all of the rights should be restored to the person under guardian advocacy. You should note that if there is no evidentiary support for the suggestion, or if the evidentiary support suggests that restoration of rights is not appropriate, or if an objection to the suggestion is filed, a hearing must be set. *See* Fla. Stat. § 393.12(12) &(c).

Why is this process to restore previously delegated rights so important? People grow and mature over time, and some people with DD may become able to handle decisions for themselves. If the original petition and subsequent orders and letters took away the individual's rights and now that person wants to continue his or her education, seek employment, or even get married, there may be a problem. So, keep in mind the restoration of rights process, and maybe you, too, will get a wedding photo from a happy couple.

For over 25 years, ***Catherine Davey, JD, LLM****, has focused her practice in the areas of probate, guardianship, guardian advocacy, estate planning, and the drafting and implementation of special needs trusts for physically and developmentally disabled clients. She received her BA from George Washington University in Washington, D.C., her JD from Stetson University's College of Law in St. Petersburg, Florida, and her LLM in transnational business practice from the University of the Pacific's McGeorge School of Law in Sacramento, California.*

Understanding the ability of a disabled client to participate in Medicaid planning

by Heather B. Samuels

As elder law attorneys, we often are asked to represent clients we have never met, and some we may never meet. This is because, from the initial consultation forward, we are engaged by clients' agents acting as fiduciaries—guardians, attorneys-in-fact, and/or trustees. Therefore, we represent such clients by and through their agents, and though we owe those clients the professional duties of competence, communication, diligence, loyalty, and confidentiality, we deliver those duties by and through a fiduciary. Thus, although we are working to protect the interest of our client, we are receiving instruction from his or her agent; however, despite the diagnosis of the client, if the client can communicate, it is the obligation of the attorney to meet with that client through whatever means possible—in person, by telephone, or increasingly by videoconference.

Rule 4-1.14 of the Florida Rules of Professional Conduct mandates that attorneys representing clients under a disability "shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." The comments point out that despite a client's legal competence, in many cases, he or she can understand and think about matters that affect his or her own well-being at some level.

When an agent, called a *legal representative* by the rule, has been appointed in the matter, the comments state that the lawyer should look to the representative for decisions on behalf of the client; however, the comments do not excuse the lawyer from speaking to the client and doing his or her best to carry on a conversation, to make recommendations, and to listen to the client, offering attention, respect, and normal communication. Not only does this allow the attorney to perform his or her duties to the client, it also offers the client the dignity and respect he or she deserves.

Other than Rule 4-1.14 and the comments, the Florida Rules of Professional Responsibility do not directly address the balance the lawyer must strike between advising the client and his or her agent/fiduciary. Assisting these clients is a gray area that lawyers often handle on a case-by-case basis, though it is essential to meet with the client to the extent the client can communicate so the attorney can understand the degree of competence the client exhibits. Though competence may change over time, it is important for the attorney to ascertain how in-depth he or she can explain the plan to the client. If the client provides direction as to how to address his or her own living arrangements, for example, the attorney can look to the agent for the specifics while learning about the relationship between the agent and the client and any concerns the client may have.

For example, when discussing Medicaid asset protection planning with a client of diminished capacity, the client may not understand or be willing to face her limits. In a private meeting with her lawyer, the client may say that her son is holding her "prisoner" in the assisted living facility and if she could just get her hands on her car keys, she would get the car and drive home. The son, her attorney-in-fact, may explain that his mother had a series of car accidents that led to having her driver license taken away, she has a habit of wandering from home and getting lost, and she cannot afford the 24-hour care she needs in her own home for more than a year. He may explain that she wasn't able to take care of her home independently, yet kept bolting the door shut so that the aide he hired couldn't get in. In this case, the attorney can ask the client about the assisted living facility—what she likes about it, if she has friends, if it is better than the aide who took care of her at home. The lawyer can ask the client about her son and whether he is good and trustworthy. Gently, the attorney can broach the topic of whether the client has gotten hurt or lost while living at home. By having a conversation with the client, even if the fiduciary/agent presents facts that support the decision he has made on behalf of the client, the lawyer gets an understanding of the full picture. The client gets the opportunity to see that the attorney is on her side. The lawyer can see from the conversation whether the client is in danger or is being exploited, and how the contemplated planning will impact the client.

The client may argue with the lawyer. She may insist that she does not need 24-hour care and was just fine at home, despite facts to the contrary. She may truly forget that she had fallen or wandered away. New elder law attorneys ask all the time whether they should move forward with the representation anyway. Rule 4-1.14 also answers that question: Although the client here may need "special legal protection" concerning "major legal transactions," the lawyer must communicate with the client and endeavor to ensure the client can participate in her case and have appropriate input concerning her own well-being, even if there is a fiduciary decision maker.

Heather B. Samuels *is a Florida Bar board certified elder law attorney and is the managing partner of Solkoff Legal PA in Delray Beach, Florida. Heather chairs the Ethics Committee of the Elder Law Section of The Florida Bar and is a Class VIII fellow of The Florida Bar Wm. Reece Smith Jr. Leadership Academy.*

The participant-directed option for SMMC-LTC approved home health care: A case study

by Jason Neufeld

I recently represented a client who has Parkinson's disease. He was looking to protect his assets so he could qualify for Medicaid waiver benefits and receive some extra help with his activities of daily living at home.

My client asked, "Isn't there a way I can choose someone I know to provide care, rather than having to use a stranger associated with an agency?" I had to admit that while I was aware the participant-directed option (PDO) exists, I did not know much about it. I promised to get back to my client with answers. There seemed to be much confusion among my colleagues on the AFELA listserv, so I hope this article provides some clarity.

I learned that all managed care plans must offer PDO to allow participants who are approved for adult companion care, attendant care, homemaker services, personal care services, or intermittent/skilled nursing to hire, train, supervise, and dismiss their own caregivers.

Once approved for SMMC-LTC, my client enrolled in Humana and asked his assigned case manager how to enroll in the company's PDO program. After the case manager noted that my client was selecting PDO, he was notified that a third-party vendor, GT Independence (https://gtindependence.com), a "fiscal intermediary" that files all state and federal taxes and conducts background checks on potential caregivers, would be reaching out.

GT Independence mailed the necessary forms for my client to receive care via PDO. The Agency for Health Care Administration (ACHA) standardizes these forms, which can be found on the ACHA website.[1] GT arranged to send someone to the home to collect fingerprints from the employee (in PDO parlance, the direct service worker or DSW), who in this case was my client's wife.

The DSW, per the PDO manual proffered by AHCA (see the endnote), can be anyone over age 18 who is able to work legally in the United States and who can pass a level 2 criminal background check. The DSW can be a friend, a neighbor, or even a relative.

Shortly thereafter, my client's wife was approved as his DSW. GT called my client to explain how to keep timesheets and how to submit them via the GT smartphone app (mail, fax, and email are available options as well). The DSW can clock in and clock out via the app. GT then pays the DSW, via direct deposit, every two weeks based on hours approved and timesheet submissions. GT withholds taxes and submits paperwork to the IRS and the Florida Department of Revenue.

Humana's PDO option pays the DSW a whopping $10.25/hour up to the number of hours approved by the SMMC-LTC plan; however, $30/hour will be approved if the DSW is qualified to render intermittent or skilled nursing services as approved by the plan.

My client was and is, cognitively speaking, doing very well. For those who are unable to handle their own affairs, the PDO option allows the participant to choose a representative to assist with the submission of timesheets, interacting with the case manager, hiring/firing the DSW, and more.

***Jason Neufeld, Esq.**, is the founder of Elder Needs Law PLLC, with main offices in Aventura and Plantation, Florida (with additional of-counsel locations). Jason focuses his practice on Medicaid planning and estate planning. He is also affiliated with Neufeld, Kleinberg & Pinkiert PA, a personal injury litigation law firm with main offices in Aventura and Lakeland, Florida.*

Endnote

1. https://ahca.myflorida.com/Medicaid/statewide_mc/ltcplans_pdo.shtml (The PDO Manual, i.e., guidance for all managed care plans, is available at this link as well.)

So, do I need to appoint a trust protector in a d4A?

by Howard S. Krooks

It's a good question, especially if you sought court approval to establish the d4A trust. So, what's the answer? Some practitioners regularly include the appointment of a trust protector in their d4A trusts. Others do not. Who is right?

In order to answer this question, let me share with you a story about a phone call I received one day in July 2013.

July 17 was an ordinary day, or at least I thought, until I received a message from one of my clients: "Tell Howie to call me as soon as possible. He drafted an invalid trust for me and now Social Security is dropping my SSI benefits as of July 31."

My heart dropped. When I finally picked it up off the floor, it was racing so fast that I thought I was going to need some form of medical care before this was over. I began to sweat as I furiously looked through Time Matters to pull up the d4A trust I had drafted for this case. My brain filled with questions like: How could I have done this? What did I do wrong? Was I really busy when I drafted this trust, thus forgetting to include operative provisions to make it a valid d4A?

Well, here's what happened. A d4A special needs trust was established on July 20, 2010, pursuant to a court order dated July 1, 2010. A copy of the trust was mailed to the Social Security Administration shortly after execution.

Earlier in 2010, we had been contacted by a woman named Jane following the unexpected death of her mother. At the time, Jane was 59 years old; suffered from severe depression, obsessive-compulsive disorder, and agoraphobia, among other issues; and had not left her mother's apartment in over 30 years. Jane was also a recipient of SSI and Medicaid benefits. Despite Jane's mental health issues, she was completely competent to handle her financial affairs and not in need of a guardianship.

Upon the death of Jane's mother, Jane became the "payable on death" beneficiary of several of her mother's accounts and a beneficiary of her mother's estate in excess of $100,000, the receipt of which would have disqualified Jane from receiving her government benefits. Therefore, it became necessary for Jane to establish a self-settled d4A special needs trust.

As her parents and grandparents were deceased and as Jane was not under a guardianship, the only remedy available to Jane (this was pre-Special Needs Trust Fairness Act) was to seek court approval to establish her special needs trust.

So why, if we submitted the trust to the Social Security Administration in July 2010, were we hearing from the Administration three years later? And what was wrong with the trust?

Well, many of you may recall that in May 2012, the SSA republished a section of the POMS replacing language in examples that were included as part of that section relating to travel and transportation costs for the beneficiary, for travel companions, and for travel and lodging expenses for the beneficiary's immediate family members to visit with the beneficiary at his or her residence. This was an effort by the SSA to tighten the interpretation of the sole benefit rule, and the SSA, following the republishing of this section of the POMS, took the position that any trust containing language in violation of the new POMS section was invalid.

Hmm. The d4A I drafted in 2010 was valid under the rules then in effect. The trust was submitted shortly after it was executed to the SSA for review and no action was taken. Two years later, the SSA has decided it will suspend Jane's SSI benefits as the trust now violates a newly republished section of the POMS?

Of course, once this new language was republished, I began either to delete caregiver language or to limit caregiver compensation consistent with the SSA's new interpretation. So, my newer trusts were O.K. in this regard. And, as we all know, the sole benefit rule was later amended in yet another version of this section of the POMS, which relaxed the rule generally and specifically with regard to these types of expenses.

But what to do about the impending suspension of my client's SSI benefits? It was July 17, 2013, and it would be a tall order, if not impossible, to get a court/judge to issue that kind of modification to a d4A with sufficient time remaining to notice the SSA, have a hearing, obtain a signed order, and deliver a newly amended trust to the SSA, all before Jane's benefits would be suspended on July 31, 2013.

As I was reviewing the trust, I saw that the court-approved d4A I submitted had a trust protector named with authority to amend the trust without further order of the court. That trust protector was me. That gaping hole in my heart started to fill with exuberance as I began to realize there was a quick and easy fix for my dilemma. I could prepare a simple Exercise of Trust Protector amending the now-offensive provisions of the 2010 trust, by replacing them with provisions I was currently using in my new trusts and which I deemed consistent with current SSA policy. So, on the very same day I learned the 2010 trust was deemed invalid by the SSA, I was able to prepare and submit to the SSA the Exercise of Trust Protector, and by the

very next day, July 18, 2013, I was able to communicate with the SSA representative to confirm its receipt such that by July 31 my client received a new letter from the SSA stating that all was well with the world, and her benefits would NOT be suspended as originally anticipated. Whew!

Take what you will from this story, but I think it is clear where I come out on the question initially posed: "So, do I need to appoint a trust protector in a d4A?"

***Howard S. Krooks, JD, CELA, CAP**, of Elder Law Associates PA, practices elder law and special needs planning in New York and Florida. He is a past president of NAELA, a past chair of the New York State Bar Association Elder Law Section, and currently serves as substantive division vice chair for The Florida Bar Elder Law Section.*

Committee Reports

Abuse, Neglect, & Exploitation (Ellen L. Cheek)

The ANE Committee seeks information about advocates' experiences with the Injunction for Protection Against Exploitation (Fla. Stat. § 825.1035) for each county across the state. If you have filed or responded to one of these injunctions, have knowledge of them being addressed in your area, or want more information on this topic, please let us know at anecommittee@gmail.com.

Disability Law (Melissa Lader Barnhardt)

The Disability Law Committee has been finalizing its submission for the board certification project and has also been focused on establishing two subcommittees. The first one addresses medical disability claims (SSI/SSDI/Veterans/ERISA), and committee members are determining a focus that may include a CLE, an *Advocate* article, or integration of a program with the second subcommittee. The second subcommittee addresses transition planning for individuals living with diverse abilities (school age, ages 18, 22, and 26, planning for replacement of care, etc.) and is planning an educational seminar for families and possibly other professionals in conjunction with a not-for-profit. We will consider areas such as benefits (types and the application process), special education, health care, advance directives, guardianship, guardian advocate, SNT, living arrangements, etc. Our committee meets on the first Tuesday of the month at 5 p.m., ET. If I have piqued your interest, please join our committee by emailing me at melissa.l.barnhardt@wellsfargo.com or contact me via text at 954/240-9841.

Estate Planning & Advance Directives, Probate (Amy M. Collins)

The Estate Planning & Advance Directives, Probate Committee will hold biweekly meetings on the second and fourth Thursdays of the month at noon (on an as-needed basis).

We continue participating actively with the Legislative Committee, reviewing legislation related to estate planning, advance directives, and probate. This summer the committee has been working on the Elder Law Section's major CLE project, developing outlines and materials for the following core topics: estate planning, probate, trust administration, retirement accounts, and taxes. We are still looking for volunteers to help our committee complete this project, so please reach out to Amy Collins (amy@mclawgroup.com) if you are interested in participating.

We plan on scheduling interesting speakers and will hold informational meetings to discuss relevant topics for upcoming meetings. If you are a committee member and have a topic you would like to review or discuss at a committee meeting, please let us know!

As a committee, we hope to be able to start work again on the statewide probate project that would provide essential local information, rules, standards, and practices of each circuit and/or county to help Elder Law Section members easily locate information if they are handling a probate outside their usual jurisdiction. This project is on hold pending completion of the ELS's CLE project.

Ethics (Heather Boyer Samuels)

The Ethics Committee is delighted to be preparing materials for the ethics section of the Zoom CLE/Board Certification Boot Camp: A Panel Discussion. These materials will cover the ethics section of the exam and will explore Rule 4-1.14 of the Florida Rules of Professional Responsibility, concerning representing a client who has a disability.

continued, next page

Guardianship (Twyla L. Sketchley)

The Florida Supreme Court approved changes to the Florida Probate Rules to include forms for Petition to Determine Incapacity, Petition to Appoint Guardian, Petition to Appoint Guardian Advocate, and initial and annual reports. The Second District Court of Appeal upheld an order for sanctions against a family member who harassed the guardian. Sanctions included removing the family member as an interested party and assessing attorney's fees against her. *Martino v. Colombo*, 2d DCA, July 8, 2020, Case No. 2D19-533 and 2D19-670. The Guardianship Committee is also creating a repository of local guardianship rules and administrative orders to help assess uniform practices throughout the state. If you have information on your county or circuit, please contact the Guardianship Committee.

Legislative (Debra J. Slater)

The Legislative Committee meets every two weeks to discuss the Elder Law Section's proposed legislation for the upcoming session as well as proposed legislation from other sections that impact the elderly, vulnerable, and disabled. The committee is working on two ELS legislative proposals: (1) additions to the Exploiter Injunction Statute that would expand those people who have standing to bring an injunction petition before the circuit court and would allow a continuance of a temporary injunction for good cause; and (2) a new bill that addresses exploiter disinheritance. We continue to discuss proposed legislation from the Real Property, Probate and Trust Law Section for the upcoming session in an effort to find common ground or to promote changes the ELS deems appropriate and necessary.

Medicaid/Government Benefits (Heidi M. Brown)

The Medicaid/Government Benefits Committee has been very busy preparing written materials and PowerPoint presentations for the Medicaid and Medicare sections of the Zoom CLE/Board Certification Boot Camp: A Panel Discussion. Also, our committee has prepared a white paper regarding the use of Medicaid authorized representatives to manage finances and create eligibility for individuals seeking Medicaid eligibility. We have forwarded the white paper to each chief judge in every circuit. Additionally, we have prepared and submitted comments for AHCA's MMA Medicaid waiver extension request application to both AHCA and CMS. This is the waiver that eliminates retroactive Medicaid eligibility. Moreover, the committee actively monitors rule making and development of administrative rules regarding DCF, AHCA, APD, and DOEA and regularly attends hearings/workshops and submits comments regarding such. Specifically, we have attended hearings and commented on rules regulating the DD waiver (I-Budget) Medicaid program and the SMMC-LTC Medicaid waiver program's prioritization and enrollment plan. Finally, the Florida Joint Public Policy Task Force for the Elderly and Disabled asked the committee to research whether the amended investment strategy and documents for investing in Coastal Income Properties (CIP 2.0) comply with the DCF ESS manual, the appellate opinion, and the eligibility rules for VA pension with aid and attendance.

The Medicaid/Government Benefits Committee meets by telephone every first and third Tuesday of the month at 12 noon, ET. If you would like to join our committee, please contact Heidi M. Brown at heidib@omplaw.com.

New Practitioners (Max J. Solomon)

In its first year, the New Practitioners Committee is providing resources to connect new lawyers and new elder law practitioners with resources and fellowship and is developing networks among members in the Elder Law Section. The committee meets monthly and also hosts a monthly Zoom happy hour to relax, unwind, and make new relationships. If you would like to learn more or join our committee, please contact Max Solomon at max@hwelderlaw.com or 850/421-2400.

Special Needs Trust (Amy J. Fanzlaw)

The SNT committee is working on several new projects. In addition to members publishing educational articles on SNT topics in the *Advocate* and other publications, we have formed a subcommittee (joining efforts with a similar subcommittee of the Guardianship Committee) to study how different guardianship courts treat SNTs. We are also working on getting self-settled SNTs recognized as designated beneficiaries on Florida retirement plans, and we are monitoring and lending our expertise on a Family Law Section legislative initiative regarding parental support obligations for an adult child with special needs. The SNT committee meets the second Tuesday of each month at 5 p.m., ET, by telephone or Zoom. Guests and new active members are welcome. Contact Amy Fanzlaw (ajf@osbornepa.com) for information.

Veterans Benefits (Teresa K. Bowman)

The Veterans Benefits Committee is preparing materials and arranging speakers for the veterans benefits section of the Zoom CLE/Board Certification Boot Camp: A Panel Discussion. These materials will cover the structure of the Veterans Benefits Administration, the VA Health Care system, and an overview of benefits such as compensation and pension to include aid and attendance. The materials will also explain how VA benefits work with Medicaid, how to plan for those dually eligible, and other practice tips to help you advise your clients in long-term care planning. If you are not a VA accredited attorney, the materials will provide all the steps to become a VA accredited attorney and grow your practice with VA planning. If you would like to join our committee, contact Teresa K. Bowman at tkbowman@tkbowmanpa.com.

SECTION NEWS

Committees keep you current on practice issues

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

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Twyla Sketchley to receive Jerome Solkoff Advocacy Award

Elder Law Section member and past chair Twyla Sketchley is the 2020 recipient of the Jerome Solkoff Advocacy Award. The Academy of Florida Elder Law Attorneys (AFELA) presents this prestigious award annually to an AFELA member in recognition of his or her advocacy and support of Florida's elderly and disabled citizens. AFELA will present the award at the December 2020 AFELA UnProgram.

The Elder Law Section congratulates Twyla and echoes these sentiments from one of the letters of nomination received on her behalf:

The list of Twyla's achievements is long and distinguished and any number of her awards and leadership positions are evidence of her advocacy and the impact she has made on seniors and the disabled in Florida. Yet I believe the most significant advocacy effort she has made, and the one with the most lasting impact, is her dedication to share what she knows with her peers. Not all attorneys are willing to do that. I know I am a better advocate for my clients because of Twyla's commitment to her profession and I feel confident that many colleagues would agree.

Twyla Sketchley is a Florida Bar board certified elder law attorney. She is licensed to practice law in Montana and Florida and founded The Sketchley Law Firm PA in Tallahassee in 2002. Her practice focuses on elder law, guardianship, fiduciary representation, and elder law related litigation. She is a past chair of the Elder Law Section and a past president of AFELA. In 2016, she founded The Sketchley Method, the nation's leading resource on the prevention of the maltreatment of elders and people with disabilities.

Jerome "Jerry" Solkoff was a lifelong advocate for the elderly and disabled. He enjoyed a distinguished professional life spanning more than four decades. Jerry received numerous honors for his advocacy on behalf of the elderly during his lifetime and amassed thousands of hours of pro bono services within his community.

Past recipients of the Solkoff Award include Scott Solkoff (2017), Shannon Miller (2018), and Ellen Cheek (2019).

SECTION NEWS

Mark your calendar!

UPCOMING EVENTS

Virtual Elder Law Section Executive Council Meeting
January 14, 2021 • 12 noon

2021 Essentials of Elder Law
Live Webcast Event + 90-Day OnDemand Access
January 15, 2021

2021 Elder Law Annual Update & Hot Topics Week
Three Live Webcast Sessions Daily + 90-Day OnDemand Access
January 18-22, 2021

Call for papers – *Florida Bar Journal*

Steven E. Hitchcock is the contact person for publications for the Executive Council of the Elder Law Section. Please email Steven at *hitchcocklawyer@gmail.com* for information on submitting elder law articles to The Florida Bar Journal for 2020-2021.

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

Ideas and tips for combatting overwhelm in your law firm

by Audrey J. Ehrhardt

Law firm life can be overwhelming under the best of circumstances. Add a pandemic into the mix and things seem to quickly escalate and even feel unmanageable. Amidst the balancing act we all find ourselves in these days, let's discuss some ways to combat a consistent feeling of overwhelm and overwork.

1. **Make a comprehensive list with accountable and intentional due dates.** Lists are important for us to get where we are going in our practices. Lay out what you need to do, but add the time/date you will work on it, add a backup time too, and then add the date it is due. It can be best to set the due date as a few days before the delivery date, as opposed to setting it for the actual date it is due.
2. **Dodge what you can.** Sounds weird, right? Overwhelm, however, happens when we see ALL the things we have to do. Consider using your system or planner or notepad to break your list into days, instead of having one multi-page to-do list.
3. **Follow the 90/10 work.** What can you do that has 90% impact, but only requires a 10% effort on your part? For example, send an email to a referral source. This can take less than three minutes, but can have a maximum impact.
4. **Automate where you can.** What templates do you have? What emails do you frequently use? What can you reuse and potentially automate to go out? This is often helpful with client management responses and billing.
5. **Hire and outsource.** If it is within your budget, consider hiring an executive assistant, even if it is only for one day a week. Start by making a list of what you need to offload and what is causing your bottlenecks. Generally speaking, the things you want to offload make the best job description.
6. **Use bundling/chaining/sequencing to manage workload.** It is not easy to do everything you need to do each day. Can you put actions into groups? These groups may include client management emails, reminders, billing, and drafting, among other things. What can you group together and put into a block of time to try and preserve your brain power?
7. **Do not control what you do not have to control.** It is never (ever) easy to hear someone tell you to let it go. Rarely does such a statement go over well. Recognize, however, that you are carrying a lot on your shoulders right now. Choose to let go what you can, even if it is just for the workday.
8. **Build in stall tactics that mean something.** Many among us struggle with having more work than any one person can finish in a week. Create processes that can buy you more time. This may include tools such as stop gap letters and intentional delays.
9. **Pretend you HAVE to be at the office.** This is particularly focused on those of us who are primarily working remotely these days. Find a way to get out of the house and into your own space. This not only can bring a sense of control, but can allow you to get more done, with minimal distractions. To set yourself up for maximum productivity, you can also stack your workload to be extremely effective on that day away from your home office.

Successfully fighting overwhelm is within your reach. Consider taking some of the steps discussed above. Should you want to discuss more ways to regain control of your workload, our team is always here to help.

***Audrey J. 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

Circumnavigating the devise and descent clause of the Florida Constitution

The tale: Sue and Jeff, a married couple, come to your office for estate planning advice. Sue and Jeff have a 23-year-old son and a 6-year-old daughter. They will be disinheriting their son and leaving their entire estate to their daughter. They have already been advised that Article X Section 4(c) of the Florida Constitution prohibits the devise of the home if the decedent is survived by a minor child. They understand that if they devise the home to their daughter while she is a minor, the devise will fail, and the home will pass under Florida Statutes section 732.103 equally to both children. They want to know if they can use a trust to accomplish what they cannot do under a last will and testament.

The tip: Sue and Jeff are not the first to try to circumvent Article X Section 4(c) by making a lifetime transfer to a trust. In *Estate of Johnson*, 397 So.2d 970 (Fla. 4th DCA 1981), the decedent deeded his home to himself, as trustee of his revocable trust. The trust devised his home to one of his adult children; however, he was also survived by a minor child. The court ruled that placing homestead property in a revocable inter vivos trust does not avoid the homestead restrictions on devise. Florida Statutes section 732.4015 clarifies that "devise" includes a disposition by trust of that portion of the trust estate that, if titled in the name of the grantor of the trust, would be the grantor's homestead. The problem is that keeping too much control over the property in the trust during the grantor's lifetime results in the transfer being a "devise."

So what exactly is a devise? Florida Statutes section 731.201 (10) defines it as follows:

> Devise, when used as a noun, means a testamentary disposition of real or personal property and, when used as a verb, means to dispose of real or personal property by will or trust. The term includes "gift," "give," "bequeath," "bequest," and "legacy."

The trick is to create a trust where the ultimate distribution does not "devise" the homestead at the grantor's death.

In 2010 the Legislature blessed such a trust by passing Florida Statutes section 732.4017. The statute starts out by clarifying that a valid inter vivos transfer of homestead to a trust during the owner's lifetime is not a devise under sections 732.4015 or 731.201 (10), even if the distribution in the trust does not descend as provided in section 732.401, so long as the transferor does not retain a power to revoke or revest that interest in themselves. The lack of the ability to revoke or revest is key.

Typically, such a transfer to an irrevocable trust would be a completed gift requiring the filing of a gift tax return. The language in section 732.4017 (2) allows the homeowner to retain the power to alter the beneficial use and enjoyment of the interest within a class of beneficiaries identified only in the trust instrument and clarifies that it is not a right of revocation if the power may not be exercised in favor of the transferor, the transferor's creditors, the transferor's estate, or the creditors of the transferor's estate, or exercised to discharge the transferor's legal obligations. This power renders this transfer an incomplete gift under the Internal Revenue Code. As a result, a gift tax return does not need be filed.

Subsection 3 of the statute sets out the powers that the grantor is allowed to retain. These powers are what make this trust a desirable planning tool for Sue and Jeff. The owner can retain a separate legal or equitable interest in the homestead property, such as a term of years, a life estate, a reversion, the possibility of reverter, or a fractional fee interest. The trust can provide that the interest in the home will not become possessory until a certain date or event and that the interest can expire or lapse upon a date or event. None of these retained powers equals a devise.

What is the point of all this language? For Sue and Jeff, it means they can create an irrevocable trust and transfer a vested remainder interest in their homestead property to that trust. They can retain a life estate in the property, thereby preserving their homestead tax exemptions. They can retain a reversionary interest in the property should either of them still be living when their daughter reaches 18. Should both Sue and Jeff die before their daughter reaches 18, the trust will provide for that minor child as Sue and Jeff desire.

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

TAX TIPS

by Michael A. Lampert

The SECURE Act—Things you may have missed

The Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) had a lot of provisions, leading to many articles and seminars. This article will address some SECURE Act provisions you may have missed.

401(K) contributions

Many seniors work part-time jobs, some out of economic necessity and others as a way to stay active and engaged. For the most part, employees who worked fewer than 1,000 hours have not been allowed to participate in their employer's 401(K) plans. The SECURE Act changes that. Beginning in 2021, with some exceptions, if the employee works at least 500 hours per year for three consecutive years (and is at least 21 years old), he or she qualifies. Note that this new rule does not apply to employees subject to a collective bargaining agreement.

Medicaid waiver (difficulty of care) payments and earned income tax credit payments

For many years the IRS fought the exclusion from income tax of Medicaid waiver (difficulty of care) payments. In Notice 2014-17, the IRS backed off and said it would treat the payments as excludable under IRC § 131 if certain requirements were met. Note that § 131(a) specifically says that qualified foster care payments are excluded.

The IRS then started to treat the income received under various states' Medicaid waiver programs for adult disabled children as excludable from income tax.

This was good, to a point. The lack of *earned* income resulted in many recipients of the difficulty of care payments not having enough earned income for the purposes of the earned income tax credit. Remember, the EITC is a *refundable* tax credit, meaning the taxpayer can receive more in a "refund" than he or she paid in taxes.

Note there is a significant amount of EITC and other refundable tax credit fraud, where the amount of earned income is made up and placed on income tax returns to generate an income tax refund in the form of a refundable tax credit. I have defended a number of income tax preparers when the IRS alleged they did just that.

In *Feigh v. Comm* (52 TC 15 (2019)), the court held that the difficulty of care payments were income for EITC purposes even though the payments were not taxable. In *Feigh*, the taxpayer received payments under a state's Medicaid waiver program. The taxpayer was providing care to adult disabled children in the family's residence. It remains to be seen if, instead, the IRS will argue that difficulty of care payments for non-foster care are subject to income tax.

Difficulty of care payments and IRAs

What if a taxpayer does not have sufficient taxable income to utilize the deductible IRA amount (IRC 2019(b)(5)) without including the difficulty of care payments?

The SECURE Act amended the Internal Revenue Code (408(0)(5) to increase the nondeductible IRA contribution limit by the amount of nontaxed difficulty of care payments. This can be helpful for families trying to save for retirement. There is a similar provision in the law (IRC 415(C)(8)) for retirement plans.

Maximum age for IRA contributions

There has been a lot of focus on the SECURE Act's increase of the mandatory distribution age to 72 and the loss, in many cases, of stretched IRAs—replaced by the 10-year payout of benefits after the death of the plan owner. What is often missed is that the maximum age to *contribute* to an IRA was repealed (IRC § 219(d)1).

Working from home—Is there a tax benefit?

Some elder law attorneys have always worked from home, or virtually, if you will, making house calls and utilizing shared meeting spaces whenever necessary. But the vast majority of elder lawyers have a physical office separate from their home. Well, until COVID-19.

Since the pandemic began this past spring, many people, elder lawyers included, have been primarily working from home, yet also still paying for their regular office lease or mortgage and other expenses. This practice requires us to revisit the income tax deduction of home offices and to offer a few practice tips and traps.

To begin, it is not yet clear exactly how the IRS will look at "pandemic home offices." (I just made up that term.) I suspect there will be more flexibility if the taxpayer is reasonable, but there are no guarantees.

Can you have a home office and another office? The short answer is maybe.

IRS Publication 587 (referencing IRC § 1.62-2(C)) states that your home office needs to meet two requirements to be considered your principal place of business: (1) Exclusive and regular use for administrative or management activities; and (2) No other substantial fixed location where you conduct substantial administrative or management activities.

To summarize, the home office needs to be used *exclusively* for business. Trying to deduct a part of your den where you also regularly watch football when you're not working does not qualify. In addition, the administrative work may not be done outside the home office (*see, e.g.*, *Sengpiehl v. Commissioner*, TCM Memo 1998-23 where an attorney met with clients in the dining room but the attorney also used the dining room on weekends for meals).

Practice tip: It is common for a spouse to also use the home office or for the attorney to have a side business. That is allowed, but:

Trap: All uses must be deductible business uses, whether as the administrative/management office or as the sole office.

Trap: Even if all the use was for business, if some of the work was done as an employee where there would otherwise be no deduction, the home office deduction is lost. So much for a school teacher's spouse grading papers in the home office.

What is deductible?

IRC Section 280A(C)(g)A allows the deduction of costs allowable to the portion of the home the taxpayer uses exclusively, on a regular basis, as the taxpayer's place of business. The use has to be exclusive and regular (on a continuing basis per Internal Revenue Manual 4.10.10.3).

Practice tip: If using multiple offices, keep records regarding time and activities in your home office. Even Elder Law Section meetings held via Zoom count as use!

Confused? Understood. Basically the home office can qualify either as (1) a principal office because it is the office where the essence of the professional services is performed, such as meeting with clients and doing attorney work (*Commissioner v. Soliman*, 113 S.Ct. 701 (1993)) or (2) a principal office under a subsequent amendment to IRC § 280A as it relates to the administrative or management activities of the trade or business, such as handling virtually all of the administrative/management aspects of the business from the home office.

But I'm an employee of my corporation or LLC.

Historically you could deduct personal work-related expenses; however, the Tax Cuts and Jobs Act changed the law. For the years between 2017 and 2025, employees cannot deduct home office expenses. In fact, there is no deduction for most unreimbursed business expenses generally. Remember, if you are set up as a sole proprietorship, you would typically use Form 8829 Expenses for Business Use of your home along with the Schedule C for your business, including other business expenses.

So, what to do? Keep careful records and have the business entity reimburse you for all legitimate business expenses and the use of your home.

Practice tip: Read the above paragraph again. You are incurring expenses to practice out of your home due to the pandemic. Do not assume you can deduct the extra and increased expenses or the business use of your home. Have the business entity pay the expenses directly or reimburse you. Keep proper documentation.

But I work for someone else.

The same rules apply regarding reimbursement of business expenses except that you have to ask your employer and hope you will be reimbursed. In some cases, a reduction in salary with reimbursement of expenses can be beneficial to both the attorney-employee and the employer-law firm.

Is my pre-pandemic office, which I still pay rent on, still my office? I stop by every few days to check for mail and packages.

This will be an interesting issue. The argument could be made that during the pandemic your principal office, really your main office, was your home. No client meetings in your outside office. It was just a glorified mail drop and storage space (for those with paper files).

Practice tip: This is another good reason to keep careful records and to address this with your tax preparer.

Trap: Remember, however, in any event if you are an employee, even of your own corporation or LLC, you need to have the entity pay the expenses or reimburse you for the expenses, and you must keep good records.

How much can I deduct for the business use of my home?

The primary way is to calculate the percent of your home used for business and deduct that percentage of the home-related expenses (e.g., rent or mortgage, insurance, property taxes, etc.). There is also a simplified way where $5 per square foot up to 300 square feet can be deducted.

Practice tip: Remember, you can also deduct direct business expenses such as equipment and communication services used for the business, etc.

Trap: With the intent of being repetitive, remember that if you are a law firm employee (whether of your own law firm or otherwise), the employer entity needs to pay the business expenses or reimburse you. And keep careful records. Otherwise the deductions will be lost.

Commuting

This really isn't a home office deduction issue, but it is important. Commuting from home to office is not deductible. But travel from your home office to your other place of business may be. So, driving 10 miles to your office each day and 10 miles back is not deductible. Driving from the office to the post office (for business), to see a client, or to attend a law seminar many miles away is deductible, provided it is from your office. But if your home is your office and you then drive to your pre-pandemic office to get the mail, check for packages, and pick up a file, that mileage may well be deductible business miles. I live about 1.5 miles from my office. Not a big deal. But years ago, my office was 30-plus miles away from my home. A big deal.

Practice tip: Do try to keep records of your miles for business purposes, including destinations for business purposes.

Practice tip: Same issue applies if you are an employee, even if you own a corporation or an LLC. Get reimbursement.

Final note

For those sheltering in another state, be aware of that state's income tax rules.

Amended returns filed electronically

Despite the IRS's push for electronic filings, for some reason the IRS has required *amended* income tax returns to be paper filed. With elder clients, this can be challenging at times. The tax preparer will send the return to the client to sign and then mail to the IRS (we hope via certified mail or another approved delivery method). As we have all seen, when clients have a stack of unopened envelopes from the IRS, financial institutions, etc., adding something else will be problematic, especially if there is no follow-up.

Perhaps spurred along by the pandemic and, for a time, the many millions (literally) of unopened and therefore unprocessed tax returns, correspondence, and paper tax payments, the IRS has changed course. In August 2020, the IRS announced that Form 1040X (amended return) for both 2019 Form 1040 and 1040SR can be filed electronically (or on paper). This way the tax preparer can simply obtain the signed filing authorization from the client and then e-file the amended income tax return. Note that as of now, only amended returns for 2019 can be e-filed; it is hoped that other years will be added soon.

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Summary of selected case law

by Elizabeth J. Maykut

Allegations alleging trustee lacked capacity to serve were sufficient to state cause of action for removal of trustee even though they did not satisfy standards for imposing a guardianship over trustee

Wallace v. Comprehensive Personal Care Services, Inc., 45 Fla. L. Weekly D1318 (Fla. 3d DCA June 3, 2020)

Issue: Does the standard for removing a trustee under the Florida Trust Code require that a trustee be removed only if he would meet the definition of an *incapacitated person* under the Florida Guardianship Law?

Answer: No.

A son alleged that his father lacked capacity to serve as trustee of the irrevocable trust as evidenced by fact that the father/trustee had gifted trust funds to new "friends" who were not beneficiaries of trust. The father argued that, pursuant to terms of the trust, which provided a specific procedure for determining whether a trustee could be removed for disability or cause, he must be determined incapacitated under the Florida Guardianship Law in order to be removed. The trial court agreed, holding that the son failed to state a cause of action because he was seeking relief that was contrary to the terms of the trust and to procedural safeguards in the Florida Guardianship Law.

The Third District reversed, holding that the Florida Trust Code, specifically sections 736.0105(2)(b) & (e), 736.1001(2), and 736.0706(1), (2)(a) & (c), Florida Statutes, gave the probate court power and responsibility to remove a trustee when necessary in the interests of justice to protect the interests of the beneficiaries. The court pointed out that while the trust document may contain some supplemental methods to remove a trustee, it cannot eliminate the court's power to do so.

The court rejected the father's argument that because he was both settlor and trustee and had funded the trust with his assets, removing him was tantamount to declaring him a ward and depriving him of control over his own property, stating:

> [The father's] argument improperly conflates the law of trusts with the law of guardianships. For good reason, the standard for removal of a trustee under section 736.0607 of the Trust Code is less exacting than the standard for imposing a guardianship under section 744.331 of the Guardianship Code.

The court also pointed out that the assets in the trust were no longer the father's property when they became the *res* of an irrevocable trust.

Practice tip: The terms of a trust do not provide the only means for removal of a trustee. Rather, those terms are supplemental to the Florida Trust Code's methods for removing a trustee. A trustee who lacks capacity to serve may be removed even if he retains enough capacity that he would not be declared partially or totally incapacitated under the Florida Guardianship Law.

Conveyance by co-trustees of settlor's condominium from revocable trust to settlor with remainder to daughter effectively removed condominium from trust and transferred title to daughter after settlor's death

Schlossberg v. Estate of Kaporovsky, 45 Fla. L. Weekly D1862 (Fla. 4th DCA August 5, 2020).

Issue: Was one-half interest in the decedent's condominium (condo) included in her estate at death, or was it validly conveyed to the settlor out of her trust when co-trustees executed a deed transferring it to the settlor individually with remainder to the daughter?

Answer: The condo was validly conveyed to the settlor with remainder to the daughter.

In 2000, the decedent executed a deed conveying ownership of her condo to herself and her daughter. Several years later, the decedent established a revocable trust and appointed herself and her daughter co-trustees. She then transferred her interest in the condo to herself as trustee of the trust. This deed broke the joint tenancy with the daughter, and the result was that the trust and the daughter both owned an undivided interest in the condo. In 2005, the decedent and her daughter, individually and as co-trustees of trust, executed a deed transferring the condo unit to the decedent with a life estate to the decedent and remainder to the daughter. After the decedent died, her daughter sold the condo to a third party.

The personal representative of the decedent's estate filed an action against the daughter and the third-party buyer alleging that the last deed was void because the trustees were only permitted to distribute/transfer trust property to the settlor or for the benefit of the settlor. Under this rationale, when the daughter sold to the third-party buyer, she only conveyed her one-half interest in the condo (from the 2000 deed), and the estate owned the other half. The trial court agreed with the personal representative that the 2005 deed exceeded the co-trustee's powers because the remainder interest was not for the settlor's benefit, and therefore, the deed was void.

The Fourth District reversed, holding that when the co-trustees executed the 2005 deed, the settlor withdrew the condo from the trust thereby revoking the trust as to the condo and transferring it to herself. This was consistent with the trustee's

powers to convey property to the settlor for her use. Once the settlor owned the condo, she had the power to convey it free of trust to herself for life with remainder to her daughter. The fact that she did so with a single conveyance in one deed was effective and had the virtues of economy and efficiency. Therefore, the deed was valid.

The court also held that the third-party buyer was entitled to status of a bona fide purchaser for value. Therefore, the appellate court ordered the trial court to enter a judgment declaring the third-party buyer the rightful owner of the condo.

Practice tip: If your client wants to remove property from her trust and grant a remainder interest to a family member, it may be prudent to do so by having the client execute a deed conveying property out of the trust to herself and then execute an enhanced life estate deed conveying a life estate to herself with remainder to the family member.

Daughter who harassed guardian and endangered ward lost right to object to guardian's attorney's fee petition

In Re Guardianship of Martino, 45 Fla. L. Weekly D1634 (Fla. 2d DCA July 8, 2020)

Issue: Can the daughter of the ward who filed a request for notice under Florida Probate Rule 5.060 lose her status as an *interested person* under section 731.201(23), Florida Statutes, when she harasses the guardian and interferes with the care of the ward resulting in unnecessary expense to the guardianship estate?

Answer: Yes.

The record in this case showed that the daughter of the ward engaged in a pattern of behavior that made it difficult for her father's professional guardian to do her job. The daughter's behavior consisted of constantly complaining to the guardian and the facility where her father resided, attempting to relocate the ward without the guardian's consent, taking the ward out of the facility for unauthorized day trips, constantly complaining to the facility about the ward's care, and maligning the facility on social media even after being ordered to stop. Due to harassment, the guardian eventually resigned and a successor guardian was appointed.

Subsequently, the daughter objected to fee petitions filed by the former guardian and her attorney and by the successor guardian's attorney.

In a hearing held on petitions of the former guardian and her attorney, the trial court held that the daughter lacked standing to object to the fee petitions, reasoning that, even though she had requested notice under Florida Probate Rule 5.060, she was not an interested person under section 731.201(23), Florida Statutes, because she had interfered with administration of the guardianship and care of the ward causing unnecessary expense. Therefore, under the standard set forth in *Hayes v. Guardianship of Thompson*, 952 So. 2d 498, 508 (Fla. 2006), the court stated that the court can consider "circumstances of the case" and the "specific issues involved," and the daughter lost her "interested person" status by her own inappropriate conduct that threatened the well-being of the ward. The Second District agreed, affirming the trial court's denial of the daughter's objections to the former guardian and her attorney's petitions due to lack of standing.

The daughter's objection to the fees of the successor guardian's attorney were due to be heard two months after the court denied her objection to petitions of the former guardian and her attorney. After the first hearing, the attorney for the successor guardian served a verified motion for relief pursuant to section 57.105(1), Florida Statutes, seeking attorney's fees as a sanction against the daughter for her action in continuing to pursue objections she knew or should have known she did not have standing to file. When the daughter failed to withdraw her objection, the motion was filed with the court. Following a hearing, the trial court found the daughter's objection without merit and granted motion for section 57.105 fees based on the fact that the daughter knew or should have known she lacked standing based on the court's denial of her earlier objection.

The Second District affirmed the trial court's award of section 57.105 fees against the daughter, noting that, after the first hearing, the daughter had been put on notice that her conduct could be taken into account in determining her "interested person" status and that the daughter had continued with her pattern and practice of harassing the guardian even after the successor guardian was appointed.

Practice tip: A family member's bad behavior toward a guardian or a ward can jeopardize his or her status as an interested person and preclude him or her from retaining the right to be served with notice of proceedings in a guardianship estate even if the family member requests notice under Florida Probate Rule 5.060.

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