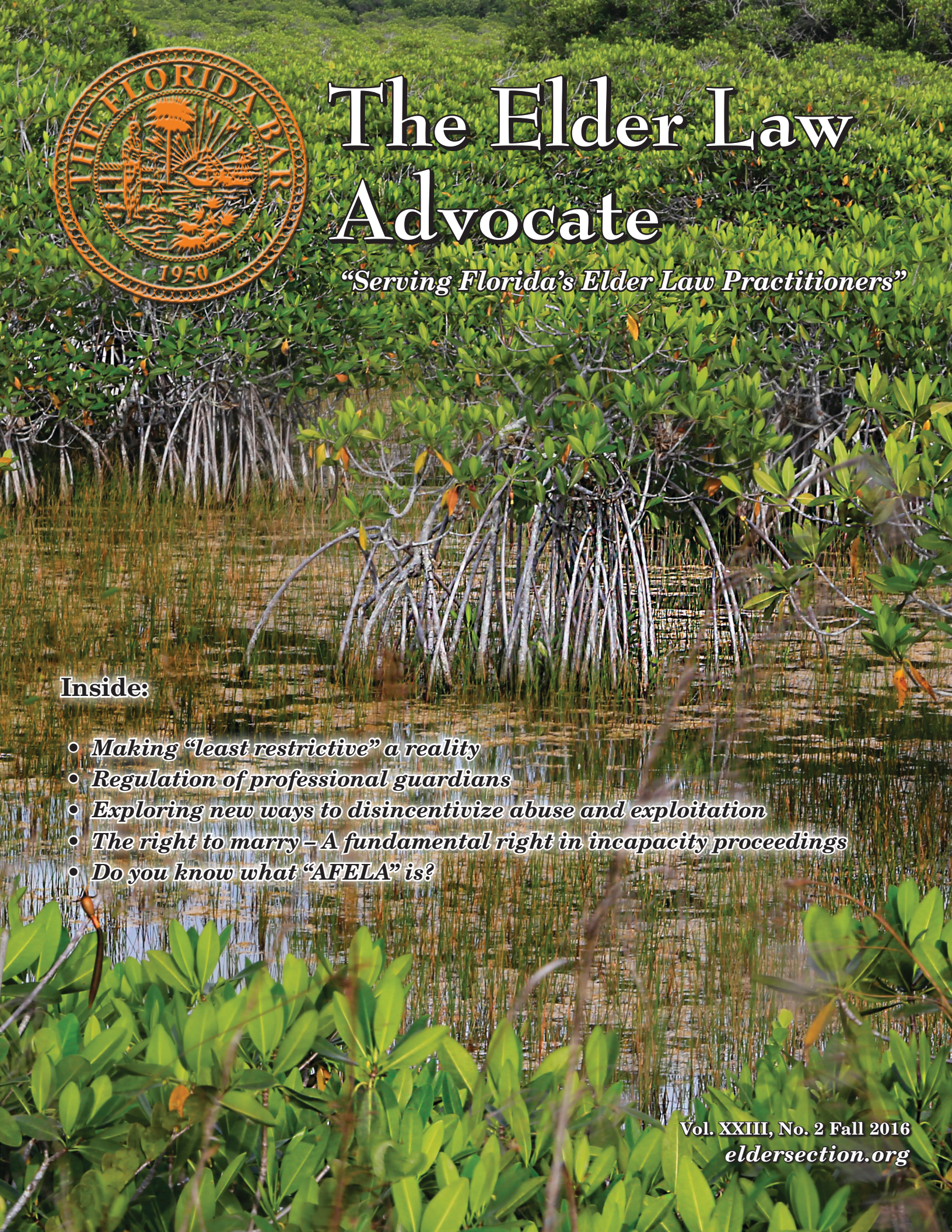

The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

Inside:

- *Making "least restrictive" a reality*
- *Regulation of professional guardians*
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The Elder Law Advocate

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COVER ART

Everglades Mangroves

by Randy Traynor

randytraynorphotography.com

9/2016

Contents:

The deadline for the WINTER 2017 EDITION: November 1, 2016. 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 Kristina M. Tilson at *kristinatilson@gmail.com*, or call Chris Hargrett at 850-561-5625 for additional information.

Correction:

The spring 2016 of The Elder Law Advocate included photographs from the Essentials of Elder Law & Annual Elder Law Update. These images should have been attributed to Twyla Sketchley and Tracy Rouse, F.R.P. We appreciate their contribution and regret the omission.

Following is correct contact information for Victoria Heuler, co-chair of the Guardianship Committee:

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A small section packing a big punch

Ellen S. Morris

Message from the chair

The Elder Law Section has just under 2,000 members, but we are growing and we are one of only six sections of the twenty-three Florida Bar sections that has a lobbyist and is very active legislatively. The "big Bar" knows who we are for sure! I just attended the Bar's leadership training institute in Tallahassee, and I learned a lot about the Bar's current initiatives, which are many and are hard to prioritize since all are of great importance. For example, the Bar has a standing committee on diversity and inclusion. In today's world of racial unrest, this committee strives to achieve a better record of diversity and inclusion among Florida lawyers. I am proud to have appointed Collett Small to this committee and look forward to her bringing us ideas to further this committee's goals.

One of my goals this year is to step up our efforts to combat exploitation of seniors and to make other lawyers aware of the good use of F.S. 825.103. To that end, Shannon Miller received great air time when Juan Antunez featured her thoughts about the statute on his very popular blog. Check it out on *flprobatelitigation.com*. Additionally we partnered with Stetson Law School to hold a seminar on exploitation on September 30, chaired by Erika Dine and Amy Collins. In addition to the live program at Stetson, the event was made available as a webcast to reach as many participants as possible with this topic that is relevant to all of our practices.

Speaking of our website, our new administrator, Chris Hargrett, and immediate past chair, David Hook, are doing an awesome job in keeping it up-to-date. Please go to *eldersection.org* for all information about our section. You can see the leadership under the "section contacts" button and the committees under the "committees" button. And check out all of our new committee chairs there. Don't hesitate to join a committee. You will learn a ton and have other elder lawyers to bounce ideas off of and to network with. Our website will be even more technologically savvy in the coming months as we budget to update it with current technology and use social media. Keeping up with technology is also a priority of the big Bar. There's also information about our retreat on the homepage. The hotel rooms will most likely go fast, so don't delay in booking.

We hope to provide all the substantive educational material that our members need and want. You can set your calendars to expect our programs regularly: June, September/October, January and March. You can also buy our materials online if you can't attend seminars in person, and you can attend our mentoring CLE calls. In other larger sections, the retreat (held in September or October) is sold out almost immediately. Members use the retreat as a working vacation, and our section will be traveling more. Last year we went to New Orleans, so this year we are staying in state, but we may go out of the country next year. Join a committee and stay involved so you can take part in this great section benefit.

I look forward to a productive year ahead. Please email me if you have any suggestions, comments or questions at *emorris@elderlawassociates.com*.

Ellen

Judicial performance feedback sought from Bar members

The Judicial Administration & Evaluation Committee is encouraging all Bar members to participate in the Confidential Judicial Feedback Program developed by the committee and approved by The Florida Bar Board of Governors.

The purpose of the Confidential Judicial Feedback Program is to promote judicial self-improvement and enhance the quality of our judiciary as a whole. Attorneys are asked to evaluate the judge's demeanor, knowledge, fairness, and other factors, but not to discuss issues of their specific cases. The commenting attorney's identity is kept confidential and the comments are provided only to the judge who is the subject of the review. All feedback is and remains confidential pursuant to Florida Rule of Judicial Administration 2.051(c)(4).

There are separate forms for trial court judges and appellate court judges. Feedback may be provided two ways" by competing the forms online at www.floridabar.org/JudicialFeedback or by downloading the forms at www.floridabar.org/JAEC and following the instructions.

Making "least restrictive" a reality

by Karen P. Campbell

There is a general belief among guardians and guardianship lawyers that once a guardianship is established, it usually remains in place for the lifetime of the person. Yet Florida guardianship law is clear that guardianship should be narrowly tailored to meet the needs of the person, with a continuing review of the ongoing need for the guardianship.

Consider a young man, we'll call him James, who has a moderate intellectual disability. James found himself in a situation where he mismanaged his personal finances. His service providers sought and obtained a plenary guardianship. James did not quite understand guardianship and did not begin to resist or object to the guardianship until it was well established. Once James learned about the restoration process, he filed a suggestion of capacity but did not present any evidence other than his assertion that he could take care of his affairs. The physician examiner recommended no restoration. Rather than dismiss the proceedings outright, the judge allowed the guardian to give James control over several aspects of his life. The judge monitored James's progress through a series of guardian reports to the court. After months of monitoring, the judge was satisfied that James had learned how to manage his finances, and virtually all of James's legal rights were restored.

Consider Ned, an older man who had a significant hearing impairment and signs of dementia. His family support was leaving the city, and the family sought a guardian to handle Ned's affairs. A plenary guardianship was established over Ned's objections. Over three to four years, the guardian observed Ned's relationship with a neighbor. The neighbor transported Ned to doctor's appointments, helped him shop and read his mail, among other things. There were no indications that the neighbor could not be trusted. The guardian explained the responsibilities of medical proxy and social security representative payee to Ned's neighbor. The guardian filed a suggestion of capacity. The physician examiner recommended no restoration because the cognitive incapacities were still present. The judge left the adjudication of incapacity intact but discharged the guardian due to the availability of the lesser restrictive alternative of medical proxy and representative payee.

These examples may cause a bit of discomfort or unease for practitioners who view guardianship as the best means of protecting the civil rights of vulnerable individuals from exploitation and abuse. These cases are examples, however, that challenge us to think creatively about using different strategies to implement Florida's legislative mandate to use alternatives to guardianship whenever possible and to seriously treat guardianship as a last resort.

In recent years, there have been national efforts and state initiatives specific to Florida addressing the subjects of alternatives to guardianship and restoration of capacity. In 2013, the American Bar Association Commission on Law and Aging published a state-by-state comparison of guardianship restoration laws and practices. This year, the commission released a new resource tool called PRACTICAL, which is designed specifically to help lawyers identify and implement decision-making options that are less restrictive than guardianship. On Sept. 7, 2016, the Commission convened a roundtable of legal professionals from around the country to examine trends in guardianship restoration and to recommend strategies for reforms in this area.

In Florida, the Florida Developmental Disabilities Council and Guardian Trust sponsored a three-year guardianship restoration project. A statewide Restoration of Capacity research study was conducted in 2014, and it concluded that there is little restoration activity in the state. The second major finding of the study was that there is a lack of awareness of the right to a continuing review of the need for guardianship in a person's life. Based on a recommendation from the project's Stakeholders' Work Group, the project assembled a collaborative team to author instructional materials and to conduct a series of workshops across the state. As a result, the publication series titled *Developing Abilities and Restoring Rights* was authored in 2015. This year, free workshops were conducted across the state to educate and inform people under guardianship, their families and service providers, guardians, attorneys, judges and examiners about the use of alternatives to guardianship and Florida's restoration process.

The publication series *Developing Abilities and Restoring Rights* includes a workbook designed for use by persons with disabilities. It contains interactive exercises and resources that promote building capacity in the area of each civil right in Florida guardianship law; an accompanying guide for use by those supporting the person with a disability; and a manual for legal professionals (guardians, attorneys, judges and physician examiners) that outlines the restoration process for guardianship and guardian advocacy; discusses strategies to limit, avoid or replace plenary guardianships; and highlights some best practices for practitioners.

All of this activity has taken place under a statutory framework that repeatedly emphasizes that guardianship should be avoided unless absolutely necessary, a system that mandates all participants work themselves out of a job. Attorneys must address least restrictive alternatives

in the petitions to initiate guardianship. Judges must make findings that no lesser restrictive alternatives exist prior to establishing a guardianship. Guardians of the person must report to the court in the annual plan the guardian's activities on building the capacity of the person.

Some of the recent vocal critics of guardianship practice in Florida accuse the system of being rigged toward promoting guardianships, yet the statutes, local rules and case law indicate that this accusation is unfounded. While there may be little data documenting restoration activity, efforts like the educational project *Developing Abilities* and even efforts like the publication of this article are evidence that guardianship professionals are committed to the principles of promoting lesser restrictive options to guardianship.

Guardianship practitioners should keep abreast of developments in this area and look for ways in their own cases to avoid, limit or replace plenary guardianships. The *Developing Abilities* publication series developed specifically for Florida is available free of charge from the Florida Developmental Disabilities Council or can be downloaded at *capacityrestoration.org*. The National Resource Center for Supported Decision-Making (*supporteddecisionmaking.org*) offers trainings, webinars and reports of supported decision-making initiatives and projects across the nation. The Restoration of Capacity research study findings are scheduled to be published in Volume IX of the *Journal of International Aging Law and Policy*. The American Bar Association Commission on Law and Aging resources are located at *americanbar.org/groups/law_aging.html*.

Karen P. Campbell *is executive director of the North Florida Office of Public Guardian, Inc., in Tallahassee. She can be reached at* ***karen.campbell@northfloridaopg.org****.*

Regulation of professional guardians

by William A. Johnson

On Mar. 10, 2016, Governor Rick Scott created the Office of Public and Professional Guardians (OPPG) by signing into law Senate Bill 232. Prior to this act, Florida had the Office of Public Guardianship, which was concerned with administering only Florida's *Public* Guardianship program. In response to public outcry over the actions of a few professional guardians, and several negative press articles, the Florida Legislature believed it was now necessary to regulate professional guardians rather than simply register them. Thus, Senate Bill 232 came into being and now is law as Chapter 2016-40, which, in order to accommodate this new legislation, makes several amendments to Florida Statutes Chapter 744 (2016).

Part II of the statute, formerly entitled "VENUE," has been renamed "PUBLIC AND PROFESSIONAL GUARDIANS." F.S. 744.201, 744.202 and F.S. 744.2025 have been moved from the old "VENUE" Part II to the expanded Part I. Furthermore, F.S. 744.1012 is amended to add new language requiring that "alternatives to guardianship and less restrictive means of assistance including, but not limited to, guardian advocates, be explored before a plenary guardian is appointed." Additional language is added to create new sections (4), (5) and (6), which collectively address circumstances when a private guardianship may be inadequate. They also provide that a public guardian, through the new office, may only be appropriate when a private guardian is truly inadequate and when a no less restrictive means is unavailable.

Part IX of Chapter 744 has been removed, as well as F.S. 744.701 and F.S. 702. An amended F.S. 744.2021 becomes the new F.S 744.2001. F.S. 2001 is the statute that spells out the duties and responsibilities of the new Office of Public and Professional Guardians. Most noteworthy is that F.S. 744.2001 directs OPPG to develop standards of practice in consultation with stakeholders, no later than Oct. 1, 2016. OPPG is also to develop disciplinary procedures. This new section will establish brand new standards for professional guardians. The newly proposed Rule 58M-2.009 defines 244 standards (including sub-parts) for professional guardians. It is the author's opinion that some of the proposed standards are so vague that any complainant could find something in them on which to "hang their hat."

The old F.S. 744.1083 and F.S. 744.1085 have been renumbered and amended, and are now under the new Part II as F.S. 744.2002 (registration) and F.S. 744.2003 (regulation). F.S. 744.2004 is brand new and entitled "Complaints; disciplinary proceedings; penalties; enforcement." OPPG must establish these new procedures also by Oct. 1, 2016. A short summary of the procedure for a complaint is as follows:

1. OPPG must first determine if a complaint is legally sufficient and, if so, then investigate any complaint that the professional guardian has violated the standards of practice established by OPPG.
2. OPPG must commence the investigation within 10 days of the complaint.
3. OPPG must provide findings of the investigation to the complainant and the professional guardian within 60 days of the filing of the complaint.

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4. OPPG may obtain documentation.
5. OPPG may dismiss the complaint or proceed under its disciplinary procedures in compliance with F.S. 120 (Administrative Procedures Act).
6. The Department of Elder Affairs (DOEA) is responsible for notifying professional guardians about any disciplinary proceedings. DOEA is to adopt its own procedures for this by Oct. 1, 2016.
7. OPPG must notify any court in which the guardian is involved if it determines to suspend or revoke a guardian's registration.

The new section F.S. 744.20041 deals with the grounds for discipline, which are as follows:

(a) Making misleading, deceptive, or fraudulent representations in or related to the practice of guardianship.

(b) Violating any rule governing guardians or guardianships adopted by the Office of Public and Professional Guardians.

(c) Being convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, a crime in any jurisdiction which relates to the practice of or the ability to practice as a professional guardian.

(d) Failing to comply with the educational course requirements contained in F.S. 744.2003.

(e) Having a registration, a license, or the authority to practice a regulated profession revoked, suspended, or otherwise acted against, including the denial of registration or licensure, by the registering or licensing authority of any jurisdiction, including its agencies or subdivisions, for a violation under Florida law. The registering or licensing authority's acceptance of a relinquishment of registration or licensure, stipulation, consent order, or other settlement offered in response to or in anticipation of the filing of charges against the registration or license shall be construed as an action against the registration or license.

(f) Knowingly filing a false report or complaint with the Office of Public and Professional Guardians against another guardian.

(g) Attempting to obtain, obtaining, or renewing a registration or license to practice a profession by bribery, by fraudulent misrepresentation, or as a result of an error by the Office of Public and Professional Guardians which is known and not disclosed to the Office of Public and Professional Guardians.

(h) Failing to report to the Office of Public and Professional Guardians any person who the professional guardian knows is in violation of this chapter or the rules of the Office of Public and Professional Guardians.

(i) Failing to perform any statutory or legal obligation placed upon a professional guardian.

(j) Making or filing a report or record that the professional guardian knows to be false, intentionally or negligently failing to file a report or record required by state or federal law, or willfully impeding or obstructing another person's attempt to do so. Such reports or records shall include only those that are signed in the guardian's capacity as a professional guardian.

(k) Using the position of guardian for the purpose of financial gain by a professional guardian or a third party, other than the funds awarded to the professional guardian by the court pursuant to F.S. 744.108.

(l) Violating a lawful order of the Office of Public and Professional Guardians or failing to comply with a lawfully issued subpoena of the Office of Public and Professional Guardians.

(m) Improperly interfering with an investigation or inspection authorized by statute or rule or with any disciplinary proceeding.

(n) Using the guardian relationship to engage or attempt to engage the ward, or an immediate family member or a representative of the ward, in verbal, written, electronic, or physical sexual activity.

(o) Failing to report to the Office of Public and Professional Guardians in writing within 30 days after being convicted or found guilty of, or entered a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction.

(p) Being unable to perform the functions of a professional guardian with reasonable skill by reason of illness or use of alcohol, drugs, narcotics, chemicals, or any other type of substance or as a result of any mental or physical condition.

(q) Failing to post and maintain a blanket fiduciary bond pursuant to F.S. 744.1085.

(r) Failing to maintain all records pertaining to a guardianship for a reasonable time after the court has closed the guardianship matter.

(s) Violating any provision of this chapter or any rule adopted pursuant thereto.

These 19 new grounds are in addition to the 244 standards mentioned above, as well as all the existing statutory obligations already imposed upon professional guardians.

In order to implement these new laws, OPPG is authorized to have six full-time employees with a total salary of $242,345 ($40,390 per employee, per year). OPPG has a reoccurring budget of $698,153 per year and a one-time authorization of $123,517 to the Department of Elder Affairs for implementation.

In closing, the real test of Chapter 2016-40 will be the final standards of practice in Rule 58M-2.009 due out on Oct. 1, 2016. If these are too strict and

onerous, the State of Florida may lose many valuable professional guardians. If they are too lax, there could be a public outcry over the enforcement of professional guardians. It is hoped that OPPG gets them just right.

William A. Johnson *is the owner of William A. Johnson PA in Melbourne. He is board certified by The Florida Bar in the area of elder law and practices predominantly in the fields of estate planning, Medicaid planning, long-term care planning, guardianship, incapacity planning, will and trust litigation and probate. He is a co-chair of the Elder Law Section's Legislative Committee.*

Exploring new ways to disincentivize abuse and exploitation

by Amy Mason Collins and Marilyn C. Belo

As elder law attorneys, more and more frequently we are presented with elderly clients who are or who have been abused or exploited by a close friend or, more likely, a family member. On a rare occasion, we are privileged to bear witness to the criminal conviction of a client's abuser. But imagine this case: the niece of an elderly woman is convicted of elder abuse and sentenced to prison for financially exploiting her aunt by abusing her authority under a power of attorney. What a win for justice, right? Well, sort of. In this particular case, while the niece served her prison time, her aunt died. From prison, the niece filed a probate action and inherited what remained in her aunt's estate, ultimately being able to benefit from the very same person she was convicted of financially exploiting.

Florida has relatively progressive laws to protect our elderly and disabled citizens. For example, Chapter 415, Florida Statutes, defines abuse, neglect and exploitation of "vulnerable adults" and provides a mechanism for the Department of Children and Families to receive and investigate reports of abuse. Chapter 415 also provides for referrals to law enforcement to conduct criminal investigations and creates a civil cause of action for abuse, neglect or exploitation. Our criminal laws under Chapter 825, Florida Statutes, were recently amended to strengthen and broaden the scope of and criminal penalties for the abuse, neglect or exploitation of an elderly or disabled adult.

Unfortunately, the current use and success of actions brought on behalf of our elders under Chapters 415 and 825, from a practical standpoint, have been somewhat limited. Victims consistently underreport abuse or exploitation—particularly if the abuse is perpetrated by a family member or a close friend. Most victims do not want a family member dishonored in public, or they are overcome by shame and embarrassment or a NIMF ("not in my family") attitude. A deep-rooted reluctance to admit abuse and publicly "air one's dirty laundry" more often than not stops a criminal or civil investigation before it even begins. The unavailability of reliable witnesses also may frustrate legitimate efforts to pursue criminal cases on abuse and exploitation due to the high burden of proof required for a successful criminal prosecution.

A further hindrance to the pursuit of civil cases is that often there is little to no chance that the victim will make any recovery from the abuser by the time a civil action is filed. The tangible and intangible costs of pursuing a civil judgment against the abuser during the victim's lifetime become insurmountable financial and emotional barriers. From the victim's perspective, resources are limited and there may be little to gain—and arguably much to lose[1]—if a judgment against the abuser is pursued during his or her lifetime.

Several states have recognized this gap in justice for our elders and their families, and given the growing problem and occurrence of abuse and exploitation of all of our vulnerable adults, they have passed additional legislation in an effort to deter abusers from committing abuse and exploitation. At least eight states have enacted legislation that, to some extent, disinherits abusers from the estates of their victims. Each of these states

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has taken a relatively different approach in implementing its laws, and many of the laws have been criticized as being too weak to adequately deter elder abuse. For example, three states' laws target only financial elder abuse, not taking into account victims facing physical or sexual abuse. Six states' laws require a criminal conviction of the abuser to trigger their disinheritance statute, which often is difficult to obtain given the high burden of proof in these very difficult cases to prosecute. California's law, which is broad in the type of abuse it covers and which does not require a criminal conviction, has been criticized as being too lenient as it only disinherits the abuser from his or her inheritance to the extent the victim's estate receives a civil judgment against the abuser.[2]

In Florida, existing post-death remedies against abusers, in many cases, are inadequate. For example, as part of the exploitation and abuse of a victim, an abuser may have unduly influenced the victim in the procurement of a testamentary document, the designation of beneficiaries of assets or titling of bank accounts. In an undue influence case, however, the abuser still may benefit from the estate as an heir or a beneficiary (with his or her share of the estate simply being reduced to the "fairer" share he or she was allocated prior to the abuse and undue influence).

Florida has the building blocks in place to create strong and potentially effective laws to further disincentivize abuse and exploitation of our vulnerable adults, and to provide further justice for victims subject to abuse and exploitation. A disinheritance statute for abusers would be the next step to protect our most vulnerable population. The authors of this article propose the following parameters for a new statute under Florida's Probate Code:

1. All forms of abuse should disqualify an abuser from inheriting from the victim—be it physical or sexual abuse, neglect or financial exploitation. Abuse should include not only intentional acts but also acts that could reasonably be expected to result in financial, physical, sexual or emotional harm to the elder or disabled person.

2. The scope of disinheritance should not be limited to only the amount of the civil judgment awarded to the victim's estate. Inheritance should be completely barred, unless otherwise ratified by the victim.

3. Abusers should not be limited to those who have a criminal conviction of abuse, neglect or exploitation. Florida's "slayer statute" permits a lower burden of proof for the determination of whether a beneficiary murdered the decedent than is permissible in the criminal context.[3] This same type of determination can be applied to the determination of whether a beneficiary committed abuse or exploitation of the decedent for the purposes of his or her disinheritance if a criminal conviction is absent.

4. The law should include a ratification clause to protect the rights of a victim who still wishes to include an individual in his or her estate plan, notwithstanding any abuse or exploitation committed by that individual.

Florida has one of the largest populations of older and disabled individuals. The vulnerability of this population is only going to become more apparent in our practices. Now may be the time to take further action to create additional tools we can use to protect and seek justice for our most vulnerable adults.

Amy Mason Collins *is an associate attorney with Waldoch & McConnaughhay PA in Tallahassee. She practices in the areas of guardianship, estate planning and estate and trust administration. She is a former co-chair of the Abuse, Neglect & Exploitation Committee and a current co-chair of Estate Planning & Advance Directives, Probate Committee of the Elder Law Section.*

Marilyn C. (Lynn) Belo *has her own practice in Gainesville and focuses on serving elders and persons with different abilities. She is a member of the Abuse, Neglect & Exploitation Committee and in May 2016 earned the LLM in elder law from Stetson Law School.*

Endnotes

1 In fact, Section 772.11(1), Florida Statutes, provides that in an action for civil theft or exploitation under Sections 812.012-812.037 or Section 825.103(1), the defendant is entitled to recover reasonable attorney fees and court costs in the trial and appellate courts upon a finding that the claimant raised a claim that was without substantial fact or legal support. This risk is a significant deterrent to many in pursuing a civil claim for exploitation.

2 *See* Travis Hunt, "Disincentivizing Elder Abuse Through Disinheritance: Revamping California Probate Code §259 and Using It as a Model," BYU Law Review, Vol. 2014, Issue 2, Article 7.

3 Section 732.802(5), Florida Statutes, states: "A final judgment of conviction of murder in any degree is conclusive for purposes of this section. In the absence of a conviction of murder in any degree, the court may *determine by the greater weight of the evidence* whether the killing was unlawful and intentional for purposes of this section" (emphasis added).

The right to marry – A fundamental right in incapacity proceedings

by Betsy Vázquez de Rincón

It is well established that the right to marry is a fundamental right protected by the United States Constitution. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2599 (2015) states that "[c]hoices about marriage shape an individual's destiny." How then can this fundamental right to marry be restricted by virtue of having the right to contract removed in incapacity proceedings? The answer is simple. Marriage is a contract. If the right to contract is removed from the ward, then common sense would dictate that any subsequent marriage would be rendered void. A marriage entered into by a person with no right to marry is void. *See Kuehmsted v. Turnwall*, 138 So. 775, 777-78 (Fla. 1932) (a marriage entered into by a person lacking capacity to consent to a marriage is void); *Dandy v. Dandy*, 234 So.2d 728, 730 (Fla. 1st DCA 1970) (marriage was rendered void because one of the parties was still legally married to another person, and therefore lacked the legal right to marry a second time).

> To constitute a valid marriage, the marital contract must be voluntarily entered into in good faith for the purposes actuating such contracts, the parties must be legally eligible to make the contract, and their status must be such that the union will not be contrary to public policy or obnoxious to the prevailing social mores. *Goldman v. Dithrich*, 179 So. 715, 717 (Fla. 1938).

Fla. Stat. § 744.3215 (2013) contains a list of the 28 rights evaluated when a person is determined incapacitated. Of the 28 rights, six rights *may* be removed from a person by an order determining incapacity, but *not* delegated to a guardian. Here, the focus shall be on one of these rights, the right to marry.

Fla. Stat. § 744.3215(2)(a) (2013) provides that where the right to contract has been removed, the right to marry is subject to court approval. The statute does not state that marriage is prohibited unless approval is given prior to the marriage. Elsewhere, however, the Legislature does expressly state instances where a marriage is prohibited. *See* § 741.21, Fla. Stat. (2013).

In *Smith v. Smith*, No. 4D14-1436, 2016 WL 803625 at *2 (Fla. Dist. Ct. App. Mar. 2, 2016), the marriage between Glenda Martinez Smith and Alan Smith (the ward) was annulled because prior court approval was not obtained as required by the controlling statute. The ward was judicially declared incompetent after being involved in an automobile accident in which he suffered head trauma. The incompetency hearing rendered Smith to have "lessening of some cognitive functions possibly due to dementia that make him incapacitated, the nature and scope being that he is unable to manage his property and to contract." The court then removed Smith's right to contract and to manage his finances. After the appointed professional guardian refused to ask the judge for approval to marry, Smith and Martinez proceeded to marry without court approval. At the time, Martinez chose not to have a lawyer seek court approval. Therefore, the sole ground for annulment of the marriage was the failure to acquire prior court approval. As a result, the court denied the motion to ratify the marriage and rendered the marriage void pursuant to the statute.

There are distinct differences between void and voidable marriages. According to *Arnelle v. Fisher*, 647 So.2d 1047 (Fla. 5th DCA 1994), a void marriage, legally speaking, is defined as one that never existed and, therefore, cannot be ratified. On the other hand, a voidable marriage, which is a civil contract, may be ratified even when a person is rendered incompetent at the time of execution. *See Perper v. Edell*, 35 So.2d 387 (Fla. 1948). Who is to say that the incapacitated person may experience a lucid interval or recover mental capacity and knowingly want to accept the benefits of his civil contract? *Id.* at 483. Should this principle be extended to marriage contracts? Is it reasonable and fair for a court to determine the validity of a marriage?

At first glance, a reasonable person may conclude that courts should not interfere with the right to contract in a marriage because it is a fundamental right. The court's decision in Smith is a question of great public importance because "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Furthermore, where a fundamental right is involved, the statute must be "strictly tailored to remedy the problem in the most effective way and must not restrict a person's rights any more than absolutely necessary." *Mitchell v. Moore*, 786 So. 2d 521, 527 (Fla. 2001).

And yet, the scope of issues addressed in incapacity hearings may be quite complicated, and marriage is an area that requires protection of the ward by the courts to prevent financial exploitation. A marriage is a contract that deals with a range of sometimes simple to very complex business transactions. The inability of a ward to understand what a marriage contract entails cannot go unnoticed. Moreover, to render an inheritance be awarded to another person that is not the rightful spouse, child(ren) or heir of the ward can lead to a detrimental outcome for the family. Therefore,

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although viewed as unfair at times, it seems logical that if the right to contract has been removed and the parties did not obtain prior court approval, then the marriage should be rendered void.

The question remains:

Do incapacitated individuals retain their fundamental right to marry without court approval?

On June 29, 2016, the appellate court certified this question to the state's highest court to determine whether incapacitated persons can retain the fundamental right to marry.

***Betsy Vázquez de Rincón, MBA**, is a juris doctor candidate (2016) and an elder law certificate candidate (2016) at St. Thomas University School of Law. She is a Florida Supreme Court certified family mediator, parent coordinator and an active board member at St. Thomas University Elder Law Society (STUELS). Upon graduation, she plans to practice in the areas of elder law, elder law mediation and guardianship.*

SECTION NEWS

Mark your calendar!

2016 Elder Law Section Retreat
Omni Amelia Island Plantation Resort
October 27-30, 2016

Tentative Schedule

Thursday, October 27, 2016
5-7p.m. – Executive Council Meeting

Friday, October 28, 2016
9-11a.m. – Practice Management CLE
4-5:30 p.m. – AFELA and Section Roundtable Discussion/Happy Hour

Friday & Saturday, October 28-29, 2016
Daytime Activities: Goony Golf, Trolley Ghost Tour, Historic Island Tour
Dine Around all evening for families or adults

Retreat Hotel Information
Omni Amelia Island Plantation Resort
39 Beach Lagoon Road
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DO YOU KNOW WHAT "AFELA" IS?

"AFELA" stands for the Academy of Florida Elder Law Attorneys. AFELA is the Florida state chapter of the national organization known as the National Academy of Elder Law Attorneys (NAELA). There are many other state chapters of NAELA around the nation. AFELA is one of the largest chapters. Membership in AFELA requires membership in NAELA and an adherence to its aspirational standards for professional behavior.

AFELA was founded in 1993 as a professional association of attorneys who are dedicated to improving the quality of legal services provided to the elderly. AFELA is the preeminent organization of Florida elder law attorneys providing advocacy, education and action on behalf of seniors and people with disabilities. It provides advanced level education, with the academy offering several CLE in-person programs and web-based programs on a wide range of topics in the elder law concentration. One of its most lauded membership benefits is the AFELA listserv, which is an open forum for questions and answers among its members on nearly every elder law topic imaginable.

AFELA is often confused as being a part of The Florida Bar. It is not. Consequently, AFELA is different from The Florida Bar's Elder Law Section, with its own board of directors and its own administrator. Nearly all members of AFELA are members of the Elder Law Section, too. Although some could imagine that AFELA and the Elder Law Section would compete with each other, the academy and the section share a unique and close working relationship. It is through this mutually beneficial relationship that the "Joint Public Policy Task Force for the Elderly & Disabled" was formed over 10 years ago to address concerns with administrative public policy and proposed legislation affecting the practice of elder law attorneys in Florida. The task force is balanced with four officers of each organization and five attorneys selected at large. Since this is a wholly volunteer-based group, it is the financial contributions by AFELA and ELS members that allow advocacy to occur within administrative and legislative forums.

If you are an elder law attorney in private practice, we are interested in having you join the AFELA membership. For more information, you may contact our administrator, Jennifer Dooley, at jennifer@afela.org and view the AFELA website,afela.org.

Please log on to the AFELA website (afela.org) for information on our educational programs.

2016 AFELA officers

Cary Moss, president
Twyla Sketchley, president-elect
Jill Burzynski, secretary
Matthew Rheingans, treasurer

Emma Hemness, immediate past president
Gregory Glenn, board member
Mike Jorgensen, board member
Ellen Morris, board member

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Amanda Wolf, board member
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AFELA

advocate | educate | action

The Academy of

FLORIDA ELDER LAW ATTORNEYS

SECTION SCENE

2016 Elder Law Section Awards Reception

The following awards were presented during the 2016 Elder Law Section Awards Reception, held June in conjunction with The Florida Bar Annual Convention in Boca Raton.

- Charlotte Brayer Award for Outstanding Public Service to Jason A. Waddell of Waddell & Waddell PA in Pensacola
- Member of the Year Awards to Scott A. Selis of Chiumento Selis Dwyer PL in Palm Coast and to William A. Johnson of William A. Johnson PA in Melbourne
- Lifetime Achievement Award to David J. Lillesand of Lillesand & Associates PA in Clearwater
- Special Recognition Awards to Stephanie M. Villavicencio, editor of *The Elder Law Advocate*, and to Arlee J. Colman, program administrator of the Elder Law Section

Outgoing Chairman David A. Hook receives a commemorative watch in appreciation for his service as chair of the Elder Law Section.

Jason A. Waddell is the 2016 recipient of the Charlotte Brayer Public Service Award.

Former section administrator Arlee J. Colman receives a plaque in appreciation of her many years of service to the Elder Law Section.

David J. Lillesand is a 2016 recipient of the Lifetime Achievement Award.

MEMBER NEWS

RPPTL selects Villavicencio for 2016-18 Fellowship Program

Stephanie Villavicencio of Miami has been selected a fellow of the Real Property, Probate and Trust Law Section's Fellowship Program for the 2016-18 Bar years. She will participate in the probate/trust side of the program.

The mission of RPPTL's Fellowship Program is to attract and retain young lawyers to be active and engaged in the Bar's oldest and largest section by immediately getting them involved in the substantive work of the RPPTL. The fellows also receive leadership training and have the opportunity to work closely with leading attorneys in their field.

Villavicencio is a partner at the firm of Zamora, Hillman & Villavicencio. Her practice is dedicated to probate and guardianship administration and related litigation, as well as estate planning. She has been a member of RPPTL for five years, is an active member of the Dade County Bar Association, Cuban American Bar Association, and served as editor for the magazine of the Elder Law Section.

Florida attorney Joseph Karp included in 2016 Super Lawyers List

Attorney Joseph S. Karp for the tenth year has been named to the Florida list of Super Lawyers. A division of Thomson Reuters, Super Lawyers bases its recognition on outstanding professional achievement and peer reviews. No more than 5 percent of Florida lawyers earn the Super Lawyers designation.

Attorney Joseph Karp is a Florida Bar certified elder law specialist and founder of The Karp Law Firm, an estate planning, elder law and estate administration firm with offices in Palm Beach Gardens, Boynton Beach and Port St. Lucie.

MEMBER NEWS

Nine elder law lawyers earn board certification

The Elder Law Section congratulates the nine lawyers who in 2016 earned Florida Bar board certification in elder law, a designation that places them among the only group of Florida lawyers who may use the term "board certified" when referring to their legal credentials. Board certified lawyers are "Evaluated for Professionalism and Tested for Expertise" by The Florida Bar. Board certification evaluates attorneys' special knowledge, skills and proficiency in various areas of law and professionalism and ethics in practice. About 5,000 of Florida's nearly 101,000 lawyers have earned board certification, with 189 earning this designation in 2016. Florida offers 26 specialty areas for board certification, more than any other state. For more information, visit *FloridaBar.org/certification* or call 850/561-5842.

Congratulations to these newly board certified lawyers:

Andrew R. Boyer – Sarasota

Heidi F. Friedman – Coral Springs

Michelle R. Hollister – Boca Raton

Matthew A. Linde – Fort Meyers

Elizabeth J. Maykut – Tallahassee

Shannon Mulkey – Ocala

Jason A. Penrod – Lake Wales

Matthew R. Rheingans – Venice

Diana C. Zolner – Brandon

PRACTICE MANAGEMENT

Can your law firm marketing go wrong?

by Audrey J. Ehrhardt

Is your law firm marketing content really doing what you need it to do?

This may seem like an unusual question to start with, but I find myself asking it multiple times each week. When it comes to marketing, especially in the digital arena, even the savviest practicing attorneys I know don't dive in and really ask this question. When I ask why, the answers I usually receive range from *The company says it can do what I need, so why should I question it, I don't have time to deal with it, I can't really get an answer I'd understand anyway* and *Well, it just seems like magic.*

The truth is all of us can be daunted by what we don't know, and then there's the lurking complication that we may not know what we don't know. Realizing this truth, however, may lead to a bigger question—just what is your law firm marketing supposed to do? The answers here are numerous and unique to each firm's goals, but (in short) there are two things your legal marketing needs to be doing for you at a minimum each week: clearly delivering your message and raising your profile with your target audiences. We're talking about print, digital and verbal marketing here.

How do you know if your marketing content is meeting these two goals each week? You may already know the answers from comments, calls or emails you receive based on your marketing efforts. If you don't know, however, or if you don't have those third party validations, here are three easy questions you can ask your legal marketing self to know if your marketing content is really doing what you need it to do for your firm's growth and profitability goals.

Question 1 – Is it original?

The reality is most of us do not have time to plan, develop and distribute original marketing content each month, let alone each day. We also do not have it in our budgets to hire someone to be on our staff to do it for us. As a result, the first thing to go by the wayside when we get busy and super stressed is our marketing efforts (even when it was those efforts that directly led to the "too busy" problem).

The majority of us fall somewhere in between sporadic marketing efforts and outsourcing the responsibility. Let's talk about the latter. Unfortunately, most of the major solutions out there are not giving you what you need in today's marketplace because they're not developing custom content just for you or using a branded message. In the best case scenario, this type of marketing content will, we hope, crossover with your message 30 percent of the time. In the worst case scenario (that we see all too frequently), your content is shared with the other couple hundred or so subscribers with a message directing the reader somewhere away from your website and contact information.

Question 2 – Are you in control of your brand?

Most of us don't have time to stay up-to-date on every social platform launched (or redesigned), search engine functionality and/or business directory out there. Keeping this contact information continuous and consistent, however, is at the very heart of brand management and is vitally important to your success. This problem also has two faces—you need the information your audience reads to be correct, but you also need to have the right information in front of the search engines that are looking for answers in your industry.

As ridiculous as it may sound, how your business information is listed makes a huge impact on your marketing efforts. For example, if you own an LLC, the question becomes is it really "LLC" or "L. L. C." or "L.L.C."? Periods and spaces make a difference! The slightest bit of inaccuracy can have a devastating impact on whether or not a search engine finds you. What's the impact? If the search engine can't find you, your potential clients can't find you.

Question 3 – Do you really own your content?

In over two-thirds of all standard contracts out there for marketing services, you do not really own "your content" or "your momentum" at the end of your contract. Instead, the company owns it and will decide the next steps. You need to have a backup plan in place before you start asking questions or considering termination of an existing contract. Questions like:

- Where will all my digital momentum go?
- Who really owns my website domain?
- What about my website text and site structure?
- Why is my blog not on my website?
- Who controls my email lists?
- Who owns my social media feeds?
- What is my hashtag strategy?
- Do I need to be prepared to start from scratch?

These questions can begin to provide insight into the dark side of

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Committees keep you current on practice issues

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

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For more information about committees, visit *eldersection.org/comchair.asp.*

Marketing . . .

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marketing content. When it comes to talking about the potential dark side and the impact on your practice, these concerns can be hard to read, especially when you are paying good money for services. Remember, marketing is a foundation for the success of your law practice, and it needs to represent your firm the right way. Start by making sure you know where you stand. If your marketing is not where you want it to be, put a plan in place to get it back on track.

Audrey J. Ehrhardt, JD, 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* ***practice42.com****.*

COMMITTEE REPORTS

Abuse, Neglect & Exploitation

Erika Dine and David A. Weintraub, co-chairs

The committee produced its major annual event on September 30, "A Day in the Life of an Exploitation Report," which walked the audience through what occurs from the moment a phone call is received by the Exploitation Hotline to the criminal and civil penalties for exploitation in Florida. In previous years, this event was a three-day workshop co-sponsored with the Office of the Attorney General. This year, we changed the format to a one-day program co-sponsored by the Stetson University School of Law and held at Stetson University's Tampa campus. The program was also available via live webcast.

The committee is interested in developing legislation to further deter elder exploitation. We also hope to create a reference contact list for persons faced with a potential exploitation case.

Meetings are by conference call and held on the first Thursday of every month at 11 a.m. Central/12 noon Eastern, except for July, August and December. If you are interested in participating in the calls or joining the ANE Committee, please contact one of our co-chairs, Erika Dine at *erika@dinelaw.com* or David Weintraub at *daw@stockbrokerlitigation.com*.

Continuing Legal Education

Sam Boone, Jr., and Marjorie Wolasky, co-chairs

At the Elder Law Section's strategic planning meeting held Feb. 18-19, 2016, the CLE Committee was charged with expanding and formalizing a four-year CLE program starting this year. The committee is to create a budgetary plan to ensure that each program at least breaks even, to establish topics and dates for mid-year programs for the next three years and to identify program topics for the 2017 through 2019 years and coordinate with the substantive chairs for program content. The CLE Committee will consist of the ELS chair, chair-elect, administrative chair, CLE chair and a sponsorship person to formalize both the structure and the procedure for establishing CLE events.

I want to welcome Marjorie Wolasky as our co-chair for this year. Marjorie and I have worked together on various projects for many years, and we both look forward to the opportunity to serve the section in this important role.

The annual *Essentials of Elder Law* and *Elder Law Annual Update and Hot Topics* seminars held in January of each year continue to be the most successful CLE events for the section. These seminars consistently receive rave reviews from the attendees, are well attended and provide quality materials that are useful throughout the year. Many of us, in fact, keep these materials on our desktops for ready reference. The ELS leadership is committed to continuing these annual programs in January.

The section's leadership has also committed to provide an annual mid-year program. It has been suggested that topics rotate through Medicare and community-based services eligibility updates, guardianship and a current topic of interest such as special needs trusts, litigation and mediation skills, exploitation or legislative changes affecting our practices. The triannual topics have not yet been formulated, and input from the Executive Council, especially the substantive committee chairs, will be appreciated by the CLE committee. It is anticipated that mid-year seminars will be held at The Florida Bar's annual convention in conjunction with the Elder Law Section's annual meeting.

Estate Planning & Advance Directives, Probate

Horatio Sosa and Mike Jorgensen, co-chairs

The Estate Planning and Advance Directives, Probate Committee foresees a busy year ahead. The committee plans on having two quarterly meetings where guest speakers will present on current estate planning and advance directives issues that affect the elderly.

The committee plans to have a thorough discussion of the recent amendments to Chapter 765, Florida Statutes, particularly the effects of the immediate powers that a principal may confer on a surrogate when executing a health care directive. The committee plans to invite experienced practitioners so they can share their experiences with the new provisions of Chapter 765. The interplay between medical powers of attorney in Chapter 709 and the surrogate powers in Chapter 765 will be included in the agenda. If further amendments to the statutes are necessary, the committee will recommend and propose such changes.

The committee will also have discussions and guest speakers addressing estate planning techniques. Particularly, the committee will discuss estate planning techniques that deal with incapacity, guardianship and probate avoidance. In addition, the committee plans to address other estate planning strategies that are related to the elderly, including Medicaid, homestead and qualifying special needs trusts.

Finally, the committee co-chairs will actively participate in other committees' calls and meetings and will stay focused on other committees' conclusions that may have an impact on this committee.

COMMITTEE REPORTS

Guardianship

Victoria E. Heuler and Debra Slater, co-chairs

Our committee took a much-needed break during late spring and early summer, but is now back to business, meeting the second and fourth Wednesdays of every month at noon. The committee's current areas of focus include:

1. Participating in all OPPG (Office of Public and Professional Guardian) rule workshops and rule development by this new agency housed within the Florida Department of Elder Affairs. One workshop has been held toward the legislative mandate of rulemaking for this new agency, and other workshops may be held prior to the actual development of proposed rules. The committee will be involved in every step of the process.

2. Reviewing the proposed new Florida Guardianship Code, to be under a new chapter number—745 rather than 744—proposed by The Florida Bar's Real Property, Probate and Trust Law Section (RPPTL). Proposed Chapter 745 is comprehensive, but we understand that it is still a work in progress and that the draft is not intended to be part of the 2017 legislative agenda. Certainly there is every expectation that proposed changes to our current guardianship laws will be before the Florida Legislature in 2018.

3. Preparing a one-page "fact sheet" for members to use when meeting with local legislators to discuss/explain guardianships, what they are, when they are necessary, family versus professional guardians, the positive work of professional guardians and the issues that practitioners face in this area.

Veterans Benefits

Javier Centonzio and Elizabeth D. Moneymaker, co-chairs

As elder law attorneys, knowing what benefits are available to our clients from the U.S. Department of Veterans Affairs is only half the battle. We must also be ready and equipped to provide our clients with relevant information about these benefits and educate our clients on how they can apply for the benefits to which they are entitled by virtue of their (or a spouse's) service to our country.

My mission as a co-chair of the Veterans Benefits Committee this year is to provide the members of the Elder Law Section with the information they need to ensure that their clients know what veterans' benefits are available to them. With this mission in mind, the Veterans Benefits Committee is working on CLE programming that will: 1) satisfy the VA accreditation requirements; 2) address any changes in the law that may happen during this year (namely the proposed rule change affecting the veteran pension, commonly referred to as Aid & Attendance); and 3) discuss some of the lesser known benefits that could potentially make a great impact on our clients.

As a veteran who has navigated the VA benefits maze myself, I know that we need more attorneys who are knowledgeable about veterans' benefits and willing to share their knowledge with the public. Our committee welcomes any input, and we're always looking for new committee members to help us reach our goals. If you have any suggestions or questions, please feel free to contact me at 727/490-8712 or *jac@wclawfl.com* or my co-chair, Elizabeth Moneymaker, at 941/746-3900 or *liz@dinelaw.com*.

QUALIFIED INCOME TRUSTS

A trap for the unwary

The tale: Sally Smith comes to your office in a panic. Her husband has been in a rehab facility and cannot come home. His level of care requires that he remain in the nursing home. She applied for the Medicaid Institutional Care program but was denied. It seems she had calculated her husband's income incorrectly by neglecting to add back the federal income tax deducted from his pension. She has been told she needs a qualified income trust. She wants to know what this is and if you can assist her.

The tip: Section 0240.0107 of the ESS manual program provides that individuals who are in need of institutional care must meet an income limit of 300 percent of the SSI federal benefit rate. In 2016, the federal benefit rate is $733, which puts the income limit for this program at $2,199. Not all states have an income limit for this program, but Florida does. If an applicant like Mr. Smith has income that exceeds $2,199 per month, the only way to qualify is to set up and fund a qualified income trust. Section 42 USC 1396p(d)(4) sets out three types of trusts into which an individual can transfer money without incurring a penalty. A qualified income trust is provided for under 42 USC 1396p(d)(4)(B) and is often referred to as a d4B trust, a Miller trust or a QIT.

The trust must be established by the individual, his or her spouse, or a court or an administrative body with legal authority to act on behalf of the individual or the spouse or acting at the direction or request of the individual or the spouse. The "acting at the direction" language gives an agent under a properly drafted durable power of attorney the authority to create this QIT. The trust must be composed only of pension, social security and other income of the individual, and the state must receive all amounts remaining in the trust upon the death of the individual up to an amount equal to the total medical assistance paid on behalf of this individual.

Income that exceeds the cap must be placed into the QIT, essentially making it uncountable toward the state's income cap amount; however, the income placed into this trust is still countable toward the client's patient responsibility. For example, Mr. Smith's gross income is $2,604. He is $405 over the income cap. He is allowed to keep $105 for his personal needs allowance, and there will be no diversion of income to Sally. His patient responsibility is $2,499. Sally must fund the QIT with at least $405 each month; however, because the balance of the trust must be paid to the state at Mr. Smith's death, she will want to empty the QIT each month. So she will pay that same $405 to the nursing home and then pay the balance from Mr. Smith's checking account. An easier way would be for her to simply put the entire patient responsibility of $2,499 into the QIT and then pay it out to the nursing home. Either way, this irrevocable trust must be established and funded in order to qualify for benefits and must be properly funded each and every month, or the individual will lose his or her benefit.

Tips & Tales

by Kara Evans

Not only must the trust be properly funded, it must be properly managed. The only expenses allowable from the QIT are the personal needs allowance, the community spouse income allowance, specified health insurance costs, special medical services and any other deduction provided in the rules of any agency with rulemaking authority for the Medicaid program. These are typically limited to medical expenses, making the funding of the QIT a challenge should the income that exceeds the cap be more than the client's patient responsibility under the applicable Medicaid program. This is especially difficult when a client is on Home and Community Based Services, where there may be no patient responsibility. Section 1640.0576.09 allows a pooled trust to be used to accomplish the same purpose as a qualified income trust, specifically allowing the income to be uncountable toward the state's income cap amount without incurring a transfer penalty. The advantage to the pooled trust is that expenses from the pooled trust are not subject to the same limitations as the QIT and can be used for non-medical expenses.

Kara Evans *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.*

Five quick items

TAX TIPS

by Michael A. Lampert

1. Taxation of wrongful-incarceration recovery; Protecting Americans from the Tax Hikes (PATH) Act

With the advent of wrongful conviction law clinics, more advanced DNA and other testing, and for other reasons, wrongfully incarcerated persons are being released from prisons. Sometimes the wrongfully incarcerated are awarded civil damages, restitution or other monetary awards in connection with their incarceration. Many of the wrongfully incarcerated are elders by the time they are released from incarceration.

The PATH Act, enacted in December 2015, included an exemption from income for damages received by wrongfully incarcerated persons due to the wrongful incarceration. The PATH Act has a provision allowing a special one-year window to file a claim for a tax refund due to the recovery now being retroactively treated as nontaxable. This means that clients have until Dec. 19, 2016, to make the refund claim for tax periods that would otherwise be too old to request a refund. In most cases, claims for tax year 2012 and prior tax years would be barred but for this special rule.

2. Final medical expenses; Can you back date?

Usually "back dating" is unethical, if not illegal. A decedent's final medical expenses can be an exception, however. Final medical expenses can, of course, be deducted on the Federal Estate Tax Return (Form 706). However, with the relatively high federal estate tax exemption ($5,450,000 in 2016), it is becoming increasingly less likely that an estate tax return will be filed.

IRC § 213(c) allows medical expenses paid within one year of the decedent's death to be deducted, subject to the normal limitations, on the decedent's final income tax return. (This option requires foregoing taking the deduction on the estate tax return.)

Practice tip: Given the high estate tax rate relative to the marginal income tax rate, if there is an estate tax, the medical expense deduction will almost always be more valuable if taken on the estate tax return rather than on the final income tax return. The client would then forego the deduction on the final income tax return.

Trap: If the medical deduction is taken on the final income tax return and the deducted amount is later reimbursed by insurance, the reimbursed amount received is income in respect of a decedent (IRD). This IRD will need to be reported on the income tax return for the estate (Form 1041).

3. Disclosure of confidential estate tax return information

The IRS Office of Chief Counsel issued advice (CCA 201621014) addressing who can request confidential estate tax return information. In addition to the personal representative/trustee, the heirs at law, "next of kin," will beneficiaries and donees of property can request confidential estate tax return information. The requester needs to show that he or she has a material interest (usually financial) when requesting the information.

Practice tip: In situations where the estate refuses to provide a copy of the estate tax return to a client/

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Tax Tips . . .
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beneficiary, it is possible that some of the information can be obtained from the IRS. It is possible that even the threat of making the information request to the IRS will cause the personal representative/trustee to release information.

4. Reminder about state taxation on retirement plan distributions

Federal law prohibits states from taxing retirement plan distributions of non-residents (Title 4 USC, Chapter 4, Section 114, enacted 1996). This includes 401(K), defined benefit and profit-sharing plans, IRAs, SEPs, 403(a) and (b) plans, etc. Certain non-qualified deferred compensation plans are also exempt in some cases.

Practice tip: This law applies to "legal residents." The "normal" planning to clarify the state of residency is especially critical when attempting to use this law.

5. IRS to start audit process by mail, not phone

As recently as June 21, 2016, the IRS website noted that "Should your account be selected for audit, you will be notified in two ways: by mail or by telephone. In the case of a telephone contact, the IRS will still send a letter confirming the audit. E-mail notification is not used by the IRS."

However, by way of a May 20, 2016, memorandum from the IRS deputy commissioner for services and enforcement, effective immediately all initial (emphasis from the memorandum) contact with taxpayers to commence an examination must be made by mail, instead of the telephone. This change is in response to the continuing threat of phone scams, phishing and identity theft. Note that IRS employees can call the taxpayer as needed after sending the letter (allowing 14 calendar days from mailing the letter). Note also that the IRS is evaluating other contacts with taxpayers outside of the examination area to address risks with respect to phone scams and other threats.

Practice tip: Scam artists are very good and generally deal in volume. It is surprisingly easy to be taken in by a scam. Some scam artists send fake letters and notices that look very much like official IRS documents.

Practice tip: While being alert to fraud, remember that some IRS notices come with real deadlines that, if missed, can significantly affect a client's rights.

***Michael A. Lampert, Esq.**, is a board certified tax lawyer and past chair of The Florida Bar Tax Section. He regularly handles federal and state tax controversy matters, as well as exempt organizations and estate planning and administration.*

Call for papers – *Florida Bar Journal*

Ellen S. Morris is the contact person for publications for the Executive Council of the Elder Law Section. Please email Ellen at *emorris@elderlawassociates.com* for information on submitting elder law articles to The Florida Bar Journal for 2016-2017.

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.

Summary of selected case law

by Diane Zuckerman

Medicaid liens-probate-wrongful death claims

Olive Goheagan, as Personal Representative of the Estate of Molly Swaby, deceased, Appellant, v. John Perkins and Agency for Health Care Administration, Appellees, No. 4D14-4843 (4th DCA July 20, 2016)

This is an important case for guiding probate lawyers in dealing with a Medicaid lien when a recovery is made in a wrongful death case. At issue before the 4th DCA was whether Section 409.910(11) (f) of the Florida Medicaid Third-Party Liability Act (hereinafter referred to the Florida Medicaid Act) is preempted by the anti-lien provision of the federal Medicaid law, specifically with respect to wrongful death recovery against a third party tortfeasor.

In this case, Molly Swaby was injured by an at-fault driver, hospitalized in a coma and died three months later. Medicaid paid $95,476.60 on her behalf and asserted a lien. Ultimately a recovery of $1 million was obtained.

The estate filed a motion for equitable distribution, arguing that the anti-lien provisions of federal law under 42 U.S.C. Sect. 1396(a) and the decisions of *Ark. Dep't of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006), and *Wos v. E.M.A. ex rel. Johnson*, 133 S. Ct. 1391 (2013), preempted the Florida Medicaid Act. These decisions held that the federal Medicaid anti-lien provision prohibited a state from making a claim against any portion of a Medicaid beneficiary's tort recovery that was not apportioned to medical expenses. Under this law, any portion of the settlement apportioned to non-medical damages, such as loss of wages or pain and suffering, could not be reached. The Agency for Health Care Administration (AHCA) argued that these anti-lien provisions did not apply to wrongful death actions, citing the specific language that "no lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the state plan" Sect. 1396p (a) (1). The Fourth District agreed with AHCA and found there was no preemption of the Florida Medicaid Act.

In its analysis, the district court concluded that the federal anti-lien statute reflected that congressional intent applied to only Medicaid recipients who are living when the settlement is obtained. Accordingly the court affirmed the trial court's ruling that AHCA was entitled to recover the full amount of the Medicaid lien.

Probate practitioners assisting personal injury lawyers in wrongful death claims should advise that Medicaid will have to be repaid, subject to the formula set forth in the statute.

Attorney's fees/probate

Laura McDonough, as Personal Representative of the Estate of Helen E. Anderson, Deceased, and Ruby Yvonne Bain, Appellees, 189 So. 3d. 266 (2nd DCA, 2016)

Appellant Anderson initiated an unsuccessful will contest of his mother's will. He alleged that his mother's will was invalid because she lacked capacity and alternatively that she had revoked the will. The final order required Anderson to pay the estate $51,897 in attorney's fees and $10,007.69 in defense costs. The estate relied on Section 733.106, Florida Statutes. The Second District reversed the fee imposed on the appellant on the grounds that it was not supported by law or evidence. It held that this statute did not provide a basis for personal liability of the litigant for attorney's fees.

The estate had argued that fees should be imposed on Anderson because the case was brought in bad faith, despite not invoking F.S. 57.105. The court rejected this argument, stating that although the appellant did not prevail, the facts did not support that the will contest was made in bad faith.

As a take-home message, in cases where bad faith is suspected, certainly the procedures of F.S. 57.105 should be followed and proper notice given. The court also noted that the appellant was never given notice that fees were being sought for bad faith conduct. On the other hand, in will contests where bad faith is not an issue, efforts should be made to shorten litigation expenses as they can substantially reduce the inheritance to all beneficiaries, including the challenger of the will.

Real property/ownership/trust versus fee simple

Ira D. Giller and Anita Grossman etc., Appellants, v. Brian J. Giller, et al., Appellees, 190 So. 3d. 666 (3rd DCA, 2016)

Upon the admission of the decedent's Will of Norman M. Giller, the personal representatives filed a complaint for declaratory relief, pursuant to F.S. 689.07(1) with regard to six parcels of real property. Each of the deeds to these properties was titled "Norman Giller, Trustee"; however, none of the deeds referenced the name or date of any trust, its beneficiaries or the nature and purpose of the trust.

At the hearing before the trial court, the appellee presented an "excerpt" of the Norman M. Giller Trust agreement dated Dec. 30, 1988. The personal representatives then filed a motion for summary judgment; however, the trial court concluded that it lacked standing and the appeal followed.

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Case law . . .
from preceding page

The appellants argued that the decedent held the properties in fee simple, and the appellees argued that a trust owned the properties. Facts of the case revealed that the appellants became aware that the properties at issue were rental properties controlled and managed by the appellees, who had not produced any trust instrument.

In the affirmative defense, the appellees asserted that the personal representatives lacked standing to sue under F.S. 689.07(1).

The statute at issue reads as follows:

> Every deed or conveyance of real estate heretofore or hereafter made or executed in which the words "trustee" or as trustee" are added to the name of the grantee, and in which no beneficiaries are named, that nature and purposes of the trust, if any, are not set forth, and the trust is not identified by title or date, shall grant and is hereby declared to have granted a fee simple estate with full power and authority in and to the grantee in such deed to sell, convey, and grant and encumber both the legal and beneficial interest in the real estate conveyed, unless a contrary intention shall appear in the deed or conveyance; provided, that there shall not appear of record among the public records of the county in which the real property is situate at the time of recording of such deed or conveyance, a declaration of trust, if any, declaring that the real estate is held other than for the benefit of the grantee.

The district court declared that the above statute was unambiguous, that when the statutorily defined identification of property is a trust asset, then the deed will be interpreted as granting a fee simple estate to the grantee, and not the unidentified trust. The court also noted that no other deed or declaration of trust was recorded in the county, to show a contrary intention.

Of note, the will gave the decedent's estate to his three children, and the apparent trust benefitted only the appellant and his descendants.

In reversing the trial court, the Third District found that the personal representative did have standing to seek a determination of ownership, citing and relying upon *Turturro v. Schmier*, 374 So. 2d. 71 (Fla. 3d. DCA 1979), for the proposition that title under these similar facts was held in fee simple, thereby entitling the personal representatives to standing and summary judgment.

Lastly, the appellees claimed that they had "cured" the ownership issue by a subsequent filing of a trust document. The court rejected this argument because it would not have been relevant to the granting of the motion to dismiss. Accordingly, the district court held that the trial court erred in dismissing the complaint with prejudice, and reversed and remanded for further proceedings consistent with the opinion.

This is a reminder to drafters of deeds to follow the requisites of Chapter 689 to avoid unnecessary litigation and expense.

Diane Zuckerman *is AV rated by Martindale-Hubbell. She received the B.S. degree in nursing from the University of South Florida and the J.D. from the University of Florida, Levin College of Law. Her education in nursing and law gives her unique insight into the interface between the two disciplines and helps her to be a knowledgeable practitioner. She is a member of the Elder Law and Real Property, Probate and Trust Law sections of The Florida Bar and the Hillsborough County Bar, and she is active in Kiwanis and the Tampa Bay Estate Planning Council.*

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